

The Varying Interpretations of the United States Constitution

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The laws of these United States of America are in place to remedy the issues within and against American society by ensuring American's citizens' rights are protected against other citizens, organizations, and the government itself.¹ America's founders gave future generations a framework, the supreme law of the land, to guide the path of the country in a way that they saw just.² The U.S. Constitution has been the framework for the American government and society for over 200 years to promote the country the founders of the nation had envisioned. The Constitutional debate today is over how this document should be interpreted and, as such, the competing views on the interpretation of the U.S. Constitution has been one of the most debated issues in American government/politics since its creation!³

The U.S. Constitution is the supreme law of the land in the United States of America, but it was not in place at the birth of America.⁴ America's original constitution, the Articles of Confederation, was a disaster for the newly developing country. Americans were so scared of a centralized power like the monarch that they had just rebelled against, that they made the Articles of Confederation far too weak to effectively run a government which led to rebellions and many other systemic problems, clearly showing that something needed to change in the American government. To prevent a total collapse of their new nation, the Founders, who consisted of delegations from twelve of the thirteen original colonies, excluding Rhode Island, called for the Constitutional Convention, which was held in Philadelphia in May of 1787.⁵ The Convention was initially meant to be a simple revision of the Articles of Confederation, but key representatives felt that the document was too weak and instead they should start from scratch which ultimately led to the creation of the U.S. Constitution which is still the Supreme Law of the Land in place today.⁶

The three branches that were created through the U.S. Constitutional Convention are the Executive, Legislative, and Judicial branch which through the Supreme Court and subsequent federal circuit courts the Constitution is interpreted.⁷ The Supreme Court is the head of the

¹ "Law and the Rule of Law," accessed January 22, 2021, <https://judiciallearningcenter.org/law-and-therule-of-law/>.

² "Creating the Constitution," accessed February 1, 2021, <https://www.ushistory.org/gov/2c.asp>.

³ Stephen G. Calabresi and Daniel M. McIntosh, "The Great Debate: Interpreting Our Written Constitution," The Federalist Society, Last modified 1986. <https://fedsoc.org/commentary/publications/the-great-debate-interpreting-our-written-constitution>.

⁴ "Constitution of the United States of America," The Editors of Encyclopaedia Britannica, Last modified January 29, 2019, <https://www.britannica.com/topic/Constitution-of-the-United-States-of-America>.

⁵ Richard R. Beeman, "The Constitutional Convention of 1787: A Revolution in Government," The Constitutional Convention of 1787: A Revolution in Government | The National Constitution Center, accessed February 1, 2021, <https://constitutioncenter.org/interactive-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government>.

⁶ "The Constitution: How Did It Happen?" National Archives and Records Administration, National Archives and Records Administration, n.d. accessed January 16, 2021, <https://www.archives.gov/founding-docs/constitution/how-did-it-happen>.

⁷ "Three Branches of Government," Harry S. Truman, accessed January 16, 2021, <https://www.trumanlibrary.gov/education/three-branches/three-branches-of-government>.

Judicial branch and is the ultimate interpreter of the Constitution through their power of judicial review, self-granted through the Supreme Court case *Marbury v. Madison*.⁸ While it is exclusively the Supreme Court's ultimate responsibility to interpret the Constitution, it cannot overstep its bounds by ruling on every issue in today's world. The Supreme Court is an appellate court, meaning unless under certain special circumstances, in order for the court to rule on any given issue there needs to be a case brought before it by a lower court. On a few occasions, there are special situations that allow the Court to have original jurisdiction on a case, meaning that the courts original jurisdiction which set in the U.S. Code, allows for the case to be heard directly by the Court without the intermediate appeals process such as disputes between states; an area the Supreme Court has exclusive jurisdiction to hear the case.⁹ An example of the rare use of original jurisdiction would be the dispute over which state had jurisdiction over Ellis Island in the 1998 case of *New Jersey v. New York* in which the Court directly ruled on.¹⁰ While there have been attempts to bring other non-original jurisdiction cases directly to the Supreme Court such as *Alabama v. Arizona* (1934) or *Massachusetts v. Missouri* (1939), these attempts have been rejected and ordered to go through the necessary appellate process or simply not be heard at all.¹¹ While the Supreme Court is the official interpreter of the Constitution, all American, including Supreme Court Justices, are entitled to their own interpretation of the Supreme Law of the Land.

