# Original In[compe]tents: Rightwing Ideologues and the Supreme Court

by Alan Singer, editor, *Social Science Docket*

I want to start with an admission. Although article 3 section 1 of the United States Constitution lists no qualifications for judges other than "good behavior" while in office, I do not believe I am qualified to be a Justice of the United States Supreme Court. It is not because I am trained as a teacher and an historian and instead of as a lawyer. It is primarily because I am an activist with a political commitment to my fundamental beliefs and not to the basic integrity of the legal system. One of my heroes is William Lloyd Garrison, who publicly burned a copy of the Constitution at an anti-slavery rally in Framingham, Massachusetts on July 4, 1854. Garrison (1845) believed the Constitution, because it permitted slavery, was a "covenant with death," an "agreement with Hell," and a "refuge of lies."

I see the courts and laws, including the U.S. Constitution, as mechanisms for achieving broader social goals. However, Supreme Court Justices must defend the principles of the Constitution even when they run counter to their own views. It is because Justices swear an oath to defend the United States Constitution as the first law of the land, and for the other reasons that I disqualify myself, that I describe former Chief Justice William Rehnquist and Associate Justices Antonin Scalia and Clarence Thomas as "Original Incompetents" who should never have been appointed to the Supreme Court. If Scalia and Thomas had any integrity, they would resign. Of course, if they had integrity, they never would have been nominated for the court by President Reagan and the earlier President Bush.

Discussion of the meaning of the Constitution, how it should be interpreted by judges, and the qualities the President of the United States and the Senate (who respectively nominate and approve candidates) should look for in potential appointees to the highest court, took on immediacy with the retirement of Associate Justice Sandra Day O'Connor and the death of Chief Justice William Rehnquist. Vacancies on the court give President George Bush an opportunity to reshape Constitutional jurisprudence and the future of the country. During the 2004 Presidential election campaign, he promised conservative audiences who share his limited world view, religious beliefs, and [mis]conceptions of the United States Constitution, to appoint judges in what he called the Scalia-Thomas "mold" (Toner, 2005: 1).

## Recent Senate Hearings

Unfortunately, the Senate hearings preceding the appointment of John Roberts as Chief Justice (replacing Rehnquist) and Samuel Alito as Associate Justice (replacing O'Connor) shed little light on constitutional issues. Both nominees were lauded for their intellect and "judicial temperament," while they refused to answer questions about their philosophies. At a time when President Bush and his supporters were trying to move the court significantly to the right, the public was being told that ideas did not matter.

The debate over the meaning of the United States Constitution and how to uncover it is not new. In the early twentieth century, Finley Peter Dunne (Levy, 1988, ix), speaking through his fictional character Mr. Dooley, a philosophical Irish bartender, wrote "Tis funny about th' constitution. It reads plain, but no wan can undherstant it without an interpreter." Part of the problem is that there is no official guidebook to the Constitution. The Constitution was written in secrecy and James Madison, Secretary of the Constitutional Convention and the 4th President of the United States (who certainly should know), warns that "As a guide in expanding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention have no authoritative character" (Levy, 1988, 1).

In his concurring opinion in Graves v. New York, 306 US 466 (1939), United States Supreme Court Associate Justice Felix Frankfurter wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we [the Justices] have said about it." Yet despite this philosophical position on interpreting the Constitution, a cautious conservative judge like Frankfurter was able to support the unanimous 1954 Brown v. Topeka, Kansas Board of Education decision that drew on modern sociological evidence to demonstrate the impact of racial segregation on African Americans. Evidently Frankfurter understood that textual analysis alone was insufficient for deciding issues that had not been clearly addressed in a document written 167 years before the case was decided.

The idea that the Constitution should be understood as a "living" document subject to continual reinterpretation was clearly endorsed by Thomas Jefferson, the third President of the United States and one of the primary authors of the Bill of Rights. In a letter written in 1810 that is quoted on the walls of the Jefferson Memorial in Washington DC, Jefferson explained, "I am not an advocate for frequent changes in laws and Constitutions, but laws must and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors" (Jefferson, 1810). Clinton Rossiter, a relatively conservative political scientist writing in the 1960s, supported Jefferson's view. According to Rossiter, "The one clear intent of the Framers was that each generation of Americans should pursue its destiny as a community of free men" (Levy, 1988, xiv).

