Modes of Constitutional Interpretation

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Summary

When exercising its power to review the constitutionality of governmental action, the Supreme Court has relied on certain "methods" or "modes" of interpretation—that is, ways of figuring out a particular meaning of a provision within the Constitution. This report broadly describes the most common modes of constitutional interpretation; discusses examples of Supreme Court decisions that demonstrate the application of these methods; and provides a general overview of the various arguments in support of, and in opposition to, the use of such methods of constitutional interpretation.

Textualism. Textualism is a mode of interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text.

Original Meaning. Whereas textualist approaches to constitutional interpretation focus solely on the text of the document, originalist approaches consider the meaning of the Constitution as understood by at least some segment of the populace at the time of the Founding. Originalists 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 responsible interpreters) is to construct this original meaning.

Judicial Precedent. The most commonly cited source of constitutional meaning is the Supreme Court's prior decisions on questions of constitutional law. For most, if not all Justices, judicial precedent provides possible principles, rules, or standards to govern judicial decisions in future cases with arguably similar facts.

Pragmatism. Pragmatist approaches often involve the Court weighing or balancing the probable practical consequences of one interpretation of the Constitution against other interpretations. One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome. Under another type of pragmatist approach, a court might consider the extent to which the judiciary could play a constructive role in deciding a question of constitutional law.

Moral Reasoning. This approach argues that certain moral concepts or ideals underlie some terms in the text of the Constitution (e.g., "equal protection" or "due process of law"), and that these concepts should inform judges' interpretations of the Constitution.

National Identity (or "Ethos"). Judicial reasoning occasionally relies on the concept of a "national ethos," which draws upon the distinct character and values of the American national identity and the nation's institutions in order to elaborate on the Constitution's meaning.

Structuralism. Another mode of constitutional interpretation draws inferences from the design of the Constitution: the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people.

Historical Practices. Prior decisions of the political branches, particularly their long-established, historical practices, are an important source of constitutional meaning. Courts have viewed historical practices as a source of the Constitution's meaning in cases involving questions about the separation of powers, federalism, and individual rights, particularly when the text provides no clear answer.

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Introduction

Early in the history of the United States, the Supreme Court began to exercise the power that it is most closely and famously associated with—its authority of judicial review. In its 1803 decision in *Marbury v. Madison*,[1] the Supreme Court famously asserted and explained the foundations of its power to review the constitutionality of federal governmental action.[2] During the two decades following its holding in *Marbury*, the Court decided additional cases that helped to establish its power to review the constitutionality of state governmental action.[3] If a challenged governmental action is unconstitutional, the Court may strike it down, rendering it invalid.[4] When performing the function of judicial review,[5] the Court must necessarily ascertain the meaning of a given provision within the Constitution, often for the first time, before applying its interpretation of the Constitution to the particular governmental action under review.

The need to determine the meaning of the Constitution through the use of methods of constitutional interpretation and, perhaps, construction,[6] is apparent from the text of the document itself.[7] While several parts of the Constitution do not lend themselves to much debate about their preferred interpretation,[8] much of the Constitution is broadly worded, leaving ample room for the Court to interpret its provisions before it applies them to particular legal and factual circumstances.[9] 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."[10] The text of the Amendment 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 a closely divided 2008 decision of the Supreme Court that ruled in favor of the former interpretation.[11]

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[1] 5 U.S. (1 Cranch) 137 (1803).

[2] *Id.* at 180.

[3] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 430 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).

[4] *Id.* The Court first struck down an action of the executive branch of the federal government as unconstitutional in Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804). The Court first struck down a state law as unconstitutional in *Fletcher v. Peck*. *See* 10 U.S. at 139.

[5] The term "judicial review" refers to "a court's power to review the actions of other branches or levels of government[, and especially] the courts' power to invalidate legislative and executive actions as being unconstitutional." BLACK'S LAW DICTIONARY 976 (10th ed. 2014).

[6] Professor Keith Whittington has distinguished between the concepts of "constitutional interpretation" and "constitutional construction." In an influential book on the subject, he wrote that both interpretation and construction of the Constitution "seek to elaborate a meaning somehow already present in the text." However, constitutional interpretation relies on traditional legal tools that look to internal aspects of the Constitution (e.g., text and structure) to ascertain meaning, whereas constitutional construction supplements the meaning derived from such traditional interpretive methods with materials outside of the text (e.g., moral principles or pragmatic considerations) "where the text is so broad or so undetermined as to be incapable of faithful but exhaustive reduction to legal rules." KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 5–7 (1999).

[7] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 11 (4th ed. 2013).

[8] For example, the Constitution provides a clear, bright-line rule that individuals who have not yet "attained to the Age of thirty five Years" are ineligible to be President. *See* U.S. CONST. art. II, § 1, cl. 5.

[9] Chemerinsky, *supra* note 7, at 11; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 93–94 (1993).

[10] U.S. CONST. amend. II.

[11] *See* District of Columbia v. Heller, 554 U.S. 570, 573–619, 635–36 (2008) (examining historical sources to determine the original meaning of the Second Amendment).

The text of the Constitution 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.[12] 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 obtaining a warrant.[13] Thus, interpretation is necessary to determine the meaning of ambiguous provisions of the Constitution or to answer fundamental questions left unaddressed by the drafters. Some commentators have also noted the practical need for constitutional interpretation to provide principles, rules, or standards to govern future conduct of regulated parties, as well as political institutions, branches of government, and regulators.[14]

When deriving meaning from the text of the Constitution, the Supreme Court has relied on certain "methods" or "modes" of interpretation—that is, ways of figuring out a particular meaning of a provision within the Constitution.[15] There is significant 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.

Judicial review at the Supreme Court, by its very nature, can involve unelected judges[16] overturning the will of a democratically elected branch of the federal government or popularly elected state officials. Some scholars have argued that in striking down laws or actions, the Court has decided cases according to the Justices' own political preferences.[17] In response to these concerns, constitutional scholars have constructed theories designed to ensure that the Justices following them would be able to reach principled judgments in constitutional adjudication. In 1987, Professor Richard Fallon of Harvard Law School divided "interpretivists," or those purporting to prioritize the specific text and plain language of the Constitution above all else, into two basic camps: "On one side stand 'originalists,'" whom he characterized as taking "the rigid view that only the original understanding of the language and the framers' specific intent ought to count. On the other side, 'moderate interpretivists' allow contemporary understandings and the framers' general or abstract intent to enter the constitutional calculus."[18] Whether or not Professor Fallon's precise description at the time was accurate, those regarding themselves as originalists have clarified that the Court should rely on the fixed meaning of the Constitution as understood

[12] LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 1–4 (Geoffrey R. Stone ed., 2008).

[13] The Court resolved this question in *Riley v. California*, holding that a warrant is needed to search the contents of a cell phone incident to an individual's arrest. *See* 573 U.S. ___, No. 13-132, slip op. at 28 (2014).

[14] HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 3 (1990).

[15] Professor Philip Bobbitt defines a modality for interpreting the Constitution as "the way in which we characterize a form of expression as true." PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11 (1991). *See also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 592 (2001) ("The power to say what the Constitution means or requires—recognized since *Marbury v. Madison*—implies a power to determine the sources of authority on which constitutional rulings properly rest.").

[16] The President appoints the Justices of the Supreme Court, who serve for life terms unless impeached and removed from office. U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

[17] *See, e.g.*, HON. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41, 44–47 (Amy Gutmann ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION] ("The ascendant school of constitutional interpretation affirms the existence of what is called the Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.").

[18] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1211 (1987).

by at least the public at the time of the Founding.[19] This has become known as the original public meaning of the Constitution.

On the other hand, still other commentators have questioned the legitimacy of fixating on what the Framers, ratifiers, or members of their generation might have considered the core meaning of a particular provision of the Constitution, 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.[20] Although the debate over the proper sources of the Constitution's meaning remains unresolved, several key methods of constitutional interpretation have guided the Justices in their decisionmaking and, more broadly, have influenced constitutional dialogue.[21]

It is possible to categorize the various methods that have been employed when interpreting the Constitution.[22] This report broadly describes the most common modes of constitutional interpretation; discusses examples of Supreme Court decisions that demonstrate the application of these methods; and provides a general overview of the various arguments in support of, and in opposition to, the use of such methods by the Court. The modes discussed in detail in this report 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.

