

Original Intent or Evolving Constitution? Two Competing Views on Interpretation

Jurists disagree over the appropriate sources to interpret the Constitution.

by **Barbara A. Perry**

Justices, legal scholars, and political leaders have clashed with one another and sometimes with the public at large about how to interpret the Constitution. Learn about some of the watershed moments in this jurisprudential controversy as Barbara Perry provides an overview from the founders to current times.

In the mid-1980s an otherwise academic debate over constitutional interpretation broke into the popular press. The controversy surrounding whether federal judges should read the United States Constitution according to the original intent of those who established it, or by evolving contemporary principles, even prompted political cartoonists to enter the fray. In one cartoon Attorney General Edwin Meese proclaimed, “The Constitution was meant to be interpreted only as the founding fathers intended.” The artist then flashed back to the dawn of the new nation, with Benjamin Franklin commenting to his fellow founders, “Of course, you can’t prevent some yo-yo 200 years from now from misinterpreting us” (Ohman, *The Oregonian*).

A vigorous clash between liberal and conservative views on how federal jurists should apply the Constitution forced this esoteric discussion to prominence on the political agenda during President Ronald Reagan’s tenure in the White House from 1981 to 1989. Through its appointments to the federal judiciary, the Reagan administration hoped to counter “activist” rulings of the Warren and Burger Courts. For conservatives, landmark decisions from *Brown* to *Miranda* to *Roe* illustrated particularly egregious examples of the Supreme Court’s departure from the intentions of those who drafted the Constitution and its amendments. In 1985 Reagan’s attorney general, Ed Meese, delivered an address to the American Bar Association in which he described the “intended role of the judiciary ... and the Supreme Court ... to serve as the ‘bulwarks’ of a limited Constitution.” He argued that the founding fathers believed that “[t]he text of the document and the original intention of those who framed it would be the judicial standard giving effect to the Constitution” (Lasser, 1996: p. 443). Original intent thus signifies con-

“The Constitution is wholly silent on methods of interpreting it ... Indeed, the power of judicial review is nowhere explicitly granted.”

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stitutional interpretation that attempts to determine the initial meaning of the text as revealed by the intentions of those who produced it (Hall, 1992: p. 613).

Meese used his lecture on original intent theory to excoriate the U.S. Supreme Court for imposing what he labeled a “jurisprudence of idiosyncrasy” through its decisions. Citing cases on federalism, criminal law, and religion from the Court’s 1984–85 term, Meese declared that “far too many of the Court’s opinions were, on the whole, more policy choices than articulations of constitutional principles.” Because the Constitution embodies “the fundamental will of the people,” Meese observed, it is “the fundamental law.” To the extent that judges base their rulings on what they view as “fair and decent” by contemporary standards, they depart from the very essence of a constitution. He distilled the application of original intent to the following succinct exercise: “Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was” (Lasser, 1996: pp. 447–448).

Justice William Brennan, the U.S. Supreme Court’s avatar of the position that Meese denounced in his 1985 attack on judicial activism, took up the gauntlet in a speech he delivered at Georgetown University just three months after the attorney general fired his salvo. Brennan’s premise was the antithesis of Meese’s. The jurist’s role, according to Justice Brennan, is to interpret the inevitable ambiguities in the Constitution, which “embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being.” Brennan viewed the governing document’s text as less than “crystalline. The phrasing is broad

and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure” (Lasser, 1996: pp. 448–449).

Justice Brennan specifically refuted original intent theory’s validity: “It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions. ... Typically, all that can be gleaned is that the framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality.” Brennan even wondered, “[W]hose intention is relevant—that of the drafters [of the Constitution], the congressional disputants, or the ratifiers in the states?” Instead, “the ultimate question,” in Brennan’s view, “must be, What do the words of the text mean *in our time*?” (Lasser, 1996: pp. 451–452, emphasis added).

