

Module 21: Source and Sovereignty

The Replacement of the People with the State and the Drift from Popular Sovereignty to Institutional Rule

Section 1: Module Summary & History

Core Overview

Module 21 examines the structural tension between popular sovereignty and institutional rule. At its core, the module investigates whether the authority exercised by a governmental body is derivative, tracing back to the People through a formal constitutional delegation, or whether the institution has begun to function as its own source of power. This friction is characterized by the "Firewall Question": Who is the true source of governmental authority: the People, or the institution claiming power? By applying the Chain of Custody method, the module seeks to determine if a governmental act can be traced back to the original constituting authority or if the trail terminates inside the institution itself.

Modern institutional practices often obscure this relationship through semantic drift and administrative complexity. While the founding structure defines government as a mere agent and trustee of the People, contemporary governance frequently operates as though sovereignty is possessed by the institution. This creates a structural inversion where rights, which are intended to exist prior to government, are treated as permissions granted by the State. The module serves as an analytical framework for identifying where the chain of authority breaks and where institutional "inherent power" replaces lawful constitutional delegation.

The Timeline of Drift (1776 to Present)

Phase Name	Historical Era	Key Developments & Doctrines	Alteration of Procedural Sequence
The Constituting Baseline	1776 / Founding Era	Massachusetts Constitution; Ninth/Tenth Amendments; The People as "Constituting Authority."	Establishes the sequence: People → Constitution → Government. Government acts only as an agent/trustee with borrowed power.
The Semantic Transition	Early Industrial to Mid-20th Century	<i>Yick Wo v. Hopkins</i> ; Shift in the definition of "The State" from body politic to governmental apparatus.	The "State" begins to occupy the conceptual space of the People. The sequence shifts toward: State → Government → People.
The Administrative Inversion	Modern Governance / Present	Administrative State; Inherent Power doctrine; "Living" Interpretation (Breyer model); Institutional Continuity.	Delegation is replaced by management. Rights are transformed into permissions. The institution looks inward to its own rules/precedent to validate authority.

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Core Operational Concepts

- **The Burden Shift:** In the original constitutional structure, the burden resides with the government to identify the specific delegation permitting interference with liberty or property. In the drifted model, the burden moves to the citizen, who must seek permission (licenses/permits) from the institution to exercise what were originally recognized as pre-existing rights.
- **The Operational Mechanism:** Administration normalizes the drift by creating a self-contained governing grammar. Institutions use internal rules, statutes, and managerial procedures to validate their actions. By focusing on "how" a power is exercised (management) rather than "where" the power came from (delegation), the institution substitutes procedural regularity for constitutional source.

Glossary of Key Terms

- **Constituting Authority:** The People, as the source that establishes the constitutional framework and creates the governmental structure.
- **Constituted Authority:** The governmental institutions, offices, and structures brought into being by the constitutional framework.
- **Sovereignty:** The ultimate political authority from which all governmental power is derived; the beginning of the authority chain.
- **The State (Body Politic):** The People organized into civil society under a constitutional form, as opposed to the mere governmental apparatus.
- **Inherent Power:** Authority claimed as necessarily incidental to a function, which often risks becoming a substitute for actual delegation if not strictly tied to a constitutional source.
- **Agent/Trustee:** The structural role of government, indicating that it exercises authority on behalf of a principal (the People) rather than owning the power it wields.
- **Semantic Drift:** The process by which the vocabulary of law remains the same while the underlying constitutional relationships and locations of power change.

Section 2: Assessment and Review

Multiple-Choice Quiz

1. **According to the "Firewall Question" of Module 21, what is the primary inquiry regarding authority?** A. Is the institution following its own internal regulations? B. Does the authority trace back to the People or the institution itself? C. Has the legislature passed a statute authorizing the specific act? D. Is the governmental act efficient and beneficial to the public?
2. **How does *Yick Wo v. Hopkins* distinguish between "sovereign power" and "sovereignty"?** A. It claims they are identical in the American system. B. It states that only the courts possess true sovereignty. C. It establishes that sovereign powers may be delegated, but sovereignty remains with the People. D. It argues that once a power is delegated, it becomes the property of the institution.