In explaining these modes, this report is merely describing the most common methods on which the Justices (and other interpreters) have relied to argue about the meaning of the Constitution.[23] Depending on the mode of interpretation, the Court may rely upon a variety of materials that include, among other things, the text of the Constitution; constitutional and ratification convention debates; prior Court decisions; pragmatic or moral considerations; and long-standing congressional or legislative practices.[24] It is important to note that the Court may use more than one source in deciding a particular case, and the Justices must exercise some discretion in

[19] SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 44–47.

[20] *E.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 54–55 (2006) (discussing the argument that the Constitution should "be interpreted to facilitate the performance of government functions"); Hon. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 436 (1986) ("A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. . . . Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance."); HON. STEPHEN BREYER, ACTIVE LIBERTY 25 (2008) ("[O]ur constitutional history has been a quest for . . . workable democratic government protective of individual personal liberty. . . . And . . . this constitutional understanding helps interpret the Constitution—in a way that helps to resolve problems related to *modern* government.").

[21] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW: VOLUME ONE 32 (3d ed. 2000) ("[T]he subject and substance of constitutional law in the end remains the language of the United States Constitution itself and the decisions and opinions of the United States Supreme Court. Modes of interpretation are means—however intricate—of explicating this subject and substance."). As discussed below, whether any particular source of meaning may serve as a proper basis for interpreting the Constitution is subject to debate.

[22] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6–7 (1982). This report does not examine the potential role of politics in judicial decisionmaking. *See, e.g.*, LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 22 (8th ed. 2013).

[23] This report does not provide an exhaustive list of the modes of interpretation. There is unlikely to be agreement on which methods such a list would include. *See* BOBBITT, *supra* note 22, at 8.

[24] *See also* Fallon, *supra* note 15, at 592; SUNSTEIN, *supra* note 9, at 95 ("It is impossible to interpret any written text without resort to principles external to that text.").

choosing or coordinating the sources and materials they will consult in making sense of those sources.[25]

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.[26] For example, Members of Congress may interpret the Constitution when considering whether to vote for proposed legislation[27] 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).[28] And knowledge of the most common methods for elaborating on the Constitution's meaning may aid Senators and the Senate Judiciary Committee in examining the judicial philosophy of individuals the President nominates to serve on the federal courts.[29] It may also assist Members and congressional committees in evaluating executive branch officials' interpretations of the Constitution.[30]

[25] For example, in *New York v. United States*, the Court held that Congress could not directly compel states to participate in a federal regulatory program. 505 U.S. 144, 188 (1992). In so holding, the majority opinion relied upon the text of the Tenth Amendment; historical sources; the structural relationship that the Constitution establishes between the federal government and states; and judicial precedent, among other sources. *Id.* at 174–83.

[26] *See* U.S. CONST. art. VI ("The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). Fulfilling this oath requires Members of Congress to read and understand the nation's founding document. *See also* Nixon v. United States, 506 U.S. 224, 228–29 (1993) (holding that the Constitution gave the Senate alone the power to determine whether it had properly "tried" an impeachment); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.").

[27] *See, e.g.*, Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and A Proposed Rule for the Senate*, 67 VAND. L. REV. 837, 846–49, 856 (2014) ("While members should vote upon legislation based on their own constitutional interpretations, which may be at odds with the Court's, they should not vote for legislation without any thought whatsoever regarding its constitutionality.").

[28] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

[29] *See, e.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary Part 1*, 111th Cong. 62 (2010) (statement of Elena Kagan in response to a question from Senator Patrick Leahy) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

[30] *See, e.g.*, Letter from Jefferson B. Sessions III, Attorney General, U.S. Dep't of Justice, to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf (advising the Department of Homeland Security that, in the opinion of the Attorney General, the Deferred Action for Childhood Arrivals (DACA) immigration policy is unconstitutional, stating, "As Attorney General of the United States, I have a duty to defend the Constitution and to faithfully execute the laws passed by Congress.").

Textualism

Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear.[31] Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text.[32] They are concerned primarily with the plain, or popular, meaning of the text of the Constitution. 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.[33]

The Justices frequently rely on the text in conjunction with other methods of constitutional interpretation.[34] The Court will often look to the text *first* before consulting other potential sources of meaning to resolve ambiguities in the text or to answer fundamental questions of constitutional law not addressed in the text.[35] For example, in *Trop v. Dulles*, a plurality of the Court held that the Eighth Amendment prohibited the government from revoking the citizenship of a U.S. citizen as a punishment.[36] When determining that a punishment that did not involve physical mistreatment violated the Constitution, the Court first looked briefly to the text of the Amendment, noting that the "exact scope" of the phrase "cruel and unusual punishment" in the Eighth Amendment had not been "detailed by [the] Court."[37] The plurality then turned to other modes of interpretation, such as moral reasoning and historical practices, in deciding the case.[38]

The *Trop* plurality's use of textualism in combination with other interpretive methods is distinguishable from a stricter textualist approach espoused most famously by Justice Hugo Black.[39] Consistent with his view that those interpreting the Constitution should look no further than the literal meaning of its words, Justice Black contended that the text of the First Amendment, which states, "Congress shall make no law . . . abridging the freedom of speech, or of the press" absolutely forbids Congress from enacting any law that would curtail these rights.[40]

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[31] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 23–38.

[32] *See id.*

[33] *See id.* at 23.

[34] EPSTEIN & WALKER, *supra* note 22, at 26. For additional examples of the Court's use of a textualist approach, see "Original Meaning" below.

[35] CHEMERINSKY, *supra* note 7, at 16; TRIBE, *supra* note 12, at 2–4; SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 9 (1984).

[36] 356 U.S. 86, 100–04 (1958) (plurality opinion). Justice William Brennan, providing the fifth and deciding vote in *Trop*, did not base his decision on the Eighth Amendment, instead concluding that denationalization exceeded Congress's war powers. *Id.* at 105–14 (Brennan, J., concurring).

[37] *Id.* at 99–101 (plurality opinion).

[38] *Id.* at 100–03 (stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

[39] EPSTEIN & WALKER, *supra* note 22, at 25–26.

[40] Justice Black once wrote that the First Amendment's statement that "Congress shall make no law . . . abridging the freedom of speech, or of the press" amounted to an "absolute command . . . that no law shall be passed by Congress abridging freedom of speech or the press." HON. HUGO L. BLACK, A CONSTITUTIONAL FAITH 45–46 (1968). This form of textualism is sometimes referred to as *pure textualism* or *literalism*. EPSTEIN & WALKER, *supra* note 22, at 26. Justice Antonin Scalia, who was both a textualist and an originalist, criticized this sort of "strict constructionist" approach to textualism. He wrote that a "text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 23.

An example of Justice Black's use of textualism in a First Amendment case is his dissent in *Dennis v. United States*.[41] In that case, the Court held that Congress could, consistent with the First Amendment's guarantee of freedom of speech, criminalize the conspiracy to advocate the forcible overthrow of the United States government.[42] The Court determined that the severity of potential harm to the government from the speech in question justified Congress's restrictions on First Amendment rights.[43] In accordance with his views that the text of the Constitution should serve as the sole source of its meaning, Justice Black dissented on the grounds that the Court should not have applied a balancing test to uphold the law against First Amendment challenge.[44] He wrote, "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."[45]

Another classic example of a self-consciously textualist opinion is Justice Black's dissent in *Griswold v. Connecticut*.[46] In *Griswold*, the majority struck down as unconstitutional a Connecticut law that criminalized the furnishing of birth control to married couples based on a view that the Due Process Clause of the Fourteenth Amendment provides a general right to privacy.[47] Justice Black criticized the majority for straying too far from the text of the Bill of Rights and relying on "nebulous" natural law principles to find a "right to privacy in marital relations" in the Constitution that—at least in his view—did not exist.[48] Adhering to his preference for interpreting the Constitution in line with its text, Justice Black wrote, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[49]

Proponents of textualism point to the simplicity and transparency of an approach that focuses solely on the objectively understood meaning of language independent of ideology and politics.[50] They argue that textualism prevents judges from deciding cases in accordance with their personal policy views, leading to more predictability in judgments.[51] Proponents also argue that textualism promotes democratic values because it adheres to the words of the Constitution adopted by the "people" as opposed to what individual Justices think or believe.[52]

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[41] 341 U.S. 494 (1951).