The very next year after Meese and Brennan publicly dueled over how to interpret the Constitution, the Reagan administration had an opportunity to

appoint two members of the U.S. Supreme Court. When Chief Justice Warren Burger retired in 1986, taking his cue from Attorney General Meese, President Reagan promoted Associate Justice William Rehnquist to chief justice and filled his vacant associate’s seat with Antonin Scalia. A self-proclaimed “textualist” and “originalist,” Scalia believes that his role is to rely solely on the literal denotations of the Constitution’s wording within the context surrounding its construction. He is fond of saying, “I do not believe in a living Constitution, this document that morphs from generation to generation. I favor what some might call the dead Constitution, but I prefer to call it the enduring Constitution” (Perry, 2001: p. 61).

Rehnquist is slightly more nuanced in his discussion of a “living Constitution.” He accepts as a truism that the nation’s governing document contains some “general language” that can provide interpretive latitude when applied to subjects “that the framers might not have foreseen.” But the chief justice utterly rejects the authority of judges to substitute “some other set of values for



The signing of the Constitution of the United States in 1787. From a painting. George Washington is standing on a platform holding a copy of the Constitution.

those which may be derived from the language and intent of the framers ...” (Murphy and Pritchett, 1979: pp. 738–739)

What Were the Framers’ Intentions?

The Constitution itself is wholly silent on methods of interpreting it. Article III, which established the federal judiciary, is the shortest of the three articles creating the branches of government. While instituting the Supreme Court, and delineating its original jurisdiction, Article III offers no guidance on how justices should interpret the governing document. Indeed, the power of judicial review, that is, the authority to determine the validity of legislative and executive actions vis-à-vis constitutional mandates, is nowhere explicitly granted in the Constitution. Yet Alexander Hamilton, in his *Federalist Paper # 78*, justified the power of judges to declare void legislative acts contrary to the Constitution. He unequivocally declared, “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body” (Hamilton, Madison, and Jay, 1961: p. 467). Yet, Hamilton did not provide the criteria for determining the Constitution’s meaning.

Nevertheless, originalists steadfastly rely on the framers for historical authority in promoting a jurisprudence of original intent. James Madison, often referred to as the Father of the Constitution for his leading role in drafting it and the Bill of Rights, wrote, “[I]f the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a consistent and stable government,

more than for a faithful exercise of its powers” (Berger, 1977: p. 3, fn. 7).

Where might that “sense” be found? *The Federalist Papers*, drafted by Madison, Alexander Hamilton, and John Jay to promote ratification of the Constitution, do not provide definitive explanations of the founders’ intentions. Jay had not attended the 1787 Constitutional Convention; Hamilton was present at only about half of its sessions. Madison himself warned that the papers “might be influenced by the zeal of advocates [who wrote them].” He did not publish his convention notes for nearly a half-century, and scholars believe that his written record represents only about 7 percent of the Philadelphia debates. Madison cautioned against using his notes as gospel: “[I]n expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character” (Murphy, Fleming, and Harris, 1986: pp. 304–305).

The Enduring Debate

Throughout American constitutional history, the dispute over using the framers’ intent as an interpretive touchstone continued and often created judicial watersheds—for good or ill. Chief Justice Roger Taney wrote in his disastrous 1857 *Dred Scott* opinion, “No one, we pre-

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For Further Reading

Berger, Raoul. *Government by Judiciary: The Transformation of the Fourteenth Amendment*. Cambridge, Mass.: Harvard University Press, 1977.

Fisher, Louis. *American Constitutional Law*, 4th ed. Durham, N.C.: Carolina Academic Press, 2001.

Hall, Kermit L. (ed.). *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. New York: Mentor, 1961.

Lasser, William. *Perspectives on American Government*, 2nd ed. Lexington, Mass.: D.C. Heath, 1996.

Murphy, Walter F., James E. Fleming, and William F. Harris, II. *American Constitutional Interpretation*. Mineola, N.Y.: Foundation Press, 1986.