Three major schools of thought are used when interpreting the Constitution: "Textualism", "Living Document", and "Original Intent". Advocates for each view present evidence to justify their interpretation, such as different legal theories and past Supreme Court cases, but each view has varying consequences that affect the Constitution differently and must be examined in depth to fully understand their implications. The Textualist interpretation is the thought that the United States Constitution was written over 200 years ago by America's forefathers with a specific idea of what their country should be, so that idea should not be altered from its original purpose.¹² The original idea of what America's forefathers believed the country should develop into was written in the Constitution, so Americans should follow the Constitution exactly how it was written in the context it was written in. This view was famously held by Supreme Court Justice Antonin Scalia The Textualist interpretation is the thought that the United States Constitution was written over 200 years ago by America's forefathers with a specific idea

⁸ "Marbury v. Madison (1803)," Bill of Rights Institute, Last modified July 9, 2015, <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/marbury-v-madison-1803/>.

⁹ "The Supreme Court," Federal Court Concepts: Supreme Court, accessed February 2, 2021, <http://adacourse.org/courtconcepts/scotus.html>.

¹⁰ "New Jersey v. New York, 523 U.S. 767 (1998)," Justia Law, accessed February 2, 2021, <https://supreme.justia.com/cases/federal/us/523/767/>.

¹¹ "Cases of Which the Court Has Declined Jurisdiction," Legal Information Institute, accessed February 2, 2021, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/cases-of-which-the-court-has-declined-jurisdiction>.

¹² Chris Cooke, "Textualism Is Not Strict Constructionism Is Not Originalism," Least Dangerous Blog, Last modified July 8, 2018, <https://leastdangerousblog.com/2018/07/08/textualism-is-not-strict-constructionism-is-not-originalism/>.

of what their country should be, so that idea should not be altered from its original purpose.¹³ The original idea of what America's forefathers believed the country should develop into was written in the Constitution, so Americans should follow the Constitution exactly how it was written in the context it was written in. This view was famously held by Supreme Court Justice Antonin Scalia amongst other more hardline Republicans.¹⁴ Advocates of the Textualist interpretation would claim that the Constitution worked well for America's forefathers so it should work just as well for modern America. Rather than utilize judicial activism to change the Constitution, Textualists opt for judicial restraint and the proper amendment process only in the most serious of circumstances. In support of their interpretation, Textualists often cite *Griswold v. Connecticut* (1965).

The 1965 *Griswold v. Connecticut* case is not a case where judicial restraint was utilized in any means. The question that arose from this case was if the Constitution protected the right of marital privacy against state restrictions which in a 7-2 decision the Court ruled that the Constitution did protect the right of marital privacy through the combination of the First, Third, Fourth, and Ninth Amendments to show the implied right of privacy supposedly intended in the text of the Constitution. This was the first Supreme Court case to recognize rights inside the Constitution that were not explicitly written and in order to derive the right of privacy from the text, the Court had to take different parts of four separate Amendments to meet their criteria for making their ruling which showed a clear need for judicial restraint and the Textualist interpretation because it opened the door to many other interpretive and controversial cases such as *Roe v. Wade* in the legalization of abortion and *Lawrence v. Texas* regarding the sexual conduct of same-sex individuals.¹⁵

As with any ideology, unintended consequences come along with the desired positive outcomes that were originally intended. The Textualist interpretation of the U.S. Constitution lends itself to become an ancient document quite rapidly because of how strongly its supporters wish to keep the document as original as possible. Textualism truly only allows for change to the Constitution, whether it be major or minor, through the Amendment process. By having such a strict view of how adaptations to the Constitution can be made, Textualism open the possibility for the Constitution to become far too rigid to effectively tackle the challenges that a changing nation presents.

In extreme contrast to Textualisms rigidity is the Living Document interpretations fluidity. The Living Document thought process is that while the U.S. Constitution was made with thought and purpose by the Founders, it was written over 200 years ago. It was written so long ago in a society that was so drastically different from the world today that the Founders could not have written the Constitution in such a way that it would be comprehensive enough to cover all of the issues put forth today and as such the Constitution should heavily and regularly be

¹³ Ibid.

¹⁴ Mary Wood, "Scalia Defends Originalism as Best Methodology for Judging Law," University of Virginia School of Law, Last modified April 20, 2010, https://www.law.virginia.edu/news/2010_spr/scalia.htm.