[42] *Id.* at 509, 513–17.

[43] *Id.*

[44] *Id.* at 580 (Black, J., dissenting) ("At least as to speech in the realm of public matters, I believe that the 'clear and present danger' test does not 'mark the furthermost constitutional boundaries of protected expression,' but does 'no more than recognize a minimum compulsion of the Bill of Rights.'") (citation omitted).

[45] *Id.*

[46] 381 U.S. 479 (1965).

[47] *Id.* at 485–86.

[48] *Id.* at 507–27 (Black, J., dissenting).

[49] *Id.* at 510.

[50] EPSTEIN & WALKER, *supra* note 22, at 26. However, some textualist approaches may allow for consideration of contemporary values. For example, approaches based on present textual meaning may allow for consideration of these values to the extent that they have become incorporated in modern understandings of phrases in the Constitution (e.g., "cruel and unusual punishment"). *Trop*, 356 U.S. at 100–03; BOBBITT, *supra* note 22, at 36.

[51] EPSTEIN & WALKER, *supra* note 22, at 26; SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 37–41, 44–47.

[52] *See* Hon. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695–97 (1976) ("The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the (continued...)

Opponents of a strict reliance solely on the text in interpreting the Constitution suggest that judges and other interpreters may ascribe different meanings to the Constitution's text depending on their background[53]—a problem compounded by textual provisions that are broadly worded[54] or fail to answer fundamental constitutional questions.[55] In addition, opponents argue that judges should consider values not specifically set forth in the text, such as those based on moral reasoning, practical consequences, structural relationships, or other considerations.[56] In other words, establishing textual meaning may not be straightforward, and a more flexible approach that does not bind the Court and policymakers to words written 300 years ago may, in the view of those who argue against textualism, be necessary to ensure preservation of fundamental constitutional rights or guarantees.[57]

Original Meaning

Whereas textualist approaches to constitutional interpretation focus solely on the text of the document, originalist approaches consider the meaning of the Constitution 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.[58] Disagreements primarily concern which sources scholars should consult when determining the fixed meaning of the Constitution.[59] 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 responsible interpreters) is to construct this original meaning.[60]

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.[61] According to this view, original intent may be found in sources outside of the text, such as debates in the Constitutional Convention or the Federalist Papers.[62] For example, in *Myers v. United States*,[63] Chief Justice William Howard Taft, writing for the majority, held that the

(...continued)

authority that originally resided entirely with them by adopting the original Constitution and by later amending it.").

[53] BOBBITT, *supra* note 22, at 37.

[54] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind"); EPSTEIN & WALKER, *supra* note 22, at 26.

[55] BOBBITT, *supra* note 22, at 38; TRIBE, *supra* note 12, at 1–4.

[56] *Cf.* BOBBITT, *supra* note 22, at 26.

[57] *Id.* at 24, 37–38.

[58] GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 39 (3d ed. 2015).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 17; ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW: THE FRANCIS BOYER LECTURES ON PUBLIC POLICY 10 (1984) ("[T]he framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.").

[62] Myers v. United States, 272 U.S. 52, 136 (1926); Hon. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) [hereinafter Scalia, *Originalism*].

[63] 272 U.S. 52 (1926).

President did not need legislative approval to remove an executive branch official who was performing a purely executive function.[64] 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.[65] 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."[66] 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 near thirty-year tenure on the Supreme Court, he and several prominent scholars explained that, as originalists, they were committed to seeking to understand *original public meaning* of the Constitution.[67] 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.[68] 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, but, rather, draws upon the original public meaning of the text as a broader guide to interpretation. Justice Scalia's majority opinion in *District of Columbia v. Heller*[69] 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.[70] 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.[71]

Those in favor of the use of original meaning as an interpretive approach point to its long historical pedigree[72] and its adherence to the democratic will of the people who originally framed and ratified the Constitution.[73] They point as well to the basic logic that a law, in order to function as law, has to have a fixed or settled meaning until it is formally amended or discarded.[74]

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[64] *Id.* at 176.

[65] *Id.* at 109–21.

[66] *Id.* at 116.

[67] SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 17, 44–45.

[68] *Id.*

[69] 554 U.S. 570 (2008).

[70] *Id.* at 635–36.

[71] *Id.* at 573–619.

[72] MAGGS & SMITH, *supra* note 58, at 18.

[73] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (discussing arguments made by supporters of originalism). Proponents of original meaning generally oppose the use of foreign law to establish the original meaning of the Constitution unless it is English common law that predates the founding era. *See* Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of cert.); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."*);* Myers v. United States, 272 U.S. 52, 118 (1926) (discussing when English common law could be relevant to original meaning). Treaties to which the United States is party (or customary international law that is incorporated into domestic law) might be cited by a proponent of original meaning when interpreting the Constitution. *See* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J. L. & PUB. POL'Y 653, 689 (2009) ("In cases where the fundamental rights that a court seeks to protect are described in a treaty or convention or are a matter of customary international law, the question is merely whether those rights are incorporated by domestic law.").

[74] MAGGS & SMITH, *supra* note 58, at 17.

Proponents of originalism also argue that the approach limits judicial discretion, preventing judges from deciding cases in accordance with their own political views.[75] Some originalists argue that changes to the Constitution's meaning should be left to further action by Congress and the states to amend the Constitution in accordance with Article V.[76] Proponents also credit the approach with ensuring more certainty and predictability in judgments.[77]

Those who are skeptical of this mode of interpretation underscore the difficulty in establishing original meaning. 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.[78] 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 actual text being construed.[79] Such a view may stem from the potentially wide variety of sources of such meaning; conflicting statements by these sources; conflicting understandings of statements in these sources; and gaps in historical sources.[80] Thus, because of this lack of consensus on the original meaning of the Constitution, judges may simply choose the original view that supports their political beliefs.[81] Opponents also argue that originalism requires judges to act as historians—a role for which they may not be well suited—as opposed to as decisionmakers.[82]

While Justice Elena Kagan, for example, has conceded that "we [the Justices] are all originalists,"[83] 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,[84] contending that the Constitution's contemporaries could not have conceived of some of the situations that would arise in modern times.[85] They argue further that

[75] EPSTEIN & WALKER, *supra* note 22, at 27; Scalia, *Originalism*, *supra* note 62, at 852, 862–64. A textualist approach based on the original meaning may allow for consideration of contemporary values to the extent that a court finds the original meaning counsels for an application of contemporary values to modern factual circumstances. MAGGS & SMITH, *supra* note 58, at 36.

[76] Scalia, *Originalism*, *supra* note 62, at 852, 862–64.

[77] MAGGS & SMITH, *supra* note 58, at 39.

[78] EPSTEIN & WALKER, *supra* note 22, at 28; MAGGS & SMITH, *supra* note 58, at 40. Furthermore, opponents argue that original meaning is of little use when the provision of the Constitution to be interpreted and applied is broadly worded and open to several meanings, or when the Constitution is silent on an issue. *Id.* at 20. Arguably, the "original meaning" of some provisions of the Constitution (e.g., the Ninth Amendment) contemplates constitutional rights that exist independent of the text, and thus the drafters contemplated that interpreters of the Constitution would consider sources of meaning outside of the text and historical sources from the time of the Founding. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14, 33–40 (1980).

[79] *See* MAGGS & SMITH, *supra* note 58, at 40–41.

[80] BOBBITT, *supra* note 22, at 7, 10–12. Justice Scalia acknowledged the limits of historical sources. Scalia, *Originalism*, *supra* note 62, at 856–57.

[81] MAGGS & SMITH, *supra* note 58, at 40–41.

[82] Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852, 935 (2013) ("Judges are not historians, and so, in addition to the risk that they will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome.").

[83] *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary Part 1*, 111th Cong. 62 (2010) (statement of Elena Kagan in response to a question from Senator Patrick Leahy) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

[84] MAGGS & SMITH, *supra* note 58, at 21.

