

# Moses and the Constitution

*by: Ronald L. Dart*

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It's surprising at times where insights come from. I was browsing the Internet and came upon a speech by a Supreme Court Justice of the United States and it helped me understand some things about biblical law that I had not got quite straight. The speaker was Antonin Scalia. He was speaking at the Catholic University of America in Washington D.C. It was 10 years ago that speech was given and I just now came across it. Christians have a lot of difficulty with biblical law, and sometimes it takes shortcuts to understand it. One of the most common approaches is, "Well, let's divide the law into types."

Thomas Aquinas divided the law into three types: Moral, ceremonial, and judicial. Something like this is widely accepted by Christians: Allowing that the moral law continues, but the others—the ceremonial, the judicial, and the civil—have all passed away. Then there's the approach of one denomination which holds that even the Ten Commandments were abolished at the cross, but nine of them were reinstated in the New Testament. If you've read the New Testament, you'll know that you can search that book in vain for any reference to reinstatement of any law. It's not a book of law and there's no list of laws in it. You can find references in the New Testament that indicate the laws still exist, but the laws are still laid out in the Old Testament.

So, how did Justice Scalia help me? The title of his speech was, "A Theory of Constitution Interpretation." It seems to me that the big problem Christians have with biblical law is not so much the application of law, but the interpretation of law, and Justice Scalia helped me a little bit with that. He began his speech with a question: What is the object of the Court? That is really a simple question. He says, "This is a matter of interest to not only judges and lawyers, but any intelligent American citizen, philosopher or not. What do you think your judges are doing when they interpret the Constitution? It's sad to tell you," he said, "after 200 years, there is not agreement on this rather fundamental question: What is the object of the enterprise?" I'm not surprised to learn that we lack an understanding of what the judges and the courts are actually doing. You read what they decide, how they decide, you basically see judges' opinions all over the place. It all depends on who you talk to and when you talk to them, what kind of an answer you're going to get.

I learned something about constitutional law recently that I did not have straight. I thought the Constitution should be interpreted on the basis of original intent, and I assumed

that Justice Scalia thought the same way. What I learned is that there is a marked difference between original intent and originalism, and the difference is more important than I thought. Here is how Scalia explains it: “The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.” We don't have to go back to the writings of the original framers of the Constitution to figure out how they thought about things, because what they thought and what they intended is not all that important. What is important is what the people who ratified that Constitution thought it meant, because the Constitution was written into a social context and accepted by society in that context. It's that meaning that is important. And it's striking to me that, when you start examining the law in any historical context, you keep coming upon the same principles. Because law is law; it functions the same way in any society.

So, in examining the laws of the Bible, we can take the words of the text as they were originally handed down and as they were understood by the people who heard them. And we can look for what Scalia calls “the fairly understood meaning” of those words. With the Bible, this is crucial because we're looking at many laws that had a meaning in that culture that does not naturally carry over into our own culture. And, just so you know what I mean, let me give you an example. In Numbers 15:38-39 there's this law: “Speak unto the children of Israel, and bid them that they make them fringes in the borders of their garments throughout their generations, and that they put upon the fringe of the borders a ribband of blue: And it shall be unto you for a fringe, that ye may look upon it, and remember all the commandments of the LORD, and do them; and that ye seek not after your own heart and your own eyes, after which ye use to go a whoring.” It's evident that the custom of wearing that fringe or tassel had to do with identity. Studies have indicated that this custom was as well understood in that culture as the yellow ribbon is understood in ours. The yellow ribbon has come to mean that you have a loved one in the military serving far away. I think it may have originated with the yellow stripe down the leg of a cavalryman's uniform, and when his lover wore a yellow ribbon in her hair in support of him while he was away on patrol. The custom has morphed into various other applications; for example, a looped pink ribbon on the lapel stands for breast cancer awareness. The yellow ribbon still is basically military in its focus.