### Justice Taney and Dred Scott

While few of its proponents want to be identified with him, one of the principle 19th century proponents of "original intent" was Supreme Court Chief Justice Roger Taney, author of the Dred Scott (1857) decision. In his decision calling for the reenslavement of Dred Scott and the unlimited extension of slavery into the territories, Taney wrote, "No one. . . supposes that any change in public opinion or feeling, in relation to this unfortunate race. . . should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes" (Levy, 1988: 325). No wonder William Lloyd Garrison wanted the Constitution burned!

According to historian Leonard Levy (1988, xii), the modern debate over interpreting the Constitution started in the 1980s when President Ronald Reagan, Attorney General Edward Meese and Supreme Court nominee Robert Bork started to promote the idea of "original intent." Up until that point, advocates of "original intent" had had no specific political ideology. However, as Reagan and Meese made clear (and as Bork, Scalia and Thomas have continually tried to obfuscate), their goal was not a more accurate interpretation of the Constitution, but finding judges who would ratify a right wing political agenda.

On July 9, 1985, at a meeting of the American Bar Association in Washington, D.C., Attorney General Edwin Meese III, argued that "The intended role of the judiciary generally and the Supreme Court in particular was to serve as the 'bulwarks of a limited constitution' . . . . As the "faithful guardians of the Constitution," the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution. . . . What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. . . . Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was."

### Ronald Reagan and "Original Intent"

President Reagan gave his personal stamp to the idea of "original intent" in a February 11, 1988 speech to a Conservative Political Action Conference dinner. President Reagan claimed that his goal was respect for the original intent of the authors of the Constitution. "For two decades we've been talking about getting justices on the Supreme Court who cared less about criminals and more about the victims of crime, justices who knew that the words 'original intent' referred to something more than New Year's resolutions and fad diets. . . The great legal debates of the past two decades over criminal justice have, at their root, been debates over a strict versus expansive construction of the Constitution."

However, President Reagan's actual agenda had little to do with Constitutional principles. He argued in the same speech, without references or evidence, that "The Constitution, as originally intended by the framers, is itself tough on crime, and protective of the victims of crime" and he blamed liberalism for

permissiveness in the national culture. The President wanted strict constructionists on the Supreme Court who would endorse conservative efforts to have the nation say "'no' to drugs, and 'yes' to family, and 'absolutely' to schools that teach basic skills, basic values, and basic discipline." If President Reagan had bothered to read the Constitution or the "Notes of Debates in the Federal Convention of 1787 Reported by James Madison" (Koch, 1985), he would have discovered that none of the issues he listed were included in the document or discussed by the framers.

Presidents Reagan and both Bushes denounced "activist," supposedly liberal, judges who they believed were reinterpreting the Constitution to suit their personal agendas. However, between 1994 and 2004, it was the rightwing of the court, Justices Thomas (65%), Kennedy (64%) , Scalia (56%) and Rehnquist (46%), who voted most consistently to declare newly enacted federal legislation unconstitutional (Gerwirtz, 2005:A19).

### Robert Bork and "Original Intent" Theory

The philosophical champion of "original intent" was federal judge Robert Bork, whom President Reagan nominated for the Supreme Court in 1987. At his nomination hearings, Judge Bork argued that "when a judge goes beyond [his proper function] and reads entirely new values into the Constitution, values the framers and ratifiers did not put there, he deprives the people of their liberty." Bork, who was rejected by the Senate, later wrote that Justices must be guided by "the meaning understood at the time of the law's enactment. . . all that counts is how the words used in the Constitution would have been understood at the time. . . . The interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people" (Bork, 1990).

The most articulate opponent of a doctrine of "original intent" was William Brennan, an actual conservative who was appointed to the Supreme Court by President Dwight Eisenhower in 1956. Brennan rejected the idea that it was possible to know "the intent of the Framers" and argued that "We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans." He accepted the responsibility to "look to the history of the time of framing and to the intervening history of interpretation," but felt "the ultimate question must be, what do the words of the text mean in our time?"

"The genius of the Constitution," according to Justice Brennan, "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time." He felt that Supreme Court Justices had no choice but to "adapt our institutions to the ever-changing conditions of national and international life."

### Justices Scalia and Thomas

Justices Antonin Scalia and Clarence Thomas have attempted to skirt Brennan's criticism of "original intent" by defining their position as a combination of what they call "textualist" and "originalist ," however, the difference, as far as I can see, is largely semantic. In a speech at the Catholic University of America in 1996, Scalia argued that "If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. . . . The words are the law." Scalia rejects the idea of an "evolving" Constitution that recognizes "all sorts of rights that clearly did not exist at the time." Justice Scalia conceded that "Originalism has a lot of problems. . . . Sometimes it's awful hard to tell what the original meaning was. . . . But the real problem is not whether it's the best thing in the world, but whether there's anything better."

