

Judicial Philosophy

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Textualism (*strict constructionism*)

The meaning of the constitution is in the plain words of the document. Dictionaries and other tools can be used to help decipher the text but the meaning is found within the words themselves.

Forms of textualism:

- Clause-bound – Each clause should be read as an independent entity whose meaning is bound within itself
- Structuralism – The whole document (including the preamble) should be read to get a global feel for what the document says
- Purposive – The intent of the document is what is crucial

Pros: ties interpretation to the text which then creates consistency and reliability

Cons: document can become inflexible; what does the 9th amendment possibly mean?

Originalism (*original intent*)

The meaning of the document can be found within the intent of the founders. The letters, speeches, and notes of the founders are culled to discern the meaning of their creation.

Pros: links document to the revered founders and ensures predictability in interpretation (assuming no new historical evidence is found)

Cons: can be difficult to determine what was intended or whose intent we should look to.

Doctrinalism (*precedent*)

The consistent acceptance of some interpretations have made some doctrines constitutional even though they aren't actually mentioned. Among those are: liberty of contract, freedom to travel and right to privacy.

Pros: Constitution becomes more flexible, by building on past interpretations the court can move to step-by-step solutions

Cons: distracts from constitution itself and focuses on what people have said about it

Developmentalism

As the polity changes so does the meaning of the constitution. For instance the court ruled in *Atkins v. Virginia* that the eighth amendment's prohibition against "cruel and unusual punishment" now means that the mentally retarded cannot be executed. Why? Because the court found an "evolving standard of decency" embodied in a variety of state legislation that either banned executions or the executions of the mentally retarded.

Pros: document can evolve with the experiences and lessons of future generations

Cons: consistent interpretation becomes dicey

Philosophical

A theory about government that helps guide interpretation of the text.

Two major forms:

- Legal positivism – Issues of legal interpretation must be separated from questions of morality. A law is the expression of the will of whatever authority created it. It is an embodiment of that authority's power and does not attempt to realize any loftier moral or social goals.
- Natural law – A positive and just law rests upon a “higher law” which is attested to by the common sense of the people and a widespread belief in justice and basic, inalienable rights.

Pros: some theory of government is inherent in any kind of constitutional interpretation

Cons: focuses on theory more than what the text says, not very stable

Balancing

When constitutional rights or compelling state interests clash then judges must balance these legitimate demands as a means of resolving the conflict. Roe v. Wade is an example of a balancing case because it weighed the state's interest in the health of its citizens with the privacy rights of pregnant women.

Pros: rights do conflict

Cons: how the competing interests are defined is open and unguided by the document

Judicial Excerpts

Directions: Attempt to identify which judicial philosophy the justices used in these cases. Some cases may embody more than one philosophy.

On if a man can be convicted of polygamy in the Utah Territories if his religion encourages it -
“Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the constitution expressly forbids such legislation. . . The question to be determined is, whether the law now under consideration comes within this prohibition. The word ‘religion’ is not defined in the constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.” (what follows is a historical examination of religious establishment in the colonies)

Majority decision in *Reynolds v. United States* (1878)

On disagreeing that there is a constitutional right to privacy -

“The court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not.”

Black and Stewart dissent of *Griswold v. Connecticut* (1965)

On arguing that the court has long recognized a right of privacy -

“The constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R.R. Co. v. Botsford* the court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”

Majority decision in *Roe v Wade* (1973)

On whether a prisoner can be forcibly sterilized -

“This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race – the right to have offspring . . .”

Majority decision in *Skinner v Oklahoma* (1942)

On whether a criminal suspect can seek the advice of an attorney during questioning -

“We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.”

Majority decision in *Escobedo v. Illinois* (1964)

On objecting to the majority decision in Roe v. Wade that balanced the “compelling state interest” of protecting a viable fetus to the privacy rights of a pregnant woman -

“The adoption of the compelling state interest standard will inevitably require this court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be ‘compelling.’ The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the 14th amendment.”

Rehnquist dissent in *Roe v. Wade* (1973)

On whether the government can limit the campaign contributions from individuals -

“The weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling . . . “

Per curiam decision in *Buckley v. Valeo* (1976)

On the court’s decision to start regulating legislative apportionment disputes -

“I find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly and impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter.”

Harlan and Frankfurter dissent in *Baker v. Carr* (1962)

On whether a urinalysis drug test is a search under the fourth amendment -

“Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer, and in view of our holding in *Railway Labor Executives* that urine tests are searches, it follows that the drug-testing program must meet the reasonableness requirement of the Fourth Amendment.”

Majority decision in *National Treasury Employee Union v. Van Raab* (1989)