[85] SUNSTEIN, *supra* note 9, at 103.

interpreting the Constitution based on original meaning may thus 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.[86] In addition, some skeptics of originalism challenge the view that Article V should be the exclusive vehicle for constitutional change,[87] as that article requires a two-thirds majority vote of the House of Representatives and Senate to propose an amendment,[88] and ratification by three-fourths of the states for the amendment to become part of the Constitution.[89] The high threshold the Constitution creates for formal amendment has prompted arguments that the Constitution's meaning should not be fixed in time, but, rather, should accommodate modern needs.[90]

Judicial Precedent

The most commonly cited source of constitutional meaning is the Supreme Court's prior decisions on questions of constitutional law.[91] For most, if not all Justices, judicial precedent provides possible principles, rules, or standards to govern judicial decisions in future cases with arguably similar facts.[92] Although the Court routinely purports to rely upon precedent,[93] it is difficult to say with much precision how often precedent has actually constrained the Court's decisions[94] because the Justices plainly have latitude in how broadly or narrowly they choose to construe their prior decisions.[95]

In some cases, however, a single precedent may play a particularly prominent role in the Court's decisionmaking. For example, a plurality of Justices relied on *Roe v. Wade* as controlling precedent in their opinion in *Planned Parenthood v. Casey*.[96] In that case, the plurality reaffirmed *Roe*'s holding that a woman has a protected liberty interest in terminating her pregnancy prior to

[86] Brennan, *supra* note 20, at 436–37; SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 7 (1993). For example, it seems possible that many of the ratifiers of the Fourteenth Amendment would have favored segregation by race and gender. SUNSTEIN, *supra* note 9, at 121.

[87] C. HERMAN PRITCHETT, CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM 37 (1984).

[88] Under Article V, two-thirds of the states' legislatures may also call a constitutional convention to propose amendments. *See* U.S. CONST. art. V.

[89] *Id.*

[90] PRITCHETT, *supra* note 87, at 37.

[91] MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 147–48 (2008) ("[I]t is practically impossible to find any modern Court decision that fails to cite at least some precedents in support."). This report's concept of "judicial precedent" is limited to prior decisions of the Supreme Court. However, the concept of "precedent" is arguably much broader, encompassing "norms," "historical practices," and "traditions." *Id.* at 3. For a discussion of the use of historical practices in interpreting the Constitution, see "Historical Practices" below.

[92] BOBBITT, *supra* note 22, at 7. BLACK'S LAW DICTIONARY 1366 (10th ed. 2014) (defining "precedent" as "a decided case that furnishes a basis for determining later cases involving similar facts or issues"). The Court may also rely on commentary on these cases by academics and judges. *Id.* This report does not examine in any detail reliance on such commentary or the precedents of state courts or foreign tribunals in constitutional interpretation. *See* BREST ET AL., *supra* note 20, at 56.

[93] EPSTEIN & WALKER, *supra* note 22, at 29.

[94] *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 76 (1991) ("Precedents commonly are regarded as a traditional source of constitutional decisionmaking, despite the absence of any clear evidence that they ever have forced the Court into making a decision contrary to what it would rather have decided.").

[95] GERHARDT, *supra* note 91, at 34–35.

[96] 505 U.S. 833 (1992) (plurality opinion).

fetal viability, stating that the essential holding of *Roe* "should be retained."[97] Another example of the heightened role that precedent can play in constitutional interpretation is the Court's decision in *Dickerson v. United States*, which addressed the constitutionality of a federal statute governing the admissibility of statements made during police interrogation, a law that functionally would have overruled the 1966 case of *Miranda v. Arizona*.[98] In striking down the statute, the majority declined to overrule *Miranda*, noting that the 1966 case had "become embedded in routine police practice to the point where the warnings have become part of our national culture."[99]

More often, the Court reasons from the logic of several precedents in rendering its decisions. An example is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which held that the voters of Arizona could remove from the state legislature the authority to redraw the boundaries for legislative districts and vest that authority in an independent commission.[100] In so holding, the Court examined the Elections Clause, which states that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[101] The Court determined that the term "Legislature" encompassed the voters of a state making law through a referendum.[102] In reaching this determination, the Court relied on three cases from the early twentieth century to support a more expansive view of the term "Legislature,"[103] including one case from 1916, *Ohio ex rel. Davis v. Hildebrant*, which the Court described as holding that a state referendum was "part of the legislative power" and could be "exercised by the people to disapprove the legislation creating congressional districts."[104]

Proponents of the primacy of precedent as a source of constitutional meaning point to the legitimacy of decisions that adhere to principles set forth in prior, well-reasoned written opinions.[105] They contend that following the principle of stare decisis[106] and rendering decisions grounded in earlier cases supports the Court's role as a neutral, impartial, and consistent decisionmaker.[107] Reliance on precedent in constitutional interpretation is said to provide more predictability, consistency, and stability in the law for judges, legislators, lawyers, and political branches and institutions that rely on the Court's rulings;[108] prevent the Court from overruling all

[97] *Id.* at 845–46 ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."). Although the plurality in *Casey* declined to overrule the core aspects of *Roe*, it discarded *Roe*'s "trimester approach" to evaluating the constitutionality of a state's restrictions on abortion in favor of a balancing test that considers whether such restrictions impose an "undue burden" on a woman's privacy interests protected by the Fourteenth Amendment. *Id.* at 872–77.

[98] 530 U.S. 428, 431–32 (2000).

[99] *Id.* at 443; *see also id.* at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.").

[100] 576 U.S. ___, No. 13-1314, slip op. at 3 (2015).

[101] U.S. CONST. art. I, § 4, cl. 1.

[102] *Ariz. State Leg.*, slip op. at 35.

[103] *Id.* at 15 ("Three decisions compose the relevant case law: *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920); and *Smiley v. Holm*, 285 U.S. 355 (1932).").

[104] *Id.* at 16.

[105] BOBBITT, *supra* note 22, at 42.

[106] "Stare decisis" refers to the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1626 (10th ed. 2014).

[107] *See* Gerhardt, *supra* note 94, at 70–71 (discussing arguments in support of the use of precedent).

[108] EPSTEIN & WALKER, *supra* note 22, at 29; Gerhardt, *supra* note 94, at 85–87.

but the most misguided decisions;[109] and allow constitutional norms to evolve slowly over time.[110]

Some argue that judicial overreliance on precedent can be problematic. For one thing, certain precedents might have been wrongly decided, in which case relying on them merely perpetuates their erroneous construction of the Constitution.[111] Indeed, critics argue that, if the Court strictly adheres to precedent, once a precedent has been established on a question of constitutional law, the only way to alter that ruling is to amend the Constitution.[112] This inflexibility is particularly problematic when those outside the Court begin to disagree about general background principles underlying a precedent; as such, disagreements arguably cause that precedent to lose its authority.[113] For example, when precedent offends basic moral principles (e.g., *Plessy v. Ferguson*),[114] the power of the Court's precedent may necessarily be weakened.[115] Other commentators argue that "consistency," "predictability," "stability," and "neutrality" are not actually benefits of reliance on precedent, as judges may choose among precedents and, to some extent, interpret precedents in accordance with their own views in order to overrule them implicitly; to expand them; or to narrow them.[116] In addition, some proponents of original meaning as a method of constitutional interpretation object to the use of judicial precedent that conflicts with original meaning, because it favors the views of the Court over the views of those who ratified the Constitution, thereby allowing mistaken interpretations of the Constitution to persist.[117]

Pragmatism

In contrast to textualist and some originalist approaches to constitutional interpretation, which generally focus on the words of the Constitution as understood by a certain group of people, pragmatist approaches consider the likely practical consequences of particular interpretations of the Constitution.[118] That is, pragmatist approaches often involve the Court weighing or balancing

[109] Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749–50 (1988); Fallon, *supra* note 15, at 585.

[110] MAGGS & SMITH, *supra* note 58, at 19.

[111] Raoul Berger, *Original Intent and Boris Bittkey*, 66 IND. L.J. 723, 747 (1991) (citation omitted).

[112] *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.").

[113] BOBBITT, *supra* note 22, at 52.

[114] 163 U.S. 537 (1896). In *Plessy*, the Court upheld the constitutionality of a Louisiana law mandating racial segregation in railway cars, determining that "separate but equal" public accommodations did not violate Thirteenth or Fourteenth Amendment guarantees. *Id.* at 542, 550–51.

[115] GERHARDT, *supra* note 91, at 35–36.