Scalia may not like it, but the only way a judge can ascertain the original meaning of what are frequently vague phrases, is to examine the intentions of the authors. This problem arose very early in the national government in the case of *Chisholm v. Georgia* (1793) when neither the federal courts nor the legislative and executive branches could agree on the meaning of the Constitutional promise of state sovereignty because they could not agree on the implications of the word "sovereignty" as used in the text (Levy, 1988:56).

Justice Thomas echoes Scalia's position in a 2001 lecture at the American Enterprise Institute for Public Policy Research in Washington, D.C. He conceded that "reasonable minds" might differ on the exact meaning of the Constitution, "but that does not mean that there

is no correct answer, that there are no clear, eternal principles recognized and put into motion by our founding documents. . . . The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean; not what we judges think it should mean."

Associate Justice Stephen Breyer has been sharply critical of justices who espouse "textualist" or "originalist" doctrines. In a series of lectures delivered at New York University in 2001, Breyer argued that Supreme Court Justices needed to focus on the consequences of laws and their decisions, and not just text. He felt that judges need to take "greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts. . . . [I]ncreased emphasis upon that objective by judges when they interpret legal text will yield better law – law that helps a community of individuals democratically find practical solutions to important contemporary problems" (Breyer, 2005: 5-6). He warned that "Literalism has a tendency to undermine the Constitution's efforts to create a framework for democratic government" and is "inconsistent with the most fundamental original intention of the Framers themselves" (131-132).

I know that this will come as somewhat of a surprise at this point in the essay, but I think Justice Brennan is wrong when he says that we cannot know the original intent of the framers of the Constitution. I believe, and will attempt to demonstrate, that we can. For me, the real problem is that Reagan, Meese, Bork, Rehnquist, Scalia and Thomas are so blinded by rightwing ideology that they cannot see what the "original intent" or the meaning of the "text" is.

A clue to the "original intent" of the framers actually appears in Brennan's 1985 speech. According to Brennan, "The Constitution on its face is . . . a blueprint for government. And when the text is not prescribing the form of government it is limiting the powers of that government. The original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government." The "original intent" of the framers of the Constitution was not the institutionalization of a particular legal principle or a specific law, nor was it the resolution of the fundamental conflicts dividing the new country. It was the creation of a "blueprint for government" based on a complex system of checks, balances and compromises that would allow the new country to resolve issues as they arose in the future. On every major substantive conflict, the framers took a pass, and opted for a mechanism rather than a solution.

This interpretation is consistent with what James Madison understood to be the purpose of the Constitution. One of the earliest debates in the first Congress was on a bill to establish the Department of Foreign Affairs. When Madison spoke to the issue, he explained that "The decision that is at this time made will become the permanent exposition of the Constitution and on a permanent exposition of the Constitution will depend the genius and character of the whole government." Therefore, Madison stressed, the decision must "retain that *equilibrium* [italics added] which the Constitution intended" (Levy, 1988: 6). This explanation of the "original intent" of the framers is also supported by Madison's arguments in favor of the ratification of the Constitution in the Federalist papers.

### Madison Explains "Original Intent"

In Federalist 10 (originally published in *The New York Packet*, November 23, 1787), Madison (Rossiter, 1961) argued that the government created by the Constitution was specifically designed to "break and control the violence of faction" by making it difficult for majorities to change the way the national government operated. The framers were responding to worries that the existing state and national "governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." According to Madison, "To secure the public good and private rights [minority rights, especially the property rights of the wealthy] against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." It is the "original intent" of the framers. They would do this by avoiding "pure democracy," which he considered turbulent and contentious. Instead the framers were proposing a republic with "the delegation of the government. . . to a small number of citizens elected by the rest" of the citizens[white, male, Protestant, property owners, including those who owned other human beings].

The great compromises at the Constitutional Convention and in the initial years of government were all designed to maintain national unity and government stability by promoting equilibrium through balance and compromise, by postponing potentially divisive decisions, and hindering movements for social reform movements or Constitutional change. This system largely worked until the 1850s, when increasingly intense sectional conflict over slavery finally plunged the nation into Civil War.

### The Great Compromises

The great compromises included federalism, the division of governmental responsibility between state and national governments; built-in checks and balances that limited the power of each of the three independent branches of the national government; a bi-cameral legislature where one house had representation based on population and the other house had equal representation for each state no matter its size; the 3/5th Compromise which was intended to balance the voting strength of northern and southern states; the Bill of Rights, which protects the rights of individuals from state power; the amendment process, which protected the property rights of the wealthy, included slaveholders, by making it extremely difficult to modify the Constitution; and, the Missouri Compromise of 1820, which formalized a decision made in 1796 to balance the number of northern and southern states and ensure equal representation in the Senate.