¹⁵ "Privacy," Legal Information Institute, accessed February 15, 2021. <https://www.law.cornell.edu/wex/privacy>.

changed to adapt to a constantly changing world.¹⁶ One of the most famous supporters of the Living Document interpretation was Supreme Court Justice Oliver Wendell Holmes Jr., who served on the Court from 1902 to 1932.¹⁷ The Amendment process for Living Document proponents is far too time-consuming for it to be an effective way to adapt the Constitution to modern issues as it can take years for an Amendment to even be considered let alone ratified. Because of this, Living Document proponents would rather see Supreme Court cases and judicial review be the main ways to interpret/adapt the Constitution. Living Document interpreters often cite *Missouri v. Holland* (1920). Supreme Court Justice Oliver Wendell Holmes in presenting the opinion of the Court in this case famously referred back to the Living Document interpretation, saying that “[t]he case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.”¹⁸ Justice Holmes through this quote exemplified his support for the Living Document interpretation by claiming that the case simply could not be decided based solely on a document written over 100 years before because situations and experiences have changed since the documents creation.

Sadly, the Living Document interpretation can cause the Constitution to stray too from the original principles and concepts that the Founding Fathers intended for the country; concepts and principles which have helped America develop into the nation that it has become today. Although the Living Document interpretation understands that the Amendment process is the only way to technically adjust the actual content of the Constitution, through the use of Supreme Court cases and judicial review/activism the Living Document interpretation can adjust the American political and legal system much quicker than if changes were made solely through the Amendment process.

Originalism, has parts of both Textualism and Living Document while simultaneously being distinct from both and ultimately would make it the most suitable for the average American.¹⁹ Original Intent would use only what is written in the Constitution or subsequent Amendments, however, it uses what was intended by the Founders in their writings to interpret the meaning behind the Constitution and Amendments. Evidence for the Founders intentions can be found in original drafts of the Constitution where they made notes along with the Federalist Papers used to explain and justify the new Constitution. One of the Major Supreme Court cases Originalists use as justification is *Griswold v. Connecticut* (1965). *Griswold v. Connecticut* was a true landmark case as it showed that there are rights protected by the Constitution that are not specifically stated within the document, rather they are implied.²⁰ By only looking at the fact that

¹⁶ David A. Strauss, “The University of Chicago The Law School,” The Living Constitution | University of Chicago Law School, Last modified September 27, 2010, <https://www.law.uchicago.edu/news/living-constitution>.

¹⁷ Bruce Ackerman, “OLIVER WENDELL HOLMES LECTURES THE LIVING CONSTITUTION,” The Harvard Law Review 120, no. 7 (May 2007), doi:<https://cdn.harvardlawreview.org/wp-content/uploads/pdfs/ackerman.pdf>.

¹⁸ “State of Missouri v. Holland, 252 U.S. 416 (1920),” Justia Law, accessed February 6, 2021, <https://supreme.justia.com/cases/federal/us/252/416/>.

¹⁹ Chris Cooke, “Textualism Is Not Strict Constructionism Is Not Originalism,” Least Dangerous Blog, Last modified July 8, 2018, <https://leastdangerousblog.com/2018/07/08/textualism-is-not-strict-constructionism-is-not-originalism/>.

the Court interpreted the text to discover the meaning of the words that the Founders intended, an Original Intent proponent could quickly claim that the Court took an Original Intent approach to reach their ruling. However, in order for this to be true, proponents need to find evidence that proves the Founders had intended for the right of privacy to be included in the text. In presenting the concurring opinion of the Court, Justice Goldberg states that, “the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”²¹ By conceding there are portions of the Constitution that are not explicitly stated, but are none the less there, the Supreme Court essentially has admitted that there are portions of the Constitution that the intention of what the Founders meant must be looked at to properly interpret the document, thus at least some portion of the Original Intent interpretation must be used when interpreting the Constitution. Since the Originalism interpretation has portions of both other interpretations, its shortfalls are a combination of the two. there are many different factors that contribute to an individual’s decision, the Original Intent interpretation is the most versatile and comprehensive interpretation for an American that wants to see the future success of the country while also staying true to the Constitutions origins. None of the Constitutional interpretations are perfect, but it is up to every American to decide where they stand on the Constitution.

