

Background Reading

Theories of Constitutional Interpretation

The issue: What are appropriate sources of authority to guide interpretation of the Constitution and what relative weight should be assigned to the various appropriate sources?

Eight Reasons to be an Originalist

1. Originalism reduces the likelihood that unelected judges will seize the reins of power from elected representatives.
2. Originalism in the long run better preserves the authority of the Court.
3. Non-originalism allows too much room for judges to impose their own subjective and elitist values. Judges need neutral, objective criteria to make legitimate decisions. The understanding of the framers and ratifiers of a constitutional clause provide those neutral criteria.
4. *Lochner vs. New York* (widely considered to be a bad non-originalist decision).
5. Leaving it to the people to amend their Constitution when need be promotes serious public debate about government and its limitations.
6. Originalism better respects the notion of the Constitution as a binding contract.
7. If a constitutional

Introduction

There are five sources that have guided interpretation of the Constitution: (1) the text and structure of the Constitution, (2) intentions of those who drafted, voted to propose, or voted to ratify the provision in question, (3) prior precedents (usually judicial), (4) the social, political, and economic consequences of alternative interpretations, and (5) natural law. There is general agreement that the first three of these sources are appropriate guides to interpretation, but considerable disagreement as to the relative weight that should be given to the three sources when they point in different directions. Many interpreters of the Constitution have suggested that the consequences of alternative interpretations are never relevant, even when all other considerations are evenly balanced. Natural law (higher law, God's law) is now only infrequently suggested as an interpretive guide, even though many of the framers of the Constitution recognized its appropriateness. Persons who favor heavy reliance on originalist sources (text and intentions) are commonly called "originalists." Persons who favor giving a more substantial weighting to precedent, consequences, or natural law are called "non-originalists." In practice, disagreement between originalists and non-originalists often concerns whether to apply heightened judicial scrutiny to certain "fundamental rights" that are not explicitly protected in the text of the Constitution.

Definitions

Textualist: *An originalist who gives primary weight to the text and structure of the Constitution. Textualists often are skeptical of the ability of judges to determine collective "intent."*

Intentionalist: *An originalist who gives primary weight to the intentions of framers, members of proposing bodies, and ratifiers.*

Pragmatist: *A non-originalist who gives substantial weight to judicial precedent or the consequences of*

Eight Reasons to be a Non-Originalist

1. The framers at the Convention in Philadelphia indicated that they did not want their specific intentions to control interpretation.
2. No written Constitution can anticipate all the means that government might in the future use to oppress people, so it is sometimes necessary for judges to fill in the gaps.
3. Intentions of framers are various, sometimes transient, and often impossible to determine. Text is often ambiguous and judicial precedents can be found to support either side. In such cases, why not produce the result that will best promote the public good? It's better than flipping a coin.
4. Non-originalism allows judges to head off the crises that could result from the inflexible interpretation of a provision in the Constitution that no longer serves its original purpose. (The

amendment passed today, we would expect a court five years from now to ask what we intended to adopt. [Can the same be said for a court 100 or 200 years from now?]

8. Originalism more often forces legislatures to reconsider and possibly repeal or amend their own bad laws, rather than to leave it to the courts to get rid of them.

.. Examples of Originalist Judges
Justice Hugo Black
Justice Antonin Scalia
Justice Clarence Thomas
Judge Robert Bork

An Example of an Originalist Opinion:
[Marsh vs Chambers](#)



Robert Bork
Robert Bork Making the Case for Originalism: If the Constitution is

alternative interpretations, so as to sometimes favor a decision "wrong" on originalist terms because it promotes stability or in some other way promotes the public good.

Natural Law Theorist: *A person who believes that higher moral law ought to trump inconsistent positive law.*

Prof's Prerogative

Any theory of constitutional theory that completely ignores consequences and focuses exclusively on text or original intentions is wrong.

Any theory of constitutional interpretation that completely ignores either text or original intentions and focuses primarily on consequences is wrong.

Certain times and places are better suited to one theory of constitutional interpretation than are other times and places.

The Court should include justices with different approaches to constitutional interpretation. A Court without dissenters is a Court that will not adequately inform us of the costs of choosing the path taken.