The "original intent" of the framers had nothing to do with promoting family values and religious beliefs or a women's ability to secure an abortion. It had nothing to do with examining the minds of the authors of the Constitution to uncover their deepest biases and moral indiscretions. It had nothing to do with searching the text for the real 18th century meaning of the words. Justice Brennan was right, even when he was wrong. The "original intent" of the framers was to create a government that would support our ability to read the Constitution in the only way that we can: as Twenty-first Century Americans." "The ultimate question must be," as Brennan argued so eloquently, "what do the words of the text mean in our time?"

A rigid commitment to discovering ultimate meaning through a slavish examination of original "text" can be seen in a number of intellectual traditions, including Roman Catholic rationalism as developed by Thomas Aquinas, dogmatic Marxists in the Stalinist era, fundamentalists within all the major religions, and even academic Shakespearean scholars. Each of these traditions believes ultimate truth is imbedded in its document and can only be discovered through careful textural analysis. Because they believe their truths are universal, they act as if they were divinely inspired rather than the work of human beings and ignore as meaningless the historical contexts of the documents. Textualists may make good academics, but they make lousy judges. Warning against this type of dogmatism, Federal Judge Learned Hand (1944) argued that "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias."

In a 2002 speech at the Georgetown University Law Center, Senator Edward M. Kennedy suggested standards for judicial appointees that make a lot more sense. They include "A commitment to the core constitutional values embedded in the fabric of our democracy - freedom of speech and religion; the right to privacy; and equal protection and due process under the law. . . . . A dedication to equality for all Americans, especially those who have been denied their full measure of freedom, such as women and minorities. A respect for justice for all whose rights are too readily abused by powerful institutions, whether by the power of government itself or by giant concentrations of power in the private sector. Respect for the Supreme Court itself, for our constitutional system of government, and for the history and heritage by which that system has evolved, including the relationship between the federal government and the states, and between Congress and the President. And, finally, possession of the special qualities that enable judges to meet their own important responsibilities - qualities often described as fairness, impartiality, open-mindedness, and judicial temperament."

Whatever you may think of Senator Kennedy, it is an interesting set of criteria, especially the ideas of "respect for the Supreme Court itself, for our constitutional system of government, and for the history and heritage by which that system has evolved" and "fairness, impartiality, open-mindedness, and judicial temperament." Personally, I can live with Supreme Court Justices who have different views than mine, true conservatives appointed by Republican

Presidents such as Earl Warren and William Brennan (Eisenhower), Harry Blackmum (Nixon), Sandra Day O'Connor and Anthony Kennedy (Reagan) and David Souter (Bush I), if they remember Judge Hand's comments on the "spirit of liberty" and possess these qualities.

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## Historian Howard Zinn Discusses the Constitution

Source: "It's Not up to the Court," *Progressive*, November, 2005

"There is enormous hypocrisy surrounding the pious veneration of the Constitution and 'the rule of law.' The Constitution, like the Bible, is infinitely flexible and is used to serve the political needs of the moment. When the country was in economic crisis and turmoil in the Thirties and capitalism needed to be saved from the anger of the poor and hungry and unemployed, the Supreme Court was willing to stretch to infinity the constitutional right of Congress to regulate interstate commerce. It decided that the national government, desperate to regulate farm production, could tell a family farmer what to grow on his tiny piece of land. When the Constitution gets in the way of a war, it is ignored. When the Supreme Court was faced, during Vietnam, with a suit by soldiers refusing to go, claiming that there had been no declaration of war by Congress, as the Constitution required, the soldiers could not get four Supreme Court justices to agree to even hear the case. When, during World War I, Congress ignored the First Amendment's right to free speech by passing legislation to prohibit criticism of the war, the imprisonment of dissenters under this law was upheld unanimously by the Supreme Court . . . . It would be naive to depend on the Supreme Court to defend the rights of poor people, women, people of color, dissenters of all kinds. Those rights only come alive when citizens organize, protest, demonstrate, strike, boycott, rebel, and violate the law in order to uphold justice."