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3. **In the Chain of Custody sequence, what is the correct order of authority?** A. Act, Statute, Constitution, People. B. People, Government, Constitution, Act. C. Act, Rule, Statute, Delegation, Constitution, People. D. State, Institution, Permission, Citizen.
4. **Which concept describes the People as the creators of the constitutional framework?** A. Constituted Authority. B. Administrative Management. C. Constituting Authority. D. Inherent Sovereignty.
5. **What is the primary danger of "Semantic Drift" mentioned in the text?** A. It makes legal documents harder to read for laypeople. B. It allows words like "State" to move from describing the political community to describing the government apparatus. C. It causes conflicts between the executive and legislative branches. D. It requires constant constitutional amendments to fix definitions.
6. **Under the "Fiduciary Idea" of government, what is the Constitution's role?** A. A set of suggestions for the State. B. The instrument of delegation from the source to the agent. C. A document that grants rights to the People. D. A managerial handbook for agency efficiency.
7. **How does the module distinguish "Constitutional Delegation" from "Administrative Management"?** A. Delegation is about who manages; Management is about whether the power exists. B. Delegation asks if government has the power at all; Management asks which office will carry it out. C. They are functionally identical in modern law. D. Delegation refers to the People, while Management refers to the Constitution.
8. **According to Justice Scalia in *A Conversation on the Constitution*, how should constitutional meaning change?** A. Through judicial interpretation of changing social needs. B. Through institutional practice over long durations. C. Through the formal process of amendment. D. Through the inherent powers of the three branches.
9. **What does the module identify as a "Source Defect"?** A. A missing signature on an administrative notice. B. The failure to identify a constitutional link between a statute and the People. C. An unpopular regulation issued by an agency. D. A disagreement between two different courts.
10. **When an institution invokes "Sovereign Immunity" based on its own status rather than a delegated function, what has occurred?** A. Lawful protection of a governmental agent. B. A return to the founding principles of the Massachusetts Constitution. C. The source inquiry has turned inward to the institution. D. A necessary step for institutional continuity.

Answer Key and Explanations Table

Question Answer Explanation

1	B	The Firewall Question explicitly asks if authority traces back to the People or if the institution points back to itself.
2	C	<i>Yick Wo</i> establishes that exercising a sovereign function does not transfer ownership of sovereignty from the People.
3	C	This represents the complete backward trace required to verify the lawful chain of custody from act to source.
4	C	The text defines the "Constituting Authority" as the source that establishes the framework, whereas government is "Constituted."

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| 5 | B | Semantic drift reallocates power by changing the relationship carried inside words like "State" or "Right." |
| 6 | B | As a trustee/agent, government operates under a "power of attorney" model via the Constitution as the instrument. |
| 7 | B | Management assumes power exists; Delegation proves the power was lawfully granted from the source. |
| 8 | C | Scalia argues that the authority to change the governing instrument does not reside in the office interpreting it. |
| 9 | B | A source defect is a gap in the chain where authority is presumed by the institution rather than demonstrated by delegation. |
| 10 | C | Invoking sovereignty as independent insulation from the People reverses the agent-principal relationship. |

Essay Format Questions

1. **The Inversion of Rights and Permissions:** Analyze the structural shift that occurs when a "right" is transformed into a "governmental permission." How does this shift affect the burden of proof in an administrative context and what does it reveal about the institution's perceived source of authority?
2. **Institutional Personhood vs. Constitutional Identity:** Discuss the role of "continuity" in governmental departments. At what point does institutional duration stop being a practical necessity and start becoming a substitute for a lawful constitutional source? Use the analogy of the trustee organization provided in the text.
3. **The Circularity of Self-Ratification:** Using the transition to Module 22 as a guide, explain how an institution (such as the Florida Bar example) can create a closed loop of authority. How does this conflict with the requirement that authority must be traceable to a source outside the institution?

Section 3: Exemplars Summary and Relevance

Exemplar	Summary	Relevance to Material
Yick Wo v. Hopkins	A Supreme Court case distinguishing between the exercise of sovereign powers and the ownership of sovereignty.	Illustrates the "American Formula" where government is a mere agent exercising derivative power.
A Conversation on the Constitution	A recorded debate between Justice Scalia and Justice Breyer regarding constitutional interpretation.	Highlights the friction between "application" of text and "alteration" of the source instrument by the interpreter.
The Florida Bar	An example of an institution asserting "inherent authority" to create and regulate itself.	Demonstrates the collapse of neutral review when an institution becomes its own source of rules and adjudication.