[116] *Id.* at 34–35 ("Applying precedents requires interpreting them, interpreting them frequently entails modifying them, and modifying them often entails extending or contracting them."); EPSTEIN & WALKER, *supra* note 22, at 30.

[117] *See* Monaghan, *supra* note 109, at 769–70 ("In the interpretation of this written Constitution, we may assume that the founding generation was much attached to the original, publicly shared understanding of the document. Thus, one can make a good case that, as historically understood, the written Constitution was intended to trump not only statutes but case law. This argument is reinforced if one recalls that to the founding generation it was not clear that judicial opinions would need to play such a dominant role in establishing the meaning of the Constitution.").

[118] HON. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 31 (1990).

the probable practical consequences of one interpretation of the Constitution against other interpretations.[119] One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches,[120] selecting the interpretation that may lead to the perceived best outcome.[121] For example, in *United States v. Leon*, the majority held that the Fourth Amendment does not necessarily require a court to exclude evidence obtained as a result of the law enforcement's good faith reliance on an improperly issued search warrant.[122] Justice Byron White's majority opinion in *Leon* took a pragmatic approach, determining that "the [exclusionary] rule's purposes will only rarely be served" by applying it in the context of a good faith violation of the Fourth Amendment.[123] Notably, the Court determined that adoption of a broader exclusionary rule would result in significant societal costs by undermining the ability of the criminal justice system to obtain convictions of guilty defendants.[124] Such costs, the Court held, outweighed the "marginal or nonexistent benefits."[125]

Another case in which the Supreme Court accorded weight to the likely practical consequences of a particular interpretation of the Constitution is *United States v. Comstock.*[126] In *Comstock*, the Court considered whether Congress had the power under Article I, Section 8 of the Constitution to enact a civil commitment law authorizing the Department of Justice to cause to be detained indefinitely convicted sex offenders who had already served their criminal sentences but were deemed "mentally ill" and "sexually dangerous."[127] Such a power is not among those specifically enumerated in Article I, Section 8 of the Constitution, but the Court held that Congress could enact the law under a combination of (1) its implied constitutional powers to, among other things, legislate criminal offenses, provide for the imprisonment of offenders, and regulate prisons and prisoners; and (2) Article I, Section 8, Clause 18 of the Constitution, which provides Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."[128] Justice Stephen Breyer, writing for the Court, listed several factors that weighed in favor of the Court's

[119] *See* HON. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 28 (1990) (discussing Justice Benjamin Cardozo's views on pragmatism, as reflected in his jurisprudence, as contemplating a method "in which social interests behind competing legal principles are identified and (roughly speaking) weighed against each other to determine how a case lying at the intersection of those principles should be decided"); Hon. Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1670 (1990) ("All that a pragmatic jurisprudence really connotes . . . is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.").

[120] Justice Byron White often argued that the Court should adopt a functionalist approach in separation-of-powers cases by considering the extent to which a particular reading of the Constitution would promote a workable government. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 984 (White, J., dissenting) ("It is long settled that Congress may 'exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415–16, 420 (1819)) (internal quotation marks omitted); William J. Wagner, *Balancing as Art: Justice White and the Separation of Powers*, 52 CATH. U. L. REV. 957, 962 (2003) ("Where he encountered silence in the constitutional text, Justice White consistently deferred to congressional judgments on the best structure and functioning of government. The judiciary's role in these cases was simply to unmask any congressional attempts to deprive another branch of its constitutional power, not to apply formulaic rules.").

[121] BREST ET AL., *supra* note 20, at 54–55.

[122] 468 U.S. 897, 926 (1984).

[123] *Id.*

[124] *Id.* at 907–08, 922.

[125] *Id.*

[126] 560 U.S. 126 (2010).

[127] *Id.* at 129–32.

[128] *Id.* at 135–37.

determination that Congress possessed the authority to enact the civil commitment law.[129] One of these factors rested primarily on pragmatic concerns about the potential detriment to society of releasing dangerous offenders into the community.[130] The Court held that the civil commitment law represented a rational means of implementing Congress's implied criminal justice powers "in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody."[131]

Using another type of pragmatist approach, a court might consider the extent to which the judiciary could play a constructive role in deciding a question of constitutional law.[132] According to this approach, a judge might observe the "passive virtues" by declining to rule on the constitutional issues in a case by adhering to certain doctrines, including those under which a judge will avoid ruling on political or constitutional questions.[133] This may allow the Court to avoid becoming frequently embroiled in public controversies, preserving the Court's institutional capital for key cases and giving more space for the democratic branches to address the issue and reach accommodations on questions about the meaning of the Constitution.[134] The Supreme Court's decision in *Baker v. Carr*[135] illustrates the application of this second type of pragmatism. In that case, Justice William Brennan, writing for the majority, debated a dissenting Justice Felix Frankfurter about whether the Court was the proper actor to review the constitutionality of a state's apportionment of voters among legislative districts, or whether the plaintiffs should have sought remedies from the state legislature.[136] Justice Brennan's majority opinion in *Baker* ultimately concluded that a state's apportionment decisions are properly justiciable matters, as an alternative holding would require those harmed by malapportionment to seek redress from a political process that was skewed against such plaintiffs.[137]

Those who support pragmatism in constitutional interpretation argue that such an approach takes into account the "political and economic circumstances" surrounding the legal issue before the Court and seeks to produce the optimal outcome.[138] Such an approach may allow the Court to issue decisions reflecting contemporary values to the extent that the Court considers these values relevant to the costs and benefits of a particular interpretation.[139] On this view, pragmatism posits a view of the Constitution that is adaptable to changing societal circumstances, or that at least reflects the proper role of the judiciary.[140]

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[129] *Id.* at 149–50. The factors included "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.*

[130] *Id.* at 142–43, 149–50.

[131] *Id.*

[132] BOBBITT, *supra* note 22, at 7. BREST ET AL., *supra* note 20, at 55.

[133] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 199–201 (1962). Alternatively, the court could rule on the merits on narrow grounds. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix–xiv (2001).

[134] BREST ET AL., *supra* note 20, at 55.

[135] 369 U.S. 186 (1962).

[136] *Id.* at 231–37, 266–68. The majority opinion announced a standard to determine when a case presents a political question not suitable for resolution by the courts. *See id.* at 217.

[137] *See id.* at 208–09.

[138] BOBBITT, *supra* note 22, at 61; BREST ET AL., *supra* note 20, at 54–55.

[139] BREYER, *supra* note 20, at 11–12.

[140] *Id.*

Critics of pragmatism argue that consideration of costs and benefits unnecessarily injects politics into judicial decisionmaking.[141] They argue that judges are not politicians. Rather, a judge's role is to say what the law is and not what it should be.[142] In addition, some opponents of the pragmatic approach have argued that when the Court observes the "passive virtues" by dismissing a case on jurisdictional grounds, it fails to provide guidance to parties for the future and to fulfill the Court's duty to decide important questions about constitutional rights.[143]

Moral Reasoning

Another approach to constitutional interpretation is based on moral or ethical reasoning—often broadly called the "ethos of the law."[144] Under this approach, some constitutional text employs or makes reference to terms that are infused with (and informed by) certain moral concepts or ideals, such as "equal protection" or "due process of law."[145] The moral or ethical arguments based on the text often pertain to the limits of government authority over the individual (i.e., individual rights).[146] The Court has derived general moral principles from the broad language of the Fourteenth Amendment in cases involving state laws or actions affecting individual rights.[147] For example, in *Lawrence v. Texas*, the Court struck down a Texas law that banned private, consensual same-sex sexual activity as violating the Due Process Clause of the Fourteenth Amendment.[148] That clause provides, in relevant part, that states shall not "deprive any person of . . . liberty . . . without due process of law."[149] The Court held that the concept of liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[150] Notably, the text of the Fourteenth Amendment does not define "liberty," and the Court's holding in *Lawrence* is more broadly grounded in general views about the proper role of government in not punishing behavior that provides no discernible harm to the public at large.[151]

A particularly famous example of an argument based on the "ethos of the law" is contained in the Court's decision in *Bolling v. Sharpe*.[152] The Court decided *Bolling* on the same day it decided *Brown v. Board of Education*, which held that a state, in segregating its public school systems by race, violated the Fourteenth Amendment.[153] Specifically, the Court held that the practice of "separate but equal" as applied to schools violated the Equal Protection Clause, a provision that prohibits state governments from depriving their citizens of the equal protection of the law.[154]

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[141] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 17, at 45–47.