Murphy, Walter F., and C. Herman Pritchett. *Courts, Judges, and Politics: An Introduction to the Judicial Process*, 3rd ed. New York: Random House, 1979.

Perry, Barbara A. *“The Supremes”: Essays on the Current Justices of the Supreme Court of the United States*. New York: Peter Lang, 2001.

FOR DISCUSSION

What are the best arguments to support the view that the Constitution’s meaning is fixed by the original intent of the framers? What are the best arguments in favor of a “living” or “evolving” Constitution?

Why did the Constitution make no provision for the power of judicial review? In what Supreme Court decision was judicial review firmly established?

Do constitutional amendments offer an adequate method for updating the Constitution and adapting it to contemporary controversies? Why (not)?

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sume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [of blacks], in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. ... [Constitutional language] must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning. ...” (Fisher, 2001: p. 67).

During the fight between President Franklin Roosevelt and the Supreme Court over the New Deal, FDR accused the justices of applying outmoded judicial theories, while Justice George Sutherland declared: “A provision of the Constitution ... does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.” In contrast, Chief Justice Earl Warren previewed the contemporary debate over constitutional meaning when he announced in 1954 that the Court sometimes looks to “the evolving standards of decency that mark the progress of a maturing society” (Mur-

phy, Fleming, and Harris, 1986: p. 290). No less a judicial authority than John Marshall, the “Great Chief Justice,” and a member of the founding generation, observed in *McCulloch v. Maryland* (1819) that “a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs” (Fisher, 2001: p. 67).

Thus, both sides of the interpretation debate believe in an enduring constitution. Whether that endurance results from adherence to the framers’ “original intent” or the evolution of constitutional standards remains for each side to expound and each American to ponder.

Resources on Constitutional Interpretation

Primary Documents

The Constitution [Annotated]
www.gpoaccess.gov/constitution/index.html

The most authoritative and comprehensive annotation to the United States Constitution—its preamble, articles, and amendments. Provided by the U.S. Government Printing Office.

Books

Barnett, Randy E. *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton, N.J.: Princeton University Press, 2003.

Barnett provides an assessment of constitutional change based upon libertarian theory, arguing that the courts have been reinterpreting the original Constitution and its amendments to eliminate those parts that protect liberty from the power of government.

Bloomfield, Maxwell H. *Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal*. Cambridge, Mass.: Harvard University Press, 2000.

Bloomfield uses literary, political, and cultural sources to support the idea that even radical changes can be achieved through constitutional interpretation.

Kramer, Larry D. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2004.

Kramer provides a detailed historical and populist argument that constitutional interpretation belonged to ordinary people during the colonial era and early years of the Republic, rather than to the courts, lawyers, and judges.

Lipkin, Robert J. *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*. Durham, N.C.: Duke University Press, 2000.

Lipkin analyzes changes in constitutional jurisprudence, arguing that judicial review plays a critical role in American democracy by reflecting cultural and political values.

Tushnet, Mark. *The New Constitutional Order*. Princeton, N.J.: Princeton University Press, 2003.

Tushnet uses an analysis of politics and judicial decisions to argue that our nation has moved into a new (post-New Deal) constitutional era, one in which there are reduced aspirations for using law and the Constitution to achieve broader social justice.

Whittington, Keith E. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence, Kans.: University Press of Kansas, 2001.

Whittington discusses how the judiciary should interpret the Constitution, using arguments from American history and political philosophy. He argues that “original intent” provides a valuable method of constitutional interpretation.

Web Sites

Alliance for Justice
www.afj.org

The Alliance for Justice is a national association of public interest organizations working in such areas as the environment, civil rights, consumer rights, and women’s and children’s issues.

The Claremont Institute/Center for Constitutional Jurisprudence
www.claremont.org/projects/jurisprudence

The Claremont Institute seeks to restore the principles of the American Founding to their rightful, preeminent authority in our national life. The Institute’s Center for Constitutional Jurisprudence is a public interest law firm that uses litigation, amicus briefs, and education.