# Debating Original Intent and the Meaning of the United States Constitution

**Instructions:** Working in your teams, examine each quotation below and complete the chart. The quotations are arranged chronologically. Working individually, use the information from your chart to write a 500-word essay explaining your views on the debate over original intent and the meaning of the Constitution. In your essay, refer to specific quotes and authors that agree or disagree with your point of view.

| | Author | Year | Position | Views on Interpreting the Constitution |
|---|---|---|---|---|
| A | | | | |
| B | | | | |
| C | | | | |
| D | | | | |
| E | | | | |
| F | | | | |
| G | | | | |
| H | | | | |
| 1 | | | | |
| J | | | | |

A. “I am not an advocate for frequent changes in laws and Constitutions, but laws must and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”
- Letter from former President Thomas Jefferson (1810)

B. “[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”
- Associate Supreme Court Justice Felix Frankfurter (1939)

C. “The intended role of the judiciary generally and the Supreme Court in particular was to serve as the “bulwarks of a limited constitution.” The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.” – United States Attorney General Edwin Meese (1985).

D. “To remain faithful to the content of the Constitution . . . an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. . . . But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. . . . We current Justices read the Constitution in the only way that we

can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time?"
- Associate Supreme Court Justice William J. Brennan, Jr. (1985)

E. "The judge's authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or their representatives voted for. . . . [W]hen a judge. . . . reads entirely new values into the Constitution, values the framers and ratifiers did not put there, he deprives the people of their liberty.
- Robert Bork, defeated nominee to become an Associate Justice of the Supreme Court (1987)

F. "The great legal debates of the past two decades over criminal justice have, at their root, been debates over a strict versus expansive construction of the Constitution. The Constitution, as originally intended by the framers, is itself tough on crime, and protective of the victims of crime."
- President Ronald Reagan (1988)

G. "I belong to a school, a small but hardy school, called "textualists" or "originalists" . . . . The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated [written]. . . . If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. . . . The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the intent of our legislators, but by the laws which they enacted, which are set forth in words."
- Associate Supreme Court Justice Antonin Scalia (1996)

H. "When interpreting the Constitution and statutes, judges should seek the original understanding of the provision's text, if the meaning of that text is not readily apparent. . . . [S]trict interpretation must never surrender to the understandably attractive impulse towards creative but unwarranted alterations of first principles."
- Associate Supreme Court Justice Clarence Thomas (2001)

I. "Literalism has a tendency to undermine the Constitution's efforts to create a framework for democratic government, . . . it is inconsistent with the most fundamental original intentions of the Framers themselves."
- Associate Supreme Court Justice Stephen Breyer (2001)

J. "In reviewing the record of a judicial nominee, I believe that the most appropriate standards include the following: A commitment to the core constitutional values embedded in the fabric of our democracy - freedom of speech and religion; the right to privacy; and equal protection and due process under the law. These are the cherished rights that we must preserve for generations to come. . . . A dedication to equality for all Americans, especially those who have been denied their full measure of freedom, such as women and minorities. A respect for justice for all whose rights are too readily abused by powerful institutions, whether by the power of government itself or by giant concentrations of power in the private sector. Respect for the Supreme Court itself, for our constitutional system of government, and for the history and heritage by which that system has evolved, including the relationship between the federal government and the states, and between Congress and the President. And, finally, possession of the special qualities that enable judges to meet their own important responsibilities - qualities often described as fairness, impartiality, open-mindedness, and judicial temperament."
- United States Senator Edward Kennedy (2002)

# Teachers Respond to the Debate Over Original Intent

Jayne O'Neill, Passaic County Technical Institute, Wayne, NJ (President, NJCSS): We cannot interpret the Constitution exactly as it was written over two hundred years ago. Our understanding of the Constitution has to change as the country and world change. We are not the same people and we do not have the same issues. This requires that the Constitution be interpreted in a different way. In my classes, I take current issues and we try to understand our rights as described in the Constitution. We explore Constitutional interpretations, the writings of the framers, Supreme Court decisions, and our society today, and look at ways that they match and ways that they seem to be in contradiction.

John McNamara, West Windsor-Plainsboro (NJ) Regional School District: The original intent of the framers of the Constitution is debatable. The best way to address this debate is to provide students with the actual document itself to read and then to ask them thought provoking essential questions that promote discussion. For example, "Could the Constitution have been written without compromises?"; "Did the Constitution grant either the national or state governments too much power?"; and "Which level of government has more influence on our lives today?" The combination of reading excerpts from the Constitution with questions that allow for multiple answers encourages students to arrive at their own opinions. I provide supplemental secondary sources, but the major thrust of instruction is reading the Constitution itself. One of the ironies is that Americans hold the Constitution in very high esteem, but I wonder how many students actually read the text itself. In my experience, students have very similar conversations and disagreements as those we hear taking place among scholars, politicians teachers and clergy. When that happens, I know that a lesson is successful.