TWO SOCIETIES, TWO VIEWS OF THE CONSTITUTION

[American Constitution Society](#)

<http://www.acslaw.org/sites/all/themes/democratica/images/mission.png>

[The Federalist Society](#)

<http://www.fed-soc.org/aboutus/>

amendment process is too difficult and cannot be relied upon to save us.)

5. Non-originalism allows the Constitution to evolve to match more enlightened understandings on matters such as the equal treatment of blacks, women, and other minorities.

6. *Brown vs Board of Education* (on originalist grounds, it was decided incorrectly).

7. Originalists lose sight of the forest because they pay too much attention to trees. The larger purpose--the animating spirit--of the Constitution was the protection of liberty, and we ought to focus on that.

8. Nazi Germany: Originalist German judges did not exercise the power they might have to prevent or slow down inhumane programs.

Examples of Non-Originalist Judges
Justice Harry Blackmun
Justice William Brennan
Justice William O. Douglas
Judge Richard Posner

law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law...." This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones. Any time he does so, he violates not only the limits to his own authority but, and for that reason, also violates the rights of the legislature and the people....the philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.

An Example of a Non-Originalist Opinion:
[*Griswold vs. Connecticut*](#)



Richard A. Posner
Judge Richard Posner on the Importance of Judicial Gap-Filling: A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law [as the Connecticut law banning the use or distribution of contraceptives] would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a

specific constitutional clause? This would mean that a state could require everyone to marry, or to have intercourse at least once a month, or it could take away every couple's second child and place it in a foster home....We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution.

Further Reading
For another view: [Strict Constructionism and the Strike Zone](#) (1987, by Doug Linder)

Judge Richard A. Posner on Originalism and Pragmatism

Excerpts from *Overcoming Law* (1995) ("What Am I? A Potted Plant?" and "Bork and Beethoven")

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From "What Am I? A Potted Plant?"

****Politically, I feel more governed than self-governing, and this is one reason why I think more warmly of limited government than of popular government. In considering whether to shrink what are now understood to be constitutional safeguards to the slight dimensions implied by a literal interpretation of the Constitution, we should be careful to have a realistic, not an idealized, picture of the legislative and executive branches of government, which would be even more powerful than they are today if those safeguards were reduced.

The framers of a constitution who want to make it a charter of liberties and not just a set of constitutive rules face a difficult choice. They can write specific provisions and thereby doom their work to rapid obsolescence, or they can write general provisions, thereby allowing substantial discretion to the authoritative interpreters, who in our system are the judges. The U.S. Constitution is a mixture of specific and general provisions. Many of the specific provisions have stood the test of time well or have been amended without much fuss. This is especially true of the rules establishing the structure and procedures of Congress. Most of the specific provisions creating rights, however, have fared poorly. Some have proved irksomely anachronistic—for example, the right conferred by the Seventh Amendment to a jury trial in federal in all cases at law if the stakes exceed \$20. Others have become dangerously anachronistic, such as the right to bear arms. Some have turned topsy-turvy, such as the provision for indictment by grand jury. The grand jury has become an instrument of prosecutorial investigation on, rather than being the

protection for the criminal suspect that the framers of the Bill of Rights expected it to be. If the Bill of Rights had consisted entirely of specific provisions, it would no longer be a significant constraint on the behavior of government officials.

Many provisions of the Constitution, however, are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it creates the possibility of alternative interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies judges have any right to exercise discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences. Reading is not a form of deduction; understanding requires a consideration of consequences. If I say, "I'll eat my hat," one reason why my listeners will "decode" the meaning of this statement in nonliteral fashion is that I couldn't eat a hat if I tried. The broader principle, which applies to the Constitution as much as to a spoken utterance, is that if one possible interpretation of an ambiguous statement would entail absurd or terrible results, that is a good reason to reject it.

