



Written by [Joe Wolverton, II, J.D.](#) on January 6, 2011

Justice Scalia: Misogynist or Misunderstood?

The recent publishing of an interview of Supreme Court Justice Antonin Scalia conducted last September is eliciting cries of “misogynist” from pundits and progressives, and partisans.

According to the text of the interview, UC Hastings law professor asked Justice Scalia if he [Scalia] thought it was an error to apply the Fourteenth Amendment to sexual discrimination and sexual orientation. Scalia’s answer, though constitutionally sound, has stirred up quite a controversy.



Yes, yes. Sorry, to tell you that.... But, you know, if indeed the current society has come to different views, that’s fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.

Not surprisingly, the response has been anything but measured and reasonable. Justice Scalia has been tried in the press (and the blogosphere) and been found guilty of hating women and advocating discrimination against them. Exhibit A:

In these comments, Justice Scalia says if Congress wants to protect laws that prohibit sex discrimination, that’s up to them,” she said. “But what if they want to pass laws that discriminate? Then he says that there’s nothing the court will do to protect women from government-sanctioned discrimination against them. And that’s a pretty shocking position to take in 2011. It’s especially shocking in light of the decades of precedents and the numbers of justices who have agreed that there is protection in the 14th Amendment against sex discrimination, and struck down many, many laws in many, many areas on the basis of that



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protection.

That's from [Marcia Greenberger](#), founder and co-president of the National Women's Law Center.

Exhibit B:

Justice Scalia apparently believes that the Constitution is meant to be read as a limitation on the rights of the people rather than a limitation on the power of the state. For nearly a century, women's rights activists attempted to amend the Constitution to explicitly ban government sponsored discrimination based on sex, and after repeated setbacks the Equal Rights Amendment was finally passed by both houses of Congress in 1972 and sent to the states for ratification. All told, 35 states ratified, 3 shy of the 38 required. Five of those states have since rescinded their ratifications, although the validity of those rescissions is in dispute. The bill passed by Congress in 1972 required ratification to occur by 1979, later extended to 1982, but no additional states ratified and the amendment is considered to be dead in the water today. Under Scalia's interpretation, the failure of the states to ratify is an open invitation for continued discrimination based on gender.

That's the learned opinion of [JD Journal](#), whose motto, curiously, is "Nothing but the truth."

What is the truth? Regardless of Justice Scalia's opinion or the opinions of those who claim he is dragging us back into the 18th Century, there is a [Fourteenth Amendment](#) and it says something; it is a fundamental expression of uniquely American jurisprudence.

The clause at issue is Equal Protection Clause that says no state may "deny to any person within its jurisdiction the equal protection of the laws."

The black letter of that clause is clear, so the cause is muddled because it is the application of the law that betrays the interpreters' biases. Justice Scalia is correct in his averment that as written the Equal Protection Clause doesn't protect women from discrimination. That is what laws are for. If we, the people, want to permit or prohibit certain acts then we should elect representatives who will write and pass such laws on our behalf.

To rewrite the Constitution every time contemporary opinion changes is as sound a policy as is the rebuilding of the foundation of your house every time you want to make some home improvements.

As the accused, we will afford Justice Scalia the last word in his own defense:

If the courts are free to write the Constitution anew, they will, by God, write it in the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.



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