# A LOOK BACK

# 1994 WILLIAM O. DOUGLAS LECTURE SERIES TRANSCRIPT

The Honorable Antonin G. Scalia*

## I. INTRODUCTORY REMARKS

First of all, where are the brown bags? [*grabs podium*] Ah, I'm used to hiding behind a podium. Well I'm glad to be here, again, or still. Let me just make a few remarks just to break the ice. Those of you who were at the lecture yesterday heard some of my thoughts about the religion clause—the religion clauses of the First Amendment in particular.

Let me say a few more words more generally about constitutional interpretation. I have been accused, and I accept the accusation, of having a minimalist view of the Constitution.

[*Moves to the center of the room*] Let me move down to the center here. It is unfair to those on the left . . . but I've been accused of always being unfair to those on the left. [*audience laughter*]

I have a minimalist view of it because it is a minimalist document. If you look at the Bill of Rights . . . [*pulls out pocket edition Bill of Rights from suit pocket*] in, you know, in a pocket edition such as this . . . [*waves the pocket edition*] look, it's one, two and a half—you know—half a third page. It is not much. And you ask yourself, "Well what was the Bill of Rights intended to include? Was it intended to include *every* important, significant, right?"

Certainly not. It says nothing in there for example—well to start off with, it says a lot of stuff that isn't really very significant or important. For example, "The right in suits at common law where the value in controversy shall exceeds

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* Ed., Erin R. Jajtner. In 1994, Gonzaga Law School's William O. Douglas Committee invited the late Hon. J. Antonin G. Scalia for their annual speaker series. He stayed for two days, giving a lecture on the first night, and a Q&A session the following day. In light of his passing, the *Gonzaga Law Review* believed it appropriate to transcribe and publish the available audio recording of Justice Scalia's remarks. The *Review* thanks Professor Jason A. Gillmer for his insight during the transcribing process, and Jesse Burrill, for his excellent work enhancing the audio of the original recording. Last, the *Review* offers a sincere and heartfelt thanks to outgoing Faculty Advisor Cheryl Beckett, for her time spent reviewing the substance of the transcript and audio for accuracy, and for all her years dedicated to helping the *Review*.

$20 [*pause*] to trial by jury." Now who cares? I'm not going to fight and die for that one. It's not very important at all—on the other hand, it leaves out some very important rights. For example, it says nothing about my right . . . to raise my children the way I please, to have them educated according to my desires, not the desires of the states. It says nothing about that. Well, how do you explain it?

It's very simple: the rights they listed there were those that were most likely to be infringed by a tyrannical government. They knew from experience what a tyrannical government moved against: freedom of speech; freedom of the press; freedom of religion; they would quarter troops in homes; they would conduct unreasonable searches and seizures and so forth. That's how they selected those few protections contained in the first ten amendments. It was not meant to protect everything that we consider important. Now, did they believe there were other rights? Of course they believed there were other rights. That's why they have the Ninth Amendment, which says "the enumeration in the Constitution of certain rights"—a certain limited number of rights—"shall not be construed to deny or disparage others retained by the people." It acknowledges that there are other rights. So you are not precluded from arguing to a state legislature, "I have a right to an abortion." You may well. That's why the Ninth Amendment is there. These were people that believed in natural rights. Do I have the right to raise my children the way I want? You betcha' I do, and I will take up arms if the state tries to take it away from me, but I won't enforce that right from the bench. Because it's not one of those limited rights that I've been given authority to enforce as a judge.

Now, the opposite view of the Constitution, the expansionist view, has somehow captured the popular imagination. So that people now genuinely believe, not just law professors—[*sarcasm*] *you know you could understand it if it was just law professors*—but ordinary real people, [*audience laughter*] genuinely believe, they have come to believe that anything they care deeply about has to be in the Constitution.

When I was a kid . . . what you would say if you were really mad about some particular custom of society, something . . . you would say "there ought to be a law." Nobody says that anymore—I mean that was such a popular—there used to be a comic strip called "There Ought to be a Law." People do not say that any more. You know what people say, they say: "It's unconstitutional!"

If it's really bad, it has to be unconstitutional because after all, this thing is just an empty bottle. The Due Process Clause, you know, no person should be deprived of life, liberty, or property without due process of law . . . means whatever you want. In fact, you know, substantive due process. Think about that—substantive due process—it's idiotic . . . How can you have substantive process? What? It's the opposite of procedural substance? You know, how can intelligent people go around talking like that? Substantive due process . . . we're

making it up. [*audience laughter*] And we are making it up. And this document cannot bear that for too long. The consequence of making it, up after we've been doing it for three decades or so now, and the consequence of the American people coming to regard this document as just a charter for a Supreme Court to give us whatever we think is important. The consequence is that the people will take control of the Constitution, and the people *should not have* control of the Constitution because it is meant to protect minorities against the people, but once you believe that it means whatever it ought to mean, you're going to start selecting your Supreme Court Justices the way we have been selecting them for the past decade or so. Not figuring out whether they're good lawyers that know how to read a text and research the history of the text and understand the traditions that are behind the text. Not that way anymore.

