

Understanding Constitutionalism

This Reading Item is based on the work of Robert Post and Reva Siegel: Democratic Constitutionalism from the National Constitution Center (<https://constitutioncenter.org/>) (edited by Zsuzsa Szakály).

INTRODUCTION AND LEARNING OUTCOMES

In learning a new subject, it is always important to understand the basic definitions. To have a better view on the question of constitutionalism, first one must examine the concept of formal and functional constitutional law.

The distinguishing between American and European Constitutionalism is also significant in the way to understand the concept. To see the principles of the originalists and the thinkers against the concept, one can find the basics of the long-time debate.

Learning outcomes

1. Understanding the concept of democratic constitutionalism
2. Understanding the differences of European and American meaning

Keywords: constitutional law, constitutionalism, originalism, democratic constitutionalism, protection of human rights

Estimated time: app. 45 minutes

Recommended Reading

1. New Millenium Consitutionalism: Paradigms of reality and Challenges, NJHAR, Yerevan, 2013
2. Elliot Bulmer: What is a Constitution? Principles and concepts International IDEA Constitution-Building Primer (2014) 10-17.
3. Mark Tushnet: Advanced Introduction to Comparative Constitutional Law, Elgar Advanced Introductions series, 114-121.

The Constitution is the **law of lawmaking**. It structures and limits the powers of government. Sometimes the Constitution speaks in precise and unambiguous terms. It provides, for example, that the “Senate of the United States shall be composed of two Senators from each State.” Constitutional controversies are **relatively rare** when the Constitution speaks in this concrete, rule-bound way.

But often constitutional provisions are **elliptical and incomplete**, filled with grand abstractions. The Constitution gives Congress the power “to regulate Commerce . . . among the several States,” and it forbids Congress from making any “law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” The Constitution provides that “No State shall make or enforce any law” that denies “to any person within its jurisdiction the equal protection of the laws” or that deprives “any person of life, liberty, or property, without due process of law.” Terms like “commerce,” or “the freedom of speech,” or “equal protection,” or “due process of law” are not precise or self-defining.

Over the centuries the **meaning** of these essential but obscure constitutional provisions has been subject to **fierce debate**. Our interpretation of these provisions has evolved dramatically as the nation has developed. In the 19th Century, congressional commerce power did not include the **right to regulate manufacturing or to protect the rights of employees**; these were conceived as matters that states alone could control. But by the end of the 20th Century, congressional commerce power had expanded beyond anything the Framers foresaw or imagined. Congress now routinely enacts laws establishing social security, enforcing fair labor standards, and prohibiting discrimination in employment.

Constitutional change of this kind is **commonplace**. For over 120 years, the **First Amendment’s reach** was quite limited. Government could use criminal law to punish persons who published seditious libel, which is speech that challenges public authority. But through cases decided in the last eighty years, we have come to understand that the primary purpose of the First Amendment is to **protect from criminal sanctions speech that criticizes the government**. Similarly, the Equal Protection Clause was originally interpreted to authorize racial segregation that was “separate but equal.” But in 1954 the Clause was reinterpreted in the famous case of *Brown v. Board of Education* to prohibit racial segregation.

Although the literal text of these important constitutional provisions has remained unaltered, the meaning of these texts has dramatically evolved. All historians agree that **the interpretation of important constitutional texts has constantly changed over the life of the nation**. What is the significance of this fact?

For some, change of this kind is a **problem**. They look to the Constitution to stand outside of politics and fix the structure of our government. They believe that the chief function of constitutional law is to offer **permanence and stability**. On this account, the Constitution’s authority flows from consent, from the fact that “We, the People” have ratified the document in 1789. If change is necessary, we must pursue the arduous amendment procedures of Article

V to obtain the authority necessary to alter the text of the Constitution. The Constitution's authority thus flows solely from formal acts of ratification; the Constitution can change only through the rigorous amendment procedures specified in Article V.

This view of the Constitution is well illustrated by Justice Scalia's dissent in the recent case of *Obergefell v. Hodges* (2015) in which the Court held that the Due Process Clause and the Equal Protection Clause prevent states from refusing to marry same-sex couples. Objecting to the Court's opinion, Justice Scalia asserted:

When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.

In this passage Justice Scalia adopts a view of constitutional interpretation that is called "originalism."

Originalism holds that the Constitution should be interpreted as a contract whose meaning is fixed at the moment of ratification.

