

COMPETING VIEWS OF THE U.S. CONSTITUTION

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An Analysis of the Competing Views on the Interpretation of the U.S. Constitution

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Abstract

This thesis will examine the competing interpretations of the United States Constitution and the different effects these interpretations would have on the American government and legal systems. By examining legal precedents and different philosophical views, the varying interpretations will be examined and put through real-world scenarios. The founding of America was over 200 years ago, but philosophical views throughout history shall be used in the understanding of the different interpretations and real-world consequences. The thesis will not claim that one interpretation is proper and the perfect one for the United States, rather it will challenge each view in an attempt to understand the best possible interpretation for the American people, government, and legal systems.

An Analysis of the Competing Views on the Interpretation of the U.S. Constitution

Today's free world is a complicated one, with the center being the United States. America has grown into much more than some farmers serving under the most powerful military and imperial force in the world. The U.S. has grown, but so has its problems. The laws of this country 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.³ 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! The various interpretations that have been used in the past have shaped America into the country it is today. The interpretations of the supreme law of the land could hypothetically change the face of the American government and legal system, so it is of utmost importance to fully understand these varying views of the United States Constitution.

¹ "Law and the Rule of Law," accessed October 22, 2020, <https://judiciallearningcenter.org/law-and-the-rule-of-law/>.

² "Creating the Constitution," accessed November 1, 2020, <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>.

The U.S. Constitution Background

The U.S. Constitution is the supreme law of the land in the United States of America. It is the oldest written national constitution in the world, and it defines the basis of the American government, its jurisdictions, and the most basic rights of American citizens.⁴ The Constitution was meant to be easily understandable to the common man and contains only about 4,400 words on four sheets of paper, making it a light read.⁵ Its creation was meant to save the nation that was on the brink of collapse from its original constitution, the Articles of Confederation.

Why Did America Need a Revised Constitution?

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. Some of the weaknesses of the Articles of Confederation, among other things, were that there was no power to enforce federal laws, no checks and balances for government, and most importantly no power to levy taxes.⁶ Nothing of value was accomplished without taxes to run the federal government and its initiatives. Without proper funding, debts went unpaid, until finally another rebellion broke out, this time in Massachusetts known as Shays Rebellion.⁷ Led by disgruntled farmer and former soldier Daniel Shays, farmers all over western

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 "Fascinating Facts about the U.S. Constitution," Constitution Facts - Official U.S. Constitution Website, accessed September 16, 2020, <https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/>.

⁶ "Challenges of the Articles of Confederation," Khan Academy, Khan Academy, n.d. accessed September 16, 2020, <https://www.khanacademy.org/humanities/ap-us-history/period-3/articles-of-confederation-ush-lesson/a/challenges-of-the-articles-of-confederation-article>.

⁷ "Shays' Rebellion," History.com, History.com Editors, Last modified November 12, 2009, <https://www.history.com/topics/early-us/shays-rebellion>.

Massachusetts took up arms and marched to a local courthouse to demand financial relief from the taxes and debts thrust upon them by the new country and the revolutionary war. Neither local militias nor the federal government could provide any aid to Massachusetts to stop the rebellion which lasted well over a year until it was finally put down by a private militia.⁸ This rebellion, alongside other clear weaknesses presented by the Articles of Confederation, made it clear that something needed to change. After a few years attempting to function under the Articles of Confederation, which was clearly not working, James Madison, Alexander Hamilton, and George Washington grew concerned that the United States was nearing catastrophe. To prevent a total collapse of their new country, 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 1787.⁹

How Did the Constitution Come About?

For three hot summer months in Philadelphia in 1787, representatives from twelve of the thirteen newly formed states (Rhode Island refused to attend) convened to revise the Articles of Confederation into a more powerful document to prevent a collapse of American society.¹⁰

While the original purpose of many of the representatives of the Constitutional Convention was a simple revision of the existing document, after spending some time deliberating the Articles of

⁸ “Challenges of the Articles of Confederation (Article)” Khan Academy, Khan Academy, n.d. accessed September 16, 2020, <https://www.khanacademy.org/humanities/ap-us-history/period-3/articles-of-confederation-ush-lesson/a/challenges-of-the-articles-of-confederation-article>.

⁹ 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 November 1, 2020, <https://constitutioncenter.org/interactive-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government>.

¹⁰ “The Constitution: How Did It Happen?” National Archives and Records Administration, National Archives and Records Administration, n.d. accessed September 16, 2020, <https://www.archives.gov/founding-docs/constitution/how-did-it-happen>.

Confederation a bulk of the representatives felt that they should throw out the document completely and start from scratch.¹¹ The decision by the Founders to start over with a totally new document ultimately led to the creation of the U.S. Constitution which is still in place today. Continuously wary of a strong centralized government, the delegates crafted the Constitution in such a way that it granted the federal government and each branch of the government specifically outlined powers and any power that was not written into the Constitution for the federal government would be delegated to the states.¹² Representation in this new federal government was one of the greatest hurdles that the Convention had to address. The ultimate decision of representation came about from two competing plans presented by the Virginia and New Jersey delegations respectively.¹³ The Virginia Plan would have benefitted the larger states by giving states with more population greater representation; conversely, the New Jersey Plan would have been a benefit to small states by giving every state, regardless of population, the same level of representation so everyone has an equal voice.¹⁴ The final solution eventually came in the form of a third plan from the Connecticut delegation that would later be known as The Great Compromise.¹⁵ As the name would suggest, the Great Compromise was a combination of the Virginia and New Jersey plans with representation based on population in the House of Representatives and representation based on statehood in the Senate which effectively created

¹¹ Ibid.

¹² “The Constitution,” The White House, accessed November 1, 2020, <https://www.whitehouse.gov/about-the-white-house/the-constitution/>.

¹³ “Creating the United States Convention and Ratification,” Convention and Ratification - Creating the United States | Exhibitions - Library of Congress, Last modified April 12, 2008, <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html>.

¹⁴ Ibid.

¹⁵ Ibid.

the bicameral legislature in place today.¹⁶ With the creation of a new centralized federal government, the Founders caution against strong governmental centralization caused them to increase the number of governmental branches from one branch to three separate branches which all had checks and balances of power between each other to ensure there were no abuses of power.¹⁷ All of these different concepts and ideas put into place in the Constitution through the Constitutional Convention helped to create the U.S. Constitution that is the framework of America today.

What Are the Branches, and Who Can Interpret the Constitution?

The three branches that were created through the U.S. Constitutional Convention were the Executive, Legislative, and Judicial.¹⁸ Each branch has unique roles to play in government which checks and balances the other branches, thus ensuring that no one branch has more power over another. The Executive branch is the face of the country led by the President of the United States, its purpose is to enforce the laws that the Legislative branch puts forth.¹⁹ The Legislative branch is responsible for the creation of the laws for the nation and is composed of the House of Representatives and the Senate. The Judicial branch is composed of the Supreme Court and federal justices throughout the country with their primary responsibility being the hearing of cases and interpretation of laws according to the Constitution.²⁰ The Supreme Court is the head

¹⁶ “Constitutional Convention,” Encyclopædia Britannica, The Editors of Encyclopaedia Britannica, Encyclopædia Britannica, inc., Last modified August 28, 2019, <https://www.britannica.com/event/Constitutional-Convention>.