We will now select them by having a question and answer period in which we go down one constitutional right after another. And the majority—the people—represented by their senators will ask these nominees one by one: "Judge So-and-so, do you think there is a right to X in the . . . you pick your favorite right. The right to abortion; the right to homosexual conduct; the right to life; right to die; whatever." [*sarcastically*] *Do you think that? You don't!? I think it's in there and my constituents think it's in there and I'm certainly not going to vote for anyone that doesn't think that right is in the Constitution. Now, what about the right to walk? You do!? Well I certainly . . .* [*trails off*]. That—this is what is going on is it not? We are conducting a plebiscite on the meaning of the Constitution every time we nominate a new justice. That is absolutely crazy. You do not want the meaning of this document to be determined by the majority. It is supposed to be a *protection* of minorities against the majority, and it can only serve that purpose if it has a fixed meaning that can be discerned by lawyers, and will be enforced honestly by lawyers—even if enforcing it does not seem to be the best thing to do. That Constitution which always means what the society thinks it ought to mean is a Constitution that is worthless, because it is no check upon the society—which is its whole purpose.

With those provocative preliminary remarks, I would be happy to talk about whatever you would like to talk about. That's basically what I wanted to say: to ask you to consider that as undoubtedly an alternative theory of the Constitution than you've come to regard it as.

## II. QUESTION AND ANSWER SESSION

**Audience:** Yes, your Honor, to what extent does the right to bear arms infringe upon my right to protect myself?

**Scalia:** The question is about the right to bear arms, which is in the Second Amendment, of course—"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." Now, first of all, I have—there is no doubt that the Second Amendment is no restriction upon the states because like all of the other Amendments, it was written as a limitation only upon the federal government, so if the states want to prohibit arms entirely, I am sure they can. Now you say well what about some of the other provisions of the Bill of Rights, they have been applied against the states, right? The freedom of religion clause, freedom of speech clause—well the answer is, yes well we have applied some of the Amendments against the states on the theory of substantive due process right? Because you have a due process clause in the Fourteenth Amendment and we said that—well you shall not deprive someone of life, liberty or property without due process means there are some things you shall not deprive them of even with due process, and therefore, some of the Bill of Rights pertain to the states—which ones? What do you think? The ones we like! [*audience laughter*] [*sarcasm*] *And I am sure we don't like the Second Amendment, so you don't have to worry about the Second Amendment being applied to the states*.

How it applies to the Federal Government is a different question. Could there be a federal law prohibiting the bearing of arms entirely? There are those who argue that because of the prologue to the provision—"A well-regulated militia being necessary to the security of a free state . . . ."—they argue, "Well it was just meant to say that the states could keep their militias." Um . . . maybe. The problem with that argument is that provisions like this—without reference to the militia to be sure—but provisions "the right of the people to keep and bear arms shall not be infringed" were found in state constitutions as well. Indeed, it was put in the federal Constitution. It was filched from state constitutions just as most of the Bill of Rights was. And in state constitutions it couldn't have had that meaning. It would have had no point. So I don't know what the answer is. There is a good argument that it means what it says that the right of the people to keep and bear arms shall not be infringed. What constitutes infringement is a harder question. I mean, you know, can you carry a pocket atomic bomb? I don't know. It certainly has to be—can and don't count—it has to be something you can carry on the person. Keep and bear arms, not tote arms, not pull arms. I got enough troubles. I don't want to have to worry about that one. [*audience laughter*]

**Scalia**: Yes?

**Audience:** I was just wondering, regarding cameras in the different levels of courtrooms, I was just wondering on the issue of highly publicized trials and cameras in the court room and what level of the court rooms . . . . [*inaudible*][1]

**Scalia:** Ah—not if I have anything to say about it. I was frankly in favor of cameras at the Supreme Court when I first joined the Court and have become less and less enthusiastic about that prospect every year. If I thought that it would really assist in informing the public about the nature of the Court's work, I would still be in favor of it, but I am persuaded that it would not, that to the contrary it would simply further the distortion of the Court's image because you know if everybody watched it gavel to gavel, on CSPAN, they would see that we're spending most of our time doing very dull stuff. Trying to figure—you know we're arguing: "well now section C(3)(i) here counsel, how do you reconcile that with section (B)(2)(7) [*mumbles*] . . . zzzzzzzz [*snores, pretends to fall sleep*]." They're not going to watch this—they don't . . . so what most people will be treated to, about a fifteen-second takeout of Supreme Court argument on the network news, and it will almost invariably be a very uncharacteristic pizzazz-y portion and generally speaking will create a distortion rather than an education. I also don't like cameras in the lower courts. In fact, I probably dislike that more than I even dislike cameras in the appellate court. I think the spectacle of making public entertainment out of private citizens' griefs . . . I just [*pause*] I find it distasteful. If you want to put on Perry Mason, hire actors, don't make public entertainment out of my familial sorrows or whatever. I do not find it a humane thing to do. I think it brings the whole legal system into disrepute.