Some aspects of the Constitution do seem to conform to this account. There are certain parts of the Constitution which we do not experience as ambiguous. These portions of the Constitution in fact seem to stand outside politics and to structure the "rules of the road" for our political life. Good examples are the constitutional rules establishing a bicameral Congress or providing that a presidential veto can be overruled only by a two-thirds vote of the Senate and the House. These aspects of the Constitution can be changed, if at all, only through the arduous process of constitutional amendment.

But this account does not well describe other, more ambiguous parts of the Constitution. The Court has not bound its interpretation of the Constitution's more abstract clauses, the clauses that set forth fundamental rights, by the understandings of those who ratified these clauses. The Court's interpretation of "freedom of speech" or "equal protection of the laws" or "due process" has evolved continuously since the ratification of these constitutional texts.

Evolving interpretation

Frontiero
v.
Richardson

Brown v.
Board of
Education

Obergefell
v. Hodges

A good example is how the **Equal Protection Clause** came to be interpreted to prohibit sex discrimination. For more than 130 years after the ratification of the Constitution, **states treated women unequally to men**. State laws prevented women from becoming lawyers and obtaining many other forms of employment, and even denied women the right to vote. But women organized, first to obtain the right to vote, and then to secure legislation guaranteeing equality of treatment by government and employers. Although an attempt to amend the Constitution to prohibit sex discrimination failed, the Court nevertheless in 1973 signaled that the Equal Protection Clause would henceforth be interpreted to **require the equal treatment of women**. Writing a plurality opinion for the Court, Justice Brennan in *Frontiero v. Richardson* (1973) explicitly noted that the Court would change its interpretation of the Equal Protection Clause in part because “over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications.” The Court adjusted its interpretation of the Equal Protection Clause to incorporate the **new national ideal of gender equality, which had emerged through decades of political contestation and mobilization**.

The Court’s canonical decision in ***Brown v. Board of Education*** (1954), which interpreted the Equal Protection Clause to forbid racial segregation, reflects exactly this kind of **sensitivity to altered popular values**. Those who ratified the Fourteenth Amendment did not understand the Amendment to require desegregated public schools. But racial discrimination had become unacceptable to most Americans in the years after our struggle against Nazism in World War II. In our own time, Justice Kennedy’s opinion for the Court in *Obergefell* struck down prohibitions on same-sex marriage in part because of the **extensive national “deliberation”** that the Court believed had caused the country to change its views regarding the justice of same-sex marriage. Political scientists have shown time after time that **judicial review regularly and unavoidably translates deeply-held popular convictions into positive constitutional law**. In this

way *both* liberal *and* conservative understandings have come to shape our interpretation of the Constitution. It is plain, for example, that the Court's recent creation of individual Second Amendment rights owes far more to the values of mobilized gun advocates of the 1980s and 1990s than to 18th century ideas. The Court's recent efforts to restrict affirmative action, or to limit the reach of federal power to regulate interstate commerce, or to limit Congress's authority to enact legislation enforcing the Fourteenth Amendment, are all responsive to contemporary conservative political mobilization.

Throughout American history, in contexts both liberal and conservative, the Court has consistently interpreted the Constitution to reflect fundamental contemporary values. The Court has rarely regarded the Constitution as a petrified contract, fixed by terms ratified in the distant past. It has instead appealed to a Constitution whose authority must be earned in each generation. Seen from this angle, the Constitution by which we are governed is plainly not outside of politics. Its authority depends, in part, on its historical lineage and, in part, on its capacity to express living Americans' understanding of their deepest ideals.

Of course in a large and heterogeneous nation there is bound to be disagreement about the meaning of the Constitution's commitments to fundamental rights. For this reason, some fear that if the Court were to interpret the Constitution in ways that respond to contemporary ideals, our constitutional order might be undermined by instability and insecurity. This is the fear that underlies originalism as a theory of constitutional interpretation. The hope is that by limiting the Constitution's interpretation to its original meaning, we can avoid conflict. In the name of this fear, originalists would bind constitutional meaning to the views of those who first consented to the Constitution in 1789, or to the Bill of Rights in 1791, or to the Fourteenth Amendment in 1868.

This theory has a superficial plausibility. Its attractiveness, however, dissolves on closer inspection. No American alive today was involved in the ratification of these constitutional texts. How, we may ask, are contemporary Americans bound to a contract they did not make? Is it reasonable to ask living Americans to identify with the Framers' agreement when many—for example, women and African Americans—would not have been permitted to vote had they been alive at the time of the Founding or even when the Fourteenth Amendment was ratified? The prospect of being bound to a document whose meaning was completely fixed by strangers would likely be most alienating. Nor would the infinitesimal possibility of amending the Constitution substitute for the lack of consent by living Americans. Unlike the Constitution of the State of California or the Constitution of India, it is almost impossible to amend the Constitution of the United States. Since 1789, the nation has used the procedures of Article V to ratify only 27 amendments. Instead we have relied on other provisions of the Constitution to enable constitutional change, including those authorizing the democratically elected Congress and President to create federal courts and to appoint federal judges.