¹⁷ “Our Government,” The White House, Accessed November 1, 2020, <https://www.whitehouse.gov/about-the-white-house/our-government/>.

¹⁸ Ibid

¹⁹ “Three Branches of Government,” Harry S. Truman, accessed September 16, 2020, <https://www.trumanlibrary.gov/education/three-branches/three-branches-of-government>.

²⁰ Ibid.

of the 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*.²¹ While it is exclusively the Supreme Court's 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.²² 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*.²³ 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 heard at all.²⁴ While in modern times it seems commonplace for the Judicial branch to interpret the Constitution, this was not the case when the Founders wrote the Constitution. The concept of judicial review that the Supreme Court uses to

²¹ "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/>.

²² "The Supreme Court," Federal Court Concepts: Supreme Court, accessed November 2, 2020, <http://adacourse.org/courtconcepts/scotus.html>.

²³ "New Jersey v. New York, 523 U.S. 767 (1998)," Justia Law, accessed November 2, 2020, <https://supreme.justia.com/cases/federal/us/523/767/>.

²⁴ "Cases of Which the Court Has Declined Jurisdiction," Legal Information Institute, accessed November 2, 2020, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/cases-of-which-the-court-has-declined-jurisdiction>.

determine the constitutionality of certain statutes was formally introduced in 1803, fifteen years after the ratification of the Constitution, through the landmark *Marbury v Madison* case.²⁵ The case was brought to the Supreme Court to determine if William Marbury and others were entitled to positions they were appointed to by a prior administration, but were denied the positions by the new Secretary of State, James Madison. At first glance the case seemed simple, the court shall either force Madison to give the promised position to Marbury and his colleagues or not, however, history has shown that *Marbury v Madison* would develop into one of the most important cases to ever pass through the Supreme Court.²⁶ The Court ultimately determined that while Marbury was entitled to the position, they could not grant it to him because the act which granted him the position was unconstitutional, making his claim null and void. By ruling that an act of Congress was unconstitutional the Supreme Court set a new precedent that granted them the power of judicial review.²⁷ Chief Justice John Marshall upon delivering the opinion of the Court wrote that, “[i]t is emphatically the duty of the Judicial Department to say what the law is.”²⁸ Ever since that landmark case, the Supreme Court has had the ultimate say in interpreting the U.S. Constitution through the power of judicial review.

What Are the Major Modern Interpretations of the United States Constitution?

Three major schools of thought are used when interpreting the Constitution:

“Textualism”, “Living Document”, and “Original Intent”. As American politics have developed

²⁵ “Marbury v. Madison,” Oyez, accessed September 16, 2020, <https://www.oyez.org/cases/1789-1850/5us137>.

²⁶ “Marbury v. Madison Case Summary: What You Need to Know,” Findlaw, Findlaw Attorney Editors, accessed November 2, 2020, <https://supreme.findlaw.com/supreme-court-insights/marbury-v--madison-case-summary--what-you-need-to-know.html>.

²⁷ Ibid.

²⁸ “Marbury v. Madison, 5 U.S. 137 (1803),” Justia Law, accessed September 16, 2020, <https://supreme.justia.com/cases/federal/us/5/137/>.

over the years, political parties have subtly taken sides on each interpretation. 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.

Textualism

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.²⁹ 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 alongside hardline Republicans in a quest to combat progressive movements and radical changes to the document.³⁰ 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. As University of Chicago Law Professor William Baude would put it, "the words in the Constitution have the same meaning over time, even if modern circumstances change, and even if we wish the words meant something else."³¹ Following this thought process, if the original Constitution that is used today worked in the past, then there would be no need to change anything. This view

²⁹ 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/>.

³⁰ 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.

³¹ Aaron Blake, "Neil Gorsuch, Antonin Scalia and Originalism, Explained," The Washington Post, Last modified April 29, 2019, <https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/>.

subsequently allows for little to no change to the original document which can present problems for a modern world. While Textualists often refer to the interpretations constitutional stability as a benefit, detractors from this perspective would argue that this stability is in fact rigidity which could make the Constitution lose effectiveness in addressing modern issues.³² Evidence for this view is largely pulled directly from the Constitution which contains the Framers' thoughts in their writings and decisions. The Textualist interpretation has base support, but skeptics often poke holes in the view because of how rigid and ineffective it could make the Constitution.

Living Document

The Living Document interpretation is essentially the exact opposite of Textualism.³³ This interpretation's thought process is that the United States Constitution was written over 200 years ago and because of this it could not possibly be comprehensive enough to cover all of today's issues.³⁴ The Living Document view calls for massive changes to be made regularly to continually and adequately adapt to a changing world. This view was famously held by Supreme Court Justice Oliver Wendell Holmes Jr. and historically held by Democrats to implement, in their opinion, necessary changes to the document lead the country in the right direction.³⁵ Advocates of this view believe that the Amendment process inherent in the Constitution is not sufficient to create perceived needed changes to keep up with a changing world. Skeptics of this

³² Ken Levy, "The Problems With Originalism," The New York Times, Last modified March 22, 2017, <https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html>.

³³ "Originalism, Barrett's Judicial Philosophy," AP NEWS, Last modified October 13, 2020, <https://apnews.com/article/donald-trump-amy-coney-barrett-us-supreme-court-courts-antonin-scalia-038ec1d4de30d1bd97a0ce3823903f0c>.

³⁴ Jason Swindle, "ORIGINALISM VS. 'LIVING DOCUMENT,'" Swindle Law Group, Last modified October 29, 2017, <https://www.swindlelaw.com/2017/10/originalism-living-constitution-heritage/>.

³⁵ 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>.

view cite that a living document would make the basis of America's legal system much too fluid and has the possibility to create an issue of the separation of powers that has been inherent in America's government since its creation.³⁶

Original Intent

While it is closer to Textualism than Living Document, Original Intent has obvious differences that set it apart from other interpretations. Original Intent, sometimes referred to as Originalism, holds that everything written in the Constitution and what the Founders intended in their writings is what can be used in the interpretation of the Constitution.^{37, 38} The world is very different than it was 200 years ago, so reasonable changes to the Constitution need to be made to adequately implement what the Founders intended in their writings. Many moderates of both political parties have supported this interpretation because of its comprehensiveness of catering, at least partially, to both party's needs. Advocates of this position understand that the world has changed since its founding, however, they believe that the country should still be led by the same original guiding principles transferred onto today's issues.³⁹ Critics claim that there is no way to determine what a reasonable change to the document is and that this view could easily be changed to be the Living or Textualist interpretations with their subsequent consequences. Despite the criticism, proponents of this view cite the Federalist Papers which explain each

³⁶ Jason Swindle, "ORIGINALISM VS. 'LIVING DOCUMENT,'" Swindle Law Group, Last modified October 29, 2017, <https://www.swindlelaw.com/2017/10/originalism-living-constitution-heritage/>.

³⁷ Jefferson Powell, "The Original Understanding of Original Intent," *The Harvard Law Review* 98, no. 5 (March 1985): 897–900, doi:https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1390&context=faculty_scholarship.

³⁸ 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/>.