**Scalia:** [*Points to member in audience*]

**Audience:** In light of the pending retirement of Justice Blackmun[2]—

**Scalia:** —[*sarcastically*] *Justice Blackmun is going to retire*?

**Audience:** That's what they told me . . . Also in light of the events of some of the nominees over the last few years, could you comment on the current state of the appointment process?

**Scalia:** Well I sort of just did—I mean you know—form follows function. The nomination process will take that form which suits the purpose it is designed to achieve. Currently, it is designed to find people who agree with the majority as to what the Constitution means and it is very well designed to fulfill that function. I do not think that is the function it should be fulfilling, but as long as the Court has the philosophy of constitutional interpretation that it has adopted in the past few decades, I think the hearings will continue to be like the last few.

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1. The use of the term "inaudible" throughout this transcript means that parts of a question were unable to be deciphered even with audio enhancement software.

2. Blackmun, Harry A., U.S. Supreme Court Associate Justice (appointed by Richard Nixon) (served 1970-1994).

And the part of it that I find the most extraordinary is, as I say, the quizzing about how this particular person—what fluid this particular person believes is contained in the empty bottle that is the Constitution. I find that extraordinary, but I'm not criticizing the Senate for doing it that way. They probably ought to do it that way if we have the notion of Constitutionalism that we do. I see no change on the horizon.

**Scalia:** Yes?

**Audience:** I have a question on the theory of substantive due process and symbolic speech and also are these incorporation theories, and I was wondering, do you ever see yourself taking the position saying that the Constitution doesn't really say that the first amendment is incorporated but yet we see flag burning cases in which you joined the majority opinion saying that as Texas has done [*inaudible*] free speech rights, so in some instances you yourself have dissented from—so where do you think it goes beyond the minimalist view—where do you find yourself drawing the line? How far do you go along?

**Scalia:** It's a good question. I'm—look it—I'm not going to kick over everything that's been done and start anew. You can't do that. There is a such thing as *stare decisis*. The way I like to put it is: I am a textualist; I am an originalist; I am not a nut. [*audience laughter*] You cannot go back and redo everything. I think substantive due process is an idiotic notion, but it's been adopted, and I think it has been solidly established that portions of the Bill of Rights apply to the states, and I'm not going to go back and redo that. Although, you know, it's only relatively recent. The religion clauses weren't applied to the states—I think the first case was 1945, '47, something like that—never before applied to the states. All the earlier religion clause cases, the Mormon case, *Reynolds v. United States*,[3] was a federal case because it was the Utah territory. Anyhow, I'll leave it alone. Generally speaking, if it is well-established, generally accepted, and is not the source of continuing difficulty for the Court and for the society, I will let it be. But there are things that are the source of continuing difficulty for the Court and for the society—*Roe v. Wade*[4] is one of those because I am going to have to decide every year whether this or the other, or the other is an undue burden upon what I consider the nonexistent Constitutional right to have an abortion. I have no idea what's an undue burden, and I don't know how to go about finding out either, except to, you know, vote my prejudices. When I have a situation like that, I will not accept *stare decisis.*

**Scalia:** Yes?

3. Reynolds v. United States, 98 U.S. (8 Otto.) 145 (1878).
4. Roe v. Wade, 410 U.S. 113 (1973).

**Audience:** On the Supreme Court, can you describe the method that the Court uses to reach the majority opinion and who gets to write the opinion afterward?