[142] *See id*.

[143] Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 15–16, 21–23 (1964).

[144] Some scholars refer to the general moral or ethical principles underlying the text of the Constitution as the "ethos of the law." BOBBITT, *supra* note 22, at 142.

[145] *Id.* at 126.

[146] *Id.* at 162.

[147] *Id.* at 142.

[148] 539 U.S. 558, 578 (2003).

[149] U.S. CONST. amend. XIV, § 1.

[150] *Lawrence*, 539 U.S. at 562.

[151] *See id.* at 578.

[152] 347 U.S. 497 (1954).

[153] *Id.* at 498–99 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[154] *Id.*

Bolling, however, involved the District of Columbia school system, which was not subject to the Fourteenth Amendment because the District of Columbia is not a state, but rather a federal enclave.[155] Furthermore, the Fifth Amendment, which applies to the actions of the federal government, provides that no person shall "be deprived of life, liberty, or property, without due process of law" but does not explicitly contain an Equal Protection Clause.[156] Nevertheless, the Court struck down racial segregation in DC public schools as a violation of the Fifth Amendment's Due Process Clause, determining that due process guarantees implicitly include a guarantee of equal protection.[157] The Court's reasoning was based on the Due Process Clause being derived "from our American ideal of fairness," ultimately holding that the Fifth Amendment prohibited the federal government from allowing segregation in public schools.[158]

Proponents of using moral or ethical reasoning as an approach for making sense of broad constitutional text, such as the Due Process Clause of the Fourteenth Amendment, argue that general moral principles underlie much of the text of the Constitution.[159] Thus, arguments about what the Constitution means based on moral reasoning produce "more candid opinions," as judges often rely upon moral arguments but disguise them as textual arguments or arguments based on precedent.[160] Some also argue that the Framers designed the Constitution as an instrument that would grow over time.[161] Thus, supporters of moral reasoning in constitutional interpretation contend that its use appropriately leads to more flexibility for judges to incorporate contemporary values when deriving meaning from the Constitution.[162] Ethical arguments can also fill in gaps in the text to address situations unforeseen at the time of the Founding,[163] consistent with the understanding of the Bill of Rights as a starting point for individual rights.[164]

Critics of using moral reasoning in constitutional interpretation have argued that courts should not be "moral arbiters."[165] They argue that ethical arguments are based on principles that are not objectively verifiable[166] and may require a judge to choose between "competing moral conventions."[167] Courts may thus be ill-equipped to discern established moral principles. Judges using this mode of constitutional interpretation may therefore decide cases according to their own policy views, and opponents believe that overturning acts of the political branches based on such considerations is undemocratic.[168] Some opponents argue that moral considerations may be better left to the political branches.[169]

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[155] *Id.*; *see also* U.S. CONST. art. I, § 8, cl. 17.

[156] U.S. CONST. amend. V; *Bolling*, 347 U.S. at 498–500.

[157] *Id.*

[158] *Id.* at 499–500.

[159] HADLEY ARKES, BEYOND THE CONSTITUTION 19 (1990).

[160] BOBBITT, *supra* note 22, at 106.

[161] BARBER, *supra* note 35, at 40 (discussing the view that the Constitution "marks out 'lines of growth' toward the real values of the framers and away from those of their views and attitudes that were inconsistent with their aspirations" (citing John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 410–14 (1978))).

[162] ELY, *supra* note 78, at 1.

[163] BOBBITT, *supra* note 22, at 102.

[164] ARKES, *supra* note 159, at 60–62.

[165] BOBBITT, *supra* note 22, at 137.

[166] *Id.* at 138.

[167] *Id.* at 139; ELY, *supra* note 78, at 59.

[168] *Id.* at 5.

[169] *See id.*

National Identity or "National Ethos"

Another approach to interpretation that is closely related to but conceptually distinct from moral reasoning is judicial reasoning that relies on the concept of a "national ethos." This national ethos is defined as the unique character of American institutions, the American people's distinct national identity, and "the role within [the nation's public institutions] of the American people."[170] An example of the "national ethos" approach to ethical reasoning is found in *Moore v. City of East Cleveland*, in which the Court struck down as unconstitutional a city zoning ordinance that prohibited a woman from living in a dwelling with her grandson.[171] In its decision, the Court surveyed the history of the family as an institution in American life and stated, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[172] Thus, the Court struck down the zoning ordinance, at least in part, because it interfered with the American institution of the family by preventing a grandmother from living with her grandson.[173]

Another example of the Court's reliance on national ethos as a rationale is *West Virginia State Board of Education v. Barnette*.[174] In that case, the Court held that the First Amendment prohibited a state from enacting a law compelling students to salute the American flag.[175] Writing for the majority, Justice Robert Jackson noted that, in contrast to authoritarian regimes such as the Roman Empire, Spain, and Russia, the United States' unique form of constitutional government eschews the use of government coercion as a means of achieving national unity.[176] The Court invoked the nation's character as reflected in the Constitution, writing that, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[177]

Many of the arguments in the debate over reliance on the "national ethos" in constitutional interpretation share similarities with arguments made about the use of moral reasoning as a mode of interpretation. Some proponents of using the distinct character of the American national identity and the nation's institutions as a method for elaborating on the Constitution's meaning argue that the "national ethos" underlies the text of the Constitution, and that the use of this method allows more flexibility for judges to incorporate contemporary American values when deriving meaning from the Constitution.[178] Moreover, unlike approaches that discern meaning from general moral or ethical principles, the "national ethos" approach arguably has added legitimacy as a mode of interpretation because it is specifically tied to the identity and values of the United States and those aspects of the Constitution that are distinctly American.[179] As noted,

[170] BOBBITT, *supra* note 22, at 94.

[171] 431 U.S. 494, 506 (1977).

[172] *Id.* at 499–504.

[173] *Id.*

[174] 319 U.S. 624 (1943).

[175] *Id.* at 642.

[176] *Id.* at 640–41.

[177] *Id.*

[178] *Cf. supra* notes 159, 162.

[179] *Cf.* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) ("The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. . . . We must never forget that it (continued...)

ethical arguments can also fill in gaps in the text to address situations unforeseen at the time of the Founding.[180]

On the other hand, as with moral reasoning, critics of an approach to constitutional interpretation based on the "national ethos" have argued that such an approach involves unelected judges determining the meaning of the Constitution based on principles that are not objectively verifiable—determinations that critics argue should be made by the political branches.[181]

Structuralism

One of the most common modes of constitutional interpretation is based on the structure of the Constitution. Indeed, drawing inferences from the design of the Constitution gives rise to some of the most important relationships that everyone agrees the Constitution establishes—the relationships among the three branches of the federal government (commonly called separation of powers or checks and balances); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people.[182] Two basic approaches seek to make sense of these relationships.

The first, known as formalism, posits that the Constitution sets forth all the ways in which federal power may be shared, allocated, or distributed.[183] An example of the use of this form of structuralism as a mode of interpretation is found in *Immigration and Naturalization Service v. Chadha*.[184] In that case, the Court held that one house of Congress could not by resolution unilaterally curtail the statutory authority of the executive branch to allow a deportable alien to remain in the United States.[185] The Court examined the structure of the Constitution and noted that under the Bicameralism and Presentment Clauses in Article I, Sections 1 and 7, laws with subject matter that is "legislative in character or effect" require passage by a majority in both houses and presentment to the President for his signature or veto.[186] Viewing the exercise of the one-house veto in *Chadha* to be of a legislative nature, the Court concluded that the structural relationships that the Constitution established between the legislative and executive branches forbid the "one-House legislative veto."[187]

An example of the Court's use of formalist structural reasoning in the context of federalism is *U.S. Term Limits, Inc. v. Thornton*.[188] In that case, the Court considered whether the State of

(...continued)

is a Constitution for the United States of America that we are expounding.").

[180] *See supra* notes 163-64.

[181] *Cf. supra* notes 165-69.

[182] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) [hereinafter BLACK, STRUCTURE AND RELATIONSHIP].

[183] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–44 (2011); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.").