³⁹ Derek H. Davis, "Original Intent," accessed November 2, 2020, <https://www.mtsu.edu/first-amendment/article/823/original-intent>.

Framer's intent for their work along with examination of the Founders worldviews and Supreme Court cases such as *Griswold v Conn.* to strengthen their unique interpretation. Having briefly introduced each approach, we will now discuss the specifics of their interpretive approaches below.

Interpretation 1: Textualism

What Is the Interpretation?

Textualism has two major parts: everything that is written is what can be worked with and minimal changes to the original document can be made. The basis of this thought process is that the U.S. Constitution was made with thought and purpose, so there should be no need to change anything drastically.⁴⁰ As Judge Willett of the Fifth Circuit Court of Appeals writes, "Text is the alpha and the omega of the interpretive process."⁴¹ Textualist supporters would claim that if the Constitution is changed dramatically from its original form then the supreme law of the land could become perverted from its original goal of freedom and liberty that America's founders had in mind during its ratification.⁴² While almost completely shunning judicial review as a form of Constitutional review/adjustment, Textualist proponents can recognize there is a constitutional way to change the Constitution through the Amendment process.⁴³ The Amendment process is the only explicitly written way in the Constitution to change the

⁴⁰ David Forte, "The Originalist Perspective," The Heritage Foundation, Last modified September 16, 2009, <https://www.heritage.org/the-constitution/report/the-originalist-perspective>.

⁴¹ "BANKDIRECT CAPITAL FINANCE LLC SUBSIDIARY OF TEXAS CAPITAL BANK PETITIONER v. PLASMA FAB LLC AND RUSSELL MCCANN RESPONDENTS," Findlaw, Last modified 2017, <https://caselaw.findlaw.com/tx-supreme-court/1860360.html>.

⁴² Ibid.

⁴³ Jason Swindle, "ORIGINALISM VS. 'LIVING DOCUMENT,'" Swindle Law Group, Last modified October 29, 2017, <https://www.swindlelaw.com/2017/10/originalism-living-constitution-heritage/>.

document; however, this amendment process must only be used in the most dire of circumstances and must be thought out beyond any possible doubt of its necessity for the situation.⁴⁴ A Textualist supporter would believe that if the Constitution is changed too drastically from its original form, it could distort the vision America's Founders had for the country, so supporters would want to strongly adhere to what is originally written. In most situations, Textualists would decisively choose to support what is written in the original document, rather than make changes that would alter the document. In essence, an Textualist would much rather tailor the situation to the document, than tailor the document to the situation at hand. Textualism supporters believe the United States Constitution has worked successfully for over 200 years to create one of the most powerful and successful nations the world has ever seen, so there should be no need to change America's framework for success.

Who Supports This Interpretation?

One of the most prominent and outspoken proponents of Textualism was Supreme Court Justice Antonin Scalia who served from 1986 until his death in 2016.⁴⁵ Justice Scalia was widely respected in the legal field and was quite vocal about his Constitutional interpretation views saying in his 1997 book *A Matter of Interpretation: Federal Courts and the Law*, “[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”⁴⁶ Justice Scalia was known for persuading, sometimes rather forcefully, both appellant and appellee attorneys to subscribe to his legal

⁴⁴ Michael B. Rappaport and David A. Strauss, “Common Interpretation: Article V,” Interpretation: Article V | The National Constitution Center, accessed November 2, 2020, <https://constitutioncenter.org/interactive-constitution/interpretation/article-v/interps/277>.

⁴⁵ “Antonin Scalia,” Biography.com, Biography.com Editors, A&E Networks Television, Last modified September 6, 2019, <https://www.biography.com/law-figure/antonin-scalia>.

⁴⁶ Antonin Scalia and Amy Gutmann, *A Matter of Interpretation: Federal Courts and the Law*. (Princeton: Princeton University Press, 1997).

interpretations/conclusions.⁴⁷ His support for the interpretation is exemplified in one of his speeches to the Catholic University of America in 1996, saying, “[w]e are bound not by the intent of our legislators, but by the laws which they enacted, laws which are set forth in words, of course.”⁴⁸ Scalia not only convinced attorneys and crowds of his legal interpretations, but he also promoted his Textualism interpretation of the Constitution through many of his rulings, works, and speeches which are still referenced today. Traditionally speaking, the Textualist interpretation of the United States Constitution has been held by more hardline Conservatives in the American political field. These Conservative beliefs are exactly that, conservative. They push bills and legislation that supports time-honored American traditions and generally push away from progressive movements and changes that other politicians would want to implement.⁴⁹ In today’s political field Conservative has become nearly synonymous with Republican while Liberal is nearly the same as Democrat.⁵⁰ These political party divisions at one time were not nearly as severe as they are today; however, the divide between the two has only grown as time marches on making consensus on a single interpretation, such as Textualism, difficult.⁵¹

⁴⁷ “Antonin Scalia,” Oyez, accessed September 16, 2020, https://www.oyez.org/justices/antonin_scalia.

⁴⁸ Antonin Scalia, “JUDICIAL ADHERENCE TO THE TEXT OF OUR BASIC LAW: A THEORY OF CONSTITUTIONAL INTERPRETATION,” Speech, October 18, 1996, <https://www.proconservative.net/PCV015Is225ScaliaTheoryConstlInterpretation.shtml>

⁴⁹ Andy Hamilton, “Conservatism,” Stanford Encyclopedia of Philosophy, Stanford University, Last modified October 29, 2019, <https://plato.stanford.edu/entries/conservatism/>.

⁵⁰ Jonah Goldberg, “What Does It Mean to Be a Conservative Today?” AEI.org, January 24, 2020, <https://www.aei.org/articles/what-does-it-mean-to-be-a-conservative-today/>.

⁵¹ Philip Bump, “Analysis | The Partisan Divide Keeps Growing,” The Washington Post, Last modified October 11, 2019, <https://www.washingtonpost.com/politics/2019/10/11/partisan-divide-keeps-growing/>.

Textualism Justification

One of the strongest stances that Textualist interpreters hold is that the U.S. Constitution needs to change as little as possible from its original form. If the Constitution changes too much from its original intentions, then the supreme law of the land may become too altered from the vision that America's forefathers had for the nation. To a Textualist, there is little to no justification for judicial review to be an acceptable and Constitutional way to change the Constitution and instead favor judicial restraint.⁵² There is of course a way to alter the Constitution, through the Amendment process, however, "[n]ot just any idea to improve America deserves an amendment."⁵³ There are, of course, many times when there are clear issues that need to be addressed and put into the supreme law of the land through the Amendment process. Unavoidable issues such as women's suffrage, the end of slavery, or even freedom of speech are all Amendments that were required and have stood the test of time to modernity. Once an Amendment is passed, it becomes an official part of the Constitution, which, according to Textualism, makes the Amendment a part of the supreme law of the land and subsequently a new part of the written set of American values that they desire to protect.⁵⁴

Griswold v. Connecticut (1965)

The 1965 *Griswold v. Connecticut* case is not a case where judicial restraint was utilized in any means. The case involved two medical professionals who opened a birth control clinic in

⁵² Thomas W. Merrill, "Originalism, Stare Decisis and the Promotion of Judicial Restraint," University of Minnesota Law School Scholarship Repository, 2005, 273, doi:<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2102&context=concomm>.