**Scalia:** The process? We just, we just vote. Majority wins!

**Audience:** Can you describe the process? How are your discussions? Are they at a round table? Is there a debate?

**Scalia:** Well it's actually a rectangular table. There is no debate. Very little discussion, and it is really a misnomer to call it a conference. It's really just a statement of nine separate views, and we take notes on each other's expressions of views. The major function it serves is if you get assigned the opinion you will know how to write it so that it will conform to the views of at least four others. It is not, as we're going around the table, if John Paul Stevens[5] says something, I would not break in and say . . . [*joking impression of self*] "Wait, wait, John, now why did you?—Wait. Now let's examine that . . . ." That would not happen. The Chief would look at me and say "Now Nino, you will have your turn. Let John—John is talking now." Now I'm not sure it used to be that way. I think there used to be much more of a real conference and a give and take. But for some reason, that no longer exists. How I get the opinion—it's up to the Chief Justice. Actually, the only judicial power that the Chief Justice has that an associate justice doesn't have is the power to assign the opinion, which is not as negligible a power as you might think. One reason John Marshall was such an influential justice is that he assigned himself all of the significant constitutional cases. He never gave a "goody" to anybody else. [*audience laughter*] If the Chief is not in the majority, the senior justice in the majority will assign the opinion. These days that . . . it used to be Bill Brennan. It's now Harry Blackmun. And that's about it. We've reached the point where even the dissents are assigned now. The senior justice in the dissent will usually either write it himself or ask one of the other justices who expressed the same view at conference to write the dissent.

**Scalia:** Yes?

**Audience:** Last night you talked about, in your speech about—

**Scalia:**—speak up really loud, I don't think they can hear you over there—

**Audience:**—last night you talked about your traditional view of certain activities and certain rights, and I was kind of wondering, my question is basically is a two-parter. First I was just wondering what is traditional and what is not, and then once that is established as traditional, can that bracket conclude that step as you see fit?

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5. Stevens, John Paul, U.S. Supreme Court Associate Justice (appointed by Gerald Ford) (served 1975-2010).

**Scalia:** Okay First of all, how do you go about deciding it. I . . . usually, usually there's plenty of evidence. For example, whether the principle that the state cannot favor religion generally—not religious practice, but religion, religious beliefs—cannot display a favorable attitude toward it. It's so easy to find a tradition that gives that belie. Beginning with George Washington's Thanksgiving Proclamation and every president since Washington with a possible exception of Jefferson—I think Jefferson did maybe one, then stopped it—but they've all issued at least one Thanksgiving Proclamations. And you know, the Invocation at the opening of the session of Congress—the Invocation at the opening of the Court—no problem. Sometimes it will be hard to find. And that is the argument that is usually made by those who criticize originalism—they say well—and textualism. Textualism well you know—words, it's so hard—words don't have any real meanings, they all acquire meaning from their context. You can never tell what a word means. Now these people usually express that thought in words. [*audience laughter*] And write it in books rather than singing it. It's close enough, you know, for human work—they have enough meaning to work with and then they also say "traditions are so hard to find, and historical research is so difficult, you are going to get it wrong." I will stipulate to all of that. Originalism and textualism is not perfect, but don't get conned into thinking therefore, we shouldn't adopt it. I will stipulate it's not perfect—it just happens to be better than anything else around. That's all. I don't have answers for everything.

Sometimes the text will be ambiguous and the tradition won't be entirely easy to find out, and I'll just have to take my best shot. But some things at least—most things—are easy for me. But for the non-originalist—for the living-Constitution type, who believes that, you know I'm supposed to give it the meaning that is the best for the modern society—everything's an open question for that person. For example, whether the death penalty is unconstitutional. It's an easy question for me. I mean, you know, the Fifth Amendment says that *[reading]* "no person shall be . . . deprived of life, liberty, or property, without due process of law." You can be deprived of life with due process of law. The Sixth Amendment says [*looking at Constitution handbook*] "in all criminal prosecutions" . . . no wait I'm sorry . . . where is it . . . [*pages through book*] [*joking*] My God they took it out! [*laughter and applause*] Ah, you know, I think it's in the text and not in the Bill of Rights. It does provide that you cannot be prosecuted for a capital offense except on presentment of a grand jury. So the Constitution mentions capital punishment—it's easy for me. For Bill Brennan, for Harry Blackmun, for non-originalists, for living Constitution people, even that is an open question, everything's up for grabs, decade by decade. So you know, as hard as it is and as much trouble as I have, it's far and away far better than anything else I can think of.

**Scalia:** Yes?

**Audience**: Mind if I ask another Second Amendment question?

**Scalia:** [*dryly*] Sure, I don't know much about the Second Amendment.

**Audience**: Last year the Supreme Court decided that the Second Amendment [*inaudible*].

**Scalia:** Do you want my guess?

**Audience**: Your guess-timate.

**Scalia:** My guess is we would accept certiorari of a case that says that the Second Amendment prohibits restrictions, but would not accept cert of a case that says that the Second Amendment allows restrictions. That's just my guess.

**Audience:** What would you advise a lawyer preparing for oral argument before you—what type of questions would you like to ask during their argument?