I think the blue tassel, or the blue thread in the tassel, for Israel served a similar purpose. It made a public statement: I am a commandment keeper and I'm a servant of Jehovah. I met

a gentleman not long ago who was wearing a pair of these tassels woven of white and blue tied to his belt, but I think he was wearing them, not so much as a sign to others, as a matter of a legalistic obligation to the law. God said I should wear a tassel, so I'll wear a tassel. I doubt seriously that one person in ten would have a clue what that tassel was supposed to mean. Thus, it becomes largely pointless. I heard that someone wore that blue ribbon on their underwear, which makes it all the more irrelevant, because it was to be worn where people could see it. The fellow I met had his tied to his belt, under his jacket, and you could easily miss them. Once again, it misses the point. I think the Israelites were supposed to wear them in plain view.

What you need to understand is, that in ancient societies (and I really hadn't focused on this until I saw an article in *Biblical Archeology Review*) it was customary, in the form of a tassel on the garment or the hem of the garment, that people wore those things as a sign of status, a sign of origin, perhaps an identity of a tribe—it was rank or status. For example, David was fleeing from King Saul and was hiding in a corner of a cave. King Saul walked into the cave to relieve himself without any clue that David was hiding back in that cave. David quietly went forward, took his knife, and cut off the hem of Saul's garment as he was relieving himself. Now what's significant about this is: It was a symbol of Saul's rank. God was replacing Saul with David. In fact, he had already done so for all practical purposes. And what David did was cut off the symbol of Saul's rank and take it for himself. His conscience smote him after that and he came outside and rendered something of an apology as Saul walked away. Nevertheless, it's a very significant thing that he did.

What we have to ask is, what was the meaning of the words in this law to the people who first heard them? Basically it was this: "In the tassels you wear on your garment, you will always include a thread of blue. Thus you remind one another of your God, His commandments, and His way." It is worth noting that blue was one of the dominant colors in the decor of the Tabernacle. Thus, it was a double tie to the worship of Jehovah. It said: This is my God; I will obey his laws. And, it made that statement to a world that understood what these were. For all we know, men of Judah wore a tassel of one color, men of Manasseh a tassel of another color, but they all were supposed to have the thread of blue identifying them as servants of God. For a society that does not wear tassels at all, the meaning of the law doesn't come through. Even if you decide to wear a loop of blue ribbon on your label, people may realize it means something, but they won't have a clue what. In the society of the time, though, it identified commandment keepers and worshipers of Jehovah to one another.

Try to avoid thinking of this as an old covenant practice that passed away with the old covenant. That will lead you the wrong way. Think of this as a custom of the time that no longer carries the meaning it once did. If you customarily wear a tassel, then put a thread of

blue in it. If the custom doesn't exist, don't bother to create it. It's also worth mentioning that this was a voluntary provision. I have never seen anything in the Bible resembling tassel police. The idea that any part of the law was voluntary gives some people the willies. Even if breaking the law was a sin, compliance was still up to the individual.

Returning to Scalia's view of the Constitution, he noted that he does not use legislative history. He said, "The words are the law." That is what is meant by a government of laws, not men. I think that's one of the things that Jesus was driving at in his conflicts with the Pharisees. It's one of the things that Paul kept hammering in his epistles. We're dealing with the law of God; not the law of men. And, this whole structure, this whole edifice of tradition that was built up in Judaism around the law, was nothing more than the commandments of men. Scalia went on to say, "We are bound not by the intent of our legislators, but by the laws which they enacted, which are set forth in words, of course. As I say, until recently this was constitutional orthodoxy. Everyone at least said that: That the Constitution was that anchor, that rock, that unchanging institution that forms the American polity. Immutability was regarded as its characteristic. What it meant when it was adopted it means today, and its meaning doesn't change just because we think the meaning is no longer adequate to our times." And then he said something that is very important: "If it's inadequate, we can amend it. That's why there is an amendment provision. That was constitutional orthodoxy. When I say constitutional orthodoxy, I don't mean it's just judges and lawyers. Judges and lawyers are not very important. It's ultimately the American people. What do they think this document is?"

Now we come across something rather different, I think. God's law is immutable and we can't amend it, but we can amend our understanding, our interpretation, and our application of the law. This is precisely what Jesus was doing through most of the Sermon on the Mount when he said, "You heard it was said by them of old time. . ." and then he goes on to say, "But I say unto you. . ."