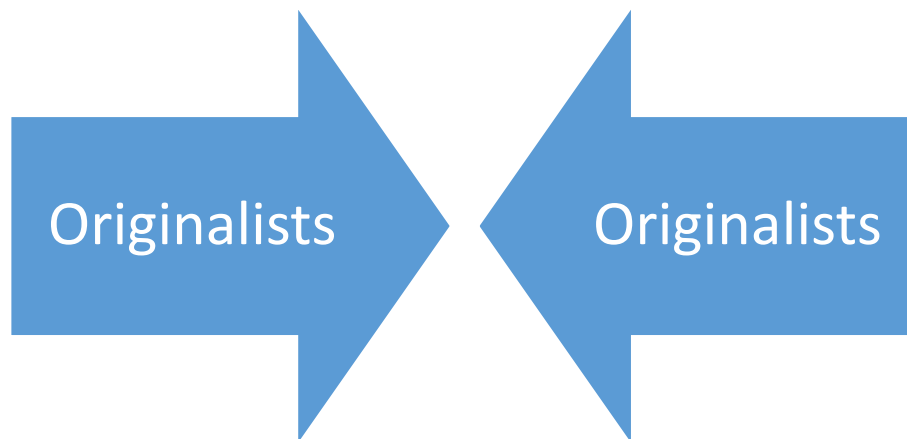
Originalists like Justice Scalia claim to reject change that occurs through judicial interpretation. They argue that judges should instead be bound to the Constitution's original meaning because this will create a neutral and mechanical way to settle disputes over the Constitution's meaning. The argument may be appealing, but its logic does not hold. Original meaning is not a simple fact waiting to be uncovered. If it were, the relevant experts would surely be historians who know far more about the facts of the past than judges. But historians rarely understand legal texts to have one meaning for all who ratify them. Uncovering "original meaning" requires interpretive judgment. That is why originalists frequently disagree among themselves. There were originalists arguing on both sides of the *Obergefell* case—some claiming that bans on same-sex marriage were not prohibited by the original meaning of the Constitution, and some claiming that they were. Because there are many ways to determine the "original meaning" of the Constitution, originalists often seem to "discover" original meanings of the Constitution that are consonant with their own values and ideals.

If it appears strange to interpret the Constitution in light of contemporary "deliberation," consider that constitutional interpretation has proceeded in this way since the beginning of the Republic when the country debated the constitutionality of a national bank. Judges interpreting the Constitution regularly look to the nation's history, to the Constitution's text, to the structure of American government, to judicial precedent, to practical reason, and to the nation's ideals as they decide the Constitution's meaning. Judicial interpretations of the Constitution typically embody the stability and predictability that characterize all judge-made law, of which our own common law is a conspicuous example. If the end result of this complex process of decision-making were not consonant with the fundamental values of the American people, the authority of the Constitution would diminish.

Originalists

original meaning of the constitution

contract in time



The point is well illustrated by the case of *Bolling v. Sharpe* (1954). *Bolling* was a companion case of *Brown*; it decided whether Washington, D.C. could operate a school system that was racially segregated. *Brown* had interpreted the Equal Protection Clause of the Fourteenth Amendment, which applies only to states, to prohibit school segregation in the states. But Washington D.C. is not a state; it is instead a federal territory. The Fifth Amendment, which applies to the federal government and was ratified in 1791, contains a Due Process Clause, but not an Equal Protection Clause. In *Bolling* the Court interpreted the Due Process Clause of the Fifth Amendment to prohibit racially segregated schools. This conclusion could not possibly be explained in terms of the original meaning of the Fifth Amendment, because in 1791 slavery was an accepted fact of American life, woven into the very fabric of the Constitution.

Critics of *Bolling* who espoused an originalist theory of constitutional interpretation objected to this anomaly. Yet the Court did not find differences in the text or history of the Fifth and Fourteenth Amendments sufficient to exempt the federal government from the prohibition against racial segregation that *Brown* had announced. Because there was no realistic possibility of amending either the Fifth or Fourteenth Amendments to reflect this conclusion, the Court chose in *Bolling* to use the process of interpretation to align the Constitution with deeply-held American values. If the Constitution had not been interpreted to constrain the federal government as it constrained the states, its authority would have been undermined.