Even the decision to read the Constitution narrowly, and thereby to "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or, "Read me narrowly." The decision to do one or the other must be made as a matter of political theory and will depend on such things as one's view of the springs of judicial legitimacy and the relative competence of courts and legislatures in dealing with particular types of issue.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Read narrowly, this just means that the defendant can't be forbidden to retain counsel. If he cannot afford counsel, or competent counsel, he is out of luck. Read broadly, it guarantees even the indigent the effective assistance of counsel. It becomes not just a negative right to be allowed to hire a lawyer but a positive right to demand the help of the government in financing one's defense if one cannot do it oneself. Either reading is compatible with the semantics of the provision, but the first better captures the specific intent of the framers. When the Sixth Amendment was written, English law forbade a criminal defendant to have the assistance of counsel unless his case presented abstruse questions of law. The framers wanted to do away with this prohibition. But, more broadly, they wanted to give criminal defendants protection against being railroaded. When they wrote, government could not afford, or at least did not think it could afford, to hire lawyers for indigent criminal defendants. Moreover, criminal trials were short and simple, so it was not completely ridiculous to expect a lay person to be able to defend himself competently from a criminal charge without a lawyer if he couldn't afford to hire one. Today the situation is different. Not only can the society afford to supply lawyers to poor people charged with crimes, but modern criminal law and procedure are so complicated that an unrepresented defendant is usually at a great disadvantage.

***** The liberal judicial activists may be imprudent and misguided in their efforts to enact the liberal political agenda into constitutional law. But it is no use pretending that what they are doing is not interpretation but "deconstruction," not law but politics, just because it involves the exercise of discretion and a concern with consequences and because it reaches results not foreseen two hundred years ago. It may be bad law because it lacks firm moorings in constitutional text, or structure, or history, or consensus, or other legitimate sources of constitutional law, or because it is reckless of consequences, or because it oversimplifies difficult moral and political questions. But it is not bad law, or no law, just because it violates the tenets of strict construction.

From "Bork and Beethoven"

The Tempting of America [by Judge Robert Bork] defends the position that "all that counts" to a judge interpreting the Constitution "is how the words used in the Constitution would have been understood at the time [of enactment]." But rather than produce convincing reasons why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases, Bork seems almost to want to place the issue outside the boundaries of rational debate. How else to explain the pervasive religious imagery? It begins with the title of the

book. Any doubt that the reference is to the temptation is dispelled by the tide of the first chapter-"Creation and Fall"-which begins, "The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall."

****A summons to holy war is not an argument for originalism. Bork's militance and dogmatism will buck up his followers and sweep along some doubters, but it will not persuade neutrals. One especially wants a better ground than piety for genuflecting to originalism because Bork rightly if incongruously reminds us of the danger of "absolutisms" and "abstract principles," criticizes reliance in constitutional law on "history and tradition," and implies in his interesting discussion of originalism's historical roots that the nonoriginalist heresy may be part of the original 'understanding of the Constitution.

Bork thinks, originalism necessary in order to curb judicial discretion, and curbs on that discretion necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives. But if democracy is the end, originalism is a clumsy means. Bork notes that in the wake of the New Deal the Supreme Court read out of the Constitution the limitations that the commerce clause of Article I appears to place on the regulatory powers of the federal government. By the test of originalism, the Court erred. But by erring it transferred power to the people's representatives.

And democracy is not the end, at least not the unalloyed end. The democratic (really Bork means the populist) principle is diluted in our system of government. Policies are made by agents of the people rather than by the people themselves-precisely so that raw popular desire will be buffered, civilized, guided, mediated by professionals and experts, informed through deliberation. Even the representatives do not have a blank check. They are hemmed in by the Constitution itself representing, to be sure, popular preferences, but those of a sliver of a tiny population two centuries ago. As Dworkin would say, the question posed by an originalist versus an activist or a pragmatist judiciary is not, one of democracy or no democracy, but of the kind of democracy we want.

****Anyway there is no evidence that the Court's authority depends on adherence to originalism. Bork knows this, for he says (in great tension with his remark about the destructibility of the institution) that "the Court is virtually invulnerable"; it "can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency." That is a sensible observation. The Court's survival and flourishing depend on the political acceptability of its results rather than on its adherence to an esoteric philosophy of interpretation. The Court has never been consistently originalist, yet has survived. Maybe the Justices know more about survival than their critics do; we economist types believe that people generally know more about how to protect their own interests than a kibitzer does.