⁵³ "The Amendment Process," Harry S. Truman, accessed November 2, 2020, <https://www.trumanlibrary.gov/education/three-branches/amendment-process>.

⁵⁴ "Constitutional Amendment Process," National Archives and Records Administration, accessed November 2, 2020, <https://www.archives.gov/federal-register/constitution>.

Connecticut and were subsequently arrested due to Connecticut law prohibiting the use of contraceptives or advice in their use.⁵⁵ 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.⁵⁶ 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.⁵⁷

This case is a clear example of why the stability of Textualism is needed, for the judicial activism that was used to reach the ruling of this case had long term influences in future landmark cases, namely *Roe v. Wade* in the legalization of abortion and *Lawrence v. Texas* regarding the sexual conduct of same-sex individuals.⁵⁸ If the Court had utilized a Textualist approach to this case then the ruling would have been in favor of the writings of the Constitution and ruled in favor of the state's right to pass laws.⁵⁹ The state would be permitted to pass these laws regarding contraceptives for the simple reason that since in no area of the Constitution is there a mention of birth control specifically or the right to privacy in general, it would not be

⁵⁵ Ibid.

⁵⁶ "Griswold v. Connecticut," Oyez, accessed November 6, 2020, <https://www.oyez.org/cases/1964/496>.

⁵⁷ Ibid.

⁵⁸ "Privacy," Legal Information Institute, accessed November 17, 2020. <https://www.law.cornell.edu/wex/privacy>.

⁵⁹ Katie R. Eyer, "Understanding the Role of Textualism and Originalism in the LGBT Title VII Cases," Last modified April 26, 2019. <https://www.theconstitution.org/news/understanding-the-role-of-textualism-and-originalism-in-the-lgbt-title-vii-cases/>.

possible for the Connecticut state law to be unconstitutional if it is not in the Constitutions writings. *Griswold v. Connecticut* utilized judicial review that fundamentally changed the nature of the Constitution by creating the concept that there are rights not written in the text and can only be determined through the use of the Supreme Court's interpretation of the text, making it possible to add parts to the Constitution without utilization of the Amendment Process.

West Coast Hotel v. Parrish (1937)

West Coast Hotel v. Parrish is one of the most versatile and referenced cases in the long-standing competition between the varying views of the U.S. Constitution. The case involved Elsie Parrish, an employee of the West Coast Hotel in Washington State, being paid less than the \$14.50 minimum wage she was promised by Washington State law, so she filed a suit to recover the difference of what she was paid versus what she was due.⁶⁰ The question presented by the case was if setting a minimum wage for women was constitutional and in a 5-4 decision, the Supreme Court ruled in favor of Parrish that the minimum wage was constitutional through the interpretation of the 14th Amendment.⁶¹ Justice Sutherland's dissenting opinion in this case is what is referenced by Textualist proponents as support for the justification of their interpretation. Sutherland felt the Court manipulated the 14th Amendments Due Process Clause to fit the politics and public opinion of the time. He states the Constitution grants that, "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and

⁶⁰ "West Coast Hotel Company v. Parrish," Oyez, accessed November 6, 2020, <https://www.oyez.org/cases/1900-1940/300us379>.

⁶¹ Alex McBride, "West Coast Hotel v. Parrish (1937)," accessed November 6, 2020, https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_westcoast.html.

enduring mandates into mere moral reflections.”⁶² Through this statement, Sutherland is saying that although it is the Supreme Court’s and the Judicial branch’s responsibility to interpret the content of the Constitution, they must be wary to only interpret what is written as opposed to making thought up interpretations of the material in the light of politics and public opinion that in reality change the document or its meaning from what it actually is. To overstep their interpretation of the material and instill new thoughts that were never there would be to change the document from the supreme law of the land, made up of inescapable decrees, to flexible moral reflections of whatever Court happens to be interpreting in this way. Textualist interpreters want to keep the Constitution as close to its original form as possible to ensure that the nation keeps its founding principles, however, America’s Founding Fathers understood that changes are sometimes necessary to protect those same principles through a carefully thought out Amendment process. An amendment process that has overall proven to be effective in maintaining America’s values.

What Are the Interpretations Unintended Consequences?

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. Going through the Amendment process in its entirety is an incredibly long process that could take years to produce results, with most Amendment proposals including a seven-year expiration date in case

⁶² “West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937),” Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/300/379/>.

no progress can be made.⁶³ 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. While the argument could be made that lower courts and Congress have the power to create laws much more quickly to address changing times, it is the Constitution that is the basis of the American legal system.⁶⁴

Congress has the power to create laws, however, the Constitution trumps any contrary legislation. If there was a situation where American rights were getting trampled on in California but not in Montana, there would be state legislation that could be passed to address the issue. While legislation could be passed, there are almost always legal loopholes that can be used to defy local or even Congressional legislation and arguments could be made against the Constitutionality of the legislation that was passed.⁶⁵ By creating an addition to the U.S. Constitution, it does not allow for further argument for the legislations Constitutionality or its reach. An addition to the Constitution is overarching, affecting the entire nation instead of one particular state or region. Textualism is wary of how overarching and powerful changes to the Constitution can be, which can unfortunately cause the Constitution to become ineffective in conquering some of the needs and challenges of a constantly changing nation.

⁶³ “AMENDMENT OF THE CONSTITUTION,” Legal Information Institute, Legal Information Institute, n.d. accessed September 16, 2020, <https://www.law.cornell.edu/constitution-conan/article-5/amendment-of-the-constitution>.

⁶⁴ U.S. Constitution, Article VI, Section 2, Clause 2.

⁶⁵ Ronny Frith, “PREVENTING AND AVOIDING LOOPHOLES AND UNINTENDED CONSEQUENCES IN LEGISLATION,” National Conference of State Legislatures Legal Services Staff Section Professional Development Seminar, Reading presented at the National Conference of State Legislatures Legal Services Staff Section Professional Development Seminar, October 11, 2012.

Interpretation 2: Living Document

What Is the Interpretation?

The Living Document interpretation's major theme is progression or change. The logic behind this 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 changed to adapt to a constantly changing world.⁶⁶ Living Document proponents would fully agree with Textualists in their claim that the Constitution is the supreme law of the land, however, their interpretations of how that term implies is different. A Textualists would understand the Constitution as the supreme law of the land meaning the understanding of the Constitution at its inception would need to be seen as the supreme interpretation, as initially stated or else it will no longer be what it was meant to be and will lose its purpose. Conversely, a Living Document supporter would argue that as time progresses and situations change, laws are developed, amended, and in the case of the Constitution this can be done through the Amendment Process and judicial activism.⁶⁷ While Living Document supporters understand and recognize the Amendment process as an explicitly stated way to change the Constitution, they more readily support the use of judicial review as a form of constitutional adjustment to tailor the Constitution to modern issues as this is much quicker than going through the entire Amendment process

⁶⁶ 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>.