Bolling illustrates that when the Court interprets the Constitution in dialogue with the nation's fundamental values, it helps sustain the Constitution's authority. It is because the Court interprets the Constitution in this way that Americans struggle to persuade each other—and the Court—about the Constitution's meaning. This struggle creates community. Even Americans who disagree about fundamental values are united in their belief that the Constitution is central in American life. This makes our Constitution vibrant and important, in a way that is unique among nations of the world.

In other countries, constitutions are the concern chiefly of legal professionals; in the United States, the **Constitution matters for the people**. This is what President Woodrow Wilson meant when he proclaimed that “the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.” Woodrow Wilson, *Constitutional Government In The United States* 69 (1908).

Consider the recent controversy over **whether the First Amendment prohibits campaign finance reform**. If this issue were truly settled by the meaning of the First Amendment in 1791, there would be no reason for millions of Americans to debate what First Amendment protections now require; As the country debates this question, **current generations of Americans argue about the meaning of the Constitution’s commitment to liberty and to democracy**. Many, outraged by the Court’s decisions striking down laws limiting donations to political campaigns, question the Court’s authority to restrict campaign finance legislation—just as other Americans question the Court’s authority constitutionally to restrict the regulation of health care, affirmative action, or abortion. Persistent debate of this kind reaffirms the centrality of the Constitution to American life; it also informs the Court about how living Americans understand constitutional meaning.

Some fear that courts interpreting the Constitution in this fashion converts the United States into a juristocracy, in which—to use Justice Scalia’s vivid phrase—**“a black-robed supremacy”** (*United States v. Windsor* (2013) (Scalia, J., dissenting)) can strangle the democratically-elected branches. This is a **danger** with which the nation has lived since its Founding.

The power of judicial review has in fact been abused, at times egregiously so. Unwise judges can thwart democracy whether they adopt an originalist theory of interpretation, as they did in the infamous case of *Dred Scott v. Sandford* (1857), which held that African slaves and their descendants could not be citizens of the United States; or whether they adopt some other theory of constitutional interpretation, as they did in the equally infamous case of *Lochner v. New York* (1905), which struck down a statute limiting the number of hours bakers could work each week.

The important thing to remember, however, is that the **Court never has the last word**. When the Court pronounces its view of the Constitution, it is as likely to spark controversy as to end it. This point was made in a pithy and amusing way by the comedian Jon Stewart in his book entitled *America (The Book): A Citizen’s Guide to Democracy Inaction*. Stewart reports in his discussion of *Roe v. Wade* (1973) that “[t]he Court rules that the right to privacy protects a woman’s decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue.” Jon Stewart, et al., *America (The Book): A Citizen’s Guide to Democracy Inaction* 90 (2004). Stewart’s irony implies what any historian would affirm:

although Supreme Court decisions exert immense authority, constitutional interpretations are truly and finally settled only when the people accept their wisdom, not simply when the Supreme Court speaks.

If the Court interprets the Constitution in ways that **mistake the actual commitments of Americans, Americans will oppose its decisions.** In the end, Alexis de Tocqueville, as in so many things, correctly perceived the nature of our constitutional polity when he observed that the “power” of Supreme Court justices:

*“Is immense, but it is power springing from opinion. [Justices] are all-powerful so long as **the people consent to obey the law**; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it. The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; **they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.**”*

Alexis De Tocqueville, *Democracy In America* 150-51 (J.P. Mayer ed., George Lawrence Trans., 1969).

De Tocqueville’s vision of judicial review is profoundly democratic. He affirms that courts can lead and should guide public opinion, but that in the long run courts are tethered to public opinion. The question is always whether the Court has interpreted the Constitution in a way that truly expresses American convictions. For this reason, **we may call this understanding of judicial review “democratic constitutionalism.”**

Questions for Self-Check

What is the meaning of constitutional law?
What is the meaning of constitutionalism?
What is the meaning of democratic constitutionalism?
What is the meaning of originalism?
What are the most important cases related to the Equal Protection Clause?
What are the negative aspects of originalism?

Home Assignment

Read the paper Rainer Arnold: National and Supranational Constitutionalism in Europe, published in: New Millenium Consitutionalism: Paradigms of reality and Challenges, NJHAR, Yerevan, 2013 (121-131. pp.)

Answer the following question: What are the most important characteristics of the supranational constitutionalism?

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