Section 4: Expanded Homework Assignment and Practical Application Exercise

Case File / Background: The Sovereignty Source Audit

A citizen receives an official notice from a state board or agency (e.g., a licensing board or land use commission) asserting a new regulatory requirement that restricts a previously unencumbered activity. The notice cites an administrative rule, which cites a state statute, which in turn refers to the board's "inherent authority" to manage the profession or resource in the interest of the State.

Procedural Review Assignment

Follow these steps to conduct a Sovereignty Source Audit on the provided notice:

1. **Identify/Document the Act:** Record the specific interference with liberty or property and the office/actor performing the act.
2. **Identify the Cited Rule:** Locate the specific administrative code or policy cited as the immediate justification.
3. **Trace to Statute:** Identify the legislative enactment that supposedly authorizes the agency to create that rule.
4. **Identify the Delegation:** Locate the specific constitutional provision that authorizes the legislature to regulate this specific subject matter.
5. **Analyze the Language:** Note if terms like "State" refer to the People/Body Politic or merely the board/agency apparatus.
6. **Preserve the Chronology:** Document every link in the chain from the act back toward the People.

Required Document Preparation: The Writ of Source Inquiry

Draft a formal instrument that records the audit results. The document must:

- **Identify the Break:** Explicitly record the exact point where the trace stops (e.g., "The statute does not identify a constitutional delegation for this subject").
- **Record Institutional Responses:** If the institution is asked for its source and provides an internal rule or "inherent power" claim, document this as an "inward-turning" link.
- **Isolate Presumptions:** Clearly distinguish between demonstrated authority and authority that the institution merely assumes because of its title or duration.
- **Preserve Silence:** Document any refusal to provide a source or any circular citations.

Final Review Question

Upon completion of the audit and the Writ, the student must answer the ultimate analytical question: **When the governmental act is traced all the way backward, does the chain terminate in the People through the constitutional structure, or somewhere inside the institution claiming the power?**

A Conversation on the Constitution: Judicial Interpretation

Firewall of Law Teaching Edition — Scalia v. Breyer on Claim 1

Source: A Conversation on the Constitution: Judicial Interpretation, a project of the Annenberg Foundation Trust at Sunnylands. Speakers are Justice Antonin Scalia and Justice Stephen Breyer, with questions from a moderator and students. This transcript has been reorganized into ten sections for classroom use tonight; each section is paired with the Firewall claim it illustrates and closes with discussion questions.

A note on speaker labels: the original transcript did not identify who was speaking. Labels below are assigned from context — Scalia self-identifies as an originalist and refers to Breyer by name; Breyer's positions track the multi-factor "values" method he describes explicitly in Section 7. A handful of short, rapid exchanges (moderator interjections, quick banter) are inferred rather than certain — worth a quick check against the source video before treating any single short line as gospel in front of the class.

1. The Two Methods: Fixed Meaning vs. Evolving Meaning

Firewall connection: This opening exchange states Claim 1 directly, from both sides. Watch for the phrase "amendment provision" — that's the Firewall's only legitimate door for changing what the words mean.

MODERATOR: What are some of the different approaches Supreme Court justices use to interpret the Constitution? And what are the advantages and disadvantages of each?

SCALIA: If you're asking about fundamental method of interpretation, I think you're asking about the major division — not just between the justices on the Court, but in American jurisprudence generally. There are those who think the Constitution is to be interpreted in such a way as to keep it up to date — it does not mean today what it meant when it was adopted; some of its provisions change to keep up with the times. My friend Justice Breyer has that view. The other view, held by people called originalists — and I'm one of them — is that the Constitution doesn't change. If you want to change it, there is an amendment provision. It's not up to the Supreme Court to write a new constitution by deciding that things that never were there all of a sudden are there. I'm putting it rather tendentiously, I think. But those are the two basic approaches — the evolutionary approach, or the approach that looks to 1791.

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MODERATOR: What is 1791? Why is that a significant date for the Constitution?

STUDENT: I believe in 1791, the Bill of Rights was created.

MODERATOR: Right on the nose. Thank you.

Discussion Questions

1. In your own words, what is the difference between Scalia's "originalist" method and the "evolving" method he attributes to Breyer?
2. Scalia says changing the Constitution's meaning outside the amendment process amounts to "writing a new constitution." Under Claim 1, what specific provision does he point to as the only legitimate path for change?
3. Why might Scalia describe his own summary as "tendentious"? What does that admission tell you about how to read the rest of the debate?