⁶⁷ "Changing Our Laws," GeorgiaLegalAid.org, Last modified July 30, 2004, <https://www.georgialegalaid.org/resource/changing-our-laws>.

which can take years. In the extreme case of the 27th Amendment this process took 202 years to be completed.⁶⁸ The Warren Court for example was filled with Justices who, through their progressive opinions, could mostly be considered Living Document supporters and through their rulings they are, “known today for their expansion of civil rights and liberties through dynamic constitutional interpretation.”⁶⁹ The expansion of civil rights and liberties from the Warren Court did not come from a sudden influx of Constitutional Amendments, rather through the use of judicial activism in its rulings. In most situations, a Living Document interpreter would firmly choose to amend/interpret the Constitution by means of judicial review to fit the situation at hand, under the guise that the original document does not cover the modern problem, rather than wait for the amendment process to be completed. Living Document proponents believe that while the U.S. Constitution was thoughtfully written by Americas Founding Fathers 200 years ago, they could not have and did not make the document comprehensive enough to address all of today’s problems so it is necessary to regularly adjust the Constitution to meet all of the issues of the modern world.

Who Supports This Interpretation?

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 1932.⁷⁰ For instance, Justice Holmes, in his majority opinion in *Missouri v. Holland*, argued that “[t]he case

⁶⁸ “The 27th Amendment,” US House of Representatives: History, Art & Archives, accessed September 16, 2020, https://history.house.gov/Historical_Highlights/1700s/The-27th-Amendment/.

⁶⁹ Vinay Harpalani, “Diversity and Living Constitution Theory,” American Constitution Society, Last modified March 29, 2019, <https://www.acslaw.org/expertforum/diversity-and-living-constitution-theory/>.

⁷⁰ 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>.

must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”⁷¹ As time has progressed and the Living Document interpretation of the Constitution has gained more popularity, the view has been held by Democrats and more left-leaning Liberals throughout the American government and there has been growing support for this constitutional interpretation over recent years. According to the Public Policy Mood Estimate tool, created and utilized by distinguished political scientist James Stimson, there has been a shift in American politics that has grown more in favor of further Democratic and liberal policies today than at any other point in the study’s sixty-eight-year history.⁷² Along with this study and others like it, comments from Robert Hurt, former U.S. Congressman for Virginia’s fifth congressional district and current Dean of the Helms School of Government at Liberty University, have corroborated these reports, claiming that “Over the years we have seen an increasing desire among those on the political left to avoid interpreting the Constitution as originally written in favor of asking the Supreme Court to undermine the fundamental process of self-government in which elected members of a legislature enact policy.”⁷³ This growth in support has culminated in greater approval of these ideologies and thus a growth of base supporters for the Living Document interpretation which caters more to Democrats and Liberals need for progression and change than the other interpretations can provide. As previously stated, the term Democrat has become nearly synonymous with Liberal while Republican has nearly become synonymous with Conservative in today’s political field and the divide between these

⁷¹ “State of Missouri v. Holland, 252 U.S. 416 (1920),” Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/252/416/>.

⁷² Eric Levitz, “America's Political Mood Is Now the 'Most Liberal Ever Recorded',” Last modified June 8, 2019, accessed September 16, 2020, <https://nymag.com/intelligencer/2019/06/americas-political-mood-is-now-most-liberalever-recorded.html>.

⁷³ Joseph Longo, and Robert Hurt. Constitutional Check. Personal Interview, November 6, 2020.

groups has only increased over the years.⁷⁴ As this division between political parties progressively increases, people on either side of the aisle are gradually being pushed to one side or the other and are being forced to choose an ideology, and subsequently, a constitutional interpretation, that aligns with their party or face rejection by their party which can often result in a loss of his or her political position.⁷⁵ The Living Document interpretation most conforms to the Democratic Party's rhetoric, thus the Democratic Party and many of the more left-leaning Americans would support the Living Document interpretation.

Living Document Justification

One of the most important parts of the Living Document interpretation is the need for change to adapt to a continuously changing world. A Living Document supporter would believe that while the Constitution was thoroughly thought out during its creation, is too dated to be comprehensive enough to cover all of today's problems so major changes need to be made to adequately combat today's issues. 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.⁷⁶ Because of this, Living Document proponents would rather see Supreme Court cases and judicial review be the main ways to interpret/adapt the Constitution. There have been many Supreme Court case rulings made by Justices that firmly support the thoughts of the Living Document interpretation.

⁷⁴ "The Partisan Landscape and Views of the Parties." Pew Research Center - U.S. Politics & Policy, Pew Research Center, Last modified May 27, 2020, <https://www.pewresearch.org/politics/2019/10/10/the-partisan>.

⁷⁵ Amber Phillips, "Analysis | All the Members of Congress Who Have Lost Their Primaries in 2020 so Far, and Why," The Washington Post, WP Company, Last modified August 19, 2020, <https://www.washingtonpost.com/politics/2020/08/05/all-members-congress-who-have-lost-their-primaries-2020-so-far-why/>.

⁷⁶ "The Amendment Process," Harry S. Truman, accessed November 2, 2020, <https://www.trumanlibrary.gov/education/three-branches/amendment-process>.

West Coast Hotel v. Parrish (1937)

In *West Coast Hotel v. Parrish* Justice Sutherland said this in response to the notion that the Constitution should be construed in the light of the present to match the writings to today's situations: "the Constitution is made up of living words that apply to every new condition which they include."⁷⁷ Sutherland would claim that the Constitution itself is a living document in the sense that the document can be applied to all situations that the law could possibly cover; however, in his same dissenting opinion Sutherland makes sure to emphasize that the court's "judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation."⁷⁸ Justice Sutherland is essentially claiming through his dissenting opinion that while the Constitution is a living document that can be applied to any situation the Constitution could cover, the interpretations of the Supreme Court do not change the actual content of the document, rather the interpretations show how the existing content can be applied to a given situation.

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."⁷⁹ 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

⁷⁷ "West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)," Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/300/379/>.

⁷⁸ Ibid.

⁷⁹ "State of Missouri v. Holland, 252 U.S. 416 (1920)," Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/252/416/>.

changed since the documents creation. That concept outlined by Justice Holmes in *Missouri v. Holland* is one of the main arguments in favor of the Living Document interpretation and is frequently referred to justification by the interpretations proponents.⁸⁰

What Are the Interpretations Unintended Consequences?

The Living Document interpretation of the U.S. Constitution has unintended consequences that starkly contrast the beneficial outcomes that are desired by Living Document proponents. The main theme of the Living Document interpretation is change/progression. As such, 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. By bypassing the Amendment process and primarily utilizing other ways to, in a way, tailor the Constitution to various different modern issues, Living Document proponents might be able to respond to a greater variety of issues at a greater speed than going through traditional ways, but they could be delving into the issue of judges acting in a legislative function which would be an overstep in their delegated powers. To say that the judges have the possibility to act in a legislative function is to say that the Supreme Court has the power to adjust the law with their decisions, rather than interpreting the Constitutionality of the case brought

⁸⁰ Ibid.

before them.⁸¹ It is easy to dismiss this claim that the Supreme Court is a legislative body because the Court does not usually have the opportunity to rule on most potential cases due to the clarity of most legislation, however, the Court does get to choose the cases brought before it and so it has the opportunity to choose the issues it wishes to rule on that it deems important.⁸² Since the Court can choose what cases it rules on, it may not have the power to decide on every issue in America, rather it can choose the important issues of the day that will have the most impact on the current American climate which gives the Court at least a small role as a legislative body.⁸³ Even with a minor role as a legislative body in America, the Supreme Court could use that extra power to adjust the Constitution and American political system from what was originally intended. The Living Document interpretation is about progression and change, however, Living Document proponents must be wary that their good intentions of rapidly adjusting the American system to adapt to modern issues do not turn into a perversion of what the nation's principles were intended to be.

