



Written by [Steve Byas](#) on October 11, 2016

## Federal Judge Sees Little Value in Studying Constitution in Law School

Judge Richard Posner (shown) is perhaps the most quoted and most significant federal appellate court judge in the country, and his recent comments (which he has attempted to “clarify”) are illustrative of the differing views on the role of the federal judiciary in the current presidential campaign.



In a brief article published recently in *Slate*, Posner was highly critical of American law schools. Among his criticisms was a dismissal of a need to study the meaning of the Constitution. “I see absolutely no value to a judge of spending decades, years, months, weeks, days, hours, minutes, or seconds studying the Constitution, the history of its enactment, its amendments, and its implementation (across the centuries — well, just a little more than two centuries, and of course less for many of the amendments),” he wrote. “Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21<sup>st</sup> century.”

Posner later offered an “apology,” if someone could take from those comments that he did not think “the Constitution has any role to play in interpreting the law — that it should be forgotten.”

“That was not my intention,” Posner continued.

One could certainly be forgiven for thinking it was his intention, when he said that the Constitution should not be studied for even “seconds” in law schools. Especially when Posner had concluded his original piece by saying, “Let’s not let the dead bury the living.”

Posner was appointed to the federal bench by President Ronald Reagan in 1981. While originally regarded as a “conservative” judge, he has made it very clear in both his decisions and in his public statements that he rejects the view it is the role of a judge to follow the Constitution. When one reads the clear wording of the Constitution, in Article VI, it is beyond dispute that it was the intent of the Framers of the Constitution that it should be followed. “This Constitution ... shall be the supreme law of the land,” and judges (like Posner) “shall be bound thereby.” All public officers are “bound by oath or affirmation, to support this Constitution.”

One can presume that Judge Posner took this oath to be bound by the Constitution of the United States. One can further presume that if someone is to be bound by “this Constitution,” then it seems federal



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judges such as Posner should spend not only some time, but a great deal of time, studying its words and the history of its enactment.

Not surprisingly, Posner had disparaging words for a judge who did take some time studying the Constitution, the late Supreme Court Justice Antonin Scalia. "I regard the posthumous encomia for Scalia as absurd," Posner complained.

Why was Posner so upset about the praise of Scalia following his death? David Bernstein, who teaches at Antonin Scalia Law School (formerly George Mason University School of Law), offered an opinion. "We all know Posner doesn't think highly, to say the least, of Scalia. Judging from what Posner writes, the distaste seems to stem primarily from jealousy — Posner thinks he would be a far better Supreme Court Justice than Scalia was, and he resents that as a 'lower court' judge, his writings, though highly influential in their own right, will never get the same attention and accolades as Scalia."

Posner's view that the words of the those "eighteenth-century guys" are just outdated, considering the culture and technology of the 21<sup>st</sup> century, are certainly apparent in many of his written decisions. We must concede that James Madison, Alexander Hamilton, George Mason, and those guys would have been appalled at a culture that not only tolerates, but actually celebrates abortion and same-sex "marriage."

But it should not be surprising that Posner is leading the march away from original intent of the Constitution and the Judeo-Christian viewpoint that dominated the thinking of the men who drafted the Constitution, considering that he is a devotee of the 19<sup>th</sup>-century philosopher Friedrich Nietzsche and his moral relativism. In 2014, Posner authored opinions in cases that challenged the same-sex "marriage" bans of Wisconsin and Indiana. Posner specifically rejected the argument that restricting marriage to a man and a woman was a long-held tradition, arguing that it was "a tradition of hate."

Just last year, Posner authored a pro-abortion decision, in the case of *Planned Parenthood of Wisconsin, inc., et al. v. Brad D. Schimel*, in which he overturned regulations on abortion clinics in Wisconsin. "They [Wisconsin] may do this in the name of protecting the health of women who have abortions, yet as in this case the specific measures they support may do little or nothing for health, but rather strew impediments to abortion."

Posner does not restrict his disrespect for constitutional intent to "social" issues such as abortion and same-sex "marriage." In his comments in which he said too much time was spent studying the Constitution, he included the amendments in those remarks. This would include the first 10 amendments, known as the Bill of Rights, and Posner clearly dismisses them as the work of a bunch of 18<sup>th</sup>-century white guys that we do not need to study any more. So in Posner's vision, protections of religious practice, free speech, the press, the right to keep and bear arms, and the right to be secure in our "persons, houses, papers, and effects, against unreasonable searches and seizures" went out of style years ago. After all, Madison and those guys just were not as smart as Richard Posner — at least in his mind.

For example, in a conference held at Georgetown University's Law Center in 2014, Posner rejected concerns about privacy in the so-called War on Terror. "If the NSA wants to vacuum all the trillions of bits of information that are crawling through the electronic worldwide networks, I think that's fine." He questioned the motives of those who are concerned about "privacy," saying it "is really just trying to conceal the disreputable parts of your conduct."



“I’m not particularly interested in the 18<sup>th</sup> century, nor am I particularly interested in the text of the Constitution. I don’t believe that any document drafted in the 18<sup>th</sup> century can guide our behavior today,” Posner has written. Yet Posner has taken an oath to uphold that Constitution that he is not “particularly interested in.” If he cannot do so, it would seem logical that he should resign and take another job in which he will not affect the lives of millions of Americans. And if he does not do so on his own, one would think it would be the duty of Congress to impeach him.

Since there is no move to remove a federal judge from the bench who regards the Constitution he has sworn to uphold with such contempt, it is not surprising that Democratic Party presidential candidate Hillary Clinton spent two minutes during Sunday night’s debate discussing what type of judge she would nominate to the Supreme Court, without ever mentioning the need to follow the Constitution. But she did insist that she wanted a Supreme Court that would uphold *Roe v. Wade*, the infamous 1973 Supreme Court decision that declared abortion a legally protected right.

Adding that she would not second-guess President Barack Obama’s nomination of Judge Garland to fill the vacancy left by the death of Justice Scalia, Clinton offered that she would name a judge such as Justice Sonia Sotomayor. Why? Because of Hispanic heritage and underprivileged upbringing.

While Clinton failed to make any understanding of or adherence to the Constitution a consideration in her potential court nominations, the Republican nominee, Donald Trump, specifically said that fidelity to the Constitution would be his highest priority, and mentioned, as he has repeatedly during the campaign, that he would select a judge in the mold of Justice Scalia.

Trump has released a list of prospective Supreme Court choices, a list that drew praise from his chief rival for the Republican nomination, Senator Ted Cruz of Texas. Cruz called Trump’s list “a very strong list of potential Supreme Court nominees ... and making an explicit commitment to nominate only from that list. This commitment matters, and it provides a serious reason for voters to choose to support Trump.”

In a way, Judge Posner has performed a service to the American people. Most federal judges who share his disdain for the Constitution pretend that they are interpreting it, when we all really know far too many have as little regard for the text of the document as does Posner. If they did have any respect for the document, they would have to admit that nothing in the text or the history of the Constitution would lead them to some of the decisions that they have reached.



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