2. Case Study: The Eighth Amendment and the Death Penalty

Firewall connection: *Claim 1 applied directly — a fixed meaning at ratification, changeable only through the people's own legislative or amendment process, never through re-labeling by the Court.*

SCALIA: As I started to say — an originalist would say: look, when the Eighth Amendment was adopted in 1791, it prohibits cruel and unusual punishments. The death penalty was not a cruel and unusual punishment — there's no doubt about that. The death penalty was the penalty for every felony; it was the definition of a felony. So it's easy for me to say the death penalty may be a very bad idea — the people don't have to have it, if they don't like it they can abolish it. But don't come to me and say the Constitution doesn't permit it, because in 1791, when the people voted to prohibit cruel and unusual punishments, this is not what they were talking about. That's an originalist approach. I take no view on whether the death penalty is a good idea or a bad idea. But if the people don't want it, they're fully able to abolish it by legislation.

Discussion Questions

1. Scalia separates two questions: "Is the death penalty good policy?" and "Does the Constitution forbid it?" Why does he insist on keeping those two questions separate?
2. According to Scalia, who has the authority to abolish the death penalty if the public no longer wants it? Why does that answer matter to the Firewall's chain-of-authority argument?

3. Old Words Meeting New Facts: Commerce, Speech, and Automobiles

Firewall connection: *Both justices agree old words can reach new facts (automobiles under "unreasonable searches"). The fight is the line the Firewall insists on: applying a fixed principle to a new fact is legitimate; quietly attaching a new principle to an old, already-understood fact is not.*

BREYER: For example, the Constitution says two senators. I don't care how desirable it is to have six, or to have none — two means two. It meant two in the year minus 1500. It'll mean two in the year 10,000. But I think Justice Scalia will also agree that words in the Commerce Clause — Congress has the power to regulate interstate and foreign commerce — or words of the First Amendment — Congress shall pass no law abridging the freedom of speech — raise a different question. What is "the freedom of speech"? What is "interstate commerce"? There were no automobiles in 1787, 1789, or 1791 — pick your year. There was no internet, no television. Still, this phrase applies. The world has changed. Here's the area of disagreement —

SCALIA: Wait, wait, wait. Before you go on. That's not really giving the words a new meaning. It's just saying that new phenomena have come into being, which are embraced within the former meaning. It's quite something different, however, to say that the death penalty — which did exist then, the people knew what it was, and the people did not vote to abolish it when they adopted the Eighth Amendment — is now covered by the Eighth Amendment. It's not a new phenomenon.

Discussion Questions

1. Give your own example (not from the transcript) of a "new phenomenon" that might fall under an old constitutional word. Then give an example of someone trying to change the meaning of an old, already-understood word instead. What's the test that tells them apart?
2. Both justices seem to agree that automobiles can be searched under the Fourth Amendment even though cars didn't exist in 1791. Why doesn't this agreement settle their broader disagreement?

4. Where the Line Gets Hard: Cable TV and the Juvenile Death Penalty

Firewall connection: *The sharpest version of the Claim I fight. Breyer's method treats the underlying "value" as fixed and lets the application shift with society; Scalia's method treats even the application as fixed unless changed by amendment or legislation. Notice who Scalia says gets to decide the death penalty question: the people, through legislation — not five of nine judges.*

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BREYER: Now we're getting to a part which is actually rather difficult, because I'll think to myself — how do I know the way in which the First Amendment applies to cable television? Take a real case: Congress passed a law that said cable television owners must devote some of their space to carrying over-the-air broadcasters, even though they didn't want to. How does that fall within the First Amendment? When I get into these real cases, what's key is there was a value, an objective phrased in general terms that existed in 1789 and 1791 and exists in unchanged form today — the value, the basic purpose. And then I look to see how that applies. Take a real case: the Court held that the Cruel and Unusual Punishment Clause forbids executing someone who commits murder under the age of 18. It was not the fact that in 1791 there probably were executions of 17-year-olds — I'm sure there were. It's that the value underlying the clause — is it cruel, is it unusual — has us look around today to see how society works that out. It's not the values that changed. It's the nature of society that's changed.

SCALIA: You picked a bad case.

BREYER: Bad for who — for you or for me?