Interpretation 3: Original Intent

What Is the Interpretation?

The Original Intent interpretation, sometimes referred to as Originalism, has parts of both Textualism and Living Document while simultaneously being it is distinct from both.⁸⁴ Original

⁸¹ Geoffrey C. Hazard, "THE SUPREME COURT AS A LEGISLATURE," *The Cornell Law Review* 64, no. 1, Last Modified November, 1978, doi:https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3287&context=fss_papers.

⁸² 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>.

⁸³ "How Does the U.S. Supreme Court Decide Whether to Hear a Case?" Findlaw, Findlaw Attorney Editors, Last modified June 21, 2016, <https://www.findlaw.com/litigation/legal-system/how-does-the-u-s-supreme-court-decide-whether-to-hear-a-case.html>.

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. An example of this would be the First Amendment's freedom of speech. At the time the Constitution was written the Founding Founders only had technologies such as pamphlets and town meetings to convey speech and could not have possibly known about modern technologies such as television, radio, or the internet when they were creating the Amendment. Yet, even without the foreknowledge of the possible ways speech could change, the Founders included freedom of speech in the Constitution to protect speech no matter what the format.⁸⁵ Because of this concept, while all modern forms of speech are not explicitly written in the Constitution, they are all protected under the First Amendment with few exceptions. Since all modern forms of speech are not explicitly written in the Constitution, it is not enough to just read out of the document to extend freedom of speech to modern technologies, instead judicial review is needed to determine if the laws put in place conform to what the Founders intended to protect, even if it seems obvious. Original Intent requires an examination of the text of the Constitution along with documents written by the Founders like personal writing and the Federalist Papers, but the interpretation can only determine their intentions of these writings by applying the Founders worldviews, determined through their works, onto those writings and more importantly the writings of the text.⁸⁶ The Original Intent interpretation is similar to

⁸⁴ 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/>.

⁸⁵ "Broadcast Radio and Television," Legal Information Institute, Legal Information Institute, n.d. accessed September 16, 2020, <https://www.law.cornell.edu/constitution-conan/amendment-1/broadcast-radio-and-television>.

⁸⁶ Russell Kirk, "THE "ORIGINAL INTENT" CONTROVERSY," Heritage Foundation Reports, Last modified October 15, 1987. <https://advance-lexis-com.ezproxy.liberty.edu/api/document?collection=news&id=urn:contentItem:3SJD-VMN0-0026-H1Y9-00000-00&context=1516831>.

Textualism in the sense that it generally uses only what is included in the original document and has limits on its use of judicial review; however, it relies more on judicial review than a Textualist would care to use.⁸⁷ Original Intent would readily use judicial review to fulfill what the Founders intended with their writings to implement their intentions on the modern world, thus covering a vast majority of modern-day issues such as the development of new technologies affecting the freedom of speech as shown above. Even though an Original Intent interpreter would be more open to judicial review than a Textualist would be, Original Intent proponents would not go as far with judicial review as a Living Document supporter because of their subscription to the idea of judicial restraint. While judicial review can sometimes be unavoidable, in cases where laws are not clearly shown to be unconstitutional Original Intent supporters would rather see judges hold back from striking down such laws to ensure they limit the exercise of their power in the form of judicial restraint.⁸⁸ Original Intent proponents recognize that if the actual content of the Constitution needs to be adapted as opposed to being interpreted, the Amendment process was specifically included in the original document as a pathway for future generations to make additions, and in cases such as the Twenty-first Amendment repeals, to the content of the document which would make these new additions law.⁸⁹ Advocates of the Original Intent interpretation of the Constitution believe that while the world has changed significantly since America's founding, the country should be led by the same guiding principles the Founders intended when crafting the Constitution.

⁸⁷ Brandon J. Murrill, "Modes of Constitutional Interpretation." District of Columbia: Congressional Research Service, March 15, 2018. <https://fas.org/sgp/crs/misc/R45129.pdf>

⁸⁸ Kermit Roosevelt, "Judicial Restraint," Encyclopædia Britannica, Encyclopædia Britannica, inc., Last modified October 16, 2019, <https://www.britannica.com/topic/judicial-restraint>.

⁸⁹ "The Constitution of the United States: A Transcription," National Archives and Records Administration, National Archives and Records Administration, Last modified 1789, <https://www.archives.gov/founding-docs/constitution-transcript>.

Who Supports This Interpretation?

Original Intent provides its supporters with change in the form of the Amendment process and judicial review for its more progressive supporters while providing rigidity through judicial restraint for its more Conservative supporters. Since Original Intent provides concessions for both sides it is not perfect for either and so the interpretation has support from both parties more moderate members and even independent thinkers but loses support from the more extreme members of either party. The advantageous part about Original Intent partially catering to both parties needs is that even with the growing political divide in American politics which would force politicians to choose either Textualism or Living Document, depending on their political affiliation, they can opt to support the Original Intent interpretation by citing its benefits to each political parties values/goals.

Original Intent Justification

The Original Intent interpretation is not necessarily meant to be a compromise between the Textualist and Living Document interpretations, rather it is its own unique interpretation that has key differences that sets it apart from the others. Original Intent holds that even though the world has developed since the Constitution's creation over 200 years ago, the only material that can be used to interpret laws and their constitutionality is what has been explicitly written by the founders and added through subsequent amendments.⁹⁰ Supporters of this view would not shy away from judicial review; however, they would insist on judicial restraint so as to not have judges overextend/exercise their power which could lead to an uneven balance of power between the branches. While critics of the Original Intent interpretation might claim that the

⁹⁰ Jefferson Powell, "The Original Understanding of Original Intent," *The Harvard Law Review* 98, no. 5 (March 1985): 897–900, doi:https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1390&context=faculty_scholarship.

interpretation is completely impractical because it is impossible to know what someone intended in their writings over 200 years ago, proponents would be quick to show that through examination of the Founders writings, such as the Declaration of Independence or the Federalist papers along with personal writings, it would be possible to understand the Founders worldview which would make it possible to understand the Founders intentions in conjunction with examination of the text.^{91, 92} Certain concepts in the text such as freedom of speech are simple to understand the intent of, in the case of the First Amendment the Founders would have meant freedom of speech needed to be protected regardless of any technological developments that could enhance that speech clearly shown in the Amendment saying, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁹³ While some concepts are straight forward and fairly simple to understand what was meant by them, many are not as simple, in complicated cases/situations Original Intent supporters would refer to a gift left by the Founders in the form of the Federalist Papers. The Federalist Papers were created to increase support for ratification of the newly proposed U.S. Constitution, because of this, the Eight-five papers showcased the Founders diverse thoughts, intentions, and justifications for the various different facets of the Constitution.⁹⁴ By utilizing the Federalist papers and other documents created by the Founders,

⁹¹ Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 852 (1989). <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ucinlr57&div=36&id=&page=>

⁹² Nancy Pearcey, Total truth: Liberating christianity from its cultural captivity, ProQuest Ebook Central. p. 32, <https://ebookcentral-proquest-com.ezproxy.liberty.edu>

⁹³ U.S. Constitution, Amendment 1.