[184] 462 U.S. 919 (1983).

[185] *Id.* at 923, 946.

[186] *Id.* at 952, 54–55.

[187] *Id.*

[188] 514 U.S. 779 (1995).

Arkansas could prohibit the names of otherwise-qualified candidates for congressional office from appearing on the state's general election ballot if the candidates had served three terms in the House of Representatives or two terms in the Senate.[189] In striking down an amendment to the Arkansas State Constitution, the Court relied heavily on its view of the formal structural relationships that the Constitution established among the people of the United States, the states, and the federal government.[190] In particular, the Court determined that the Founding Fathers established a single, national legislature representing "the people of the United States" rather than a "confederation of sovereign states."[191] Thus, allowing states to adopt a patchwork of distinct qualifications for congressional service would "erode the structure envisioned by the Framers."[192] Notably, the Court in *Thornton* adhered closely to its view of how the Constitution allocates power between the federal and state governments, and did not employ a balancing test to examine the degree to which the states' power to set qualifications for congressional office would interfere with the federal government's constitutional prerogatives.

A second form of structural reasoning, known as functionalism, treats the Constitution's text as having firmly spelled out the relationship among the three federal branches only at their apexes, but otherwise left it to be worked out in practice how power may be distributed or shared below the apexes.[193] Whereas formalism purports to hew closely to original meaning and regards historical practices as basically irrelevant or illegitimate, functionalism uses a balancing approach that weighs competing governmental interests as one of its principal methodologies.[194] One early example of functionalism is *McCulloch v. Maryland*.[195] In that case, the Court held that Congress had the power to create the Second Bank of the United States.[196] While Congress's enumerated powers in Article I, Section 8 of the Constitution do not specifically include the power to create a central bank, the Court considered whether Congress had such authority under its enumerated powers when viewed in conjunction with Article I, Section 8, Clause 18, which provides Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[197] The Court determined that Congress had an implied power to create the bank under the Necessary and Proper Clause in order to implement its express powers to tax and spend, concluding that the terms "necessary" and "proper" should not have a

[189] *Id.* at 783. The Constitution imposes qualifications regarding minimum age, citizenship, and residency of a Member of the House or Senate, but it does not contain language expressly imposing term limits on Members. U.S. CONST. art. I, § 2, cl. 2 (qualifications for Members of the House of Representatives); *id.* art. I, § 3, cl. 3 (qualifications for Senators).

[190] *U.S. Term Limits*, 514 U.S. at 783.

[191] *Id.* at 783, 822, 837–38; Kathleen M. Sullivan, Comment, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 88 (1995) ("The majority and the dissent deduced opposite formal structural axioms from the founding. To the majority, the founding was a 'revolutionary' act that replaced a confederation of sovereign states with a 'National Government' in which the 'representatives owe primary allegiance not to the people of a State, but to the people of the Nation.'").

[192] *U.S. Term Limits*, 514 U.S. at 783, 822, 837–38. The Court also determined that the sovereign powers possessed by the states prior to the American Revolution did not include the power to establish additional qualifications for congressional service. *Id.* at 802.

[193] Michael C. Dorf, *Interpretive Holism and the Structural Method*, 92 GEO. L.J. 833, 837 (2004); Strauss, *supra* note 183, at 489.

[194] *See* Manning, *supra* note 183, at 1942–44.

[195] 17 U.S. (4 Wheat.) 316 (1819).

[196] *Id.* at 425.

[197] *Id.* at 411–12.

restrictive meaning on Congress's power.[198] In so holding, the Court examined the structure of the Constitution's text, noting that the Constitution located the Necessary and Proper Clause in the section of the Constitution that grants powers to Congress (Article I, Section 8), instead of the section of the Constitution that restricts the powers of the federal government (Article I, Section 9).[199] Moreover, the *McCulloch* Court noted that a more restrictive reading of Congress's powers would impair its ability to "perform[] its functions," as a narrow reading of the Necessary and Proper Clause would impose "some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects."[200]

As is evident, a threshold debate among structuralists is whether to use a formalist or functionalist approach when interpreting the Constitution. This debate is founded partly in concerns about which approach demonstrates greater fidelity to the Constitution, which is closest to the original meaning of the Constitution, and which best protects liberty in cases raising questions about the proper allocation of power between the branches of the federal government; federal government and states; government institutions; or citizens and government.[201]

Formalism focuses on the structural divisions in the Constitution with the idea that close adherence to these rules is required in order to achieve the preservation of liberty.[202] An example is the Court's opinion in *Chadha*, which, as noted, held that structural relationships that the Constitution established between the legislative and executive branches forbid the "one-House legislative veto."[203] The Court rested its holding in part on a close adherence to the structural divisions established in the Constitution, stating, "It emerges clearly that the prescription for legislative action in [Article I, Sections 1 and 7 of the Constitution] represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[204] As demonstrated in *Chadha*, a formalist approach to separation-of-powers questions rejects not only looking to postratification historical practices as a guide for determining constitutional meaning, but also eschews balancing tests that weigh the degree of interference with one branch's powers.

By contrast, *functionalism* takes a more flexible approach, emphasizing the core functions of each of the branches, and asking whether an overlap in these functions upsets the equilibrium that the Framers sought to maintain.[205] An example is the Court's opinion in *Zivotofsky v. Kerry*.[206] In that case, the Court held that the President has the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President's policy on recognition.[207] In so holding, the Court stated that the President should have such an exclusive power because the nation must have a "single policy" on which governments are legitimate, and that additional

[198] *Id.* at 419–21.

[199] *Id.*

[200] *Id.* at 409.

[201] *See* Manning, *supra* note 183, at 1942–44, 1950–52, 1958–60. *See also* Myers v. United States, 272 U.S. 52, 116 (1926).

[202] Manning, *supra* note 183, at 1958–60.

[203] 462 U.S. 919, 952, 54–55 (1983).

[204] *Id.* at 951.

[205] Manning, *supra* note 183, at 1950–52.

[206] 576 U.S. __, No. 13-628, slip op. at 1 (2015).

[207] *Id.* at 29.

pronouncements from Congress on the issue could result in confusion.[208] The Court thus adopted a functionalist approach by considering the practical consequences of allocating the power of recognition between the legislative and executive branches, ultimately concluding that the President alone should exercise that power.

A further illustration of the distinction between formalism and functionalism in a separation-of-powers case is *Morrison v. Olson*.[209] In *Morrison*, the Court upheld against constitutional challenge provisions in the Ethics in Government Act of 1978 that allowed for appointment of an "independent counsel to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."[210] The Attorney General could remove the independent counsel only for "good cause,"[211] a legal standard that provided the special prosecutor with significant independence from the President and his officers.[212] In a 7-1 decision, the Court employed a functionalist approach and held that the act did not violate constitutional separation-of-powers principles by sufficiently interfering with the President's executive authority under Article II.[213] The Court determined the limited nature of the special prosecutor's jurisdiction and authority meant that the position did not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws."[214] Justice Scalia, the sole dissenter, adopted a formalist approach, arguing that the majority failed to adhere to the strict allocations of power that the Constitution establishes among the branches of government.[215] Justice Scalia wrote that the independent counsel provisions deprived the President of "exclusive control" over the exercise of "purely executive powers" (e.g., investigation and prosecution of crimes) by vesting them in the independent counsel, who was not removable at will by the President.[216]

Proponents of structuralism note that it is a method of interpretation that considers the entire text of the Constitution rather than a particular part of it.[217] As a consequence, some proponents argue that structuralist methods produce clearer justifications for decisions that require interpretation of vague provisions of the Constitution and their application to particular factual circumstances than textualism alone.[218] Some argue that structuralism provides a firmer basis for personal rights than other modes of interpretation like textualism or moral reasoning.[219] For example, in *Crandall v. Nevada*, the Court struck down a state law imposing a tax on people leaving or passing through the state.[220] The Court inferred an individual right to travel among the states from the structural relationship the Constitution establishes between citizens and the federal and state governments.[221] While the Constitution does not specifically provide for a right to travel among

[208] *Id.* at 11.

[209] 487 U.S. 654 (1988).

[210] *Id.* at 659–60.

[211] *Id.* at 663.

[212] *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers [subject to removal 'for cause'].").

[213] *Id.* at 689–97.

