



The Modes of Constitutional Analysis: Original Meaning (Part 3)

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This Legal Sidebar Post is the third 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*)

Whereas textualist approaches to constitutional interpretation focus solely on a document’s text, originalist approaches consider the Constitution’s meaning as understood by at least some segment of the populace at the time of the Founding. Though this method has generally been called “originalism,” constitutional scholars have not reached a consensus on what it means for a judge to adopt this methodology for construing the Constitution’s text. Disagreements primarily concern which sources scholars should consult when determining the Constitution’s “fixed meaning.” Originalists, however, generally agree that the Constitution’s text had an “objectively identifiable” or public meaning at the time of the Founding that has not changed over time, and the task of judges and Justices (and other interpreters) is to construct this original meaning.

For many years, some prominent scholars (such as [Robert Bork](#)) argued that in interpreting the Constitution, one should look to the *original intent* of the people who drafted, proposed, adopted, or ratified the Constitution to determine what those people wanted to convey through the text. According to this view, original intent may be found in sources beyond the text, such as debates in the Constitutional Convention or the *Federalist Papers*. For example, in *Myers v. United States*, Chief Justice William Howard Taft, writing for the majority, held the President did not need legislative approval to remove an executive branch official who was performing a purely executive function. The Court sought the original meaning of the President’s removal power by looking at English common law, the records of the Constitutional Convention, and the actions of the first Congress, among other sources. Relying on these various sources, in his opinion for the Court, Chief Justice Taft wrote that “the debates in the Constitutional Convention indicated an intention to create a strong Executive.” Notably, in *Myers* the Court did not look at sources that would likely indicate what ordinary citizens living at the time of the Founding thought about the President’s removal power.

Over the course of Justice Antonin Scalia’s nearly thirty-year tenure on the Supreme Court, he and several prominent scholars [explained](#) that, as originalists, they were committed to seeking to understand the

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Constitution's *original public meaning*. This method considers the plain meaning of the Constitution's text as it would have been understood by the general public, or a reasonable person, who lived at the time the Constitution was ratified. This approach has much in common with textualism, but is not identical. The original public meaning approach to understanding the Constitution is not based solely on the text; rather, it draws upon the text's original public meaning as a broader guide to interpretation.

Justice Scalia's majority opinion in *District of Columbia v. Heller* illustrates the use of original public meaning in constitutional interpretation. In that case, the Court held that the Second Amendment, as originally understood by ordinary citizens, protected an individual's right to possess firearms for private use unconnected with service in a militia. Justice Scalia's opinion examined various historical sources to determine original public meaning, including dictionaries in existence at the time of the Founding and comparable provisions in state constitutions.

Those in favor of the use of original meaning as an interpretive approach point to its long historical pedigree and its adherence to the democratic will of the people who originally framed and ratified the Constitution. **Proponents** of originalism also argue that the approach limits judicial discretion, preventing judges from deciding cases in accordance with their own political views. On the other hand, those who are skeptical of this mode of interpretation underscore the difficulty in establishing original meaning. Justices and scholars **cannot always agree** on original meaning, and, perhaps, people living at the time of the Constitution's adoption may not have agreed on a particular meaning either. As such, critics argue, originalists will have merely constructed a meaning that had never actually been approved by the people who drafted or ratified the text being construed.

Many critics question the extent to which originalism is a workable theory of constitutional interpretation. They **argue** that originalism is an inflexible, flawed method of constitutional interpretation, contending that the Constitution's contemporaries could not have conceived of some of the situations that would arise in modern times. They further argue that interpreting the Constitution based on original meaning may fail to protect minority rights because women and minorities did not have the same rights at the time of the Founding (or ratification of the Civil War Amendments) as they do today. In addition, some skeptics of originalism **challenge the view** that Article V should be the exclusive vehicle for constitutional change, as that article creates a high threshold for formal amendment. They contend that the Constitution's meaning should not be fixed in time, but, rather, should accommodate modern needs.

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