⁹⁴ “Federalist Papers,” History.com, History.com Editors, A&E Television Networks, Last modified November 9, 2009, <https://www.history.com/topics/early-us/federalist-papers>.

such as the Declaration of Independence, as the basis of research in determining the intentions of the Founders in any given case, then it would be possible to determine the Founders worldview/meaning and which would consequently reveal their true intentions.⁹⁵ As Nancy Pearcey would put it, “a worldview is like a mental map that tells us how to navigate the world.”⁹⁶ By being able to determine the Founders worldview through examination of their different works, Original Intent supporters solidify their claim that their interpretation is not only possible, but there is a straight forward way to determine the Founders worldview and thus their intentions in their writings. Original Intent proponents see the Amendment process, in tandem with judicial review, as enough to adapt the Constitution to solve the modern issues that are presented in today’s ever-changing world. While Original Intent is not exactly like either of the other interpretations, because it has portions of both of the other interpretations it can also use some of their justification cases in fully justifying itself.

West Coast Hotel v. Parish (1937)

In the case of *West Coast Hotel v. Parish*, Justice Sutherland presented his dissenting opinion which partially advocates for his personal belief in the Living Document interpretation but provides a sizeable amount of rhetoric that would support the Original Intent interpretation of the Constitution. One of Sutherlands earlier quotes from this case specifically mentions the Constitution, saying, “Constitutions cannot be changed by events alone...It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.”⁹⁷ Justice Sutherland is clearly affirming

⁹⁵ Brandon J. Murrill, “Modes of Constitutional Interpretation.” District of Columbia: Congressional Research Service, March 15, 2018. <https://fas.org/sgp/crs/misc/R45129.pdf>

⁹⁶ Nancy Pearcey, Total truth: Liberating christianity from its cultural captivity, ProQuest Ebook Central. p. 32, <https://ebookcentral-proquest-com.ezproxy.liberty.edu>

that the Constitution cannot be changed due to events that might arise from modern problems. He is also saying that just because the Constitution might not be perfectly tailored to handle situations that may arise, that does not give any government the right to alter the document in any way for it would be foolish to do so. The stimulus for the Constitution to be changed could come about from problem/events; however, in order for changes to actually be done to the document, the Amendment process must be completed. Sutherland goes on to say that, “[t]he meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.”⁹⁸ The meanings of the different parts of the Constitution do not change once they are written and so the meanings of the Constitution’s different parts cannot be changed regardless of what court happens to see it at any given time. While the writing’s meaning does not change, it does beg the question of what the Founders intended/meant with each of their different parts which is where the Original Intent interpretation comes in to provide an explanation. Since the meanings of the Constitution do not change regardless of the time observed or court observing, it is imperative to know what was meant and intended to properly apply the supreme law of the land in any given situation.

Griswold v. Connecticut (1965)

The case of *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.⁹⁹ By only looking at the fact that the Court interpreted the text to discover the

⁹⁷ “West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937),” Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/300/379/>.

⁹⁸ Ibid.

⁹⁹ Alex McBride, “Griswold v. Connecticut (1965): PBS,” The Supreme Court, *Griswold v. Connecticut (1965)* | PBS, accessed September 16, 2020, https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html.

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.”¹⁰⁰ In further developing this concept, Goldberg continues, saying, “[t]he Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”¹⁰¹ The importance of the Court recognizing that there are implied rights in the Constitution for the Original Intent interpretation is huge for Original Intent supporters in the sense that with the concession that 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.

What Are the Interpretations’ Unintended Consequences?

Original Intent proponents need to be especially wary of the unintended consequences that could arise from their Constitutional interpretation because along with the interpretations unique unintended consequences there is the possibility that the Original Intent interpretation

¹⁰⁰ “Griswold v. Connecticut, 381 U.S. 479 (1965),” Justia Law, accessed March 6, 2020, <https://supreme.justia.com/cases/federal/us/381/479/>.

¹⁰¹ Ibid.

could fall into the same pitfalls as the Textualist and Living Document views. One of the unique parts of the Original Intent interpretation is that its goal is to allow for change to the Constitution through the Amendment process in tandem with judicial review to allow reasonable adjustments to the document to implement what was meant by the Founders on today's issues.¹⁰² The problem with this thought process is how can someone truly decide what is a reasonable enough change to the document that properly adjusts the meaning of the Founders onto the modern issues of the day? Original Intent proponents can reference the Federalist Papers to possibly infer the meaning of many of the parts of the Constitution and certain portions of the document, such as freedom of the press/speech, are more straight forward in their meanings, but there is no way to be absolutely sure how to perfectly adjust the Constitution to fit modern problems while staying true to the Founders intent. Even relying heavily on the Federalist Papers to understand the Founder's intent, the Federalist Papers were only written by three of the Founding Fathers which is hardly a sufficient sample size compared to the multiple delegations that all had a say in the final creation of the document.¹⁰³ The best way to determine the intentions of the Founders is to not only examine the Founders writings, but to apply their worldviews onto these works to best understand the Founders positions and subsequently their intentions.^{104, 105} As previously said, Original Intent interpreters must be wary of Textualist and Living Document pitfalls if it is not implemented properly. An Original Intent viewer might become too cautious and lean more

¹⁰² "Original Intent," West's Encyclopedia of American Law, edition 2, Last Modified 2008, <https://legal-dictionary.thefreedictionary.com/Original+Intent>.

¹⁰³ "The Federalist Papers," Constitution Facts - Official U.S. Constitution Website, accessed November 2, 2020, <https://www.constitutionfacts.com/us-articles-of-confederation/the-federalist-papers/>.

¹⁰⁴ Brandon J. Murrill, "Modes of Constitutional Interpretation." District of Columbia: Congressional Research Service, March 15, 2018. <https://fas.org/sgp/crs/misc/R45129.pdf>

¹⁰⁵ Nancy Pearcey, *Total truth: Liberating christianity from its cultural captivity*, ProQuest Ebook Central, p. 32, <https://ebookcentral-proquest-com.ezproxy.liberty.edu>

towards judicial restraint similar to a Textualist interpreter. This judicial caution could be a problem when it comes to issues that need to be addressed immediately, such as in the case *Brown v. Board of Education* (1954) which dealt with the desegregation of the education system, a case many regard as overdue action that might not have gone far enough for immediate equality.¹⁰⁶ Original Intent proponents must also be careful to not make changes to the Constitution just for the sake of change or simply because they can, like commonly referred to failed noble experiment of National Prohibition which turned out to be a complete failure and is to date, the only Amendment to be repealed.^{107, 108} The Constitution is not an area for social experimentation, rather it is the framework of a nation with a set of principles that need to be preserved yet applied properly to the modern age which may be difficult to do but is necessary in order for the Original Intent interpretation to function properly and avoid the interpretations unintended consequences.

Conclusions

Interpretation Pros & Cons

Textualism

Textualism provides pros such as stability. The basis of the Textualist view of the Constitution is that since the Constitution was written over 200 years ago and has worked thus far so there is no need to change the framework that was meant for the nation by its Founders.