SCALIA: For you, of course. The majority of the states that had the death penalty permitted it for someone who committed the crime under 18 — but it didn't make any difference to the Court. The Court, being an evolutionist court, just said we think you shouldn't be able to execute anybody under the age of 18. Again, I take no position on the merits. Maybe you shouldn't be able to. But the people are able to pass their own laws and abolish it, and it doesn't seem to me it ought to be up to five out of nine lawyers on this Court to say, coast to coast, you can't execute anybody who committed a crime under 18. The people never voted for that limitation on democracy. And that's what happens whenever you impose a constitutional limitation from the Bill of Rights — you are telling the people you can't do what you want to do. My position is: unless the people themselves voted that limitation on democracy, it's up to them.

BREYER: The subtlety of this view — where you look to conditions in the world in light of the value — is that it is complicated. A large number of states had statutes on the books that said you could execute a 17-year-old. But if you look at the number of states where such executions actually occurred, there were very few. And if you looked around the world, we were the only country, in practice, that did such a thing. Is that relevant?

SCALIA: Well, you know what the framers said about whether that's relevant? Nothing. They told us nothing about it. And if you look at what they did, sometimes they looked abroad, sometimes they didn't. Hence, there is ground for disagreement.

Discussion Questions

1. Breyer says "it's not the values that changed, it's the nature of society that's changed." Restate that distinction in your own words. Do you find it persuasive, or does it look to you like a change in meaning dressed up as a change in facts?

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2. Scalia objects that "five out of nine lawyers" decided a national rule the people never voted for. Under the Firewall, why does the number of votes among unelected judges matter less than who holds the ratifying authority?
3. Both justices bring up state legislative practice and international practice as possible evidence. Should either matter to constitutional meaning? Why does Scalia say the framers "told us nothing" about it?

5. "Who Made You King?": Democracy, the Bill of Rights, and the Abortion Question

Firewall connection: Watch the convergence at the end of this section: Breyer concedes that a Court ruling restricting the people's ability to legislate on abortion is itself "a limitation on democracy," whether or not you think it's the right outcome. Under Claim 1, the question is never "was the outcome good" — it's "who had the authority to decide it."

BREYER: I cannot resist pointing out that if you look at the numbers, I have probably been more willing in constitutional cases to allow the electorate to choose matters for themselves than some who hold the originalist view. So that's a wash.

SCALIA: Oh, I doubt that. But the question is: who made you king? The world has changed, but who placed it in your hands to change our Constitution the way you think it ought to be changed to account for those changes? The people can do that themselves — they can abolish the death penalty for anyone under 18. And as for the notion that it's "rarely used" — it's also rarely used to execute women. Is that the next case? Are you going to abolish the death penalty for women because it's rarely used?

BREYER: I never discuss a case that hasn't arisen. The interest here is: I don't believe I'm changing the Constitution. I believe what I'm doing is taking an unchanging value and applying it to the circumstance today. And I don't think it helps one side or the other to appeal to "democracy," because both camps believe the Constitution is basically about democracy — it sets up a system so the people, through the democratic process, decide what to do. It doesn't give us the power to be kings, but it does give us the power to patrol the boundaries — boundaries meant, among other things, to protect individuals and minorities from the tyranny of the majority. Hamilton and Madison both thought it would help for a group of unelected judges to be able to say, for reasons they write down, that an action by the majority is a kind of tyranny that interferes with those rights.

SCALIA: Hamilton would jump out of his skin if he thought the Constitution he supported allowed nine unelected judges to change the meaning of the document from year to year.

BREYER: Every time we make a Bill of Rights decision, it is an anti-democratic decision. The only thing that lets us do it is that the people themselves authorized it. The people said you can't

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quarter troops in homes, even if the majority wants to. The people said you cannot suppress freedom of religion, even if the majority wants to. But they never said, for example — to take what's called "the big A" here in Washington — that a state cannot place limitations on abortion. There are views on both sides of that, and I'm officially neutral as to which is right. But do not pretend it is not a limitation on democracy for the Supreme Court to say the people cannot place limitations on abortion even if they want to. That's a limitation on democracy.

Discussion Questions

1. Breyer argues the Bill of Rights itself is "anti-democratic" but legitimate because the people authorized it in advance. How is that different, in his view, from a court deciding a new limitation the people never voted on?
2. Where do Scalia and Breyer actually agree in this section? Why is that agreement more revealing than their disagreement?
3. "Who made you king?" — restate Scalia's challenge as a question about authority rather than about outcome. How does it connect to the Firewall's insistence that a decision requires a prior grant of authority?