Bork argues that if the only criterion for evaluating the Supreme Court's decisions is their political soundness, anyone who thinks the Court is politically wrong "is morally justified in evading its rulings whenever he can and overthrowing it if possible in order to replace it with a body that will produce results he likes." He adds ominously: "The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution capable of wielding power. If the Court will not agree with him, why not argue his case to some other group, say the Joint Chiefs of Staff, a body with rather better means for enforcing its decisions? No answer exists." Actually there are plenty of answers, and one is that Bork is posing a false dichotomy: a court committed to originalism versus a court that a "naked power organ;" blind obedience versus rebellion. These dichotomies imply, implausibly, that the only method of justification available to a court, the only method of channeling judicial discretion and thus of distinguishing judges from legislators, is the originalist. No other method-one that emphasizes natural justice, sound justice, social welfare, or neutral (but not necessarily originalist) principles-so much as exists. "The judge who looks outside the historic Constitution always looks inside himself and nowhere else." And it may be doubted whether the forbearance of the Joint Chiefs of Staff to attempt a takeover of the government of the United States is dependent to the slightest degree on the Supreme Court's adherence to originalism. If one may judge by the evidence that Bork arrays, the Court has since the beginning strayed repeatedly

from the originalist path, yet the Joint Chiefs (or their predecessors) have never tried to take over the government. Nor are they likely to try.

*****The idea of the Constitution as a binding contract is an incomplete theory of political legitimacy, not an erroneous one. A contract induces, reliance that can make a strong claim for protection; it also frees people from having continually to reexamine and revise the terms of the relationship. These values are independent of whether the original contracting parties are still alive. But a long-term contract is bound eventually to require, if not formal modification (which in the case of the Constitution can be accomplished only through the amendment, process), then flexible interpretation, to cope effectively with altered, circumstances. Modification and interpretation are reciprocal; the more difficult it is to modify the instrument formally, the more exigent is flexible interpretation. Bork is aware of the practical impediments to amending the Constitution but is unwilling to draw the inference that flexible interpretation is therefore necessary to prevent constitutional obsolescence.

*****The long-dead framers are a convenient group to whom to pass the buck. But although judges are not immune from the all too human tendency to deny responsibility for actions that cause pain, the significance of this fact is another matter. It is a considerable paradox to suggest that these reasons which uncandid judges give for their actions are the only legitimate grounds for judicial action. If the result-oriented or activist judge is queasy about the title deeds of his rulings, the originalist is (on the evidence of *The Tempting of America*, at any rate) queasy about the consequences of originalist rulings. And rightly so. A theory of constitutional interpretation that ignores consequences is no more satisfactory than one that ignores the political importance of building a bridge between the contemporary judge's pronouncement and some authoritative document from the past. It is difficult to argue to Americans that in evaluating a political theory they should ignore its practical consequences. Bork is not prepared to make such an argument. He continually reassures the reader that originalism does not yield ghastly results, while at the same time denouncing judges who are "result-oriented."

*****The originalist faces backwards but steals frequent sideways glances at consequences. The pragmatist places the consequences of his decisions in the foreground. The pragmatist judge does not deny that his role in interpreting the Constitution is interpretive. He is not a lawless judge. He does not, in order to do short-sighted justice between the parties, violate the Constitution and his oath, for he is mindful of the systemic consequences of judicial lawlessness. Like Samuel Lipman's ideal conductor, however, the pragmatist judge believes that constitutional interpretation involves the empathic projection of the judge's mind and talent into the creative souls of the framers rather than slavish obeisance to the framers' every metronome marking. In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations often are decisive; to the consistent originalist, if there were such a person, they would always be irrelevant. In a representative democracy, the fact that many (it need not be most) people do not like the probable consequences of a judge's judicial philosophy provides permissible, and in any event inevitable, grounds for the people's representatives to refuse to consent to his appointment, even if popular antipathy to the judge is not grounded in a well-thought-out theory of adjudication. The people are entitled to ask what the benefits to them of originalism would be, and they will find no answers in *The Tempting of America*. If, to echo Samuel Lipman again, originalism make bad music despite or perhaps because of its scrupulous historicity, why should the people listen to it?

Source: <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/interp.html>