Allison Brew, Greenwich (NY) CSD: In seventh grade, I teach about the Constitution and national government. I focus on major themes such as separation of powers, checks and balances, the reason for the Bill of Rights and what the framers of the Constitution had in mind when they wrote it. With seventh graders, I do not get too involved with the actual language of the document. I know people debate what words written in the eighteenth century actually meant to the Founders. I am not sure if it really matters that much. I think that in most cases, the Constitution should be interpreted according to what these ideas mean in today's world. Supreme Court Justices should base their decisions on the specifics of a situation. In some cases the issues and the language of the Constitution are clear. Sometimes it can be read in a lot of different ways and it makes more sense for the Court to interpret the Constitution using a modern framework.

Sherida Cowans, Uniondale (NY) CSD: In the Freewill Baptist Church which I attend with my grandmother, the text of the Bible is seen as the word of God and is held up to members of the congregation as God's law. Despite the name of the church, there really is no space for free will. Many people view the U.S. Constitution in a similar way. In both cases, I think it is a mistake. The point of the Enlightenment (the time period during which the Constitution was written and ratified) was to promote the ability of people to think and understand, not just repeat interpretations offered by people in early eras. The world has changed in the last 200 years and our understanding of the text of the Bible and the Constitution must change with it. Otherwise we remain trapped in a world that limited full human rights to White, male, Protestant property holders. I see fundamental contradictions in the text of the Constitution and the original intent of the founders. The preamble claims to promote the will of the people, but its authors actually represented an elite minority. It claims to establish justice, but my ancestors were enslaved.

Thomas Siembor, Wayne Central HS, Ontario Center, NY: The Supreme Court should be the interpreter of the Constitution, and the Framers' intentions. The loss of Sandra Day O'Connor on the bench, whose work, *The Majesty of the Law*, points out that discerning that intent is an awesome and difficult task, may lead us to a more Constructionist court. The Supreme Court has to protect Americans freedoms that were paid for with the blood of patriots. New Justices should be appointed because of their ability to fairly adjudicate the law, not because of their political affiliation. The Rule of Law is a sacred gift to Americans and the Court is the defender of that gift. I am greatly

concerned with the diminishment of our freedoms during times of war, particularly because of the Patriot Act. This Act represents legislation granting extensive and intrusive powers to the Federal Government for information-gathering and surveillance, and has become a conservative precedent for similar legislation. I feel strongly that as an educator it is important to raise all issues in as an unbiased manner as possible with students. As Americans, we have to be able to criticize our government openly without fear of being branded with the label of "anti-American."

Kerry Schaefer, MacArthur High School, Levittown, NY: As a woman, it is hard for me to honestly understand the original intent of the Founding Fathers. I do not feel that I am a part of their vision for America. There were no women present at the Constitutional proceedings. No women were on the Supreme Court (until recently) to help establish legal precedents. The goal of the founders was to ensure economic and political freedom from the British monarchy for themselves, but not for others. The original intent of the Constitution is a relic of the past and should have no bearing on the modern day interpretation of the Constitution.

Charles De Jesus, MS 72, Queens, NY: Lawyers should never be appointed to the Supreme Court. By their nature, lawyers are trained to function as adversaries, but Supreme Court decisions should never be reduced to a win/lose contest. Justices should be legal scholars and historians rather than lawyers. They should be able to base decisions on their study of the meaning of the Constitution in the past and present as well as its implications for the future. The text of the Constitution can only be a guide. Its meaning derives from who we are, how we perceive the world and our willingness to accept and adapt to change in each new age.

Oliver Schnabel, John Bowne High School, Queens, NY: The genius of the United States Constitution is not its individual articles or its clever compromises. Rather, its genius lies in one brilliant notion – the malleability of the Constitution. It is meant to change with the times and the expanding philosophy of a society and its people. This notion is often overlooked in arguments about original intent that tend to view the document as some sort of sacred and inflexible text. The fact that original intent theory is presented by conservatives is irrelevant. It would be equally wrong if it were championed by liberals. The doctrine is misapplied by judges who seek to justify their own beliefs and to deny their personal motives.