6. The Ex Post Facto Clause: When the History Isn't Clean

Firewall connection: *Scalia states, almost as a job description, the limit of judicial authority under the Firewall: a judge's qualification is legal craft, not moral or policy expertise — and where the text is genuinely vague, that's the narrow space for judgment, not an invitation to import personal values.*

SCALIA: The controversial issues are the better ones — they get the blood flowing. But here's a good one. There's a clause in the Constitution that says you cannot have an ex post facto law — charging a person with a crime they committed before it became a crime. Here's a real case: California passed a statute making a certain awful thing involving molesting children a crime — which it already was. But the statute of limitations for that crime was three years. Three years expired. Twenty more years went by. Then California passed a new statute extending the statute of limitations backward, and charged someone a quarter-century after the incident, about twenty years after the original limitations period had expired. Is that an ex post facto violation or not? That's a hard question. One method looks into the history. And I'll tell you one thing about the history: it requires the Court to look at what a judge in the early 19th century wrote about an 18th-century treatise writer, Blackstone, who was writing about an incident in the British Civil Wars in the middle of the 17th century. If that's the kind of thing we have to look to all the time, you'd better select a historian to be a judge — I am not a historian, and I'm the first to admit I know virtually nothing about it. And in that particular incident, the historians disagreed about what it all meant.

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BREYER: I'd say the value-laden method tries to identify the values that underlie the ex post facto clause. Why do we have such a clause? What are we trying to prevent, what kinds of unfairness? That's what it's interested in, and then you see if you can apply that to the modern circumstance. That isn't changing the meaning of the Constitution — it's applying it, emphasizing different kinds of sources when you try to identify the meaning. And by the way, you can look it up — see in recent times which method has set aside the people's democratic action more. I happen to know the answer, and I wouldn't bring it up if it didn't favor my side. In other words — less.

SCALIA: You misunderstand me. I have no qualms about setting aside the people's democratic action — I do it all the time, when the Bill of Rights requires me to. That's my oath of office. I only object to setting it aside when there is no sanction in the Constitution adopted by the people to do that. And you pick an instance where the history is not that clear. There are innumerable instances, especially in the most controversial areas — abortion, the death penalty — where the history is entirely clear. And if you think the values approach is always clear: the values you think are more important are not necessarily the values I think are more important. What you think the ex post facto clause was intended to protect against may not be what I think it was intended to protect against. You may think it's a terrible retroactive change to make him guilty when he was free of that charge for twenty years. I may say the only thing it was really meant to do was make sure an act that was lawful at one time is not later made unlawful. Either one is entirely reasonable. So don't pretend the "values" approach provides an easy answer. It provides an answer the people ought to decide — the people know values. I'm a good lawyer, presumably appointed because I'm a good lawyer, not because I know more about the values of the ex post facto clause, or whether there ought to be a death penalty, or a right to abortion. I don't know any more about those things than you do. That's not why I was appointed. I am a good lawyer, and I can read the text and see what it meant when it was adopted. In some cases it's vague — but the cases where it's vague in significant ways are far fewer than the cases where the values you want to pursue are values different segments of the American people will disagree about considerably.

Discussion Questions

1. Scalia admits that under his own method, in the ex post facto case, he'd have to rely on a chain of secondhand historical interpretation going back to a 17th-century incident. Does that complicate his claim that originalism is more predictable than the values approach? Why or why not?
2. Scalia says, "I'm a good lawyer... not because I know more about the values... than you do." What is he claiming judges are and are not qualified to decide? How does that connect to the Firewall's insistence that authority has to be granted, not assumed?
3. Breyer claims the "values" method doesn't change the Constitution's meaning, only "emphasizes different sources." Do you agree that's a meaningful distinction, or is it a difference without a difference? Defend your answer.

7. Breyer's Six Tools of Interpretation

Firewall connection: Notice Breyer names his own six tools — and Scalia's rebuttal isn't that the tools are illegitimate, it's that Breyer weights four of the six (tradition, precedent, purpose, consequences) heavily enough to override what text and history alone would predict. Under Claim 1, that's the mechanism the Firewall calls the quiet substitution of a new meaning for the ratified one.

SCALIA: What Justice Breyer just said really identifies sources of differences where I think there is no right and wrong. When I think of it, I think of a lawyer or a judge reading a document with words that don't define themselves. There are always two arguments on both sides — sometimes six. We're the border patrol. We patrol the borders of the Constitution.