And then there's an interesting occasion in chapter 8 of John. Early in the morning Jesus came into the temple again and all the people gathered around and he sat down and taught them. Then there was a disturbance. The Scribes and the Pharisees brought to him a woman caught in adultery, and when they set her in the midst, they said to him, "Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou?" They did this because, in spite of everything, they thought Jesus was in conflict with Moses and they were trying to establish that. John continues with the account, "This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the ground, as though he heard them not." This may be more important than we might think because, in point of fact, Jesus did not hold the office of a judge in this place, in this society, in this time. It really wasn't

appropriate to bring this woman before him at all, so he ignored them. But they pressed him. Finally he raised himself up and said, “He that is without sin among you, let him first cast a stone at her.” This is an interesting example and it illustrates a basic misunderstanding about biblical law. The Law of Moses required due process, just as our own Constitution does. If a man caught his wife in adultery, he couldn’t just take her out and kill her himself. Many a man has been known, after having found his wife in bed with another man, to just shoot both of them—but that’s another time and place. In Israel you couldn’t do that. There was a judiciary, the woman had rights, and she could not be deprived of life without a hearing, just as in our own Constitution, “No man shall be deprived of life, or property, or liberty without due process.”

Furthermore, some assume that under the Law of Moses the adulterer had to be stoned. Not necessarily. There’s an interesting example of a just man, a righteous man, a man who did the right things, mind you. His name was Joseph. His betrothed wife was named Mary, and you know her as the mother of Jesus. When he found Mary with child, Joseph was minded, the Scripture tells us, to put her away privately. He had the right to take her to the judges. He had the right to have her judged and, I suppose, stoned. He didn’t. It was his option not to do so. That’s why the Law of Moses allowed for divorce instead of death in Deuteronomy 24. It was an option that someone could take rather than having to kill somebody who might have even been the mother of your children. In any case, someone had to want to carry out the penalty. The witnesses were to be the ones who cast the first stones and if they wouldn’t do it, no one else could. And Jesus added one more criterion: If you were going to stone this woman, you had to be innocent yourself. Now, that’s not in the law; that’s a judgment. And, since it comes from Jesus himself, it carries a lot of weight.

Scalia presents an interesting illustration of the principles involved in all this, and he cites the 19th Amendment, adopted in 1920, which gave women the right to vote. He points out that, “There was a national campaign of suffragettes to get this constitutional amendment adopted, a very big deal to get a constitutional amendment adopted. Why? Why did they go through all that trouble? If people thought then the way people think now, there would have been no need, because there was an equal protection clause right there in the Constitution in 1920. As an abstract matter, what could be a greater denial of equal protection in a democracy than denial of the franchise? So why didn’t these people just come to the court and say, ‘This is a denial of equal protection?’” That’s a really interesting question, and his answer is just as interesting. Scalia said, “Because they didn’t think that way. Equal protection could mean that everybody has to have the vote. It could mean that. It could mean a lot of things in the abstract. It could mean that women must be sent into combat, for example. It could mean that we have to have unisex toilets in public buildings [equal rights]. But does it mean those things?” There’s a big gap there. I hadn’t thought about it this way, but there’s a huge gap between “it *could* mean something” and “it *did* mean something.”

Does it mean those things? “Of course it doesn't. It could have; it just never did. That was not its understood meaning. And since that was not its meaning in 1871, it's not its meaning today. The meaning doesn't change.” He goes on to point out that's why you had to have the constitutional amendment allowing women the right to vote. Because in all the meaning of that constitutional phrase, “equal protection under the law” did not include the franchise as it was put in the Constitution, as it was understood when it was ratified.

A new way of interpreting the Constitution has developed over the years. The phrase “to reflect the evolving standards of decency of a maturing society” often comes into opinions now. Scalia says, “Every day, in every way, we get better and better, people think. Now you know that Pollyanna-ish attitude is not the attitude that is possessed by people who adopt a Bill of Rights. People who adopt a Bill of Rights know that societies not only evolve, they also rot.” That, to me, is one of the most important things in this entire speech—the realization that, when the framers of the Constitution adopted this Bill of Rights, they did so because societies don't go on and on to bigger and better things. History tells us exactly the opposite. Societies evolve and they also rot.