Cheryl Bachmann, West Milford (NJ) High School: As a teacher, I see my major task as broadening the intellectual horizons of my students. We look at the meaning of the Constitution at a number of places in the curriculum. It is a major topic when we examine the Civil Rights movement, women's rights and reproductive freedom, and the experience of immigrant groups. There are many issues that students do not usually think about that are of great importance to our future as a nation. One of the big issues being debated about the original intent of the United States Constitution is whether it guarantees Americans the fundamental right to privacy. I teach students about the Patriot Act and we discuss the documentary film "Unconstitutional," which charges that the Patriot Act, passed after the attack on 9/11, is an invasion of our Constitutional right to privacy. Students are taken aback when they learn how the government is able to find out about the details of their lives. These are sensitive issues to teach about. They can make students uncomfortable and as teachers, we have to be careful not to just promote our own views. But we cannot afford to ignore these questions either. They are the key questions that students, as citizens and future leaders, must consider and develop views about. The founders of the nation wrote the Constitution to protect the freedom of Americans and of people who would come to this country in the future. This freedom will only survive if we defend it from those who want to narrow and undermine Constitutional protections.

Denis Williams, Nutley (NJ) High School: I see the Constitution as a living, breathing document that must change with the times. It must be fluid and open to reinterpretation. Obviously, some clauses leave little room for interpretation. The third amendment specifically bars the stationing of troops in private residences. However, other clauses offer wide leeway for discussion. The Federalist Society and other conservative groups think that they alone understand what the Founding Fathers intended. That is a very dangerous idea and ignores all the debates and compromises that went into the writing of the

Constitution. Many of the people who claim to know the original intent of the founders often ignore the values of the Enlightenment held by the founders. They conveniently ignore the Founders commitment to human progress and liberation. In my class, I try to examine timeless themes about the human condition and how they both remain consistent and change over time. We look at how these themes reappear in contemporary events and I encourage students to debate issues and develop their own views.

Michael Pezone, Law, Government and Community Service High School, Queens, NY: Merchants, bankers, ship-owners, planters, slave owners, slave traders, lawyers, and land speculators fashioned the Constitution to create a form of government that would protect and expand their interests. Creation and protection of a commercial capitalist state following successful colonialist revolt against Britain represented a progressive historical development. The Constitution thus contains positive and progressive elements, including limitation of arbitrary power and protection against religious influence on government. At the same time, the Constitution is a conservative document that reflects the intention of the Framers to preserve class domination and prevent majority rule. Anti-democratic aspects of the Constitution include an unrepresentative Senate, non-popular election of President, limitation of the franchise, protection of slavery, an extraordinarily difficult amendment process, and an enormously powerful Federal judiciary that has functioned as a reactionary institution throughout US history. Bourgeois class domination depends in large part on the workings of ideology. Formal, ideal conceptions of neutral government, equal rights, and rule of law are embraced and substituted for recognition of the brutal exploitation at the heart of the actual social order. The notion of the Constitution as a document that embodies universal values of justice and equality is nothing other than an enabling myth. Popular, progressive movements have won important democratic improvements throughout US history, including extension of Constitutional rights and improved life opportunities. Never able to threaten the basic structures of class rule, these reforms nevertheless have met with continuing resistance from conservative and reactionary forces. In the legal arena, such resistance is organized around conceptions of original intent and strict constructionism. Debate about these conceptions occurs on the plane of legal reasoning because the real motivation of the originalists cannot be acknowledged given the constraints of an ideological system that obscures the real nature of the Constitution. Originalists are committed to overturning progressive legal-historical developments that, they correctly perceive, violate the Framers' anti-democratic intentions and distort the system they created.

April Francis, Lawrence Road Middle School, Uniondale, NY: The primary qualification for a Supreme Court Justice should be wisdom. They must interpret the Constitution as progressive, insightful, contemporary men and women who recognize the need of each generation to adjust to changing conditions. Change is probably the only constant factor in human history – changing ideas, technology and values. By accepting change, Supreme Court Justices help the Constitution, government and society to adapt. Justices need to be politically astute and capable of defending their positions and explaining them to the public.

Al Moussab, Bloomfield (NJ) High School: The standard narrative that most teachers present to their students is that the framers of the Constitution wanted to organize a government to provide for democracy and protect liberty and that they wrote a “perfect” document. However, I see a document that was created to maintain the social, economic and political class inequalities that existed before the revolution. That was the original intent of the framers of the United States Constitution. Women, African Americans and poorer White indentured servants, as well as farmers and workers remained disenfranchised in the new nation. The Constitution offered them very little in the way of opportunity or equality. The framers held the poor in contempt and saw democracy as dangerous. Compared to the Declaration of Independence and the Articles of Confederation, the Constitution was oppressive. It was designed to keep the top one percent of the wealthy in power and to make changing this system exceedingly difficult. Even the famous compromises were efforts to balance power between the ruling class of the different regions of the new country. I encourage students to examine who the framers of the Constitution actually were. A useful source is a book by Jerry Fresia, *Toward an American Revolution: Exposing the Constitution and Other Illusions* (Cambridge, MA: South End Press, 1988). A lot of students accept the

interpretation that the Constitution opened the door for social change and the creation of a democratic society. Other students argue that conditions could have been a lot better and the document itself could have been improved. My goal is to expose students to a broader spectrum of opinion about the nature of the Constitution so that they can have genuine debates about its meaning. If we only present them with the standard narrative we are really proselytizing.