**Scalia:** What kind of questions? Oh, I don't know—I don't know if there's any particular kind of question. There are all sorts of different things you do with your questions. Sometimes you ask questions not really expecting counsel to answer it—it may not even be concerning a point that counsel made or had in mind. Sometimes, you're asking questions simply in order to convey the idea to the other eight people on the bench who you hope might be listening. [*audience laughter*] Because otherwise, the first chance you have to convey your view of the case to them is at conference and if you're the most junior justice, by the time it comes around to you—you can tell them what you're thinking—it's too late. They've all—the other eight have already voted. You know we don't go around the table going, [*jokingly*] *"Oh, oh you know, God,* [*slaps forehead*] *I never thought of that.*" So you know, you try to bring out any new thoughts you have about in the case in oral argument and you use counsel like a Charley McCarthy[6] for that purpose—just a device. That's—any court uses counsel that way sometimes. Sometimes I ask questions because I really have problems in the brief that seem to me are insuperable, and if counsel can satisfy that problem, you got me. Sometimes I ask questions because I'm bored stiff and I'm trying to stay awake. [*audience laughter*] [*chuckles*] In the . . . In the old days you know . . . I was talking to a group of students this morning about this . . . in the old days . . . oral argument used to go on literally for days. I mean when Daniel Webster[7] was arguing we had the system that the English still use on appellate cases—argument goes on for days, just the way jury trial goes on—until counsel is done

6. Referring to comedian and actor Edgar Bergen's ventriloquist dummy.

7. Argued several cases in front of the Marshall Court, particularly, Darmouth College v. Woodward, 17 U.S. 518 (1819) and Gibbons v. Ogden, 22 U.S. 1 (1824). Daniel Webster was also the 14th (1841-1843) and 19th (1850-1852) United States Secretary of State.

you know within reason. And John Marshall[8] is quoted by his biographer as having said "The true test of a great judge is to be able to look council straight in the eye for 2 hours and not hear a damn thing he says." [*laughs*] But oral argument is important. Do not think that it's just a show and makes no difference. It often makes a difference. Often makes a difference. Well I won't go any further. If there are other questions about oral argument, I will answer them.

**Audience:** Your esteemed colleagues have made some comments, some personal remarks about the retirement of Justice Blackmun, and I was noticing that your name was not in the paper about comments about Justice Blackmun's retirement. My question is about your tenure you've had with Justice Blackmun, and maybe some recommendations to the Congress about who his successor should be.

**Scalia:** Oh I thought you said to the Congress about who his successor should be. Is that right? [*laughs*] No . . . I don't—I had left town before I . . . in fact just as I was packing to leave I heard on the radio that it was expected he would announce his retire—I had no occasion to issue a statement. I think I spoke to a reporter last night and there may be something in the paper today about it. We work closely together . . . You're on a team with eight other people and you work closely together for an awful long part of the year. You obviously become friends with those people . . . either friends or terrible enemies, and fortunately we don't have that kind of a Court. It's been a very bitter place at some times. William O. Douglas[9] and Felix Frankfurter[10] would not talk to each other I am told—really would not even talk to each other. We have nothing like that on the current Court. I will miss Justice Blackmun. He will make—his departure will make a big change. I mean a much bigger change than one-ninth in the Court. It's funny how the substitution of one justice changes the chemistry of the whole enterprise. I've seen it happen—what—four times now? I have no suggestions for his replacement.

**Scalia**: Yes?

**Audience:** [*inaudible*] [About an anecdote involving the law clerks asking, "If you were standed on a desert island, who would you pick," and you'd pick Ruth Bader-Ginsburg?]

**Scalia:** Yeah well let me straighten you out on that other story. My wife is giving me a hard time about that one. The question was—to begin with—the

8. Marshall, John, U.S. Supreme Court Chief Justice (appointed by John Adams) (served 1801-1835).

9. Douglas, William O., U.S. Supreme Court Associate Justice (appointed by Franklin Roosevelt) (served 1939-1975).

10. Frankfurter, Felix, U.S. Supreme Court Associate Justice (appointed by Franklin Roosevelt) (served 1939-1962).

occasion was . . . ah not my law clerks but the law clerks of the DC circuit on which Judge Ginsburg[11] was then sitting—then Judge Ginsburg—was then sitting—and it's just down the street from the Supreme Court. I used to sit there, and the clerks have a brown bag lunch now and then. And they invite great Americans to go down and talk to them. [*audience laughter*] So I went down and the question put to me was very loaded. It was whether I would like—It was while the previous vacancy was still open—would you prefer—you know, if you had to be on a desert island—would you prefer Larry Tribe[12] or Bruce Babbit,[13] [*audience laughter*] and I said Ruth Ginsburg. [*audience laughter*] Ah, now what was the second part of the question?

