

Handout 2: DBQ – Originalism & a Living Constitution

Question: Which approach is better – Originalism or a Living Constitution?

Examine the following documents and consider the questions about each one. The documents will all discuss the author’s ideas about the best way to interpret the Constitution.

After examining each document, use the chart on page 5 to organize the arguments to support two different positions: that judges should take an Originalist approach to interpreting the Constitution, or that judges should take a Living Constitutionalist approach to interpreting the Constitution.

Document A

Chief Justice John Marshall, in the Supreme Court’s opinion from *McCulloch v. Maryland* (1819), in which the Court had to decide whether the Constitution gave Congress the power to create a national bank:

“[The] Constitution [is] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”

What does Chief Justice Marshall say about the Constitution’s adaptability?

Document B

Edwin Meese, Attorney General, from a speech delivered in 1985 (excerpted):

“What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention...

“This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A Constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

“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...

“It is our belief that only ‘the sense in which the Constitution was accepted and ratified by the nation,’ and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.”

What does Attorney General Meese say about the words used by the people who framed the Constitution?

What does Meese say will happen if judges ‘pour new meaning into old words’?

Document C

Chief Justice William Rehnquist, from an article in the *Texas Law Review* (1976):

“...Serious difficulties flaw the [approach] of the living Constitution. ...It misconceives the nature of the Constitution, which was designed not to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times...

However socially desirable the goals sought to be advanced... advancing them through a free-wheeling, nonelected judiciary is quite unacceptable in a democratic society.

Under [some versions of] the living Constitution, nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so.”

Who does Chief Justice Rehnquist say should be responsible for addressing the social problems of our country?

Document D

Justice Stephen Breyer, from *Making Our Democracy Work* (2010):

“[We] require a constitution that works well for the people today... The Court should reject approaches to interpreting the Constitution that consider the document’s scope and application as fixed at the moment of framing. Rather, the Court should regard the Constitution as containing unwavering values that must be applied flexibly to ever-changing circumstances. The Court must consider not just how 18th century Americans used a particular phrase, but also how the values underlying that phrase apply today to circumstances perhaps then inconceivable.

“Originalists hope that judges will find answers to difficult constitutional questions by proceeding objectively, almost mechanically, to examine past historical fact. An objective approach will reassure the public that the Court’s interpretation reflects what history shows to have been the framers’ detailed intentions, not the judge’s own. ... This historical approach, however, suffers serious problems. For one thing, it is less ‘objective’ than one might think. ... history often fails to provide specific objective directions.”

How does Justice Breyer describe his view of the problem with Originalism?

Document E

Justice William Brennan, from a speech at Georgetown University (1985):

“There are those who find legitimacy in fidelity to what they call ‘the intentions of the Framers.’ In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. ...

It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on the application of principle to specific, contemporary questions. Typically, all that can be gleaned is what the framers themselves did not agree about the application or meaning of particular constitutional provisions...

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 adaptation of overarching principles of changes to social circumstances.

The ultimate question must be, ‘What do the words of the text mean in our time?’ For the genius of the Constitution rests not on 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.”

Does Justice Brennan think that we can accurately figure out what the Framers meant when they wrote specific parts of the Constitution? Why or why not?

What does Justice Brennan think is the ‘genius of the Constitution’?

Arguments for Originalism & a Living Constitution

Use the chart below to organize the arguments presented in the documents. List reasons in favor of the Originalist approach in the left column, and reasons in favor of the Living Constitutionalist approach in the right column.

The Constitution should be interpreted using the Originalist approach:	The Constitution should be interpreted using the Living Constitutionalist approach:
<p>Argument from: Document _____</p> <p>Document _____</p> <p>Document _____</p>	<p>Argument from: Document _____</p> <p>Document _____</p> <p>Document _____</p>