[214] *Id.*

[215] *Id.* at 699, 703–04 (Scalia, J., dissenting).

[216] *Id.* at 705–10.

[217] BOBBITT, *supra* note 22, at 74.

[218] BLACK, STRUCTURE AND RELATIONSHIP, *supra* note 182, at 13, 22.

[219] *Id.* at 46.

[220] 73 U.S. 35, 39, 49 (1868).

[221] *Id.*

the states, because citizens of the United States might need to travel among the states to exercise other constitutional rights, the Court inferred a right to travel from the Constitution viewed in its entirety.[222] As a result, some structuralists argue that the method of interpretation provides a more firm basis to establish key constitutional rights, like the right to travel, than other modes of constitutional interpretation.[223]

Some scholars maintain, however, that structuralism does not always lead to a clear answer.[224] More specifically, critics argue that it is more difficult for judges to apply and for citizens to understand interpretations based on structuralism than arguments based on other modes of interpretation.[225] In addition, many believe that determinations about the proper structure established by the Constitution are often subjective. While the eminent Professor Charles Black argued that structure was the most important mode of constitutional interpretation, at least one other prominent commentator has argued that the approach provides "no firm basis for personal rights" because personal rights are considered to derive from the "structure of citizenship" and are therefore "vulnerable to the [government's] desire for power and its ability to manipulate the relation between citizen and state."[226]

Historical Practices

Judicial precedents are not the only type of precedents that are arguably relevant to constitutional interpretation. Prior decisions of the political branches, particularly their long-established, historical practices, are an important source of constitutional meaning to many judges, academics, and lawyers.[227] Indeed, courts have viewed historical practices as a source of the Constitution's meaning in cases involving questions about the separation of powers, federalism, and individual rights, particularly when the text provides no clear answer.[228]

An example of judicial reliance on historical practices—sometimes described as tradition—in constitutional interpretation is the Court's decision in *National Labor Relations Board v. Canning*.[229] When determining, among other things, that the President lacked authority to make a recess appointment during a Senate recess of fewer than ten days, the Court cited long-settled historical practices showing an absence of a settled tradition of such recess appointments as being relevant to the resolution of a separation-of-powers question not squarely addressed by the Constitution.[230] Another example of the influence of historical practices on constitutional interpretation is the Court's decision in *Zivotofsky v. Kerry*.[231] As noted above, in that case the

[222] BLACK, STRUCTURE AND RELATIONSHIP, *supra* note 182, at 27.

[223] *Id.* at 13, 22.

[224] BOBBITT, *supra* note 22, at 84; SUNSTEIN, *supra* note 9, at 120.

[225] BOBBITT, *supra* note 22, at 85.

[226] *Id.* at 85–86; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53 (1975).

[227] BREST ET AL., *supra* note 20, at 56.

[228] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."); *see also* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 21–25 (D.C. Cir. 2016) (summarizing Supreme Court cases using historical practices as a method of constitutional interpretation in separation-of-powers cases).

[229] 573 U.S. __, No. 12-1281, slip op. at 1 (2014).

[230] *Id.* at 21.

[231] 576 U.S. __, No. 13-628, slip op. at 1 (2015).

Court held that the President had the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President's policy on recognition.[232] In deciding the case, the Court relied in part on the long-standing historical practice of the President in recognizing foreign sovereigns without congressional consent.[233]

An example of the use of historical practices as a method of constitutional interpretation in a case involving the limits of government power is *Marsh v. Chambers*.[234] In *Marsh*, the Court considered whether the First Amendment's Establishment Clause, which prohibits laws "respecting an establishment of religion," forbade the State of Nebraska from paying a chaplain with public funds to open each legislative session with a prayer in the Judeo-Christian tradition.[235] The Court held that the state's chaplaincy practice did not violate the Establishment Clause, attaching significance to the long-standing practices of Congress (including the Congress that adopted the First Amendment as part of the Bill of Rights) and some states in funding chaplains to open legislative sessions with a prayer.[236] The Court wrote, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[237]

The debate over historical practices as a mode of interpretation echoes many of the elements of debates over original meaning, judicial precedent, and arguments based on a "national ethos."[238] Functionalists, for example, attach considerable importance to historical practices as a source of constitutional meaning, while formalists generally regard them as irrelevant.[239] Those employing this method often argue that, when the text of the Constitution is ambiguous, the use of historical practices has legitimacy as an interpretive tool.[240] They also contend that such an approach provides an objective and neutral basis for decisionmaking, leading to more predictability and stability in the law upon which parties can rely.[241] Moreover, according interpretive significance to historical practices in cases concerning the allocation of power among the branches of government may help to preserve settled expectations that have resulted from long-standing compromises among the branches regarding such allocations.[242]

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[232] *Id.* at 29.

[233] *Id.* at 20–21.

[234] 463 U.S. 783 (1983).

[235] *Id.* at 784.

[236] *Id.* at 788–89.

[237] *Id.* at 786.

[238] The arguments in the following three paragraphs draw heavily from the sections *supra* on "Original Meaning," "Judicial Precedent," and "Moral Reasoning."

[239] Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965, 969 ("[Functionalism] is a model of interpretation that invites the use of historical practice as self-affirming support for meaning.").

[240] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *see also* Turley, *supra* note 239, at 969.

[241] *Cf.* Gerhardt, *supra* note 94, at 70–71, 86–87 (discussing similar arguments in support of the use of judicial precedent in constitutional interpretation).

[242] Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional*
(continued...)

Those opposing reliance on historical practices as a source of constitutional meaning argue that it may be difficult to establish definitively what the relevant historical practices are in order to interpret the Constitution properly.[243] They suggest that not all practices are authorized by the written text and that historical sources may differ and thus might not be helpful in illuminating patterns in historical practices.[244] They also warn that this methodology could allow judges to engage in a form of what is called "law office history"—simply choosing the sources that support the historical practices they wish to ratify or reject.[245] Thus, it could be argued that historical practices may not lend themselves to easy or clear interpretation. Moreover, they can lead to results inconsistent with the original meaning of the Constitution.[246] Another possible problem with reliance on historical practices in constitutional interpretation, according to its critics, is that courts could end up legitimizing long-standing historical practices, such as slavery or segregation, that offend modern moral principles. Indeed, giving historical practices special place in constitutional interpretation could lead courts to fail to protect minority rights[247] or to preserve the basic structure of government established by the Constitution.[248] At the same time, reliance on historical practices might undermine the political branches when they are attempting to be innovative or opt for novel solutions to old problems.[249]

Deriving the Constitution's meaning from long-established, historical practices of the political branches is one of several methods of constitutional interpretation the Court has relied upon when exercising the power of judicial review. In explaining the meaning of the provisions of the Constitution, courts and commentators often refer to these modes of interpretation. An understanding of these methods, which are not mutually exclusive, will aid congressional staff in understanding the development of the constitutional doctrines that guide the Justices, government officials, and other individuals when they interpret the Constitution.

(...continued)

Adverse Possession, 2014 SUP. CT. REV. 1, 40 ("[I]nterests in stability and related rule-of-law considerations, such as consistency, predictability, reliance, and transparency, also can be advanced by adhering to long-standing practices, regardless of whether they date to the early post-Founding period.").

[243] *Cf.* EPSTEIN & WALKER, *supra* note 22, at 28 (reciting arguments made against original meaning as a method of constitutional interpretation).

[244] Bradley & Siegel, *supra* note 242, at 41–44; BOBBITT, *supra* note 22, at 11 (summarizing arguments made against original meaning).

[245] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13 (defining "law office history" as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

[246] Bradley & Siegel, *supra* note 242, at 27–29.

[247] *Cf.* Brennan, *supra* note 20, at 436–37.

[248] NLRB v. Canning, 573 U.S. __, No. 12-1281, slip op. at 4–5 (2014) (Scalia, J., concurring in the judgment) ("[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'") (citation omitted); *id.* at 47–48 ("Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution's original meaning. There is thus no ground for the majority's deference to the unconstitutional recess-appointment practices of the Executive Branch.").

[249] *See* Manning, *supra* note 183, at 1943 ("[F]unctionalists believe that Congress has substantially free rein to innovate, as long as a particular scheme satisfies the functional aims of the constitutional structure, taken as a whole.").

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