**Audience:** [*inaudible*]

**Scalia:** Oh no, I don't want to comment.

**Audience:** [*inaudible*]

**Scalia:** I don't want to hurt any of them. [*audience laughter*]

**Scalia**: Yes?

**Audience**: What is the status of [the] *Lemon*[14] test after the *Weisman*[15] case?

**Scalia:** Darned if I know. I thought it was dead! We had five—when Byron White[16] was still on the Court we had five Justices who had said it was wrong but they had not all said it in any single case so we never had any single case that buried it. Sometimes, we write opinions without making any reference to it. That was *Lee v. Weisman*[17]—wasn't even mentioned. We just invented a whole new test. The psychic coercion test or something. Then sometimes when it seems to be leading to the result we want, we mention it again. That's the wonderful thing about making up the Constitution. [*audience laughter*] You can use whatever test you like. I . . . the *Lemon* Test has a real attraction to it because it is more manipulable that most tests. It's very easy to say its primary effect is the furtherance of religion or its primary effect isn't the furtherance of religion. I mean—we don't have any gauges, so I expect it will be around for a while.

**Scalia**: Yes?

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11. Bader Ginsburg, Ruth, U.S. Supreme Court Associate Justice (served 1993-present) (appointed by Bill Clinton), Judge, D.C. Cir. (served 1980-1993).

12. Tribe, Laurence H., Professor of Constitutional Law, Harvard Law School.

13. Babbitt, Bruce E., 16th Governor of Arizona (D) (1978-1987), United States Secretary of Interior (1993-2001). J.D., Harvard Law School.

14. Lemon v. Kurtzman, 403 U.S. 602 (1971).

15. Lee v. Weisman, 505 U.S. 577 (1992).

16. White, Byron R., U.S. Supreme Court Associate Justice (appointed by John F. Kennedy) (served 1962-1993).

17. *Weisman*, 505 U.S. at 577.

**Audience**: This question goes back to your confirmation process, comments, when Justice Blackmun was confirmed, the process was quite different than it is now—He's known to have somehow adjusted or changed his political leaning over the years. His writings on the Court. You can either change the way the confirmation hearings go or have questions for the Justices on the Court on whether they would they want to change at all?

**Scalia**: Well I do think—and this is why I didn't answer any questions—I could get away with it, I literally said in my confirmation hearing that I would not answer—I am surprised that I got away with it—I said that I would not say whether I would overrule *Marbury v. Madison*[18] because I don't know how to distinguish that question from the next one. I mean if you start getting into what my views are about particular legal doctrines, you can quiz me on the whole thing and I guess I can preface it by saying these are just my current views and who knows when I actually hear argument I may change my mind, but the fact is when you are under oath and you've told the Senate committee that this is what your view is going to be on a particular matter, I think you're very much constrained not to change that view, and I don't think that's good—I think you should feel free to listen to counsel to reflect on the matter to think and to vote the way you think the law requires—which is why I tried to answer as little as possible, and I had a record from which people could judge whether I would overrule *Marbury v. Madison*.[19] I invited them, if they thought I would, not to confirm me, but ah, I don't know that justices are going to be any more changeable—or less changeable in the future—than they have been in the past. I mean it's a natural phenomenon that justices seem to grow—quote grow—while they're on the Court. That's what the press who agrees with the direction they are growing in calls it. [*audience laughter*] Who is that? [*audience laughter*] [*sarcastically*] *It's the shadow, isn't it?* I don't know.

The reason it's a natural phenomenon—frankly, it's hard to tell from what a judge does on a Court of Appeals what he will do when he's on the Supreme Court. For example, when I was on the Court of Appeals, my job is to as best I can follow the doctrine that's been laid down by the Supreme Court. So when I was on the Court of Appeals in the *Goldman*[20] case, which is the one I talked about the other night about the yarmulke. That was decided by a three-judge panel of the DC Circuit—a very liberal panel. Judge Mikva[21] was the presiding

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

19. *Id.*

20. Goldman v. Secretary of Defense, 734 F.2d 1531 (1984), *aff'd*, Goldman v. Weinberger, 475 U.S. 503 (1986).

21. Mikva, Abner J., Judge, D.C. Cir. (served 1979-1994) (Chief Judge 1991-1994).

Judge I think, and I forget who the other two were. Maybe Harry Edwards[22]—it was a very liberal panel, and they decided no, there was a compelling state interest in making this guy wear an Air Force hat instead of a yarmulke. I thought that was so ridiculous, and we had the *Lemon* test—I mean we had the compelling state interest test, *Sherbert v. Verner*,[23] that's what the Supreme Court told us to apply, so I said this has to be wrong, and I voted to *en banc* the case, and the only judge who voted with me to *en banc* it was Ruth Bader Ginsburg. We did not *en banc* it. It got appealed to the Supreme Court, and as I told you yesterday the Supreme Court affirmed that panel, that yes there was a compelling state interest, which seemed to me ridiculous, but that's how I behaved on the Court of Appeals.