Scalia went on: “And they are worried that future generations may not have the integrity and the wisdom that they do, so they say, ‘Some things we are going to freeze in, and they will not change.’” Now you begin to understand the importance of an inflexible Constitution. We have the right to amend it if we need to, but we don't need nine justices amending it at will. Then, Scalia said something else that was a surprise to me: “This is not, I caution you, a liberal versus conservative issue.” That was a revelation. “In truth, new rights are being created all the time on both sides. So, it's not liberal/conservative. It's the modernist versus the traditional view of the Constitution.” This is a mistake we all make in talking about our political situation. There is a presumption in our society that modern equals good. I suppose it's rooted in the evolution we're taught in school, and the assumption that everything is always going to go upward and onward.

We forget that societies do not always evolve upward, they also rot; thus the need for stability somewhere. It comes most naturally in the words of the written law. This may be why Jesus said what he said about it in Matthew 5:17: “Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfill. For verily I say unto you, [now brace yourself] Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled.” To Jesus, the written law, including the law about hems and tassels, is not going away. But he proceeds, in that same message, to interpret the law in terms of its original meaning. Applications of the law and judgments made on the law can change with the changing times. One of the truly classic examples of this is the law that forbids women from wearing that which pertains to a man and vice versa. There is nowhere in the Bible that describes—or prescribes, I should say—men's clothing or women's

clothing and so, consequently, the culture of the time will determine how that law is carried out.

Scalia said, “Finally I will mention the last deficiency of non-originalism. And that is, in the long run, it is the death knell of the Constitution. As I suggested earlier, the whole purpose of the Constitution is to prevent a future society from doing what it wants to.” And, in a very important way, that is precisely why the Old Testament cannot be cast aside either. It is there to prevent a future church from doing what it wants to. There’s a whole list of churches which are doing what they want to do, with no regard to what the law of God, the Bible, the Old Testament, and the New Testament say they ought to do. When it comes to the Constitution, Scalia said, “To change, and to evolve, you don't need a Constitution, all you need is a legislature and a ballot box. Things will change as fast as you want. You want to create new rights, destroy old ones? That's all you need. The only reason you need a Constitution is because some things you don't want the majority to be able to change. That's my most important function as a judge,” he said. “I have to tell the majority to take a hike. I tell them, ‘I don't care what you want; the Bill of Rights says you can’t do it.’” The reason Jesus did not lay aside the written law was because there were some things he didn’t want the church to change.

It’s the same way with the Constitution. Scalia said, “If there is no fixed absolute, if the Constitution evolves to mean what it ought to mean today, what makes you think the majority is going to leave it to me or to my colleagues to decide what it ought to mean? . . . So at the end of this long process, this great evolution from stuffy old originalism to an evolutionary Constitution we arrive at the point where the meaning of the Constitution—the most important part of the Constitution, the Bill of Rights—is decided upon by the very body that the Bill of Rights is supposed to protect you, as an individual, against. Namely, the majority.” I think there is a lesson in all this for the church. We have been tempted to interpret Scriptures, not in terms of what the words mean, but in terms of what we think they ought to mean. Thus, we have made ourselves the arbiters of right and wrong. That has happened to the nation, and it seems to be happening to the churches as well. We end up steering our ship, not by the stars, but wherever the wind, the tide, and the current blows. We have no fundamental basis for what we teach, what we believe, and what we practice. There’s a reason why Jesus is called the Word of God in the Bible. The truth of God is conveyed to us, not by vague images, but by very precise words which we can understand.

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Ronald L. Dart is an evangelist and is heard daily and weekly on his Born to Win radio program.

You can contact Ronald L. Dart at Christian Educational Ministries  
P.O. Box 560 Whitehouse, Texas 75791  
Phone: (903) 839-9300 — 1-888-BIBLE-44

[www.borntowin.net](http://www.borntowin.net)