BREYER: I think, to go back to basics, a judge faced with words he doesn't fully understand in a difficult case has six tools to look at. He reads the words — do the words matter? Of course. He reads the nearby words. Second, he looks at the history — of course you should look at that, it may tell you something interesting. Third, the traditions that have grown up around the word. Fourth, the precedent. Fifth, the purpose — that's what we've been talking about, purpose or value. And finally, the consequences of deciding one way or the other — not any consequence in the world, but consequences that have to do with the purpose. If it's a speech case, speech consequences matter; a privacy case, privacy and unreasonable-search consequences matter. So: text, history, tradition, precedent, purpose or values, and consequences — all six are relevant to every judge.

SCALIA: Four of those six factors came out the other way in the 17-year-old execution case you voted for. Four of the six pointed the other direction, but you thought it was a good idea not to execute 17-year-olds. That's the difference — in my characterization of the originalist view, a lot of weight is put on those four, and if possible we'd like them to predict the answer every time. Maybe sometimes they don't, but that would be the ideal, and the closer you can come to it, the better.

BREYER: In my view, those factors don't very often give you the answer all that much. I'm not against using them, but I look quite a lot to purposes, values, and consequences. And the danger of my approach is that I would substitute my view of what's good for what the Constitution is about — so I have to take care not to do that. I write my reasons down carefully so others can criticize, and they do. The danger the other way, in my view, is that we separate the law and the Constitution from life — too rigid to be lived for a thousand years, unless it's brought down to the life of people today, which means looking at how these values apply to today's circumstances.

Discussion Questions

1. List Breyer's six tools from memory: text, history, tradition, precedent, purpose/values, consequences. Which of these does an originalist judge, by Scalia's account, still use? Which does Scalia treat as dangerous if given too much weight?
2. Scalia says four of the six factors "came out the other way" in the juvenile death penalty case, but Breyer ruled based on the other two anyway. Is that itself evidence of "values" overriding "text," or a legitimate weighing of six legitimate tools? Argue either side.
3. Breyer says if judges are "implementers of values" rather than "good lawyers," "they ought to be elected." Do you agree with that conditional? Why or why not?

8. Why the Method Matters: Confirmation Hearings and the "Mini Constitutional Convention"

Firewall connection: *Scalia describes, in plain terms, what happens once the Firewall's fixed-meaning rule is abandoned: the confirmation process stops screening for legal craft and starts screening for policy outcomes, because the seat itself has become a policy-making seat rather than a law-interpreting one.*

SCALIA: If judges are implementers of values, not good lawyers, they ought to be elected — or at least you should select them that way, and you're seeing it happen in the confirmation process. The people are not fools. They've come to recognize that in the last twenty years or so, things have changed — that we have a Supreme Court that believes mostly in an evolutionary Constitution, and is effectively changing its meaning from decade to decade. If that's what's happening, then it's not so important whether a nominee is a good lawyer, an honest person, has a modicum of judicial temperament. That's nice, but it's not the most important thing. The most important thing is: I want to put somebody on the Court who has my values — who wants to allow abortion or prohibit it, who wants to allow the execution of 17-year-olds or forbid it. And that's what's happening. We're having a mini constitutional convention every time we nominate and confirm a new justice. That's not the way it was supposed to be. These justices were supposed to be lawyers who, like other lawyers interpreting a statute, look at the words and what the legislature that adopted them understood them to mean. Once you go beyond that, you convert what was a lawyerly institution into a political institution. And when the people realize that, they treat it accordingly. That's what's happening in the confirmation process. It's very sad, but inevitable, I think.

Discussion Questions

1. Scalia calls a confirmation hearing under the "evolving" model a "mini constitutional convention." What does he mean, and what would a confirmation hearing look like instead under a strictly originalist model?

2. Do you think Scalia's prediction — that confirmation hearings would become more about a nominee's values than their legal skill — has held up? Where might you look for evidence either way?
3. Is it fair for the public to want justices who share their values, or does that demand itself prove Scalia's point that the institution has become political? Defend your position.

9. Brown v. Board and Judicial Humility: When the Court Gets It Wrong

Firewall connection: Both justices agree the Court can get it wrong — *Plessy* is their shared example. Where they part ways is the remedy: Breyer treats *Brown* as the Court correctly identifying that *Plessy* had betrayed the Constitution's own underlying value; Scalia would locate the correction in the Fourteenth Amendment's actual ratified text and history, not in an evolving sense of "equal protection." Both readings reach *Brown* — that convergence is worth sitting with.