As you know, when I got to the Supreme Court, you know, this . . . I behaved differently, because at that point, this line of authority is not somebody else's line of authority. It's my line of authority. And I have to decide whether I really want to continue it or dump it overboard, and it seemed to me that *Sherbert v. Verner*[24] was just not at all true and causes us continuing difficulties—namely the difficulty of having to lie. There obviously is no compelling state interest in making this person wear an Air Force hat. There is obviously no compelling state interest in preventing the American Native Church from smoking or eating or whatever they do to peyote. [*sarcasm*] *I think they smoke it too—shouldn't let myself get pushed around so easy— just the kind of guy I am: I'm wishy-washy.*

**Scalia**: Yes?

**Audience:** [*inaudible*] [Question on *stare decisis*]

**Scalia:** I don't have any more problem than Thomas Aquinas[25] did in saying that every religious prescription does not have to be a legal prescription, those that may be I determine on the basis of our societal traditions. Some things that are prohibited are obviously, have traditionally been prohibited for religious reasons, so you might say golly gee, the First Amendment prohibits them. I don't believe that. Bigamy. Laws against bigamy—what possible reasons are there for laws against bigamy. There are perfectly stable societies, more stable than ours that are bigamist. Its explanation has to be ultimately a religious explanation. But that doesn't make it invalid under the First Amendment because we have

22. Edwards, Harry T., Judge, D.C. Cir. (served 1980-2005) (Chief Judge 1994-2001).

23. 374 U.S. 398 (1963).

24. *Id.*

25. Thomas Aquinas was an Italian-Catholic legal philosopher well-known for his principles on natural law, as well as religion and the law. *See, e.g.*, ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province, trans., Christian Classics 1981).

traditionally had laws like that. Laws against all sorts of things . . . indecency. I mean [pauses] nudity—public nudity—are there religious basis yes there are, but they have been traditional and therefore are permissible despite the First Amendment. I don't insist that every jot and tittle of my religious belief be in the law. Now there may come a point at which the conflict between the two is such that I cannot enforce the law, at which point—in Nazi Germany that would have been a problem. I could not condemn an innocent person to death—I would have to resign. But that is the course, to resign and not to distort the law so that it does conform to your religious beliefs. That would be wrong. Seems to me, you've got to get out of the job. But I haven't had any trouble with it so far.

**Scalia:** Yes?

**Audience:** What are your thoughts [*inaudible*].

**Scalia:** You know it is probably going to come before us—so I shouldn't express any view on it—I haven't thought enough about it to say anything intelligent anyway. [*audience laughter*]

**Scalia:** Yes?

**Audience**: I believe that the so-called "war on drugs" seems to be draining our nation's resources and overcrowding the prison system—do you have any opinion, or foresee how to change that?

**Scalia:** Now I have no public views on that. That is a policy question you're asking me, and I have—I am a policy eunuch. Once you take an oath as a judge, you no longer have any public policy views. I seriously try to avoid expressing opinions, except to the extent a policy affects the courts. When a policy affects the courts, I think I am . . . it is appropriate for me to comment about it, and I for that reason I will comment about the federalization of drug crimes. I think that's a great mistake converting the federal courts into police courts . . . into nickel-dime police courts. It's going to kill us.

**Scalia**: Yes?

**Audience:** If you don't believe in a living Constitution, where do you suggest we look to for the protections of rights that were not considered at the outset of adoption of the Constitution?

**Scalia**: Where the people expect it to come from—the legislature. And if the legislature would not obey them from the, you know . . . every 20-year revolutions that Thomas Jefferson favored but certainly not from a nine-person oligarchy which is going to decide our most basic questions. If you believe in a living Constitution, if you really believe it should change from decade to decade, then *Marbury v. Madison*[26] is wrong for you. That decision which says that you know we're the last word on what's constitutional assumes that the question is a

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

lawyer's question. That's what *Marbury v. Madison*[27] is all about. It says look it—it's a law like any other law. Lawyers always have to do this—you have to say which—you have to reconcile the two if possible, if not, the superior one prevails the later one prevails when they are of the same level, but when one is superior to the other as the Constitution is to the statute—but that is the whole essence of *Marbury*:[28] that this is a lawyer's question. But if in fact it's not a lawyer's question—if it's, you know, is there a right to die? Where do I go to look for that? If it's that kind of a question, if that's what we're asking when we're asking what the Constitution means, then the legislature ought to be the last word on this. If you want a living Constitution, whatever Congress passes ought to be Constitutional law. That will give you constantly a Constitution that means what the people think it ought to mean.

