

- Justice Scalia's talk will run from 4:15-5:00.
- Leonard Leo: Note to reporters-"Pen and pad only." No recording devices. Cameras? First 20 seconds or so fine, then back off.
- Leonard Leo still introducing Justice Scalia...
- Scalia is up
- Thomas Moore I am not, Blackstone's Commentaries this book is not. Co-authored w Garner.
- 3.5 year enterprise, I can't tell you how glad I am that it is over.
- Some part of the books are Garners--note on the use of dictionaries.
- Garner interviewed all the Justices. He and I all struck it off. We are both what David Foster Wallace calls "snoots"
- On US Airways- "The FAA rules require that your luggage *is under* the seat." #GrammarFail
- People being misinformed about their mother tongue.
- Scalia reading out dictionaries "I didn't know this" - you must consult the prefatory material to understand the principles on which the dictionary has been assembled.
- What I wrote- "Screeds about legislative history and originalism."
- "You have no idea how crazy modern academic writing is."
 - Sometimes refer to interpretation or construction
 - Construction quite different from interpretation
 - One has book between interpretation and construction
 - Oh...Solum
 - Accident that noun construction si derived from two different verbs. Comes from construe and from construct. So academics say, well construction involves building out the American state over time, especially through modalities of interpretation. These are state-building constructions.
 - You wouldn't believe it if it wasn't in a book.
 - I just ribbed Randy Barnett who was smiling.
- Purposivism
 - purposivist feels free to go above the immediate purpose of statute to more general purpose
- Consequentialist-
 - Judge produces best result.
 - John Marshall never thought that was the case
- First compendium of canons of interpretation in 100 years
- Richard Posner is nowhere to be found.
- Scalia reads some obscure latin canon of construction. Leonard Leo replies, "of course."
- I think the last time Scalia was here was to pitch is last book, Making the Case.
- There are a lot more cannons, I won't go through any more of them.
- "I dropped my glasses. I'm about to step on them. That's because I don't really need them."
- Question time
- Question about cannons of "construction"--Scalia, or "interpretations." Can congress legislate canons?
 - Court must follow statute, but Congress can't enact general law to dictate rules of interpretation that courts must apply. "that's our job"
 - Congress could not say: the supreme court shall no longer use rules of logic. maybe it's no longer necessary to say that. but i'm darned if they can make us illogical. We can do it on our own.
- Question about stare decisis- should judge abide by precedent believes wrongly decided. when ok to

break w past precedent

- stare decisis means accepting a decision you think is wrong. don't look behind, afraid of what you'll see
- JB: ahem Roe.
- in our system, never rigid stare decisis
- In England no evolving common law. once found, didn't change till parliament changed it. parliament could fix mistakes court made.
- in this country, when scotus made mistake in constitutional interpretation, congress could not fix it
- we did not apply strict stare decisis to constitutional issues
- I accept stare decisis as general principle that ought to be ordinarily followed.
- should be followed very strictly w respect to statute. my court very rarely overrules prior interpretation of statute
- with regard to constitutional decisions, a lot more runnig room.
- most of them is water over the dam (JB: under the bridge?)
- Counsel argues that the statute unconstitutional, justice asks do you think we have power to declare statute invalid bc of Constitution. Justice: but was Marbury right?
- Can't begin from square A in every case.
- NOt all of it is water over the dam.
- Some cases I won't accept prior constitutional decisions
- Three-fold
 - 1. how wrong was it (some maliciously wrong)
 - 2. was it generally accepted?
 - 3. Does that prior decision at least permit me to behave like a judge rather than a legislator
- Roe v. Wade
 - 1. it was very bad. ppl who like it acknowledge terrible decision
 - 2. controversial when announced, behaves so
 - 3. doesn't permit me to behave like a judge in new form, Casey, test is whether statute places "undue burden" on right to abortion. what am I supposed to do with that?
 - For 200 years there was no undue burden, it was prohibited
 - Next time, discussion something like--statute that requires staffing, doctors, and certain equipment, all of which causes abortion price to go up. does this place undue burden. what do you think we'll talk about. 8 doctors, 6 nurses. I don't think that places an undue burden? Do you think it places an undue burden (raises hand). 5 it does, 4 it doesn't. I'm not going to do that.
- COntrast that with incorporation doctrine.
 - 14th am has effect of applying bill of rights to the states
 - theory is 14th am causes BOR to be imposed on states
 - "I think that is probably wrong. But it is not a problem for me. Apply same rules for federal government to states."
 - IT isn't controversial anymore. Still questionable when I was in law school.
 - Turn around to look at Alan Gura.
- Do you think increase frequency congress leaves statutes vague to avoid making tough political decisions, pass buck to courts, how do you deal with that as a judge?