Janis Mottershead, Memorial Middle School, Eatontown, NJ: The Constitution is the document that defines all of our rights and responsibilities as Americans. Although I see myself as leaning towards a conservative, strict constructionist position, I try not to let that influence my teaching. I know I have a strong personality and I do not feel I should influence the way my students think. Just because I say something does not mean they should agree with me. In fact, I want them to disagree. When they are 18, they can't come back to me and ask me how to vote. While I personally believe our society and the courts need to get back to the original intent of the Constitution, I teach it as a contemporary document. I have students examine the way the Constitution addresses the issues that affect us today. On some issues the Constitution is pretty explicit about what it means, but on other issues there is flexibility built into the document.

Bill Reich, Memorial Middle School, Eatontown, NJ: For me, the crucial thing is preparing students to be informed citizens who will participate in our government. They have to figure out their own views. The Constitution must be seen as a living document. It has been amended a number of times over the years because the world has changed. Students must understand how the amendment process works. I am not so comfortable with judicial activists reinterpreting the Constitution, but I think that has to be addressed on a case by case basis. I am a strong believer in personal freedom and do not want the courts or the government telling me what I can do in my personal life. If my behavior or your behavior does not hurt other people, the government should not be interfering in what you or I do. People have the right to their own morality. That is one of the reasons for the separation of church and state.

Charlie Gifford, Farnsworth Middle School, Guilderland, NY: No matter how many times candidates for appointment to the Supreme Court deny that their personal beliefs affect the outcomes of court decisions, we know from history that the personalities and views of Justices, particularly the Chief Justice, are reflected in decisions. The Warren Court was known for its defense of the rights of people accused of crimes. The Rehnquist Court made a number of decisions limiting the federal government's authority over the states. I wonder how thoroughly the Founding Fathers thought out this particular balance of power. It seems to me that too much is based on fate, the timing of the exits of the justices and who is sitting in the President's chair at a particular moment. The importance of students understanding the dynamics of the Supreme Court and the President's ability to influence decisions through appointments is undeniable. Getting the kids, or adults, to understand how it can directly affect their lives, and why they should care about it, is another task entirely. I find the most effective way is to integrate current controversies into the topics we are studying in the curriculum. We focus on the role of the Supreme Court when we look at Plessy v. Ferguson and Brown v. the Board of Education of Topeka, Kansas. The role of the President and the issue of balance on the court are introduced when we discuss Franklin Roosevelt's battle with the Supreme Court over New Deal plans and his discredited proposal to enlarge the court.

Takiea Simpson, John Adams High School, Queens, NY: Criteria used by a president for judicial appointments must include a candidate's opinion in the debate over original intent. One aspect of the Constitutional debate is clear; the original framers of this great document did not represent me. These wealthy white men did not consider people like me when they constructed the framework for our government. With this in mind, it is impossible to take the constitution literally. We must recognize the brilliance of the document, for if it were not so well constructed this country would have abandoned or replaced it. However, to think that all the sections of the Constitution that deal with the specifics of people from so long ago can govern people of today is a foolish notion.

Vanessa Marchese, Richmond Hill High School, Queens, NY: The original intent of the framers of the Constitution is a mystery. Although it is an interesting debate, it seems that those who promote a strict interpretation of the Constitution have an ulterior motive, which is to push their personal morals onto others. There is no way that the "Founding Fathers" could have been prepared for the world as it is today. 21st Century Americans need to interpret the Constitution for life in the world they live in today. Only then can the Constitution remain a strong foundation for the United States.

Kamillah Dawkins, Uniondale (NY) High School: Supreme Court Justice Clarence Thomas argues on one hand that "The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean," and on the other hand that it "remains a modern, 'breathing' document." There is a fundamental inconsistency between the two positions. I think Supreme Court Justices can resolve this problem if they interpret the Constitution by both considering the notes of the founders and the needs of a modern society. The words of the Founders should be seen as guidelines, but not as rigid restriction.

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