**Scalia**: Yes

**Audience**: I just have an analytical question. When I read *California v. Acevedo*,[29] you had a concurring opinion, you talked about this whole search and seizure that has gotten to the point where—and you alluded to this last night—now we say a warrant is generally required except sometimes and except this and except that, so I read that as saying that once the Court's got so many exceptions to a rule it is subsumed, and we need to go to the reasonableness standard—and last night you talked about how a few exceptions to the religious clause were sales tax or similar [*inaudible*] traditions, are you considering the tradition in that case an exception or are you saying whenever we come up with an exception we need to just throw out the rule?

**Scalia:** My point is that where you have a major exception that's existed all along you can't just say, "Well thank—you can't say, well, as Justice Brennan said—well, thank goodness, hurray for the Court that it allowed this exception because after all, it's always been like this but nonetheless didn't modify the rule. The existence of such an overwhelming exception sugg—more than suggests—it shouts—that the rule you've made up is wrong. It is not a rule that is truly a reflection of our Constitutional tradition. That's all I meant by my statement.

**Audience:** Exceptions are okay then

**Scalia:** No, I—[*looks around behind him in mock confusion*] [*audience laughter*]—did I say that?

**Audience**: Let me rephrase then—

**Scalia**: —The better the rule—

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27. *Id.*
28. *Id.*
29. California v. Acevedo, 500 U.S. 565 (1991).

**Audience**: —How do you draw a distinction between an exception and a huge exception which extends the rule?

**Scalia**: [*stares blankly*] [*audience laughter*] I think that the rule in the cases of searches and seizures should be the rule that you need warrants to search homes. If you read the provision of the Constitution, it doesn't say anything about the requirement for warrants. There is no warrant requirement in the Fourth Amendment. There is only a reasonableness requirement. [*reading*] It says that the people shall be secure against unreasonable searches and seizures. Then it says, secondly, no warrants shall issue, except on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person . . . [*trails off*]. And it makes perfect sense because the effect of a warrant, in those days, was to immunize the officer conducting the search from lawsuit. Otherwise, he would be subject to a suit, and his personal funds would be at stake. So it made sense to say you will not immunize an officer for a search and seizure, except with these requirements for a warrant. That's one rule. The second rule is that all searches and seizures must be reasonable. If one is not reasonable, you sue the officer. If he has a warrant, you can't sue him. That's all it says really. And it was not indeed until this century, I guess in the '20s that we began this notion of it being automatically unconstitutional if there's no warrant. Now maybe it's a good idea—it probably is a good idea. Pass a statute!

**Scalia**: Yes

**Audience**: I just have a question about dissenting and majority opinions: would you rather write a dissent or majority opinion?

**Scalia:** Ah, dissents [*smiles*]. It's always more fun to write dissents if we are talking about just sheer fun because you just write for yourself. You know you can be as outrageous as you like because you don't care if anybody joins you or not. Right? Whereas, when you're writing a majority opinion, you have to—you're writing for others as well. You have to be sensitive to their wishes and desires. You cannot say things like, you know, substantive due process is ridiculous—you can't do that in a majority opinion. So it's always more fun to write dissents. But you know, it's a strange kind of fun—you cry the whole time you're laughing.

**Scalia**: Yes

**Question**: To what extent do your clerks or the Supreme Court clerks take on or write opinions?

**Scalia**: They . . . I'll put it this way. When I first became a judge I tried to write my opinions from scratch. I sat down, and began from the beginning. I immediately acquired, within six months, a backlog that I never got rid of and I, so I went over to having my clerks do the first draft and I thereupon was able to stay current—never did get rid of my backlog. So I have continued with that. My law clerks generally do the first draft and I work on a word processor and change

the first draft considerably. I think my opinions are identifiable as my opinions, but I'm usually working from an initial text done by somebody else. Most judges do that—almost all judges do that now-a-days. There are a few geniuses that don't. I think Richard Posner[30] and Frank Easterbrook[31] on the Seventh Circuit write their own from scratch. There may be a few others, but not many. Most of mine—the vast majority of mine, a law clerk writes the first draft. I think we've covered it all.

**Moderator:** Thank you very much for coming.

**Scalia:** Thank you!

**Moderator**: Just a little token . . . [*hands over a sweatshirt*]

**Scalia**: Oh, thank you, it's the Gonzaga sweatshirt! Thank you, good, good, thank you very much—I will wear it.

—END OF TRANSCRIPT—

30. Posner, Richard A., Judge, 7th Cir. (served 1981-present) (Chief Judge 1993-2000).

31. Easterbrook, Frank H., Judge, 7th Cir. (served 1985-present) (Chief Judge 2006-2013).