



The Modes of Constitutional Analysis: An Introduction (Part 1)

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This Legal Sidebar Post is the first in a nine-part series that discusses certain “methods” or “modes” of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*.)

Early in the United States’ history, the Supreme Court began exercising the power it is most closely and famously associated with—its authority of judicial review. In its 1803 decision in *Marbury v. Madison*, the Supreme Court asserted and explained the foundations of its power to review the constitutionality of federal governmental action. If a challenged governmental action is unconstitutional, the Court may strike it down, rendering it invalid. When performing the function of judicial review, the Court must necessarily ascertain the meaning of a given constitutional provision before applying its interpretation of the Constitution to the particular governmental action under review.

The need to determine the Constitution’s meaning through the use of methods of constitutional interpretation and, perhaps, [construction](#), is apparent from the document’s text itself. While several parts of the Constitution do not lend themselves to much debate as to their intended meaning, much of the Constitution is broadly worded, leaving ample room for the Court to interpret its provisions before applying them to particular legal and factual circumstances. For example, the Second Amendment [reads](#): “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Second Amendment’s text alone does not squarely resolve whether the “right of the people to keep and bear arms” extends to all citizens or merely is related to, or perhaps conditioned on, service in a militia. This ambiguity prompted the closely divided [2008 Supreme Court decision](#) that ruled in favor of the former interpretation.

The Constitution’s text is also [silent](#) on many fundamental questions of constitutional law, including questions that its drafters and those ratifying the document could not have foreseen or chose not to address. For example, the Fourth Amendment, ratified in 1791, [does not](#) on its face resolve whether the government may perform a search of the digital contents of a cell phone seized incident to arrest without first obtaining a warrant. Thus, interpretation is necessary to determine the meaning of ambiguous constitutional provisions or to answer fundamental questions left unaddressed by the drafters. Some [commentators](#) have also noted the practical need for constitutional interpretation to provide principles,

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rules, or standards to govern future conduct of regulated parties, as well as political institutions, branches of government, and regulators.

Judicial review at the Supreme Court, by its very nature, can involve [unelected judges](#) overturning the will of a democratically elected branch of the federal government or popularly elected state officials. In response to these concerns, constitutional scholars have identified theories designed to ensure that the Justices following them would be able to reach principled judgments in constitutional adjudication. Those regarding themselves as originalists have [clarified](#) that the Court should rely on the Constitution’s fixed meaning as understood by the public at the time of the Founding. This concept has become known as the Constitution’s original public meaning. On the other hand, [other commentators](#) have questioned the legitimacy of focusing on what the Framers, ratifiers, or members of their generation might have considered the core meaning of a particular constitutional provision, and have instead suggested interpretive methods that ensure the Court’s decisions allow government to function properly, protect minority rights, and safeguard the basic structure of government from majoritarian interference.

When deriving meaning from the Constitution’s text, the Supreme Court has relied on certain “methods” or “modes” of interpretation—that is, ways of determining the meaning of a particular constitutional provision. As constitutional scholar Philip Bobbitt [emphasized](#), it is possible to categorize the various methods that have been employed when interpreting the Constitution.

This nine-part series of Sidebar posts describes the most common methods on which the Justices (and other interpreters) have relied to argue about the Constitution’s meaning. The modes discussed in this series are (1) textualism; (2) original meaning; (3) judicial precedent; (4) pragmatism; (5) moral reasoning; (6) national identity (or “ethos”); (7) structuralism; and (8) historical practices. The series concludes with a discussion of the doctrine of constitutional avoidance, which discourages federal courts from issuing broad rulings on matters of constitutional law.

As recent controversies at the Supreme Court have demonstrated, there is significant public debate over which sources and methods of construction the Court should consult when interpreting the Constitution—a controversy closely related to more general disputes about whether and how the Court should exercise the power of judicial review. Understanding these methods of interpretation may assist Members of Congress in observing the [oath](#) they take to uphold the Constitution when performing their legislative functions and fulfilling Congress’s role as a coequal branch of government. For example, Members of Congress [may interpret](#) the Constitution when considering whether to vote for proposed legislation or when a [dispute](#) arises regarding the boundaries between Congress’s own constitutional authority and that of the executive branch (e.g., a dispute over the reach of Congress’s oversight power or the scope of executive privilege). Knowledge of the most common methods of elaborating on the Constitution’s meaning may also aid Senators and the Senate Judiciary Committee in examining the judicial philosophy of individuals the President nominates to serve on the federal courts. It may also assist Members and congressional committees in evaluating executive branch officials’ interpretations of the Constitution.

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