¹⁰⁶ Ronald Brownstein, "How *Brown v. Board of Education* Changed-and Didn't Change-American Education," *The Atlantic*, Last modified April 25, 2014, <https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/>.

¹⁰⁷ Franklin D. Roosevelt, "President Franklin D. Roosevelt Announces the Repeal of Prohibition," National Archives and Records Administration, National Archives and Records Administration, Last modified December 5, 1933, <https://www.archives.gov/historical-docs/todaysdoc/?dod-date=1205>.

¹⁰⁸ Mark Thornton, "Alcohol Prohibition Was a Failure," Last modified September 22, 2020, <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>.

By favoring judicial restraint Textualism ensure that, while not impossible, it is difficult to change the Constitution's core principles away from what the Founders originally wanted. A Textualist proponent supports everything that is a part of the original document and would rather tailor modern situations to fit the writings of the Constitution as opposed to modifying the Constitution to fit today's everchanging problems.

While Textualism emphasizes stability, this can quickly turn into rigidity. Since the Constitution was created so long ago it can become inept to tackle more modern problems if adjustments are not made to keep the document up to date with new issues. While judicial review can be a useful tool to adjust the Constitution to today's issues, Textualist proponents favor the thought out Amendment process alongside judicial restraint. By favoring the Amendment process, Textualist interpreters lend themselves to being left behind the everchanging world because of how long the process could take making their view too rigid to be useful.

Living Document

While the basis of Textualism is stability, the Living Document interpretations pros are based off of the interpretations basis of change/progression. Since the Constitution was created over 200 years ago, Living Document proponents argue that the Constitution could not possibly be comprehensive and modern enough to take on today's issues adequately, so substantial change through judicial review and the Amendment process must occur to keep the document up to date effectively. The interpretation favors judicial review/activism as opposed to the Amendment process which the view claims to be too slow to properly adjust to today's issues quick enough. The progressive nature of this interpretation would favor adjusting the

Constitution, even if it is slightly, to the modern situation to quickly and effectively address the modern problems that have arisen since the Constitution's creation.

The Living Documents benefit of being progressive is also one of its main detriments. Because of the Living Document interpretations strong emphasis on change and progression to accommodate modern issue, it easily can turn the Constitution into too fluid a document that changes every time society decides to change its opinion on certain issues, as opposed to being the structured framework of a nation with a purpose. The ease of change that Living Document proponents rely on can lead to an issue of separation of powers. From the judicial activism of this interpretation and how the Supreme Court can pick and choose the cases brought before it in such a manner, the Court lends itself to fill a legislative role in changing legislation and the content of the Constitution. The separation of powers put in place by the Founders was implemented specifically so no one branch overextended their delegated powers, so the Supreme Court acting as a legislative body is an obvious problem with this interpretation. From their basic belief in progression, in some cases blind progression like the Eighteenth Amendment, Living Document proponents lend themselves to changing the Constitution far from the framework intended by the Founders for the nation's future.

Original Intent

The Original Intent interpretation could be claimed as a center of the road interpretation, in between the staunch rigidity of Textualism and the progressive fluidness of Living Document by featuring some good qualities of each. Original Intent proponents, like Textualism supporters, want to work with everything that is already in the Constitution to address the problems of the modern world so the original framework for the nation that the Founders intended is not perverted from its original purpose. Original Intent interpreters do understand

that not all issues can be solved through the slow Amendment process so, like Living Document supporters, they can support the use of judicial review to at least interpret the writing/intent of the Constitution to fit the situations of the modern world so the document does not become obsolete in an everchanging world. The Original Intent interpretation realizes that the nation is very different and has developed since the initial writing of the Constitution, but the same guiding principles and framework that was intended for the nation can be transferred onto today's world.

The Original Intent interpretation could be considered the middle of the road between Textualism and Living Document which gives it some of the benefits of each, but that also means that the issues of both of the other interpretations can easily be applied to Original Intent interpretation. Original Intent calls for only reasonable changes to be made to the Constitution to adequately adjust to the modern world and still stay in line with what the Founders intended, but how can someone decide what a reasonable change is and how would it be possible to say exactly what the Founders intended with every issue that could come up. While the Federalist Papers give a solid background to many parts of the Constitution, they were written by only three individual members of the various delegations sent to the Constitutional Convention which is not the best sample size to explain all of the Founders intentions.¹⁰⁹ Original Intent, if approached too cautiously, could turn into the pitfalls of Textualism and lean too much on judicial restraint thus making the Constitution too rigid and not adequate to address modern issues. On the other hand, if Original Intent is approached too heedlessly and proponents focus on the prospect of immediate change as opposed to using the proper channels provided for Constitutional change then the interpretation could fall victim to making the supreme law of the land too fluid a

¹⁰⁹ "Federalist Papers," Encyclopædia Britannica, The Editors of Encyclopaedia Britannica, Last modified January 26, 2020, <https://www.britannica.com/topic/Federalist-papers>.

document that could become far from what the Founders intended for the nation. Original Intent interpreters must be careful not to fall into the common pitfalls of the other interpretations while also staying true to what the Founders intended in their writings of the US Constitution.

What Is the Best Possible Interpretation for the American People, Government, and Legal Systems?

Simply put, even though 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 Constitution's origins. Textualism is strong in its basis of stability with the originality of the Constitution, thus ensuring that the original framework that the Founding Fathers crafted for the nation is well preserved and not perverted from its initial intentions for a free nation. Textualism supports stability, but is simultaneously rigid in its ineffective ways to adjust to modern problems quick enough to adequately adapt to the modern issues that today's world presents, "Textualists generally are not concerned with the practical consequences of a decision; rather, they are wary of the Court acting to refine or revise constitutional texts," thus making it unsuccessful as the best solution to America's Constitutional issues.^{110, 111} The Living Document interpretation shows a strong basis of change and favors progressive movements/changes to address Constitutional issues, by doing so the interpretation ensures that the Constitution stays relevant in today's modern world and is an effective supreme law of the land that can cover all new problems. By having such a strong basis in progressiveness and

¹¹⁰ Ken Levy, "The Problems With Originalism," The New York Times, Last modified March 22, 2017, <https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html>.

¹¹¹ Brandon J. Murrill, "Modes of Constitutional Interpretation." District of Columbia: Congressional Research Service, March 15, 2018. <https://fas.org/sgp/crs/misc/R45129.pdf>

immediate results, the Living Document interpretation lends itself to threaten the original purpose of the Constitution and makes the framework of the nation's governmental/legal system too fluid, in doing so it proves ineffective to be the best suited interpretation for the American people. The Original Intent interpretation provides the stability given in Textualism through its commitment to what the Founders intended and what is specifically written out in the Constitution with its subsequent Amendments while also providing the flexibility/progressiveness afforded in the Living Document interpretation through its understanding that there is a need for judicial review alongside interpretations of the Founders intentions for modern cases/issues. While the Original Intent interpretation is not perfect, it can be considered the middle of the road between Textualism and Living document: essentially a compromise between the two. It is up to every American to decide what their personal interpretation of the United States Constitution is, but given the evidence and justifications for each interpretation provided, Original Intent shines as the best interpretation to honor the past and ensure a successful American future.

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