- I don't know.
- Happens a lot, always happens a lot.
- It isn't so much passing buck, its a way of getting agreement on text half think mean one thing, half another.
- What do we do? Give fairest meaning.
- If law utterly vague, law ineffective
- How should legal education be reformed?
 - Leo: Oh boy.
 - The problem with legal education is the problem and the most attractive feature. First year of law school is wonderful year. Mind gets warped, begin to think like a common law lawyer. 1L year study common law subjects. Crim, contracts, torts, property. Image develop of great judge is the great common law judge. Common law judge were making up the law. Agents of the king. Few stauttes in those days. Judges wrote statutes.
 - Great judge was jduge who could figure out what best answer was to legal problem.
 - Shift millshaft to be repaired--hadley v. baxendale--who should bear risk that it doesn't get delivered int ime.
 - Great judge could figure out what's best for economy
 - Broken field running- distguish one case, distinugish another case
 - WHat happened after Hadley was democracy.
 - fuction of judge is to figure out fairest meaning of text
 - warped mind, common law lawyer, no longer mcuh any common law. pick up canons of interpretation haphazardly.
 - law schools have introduced classes on legislation. there ought to be much more.
 - europeans do much better job interpreting legal texts than we do
 - law schools teaching skill equivalent to buggy whip. it's a lot of fun.
- Can originalist enterprise be more accurate? How to foster better dialogue between historians and ppl who do originalism?
 - I have a whole talk about why it is not true that judges cannot do history.
 - Response to criticism that judges are not historians
 - We are not historians, not engineers or physicists. We decide patent cases. We have to learn that stuff. Assisted by experts who do know the particular science at hand.
 - If we practice originalism, we will get experience from experts.
 - When we got on court, got no help from counsel about original meaning of constitutional text. Just me.
 - Our cases cited last supreme court case. never mind original text of constitution and what that means.
 - Then Clarence came on court, 2 votes out of 9, don't throw those away. We got some help from counsel.
 - Heller case, you cannot imagine how much historical assistance we got from amicus briefs. are they on both sides. but as usual it is the job of the judge to decide where the truth lies with respect to conflicting advice.
 - i dont think crying need for vast alteration fo way we do historical inquiry. a lot easier than when we first came on the court.

- no major law school would consider adequately staffed if did not have a legal historian
- Have you ever performed in an Opera?
 - “i wouldn’t call it performing”
 - RBG and I performed in extras in can’t spell
 - won’t answer favorite opera- Sicilian, can’t spell.
 - I shed a tear for madame butterfly every time i watch it.
- Two canons lead to different interpretation, how do you decide
 - no canon is conclusive
 - canons fell into disrepute bc Karl Llewelyn- thrust and parry.
 - This doesn’t prove they aren’t useful
 - canons are clues to the meaning of text. as with any good mystery, clues point in different directions
 - Llewelyn did a lot of damage, in disrepute
- How does one interpret the constitution in relationship to modern times--modern searches, monitoring text messages
 - false argument made against originalism
 - of course new tech has to be adjudged under old constitution
 - as to those phenomena that existed at the time, what Constitution said then, does now.
 - when 8th amendment adopted, death penalty was only penalty for felony
 - Is death penalty unconstitutional--i sleep very well at night
 - what about electric chair? apply cruel and unusual to new phenomenon.
 - first take account of phenomena approved at time
 - is electric chair more cruel than hanging? no
 - is lethal injection more cruel than hanging? certainly not
 - Same w first amendment. apply to radio, TV, apply to what it meant at that time to phenomena that existed
- Judicial engagement
 - Judicial restraint, judicial activism are just conclusory labels. they don’t help analysis at all
 - Should actively do what judges are supposed to do
 - you should actively do what you are supposed to do. you should not actively do what you are not supposed to do.
 - cases i care most about are structural cases
 - Every tinhorn dictator in the world has a bill of rights. every banana republic has a bill of rights. they are usually better than our bills of rights bc nobody expects them to be enforced
 - what makes us different is the structure of our gov, most americans do not appreciate how different we are from rest of world
 - few countries have bicameral legislature. house of lords can’t do anything
 - hard to get language through two different houses, with different parties.
 - intentional. broke legislature in two, thought that would be source of tyranny
 - in any democracy, source of tyranny is legislature.
 - very few countries have separately elected Chief
 - Try to get bill of rights cases right, but structural cases i live or die for
 - Independent counsel cases, Printz case most important.

- Book everyone should read
 - Democracy in America De Tocqueville
 - Ask con law students- who has read federalist papers, the entire thing
 - JB: at GMu we read em all!
 - nobody should get out of high school or college wo reading the federalist
- Last question! Joke
 - Venice getting too crowded
 - Bishop ordered Jews had to be expelled
 - Chief rabbi got very upset. proposed issue should be debated between bishop
 - Debate had to be in pantomime
 - Bishop gets up and says “wave up”
 - Rabbi goes pointing down
 - Bishop gives host to rabbi
 - rabbi reaches under chair, pulls out apple. takes a bite
 - Bishop faints, end of debate.
 - Bishop said, i told him get out of city. now we are going to stay right here. There are three persons in god (3 fingers). He said, there is just one god (one finger). Called over host to show jesus was crucified. Trying to throw blame on him. He pulls out apple, symbol of sin of adam, we are all guilty. that’s when I fainted.
 - Rabbi what was debate about. Bishop said get out, no im staying right here. Ill give you 3 weeks to get out. I said, at least a year. Then we broke for lunch.
- That’s it!