BREYER: What Justice Scalia says about the problem of judges' values coming into the opinion — it's true, it's a problem. But we have a Constitution that was designed, particularly after the Civil War, to protect the individual rights of unpopular people. Think of *Brown* itself. If you'd gone back and looked totally at history — well, maybe you'd say schools at the time were segregated, and they passed the Thirteenth, Fourteenth, and Fifteenth Amendments anyway. But if you looked at the objective of the provision — to take people who had been formerly enslaved, and have them and their children be just like everybody else, part of American society — that was the dream, that was the hope. In 1954, all you had to do was open your eyes, look at the South, and say: this is completely contrary to what this is about. It was the same in 1896, whenever *Plessy v. Ferguson* was decided, interpreting text that said no state shall deny any citizen equal protection of the laws — and said you could require Black citizens to ride in a separate railroad car. It was wrong. It was wrong when it was decided.

SCALIA: Sometimes we get it wrong. I occupy the seat that used to be held by Robert Jackson, one of my favorite justices. In a concurrence, he wrote: my brethren sometimes forget that we are not the court of last resort because we are always right — we are always right because we are the court of last resort. We've made mistakes, and we try not to. I admire enormously the efforts of my colleagues to come out the right way by their lights, and I do by mine. I think we get it right about ninety-five percent of the time. We're unanimous maybe twenty to thirty percent of the time — the other five percent, I'm right.

BREYER: You're always right, except right when you said that.

Discussion Questions

1. Breyer uses *Brown v. Board* as his strongest example for the "values" method. Could an originalist also reach the result in *Brown* using fixed text and history alone? Try to construct that argument.
2. Robert Jackson's line — "we are not the court of last resort because we are always right; we are always right because we are the court of last resort" — what is he warning against? How does that warning apply equally to both originalist and evolving judges?
3. Why might it matter, under the Firewall, whether *Brown* is understood as the Court correcting a factual/historical error in *Plessy* versus the Court updating the Constitution's meaning for a new era? Does the distinction change anything practically, or only in terms of legitimacy?

10. Closing: Disagreeing Without Breaking the System

Firewall connection: *This is worth ending on deliberately. The entire debate — a profound disagreement about who holds the authority to change constitutional meaning — was itself conducted inside a shared, fixed set of rules about how disagreement gets resolved: reason, not force. That's the Firewall's whole argument in miniature.*

BREYER: We don't debate the things Justice Scalia and I have been talking about today in conference. I'm not going to persuade him, and he's not going to persuade me — we've both thought about these things for a long time. He'll continue to apply his interpretation, I'll continue to apply mine. And then you count the votes. But I don't start out with a particular view — I start with a case, and we're trying to find the right answer to it.

SCALIA: We're talking about the border patrol. The area between the borders is vast — that's where people make their democratic decisions. When you get to the boundaries, you have cases that are genuinely difficult, and people disagree about them. Each approach has, I think, some problems with it. None is perfect. But there we are.

BREYER: Don't think that because we have profound disagreements — and we do, sometimes expressed passionately in dissents — that we're not a congenial group. My best friend on the Court is Ruth Bader Ginsburg. We've been colleagues since 1982, and God knows we do not have the same judicial philosophy. But that has nothing to do with whether we're friends and can conduct our business in a congenial fashion. If you cannot disagree without taking it personally, you should look for another day job — you are not meant to be a judge. There's a deep reason for that: the Constitution says we're a nation under law, which means we decide things through reason under law rather than fighting each other in the streets. I've never heard a voice raised in anger in that conference room. We resolve our differences — where they are great, and sometimes they are — by listening and speaking in a reasonable way. If I'm not going to convince somebody that way, I'm certainly not going to convince them by raising my voice. That's the system the Constitution sets up, and I'm glad that it does.

Discussion Questions

1. Breyer says the justices "count the votes" once each side has applied its own method. Is majority vote itself a legitimate way to resolve a disagreement about who has the authority to decide something? Why or why not?
2. Both justices describe the Court as needing to "patrol the boundaries" or act as "border patrol." What's inside the boundary (left to democracy) and what's outside it (protected regardless of majority will), according to each justice?
3. After reading this whole exchange, which method do you find more persuasive — and can you state, specifically, which Firewall Claim 1 principle it upholds or departs from? Defend your position using at least one specific example from the transcript.