Bibliography

Ackerman, Bruce. “OLIVER WENDELL HOLMES LECTURES THE LIVING CONSTITUTION.” *The Harvard Law Review*. 120, no. 7 (May 2007). doi: <https://cdn.harvardlawreview.org/wp-content/uploads/pdfs/ackerman.pdf>.

Beeman, Richard R. “The Constitutional Convention of 1787: A Revolution in Government,” *The Constitutional Convention of 1787: A Revolution in Government | The National Constitution Center*, Accessed February 1, 2021, <https://constitutioncenter.org/interactive-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government>.

Calabresi, Stephen G, and Daniel M McIntosh. “The Great Debate: Interpreting Our Written Constitution.” *The Federalist Society*, Last modified 1986. <https://fedsoc.org/commentary/publications/the-great-debate-interpreting-our-written-constitution>.

“Cases of Which the Court Has Declined Jurisdiction,” *Legal Information Institute*, Accessed February 2, 2021, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/cases-of-which-the-court-has-declined-jurisdiction>.

²⁰ Alex McBride, “Griswold v. Connecticut (1965): PBS,” *The Supreme Court, Griswold v. Connecticut (1965) | PBS*, accessed January 16, 2021, https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html.

²¹ “Griswold v. Connecticut, 381 U.S. 479 (1965),” *Justia Law*, accessed February 6, 2021, <https://supreme.justia.com/cases/federal/us/381/479/>.

“The Constitution: How Did It Happen?” National Archives and Records Administration, National Archives and Records Administration, n.d. Accessed January 16, 2021, <https://www.archives.gov/founding-docs/constitution/how-did-it-happen>.

“Constitution of the United States of America,” The Editors of Encyclopaedia Britannica, Last modified January 29, 2019, <https://www.britannica.com/topic/Constitution-of-the-United-States-of-America>.

Cooke, Chris. “Textualism Is Not Strict Constructionism Is Not Originalism.” Least Dangerous Blog, Last modified July 8, 2018.

<https://leastdangerousblog.com/2018/07/08/textualism-is-not-strict-constructionism-is-not-originalism/>.

“Creating the Constitution,” Accessed February 1, 2021, <https://www.ushistory.org/gov/2c.asp>.

“Griswold v. Connecticut, 381 U.S. 479 (1965),” Justia Law, Accessed February 6, 2021, <https://supreme.justia.com/cases/federal/us/381/479/>.

“Law and the Rule of Law,” Accessed January 22, 2021, <https://judiciallearningcenter.org/law-and-the-rule-of-law/>.

“Marbury v. Madison (1803),” Bill of Rights Institute, Last modified July 9, 2015, <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/marbury-v-madison-1803/>.

McBride, Alex. “Griswold v. Connecticut (1965).” The Supreme Court. Expanding Civil Rights. Landmark Cases. Griswold v. Connecticut (1965) | PBS. Accessed September 6, 2020. https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html.

“New Jersey v. New York, 523 U.S. 767 (1998),” Justia Law, Accessed February 2, 2021, <https://supreme.justia.com/cases/federal/us/523/767/>.

“Privacy,” Legal Information Institute, Accessed February 15, 2021. <https://www.law.cornell.edu/wex/privacy>.

“State of Missouri v. Holland, 252 U.S. 416 (1920),” Justia Law, Accessed February 6, 2021, <https://supreme.justia.com/cases/federal/us/252/416/>.

Strauss, David A. “The University of Chicago The Law School.” The Living Constitution | University of Chicago Law School, Last modified September 27, 2010. <https://www.law.uchicago.edu/news/living-constitution>.

“The Supreme Court,” Federal Court Concepts: Supreme Court, Accessed February 2, 2021, <http://adacourse.org/courtconcepts/scotus.html>.

“Three Branches of Government,” Harry S. Truman, Accessed January 16, 2021,
[https://www.trumanlibrary.gov/education/three-branches/three-branches- of
government.](https://www.trumanlibrary.gov/education/three-branches/three-branches-of-government)

Wood, Mary. “Scalia Defends Originalism as Best Methodology for Judging Law.”
University of Virginia School of Law, Last modified April 20, 2010.
[https://www.law.virginia.edu/news/2010_spr/scalia.htm.](https://www.law.virginia.edu/news/2010_spr/scalia.htm)