

# How do Judges Interpret the Constitution?

Overview	This lesson can be used in:	Teaching strategies	National standards for civics and government
Students explore competing approaches to interpreting the Constitution.	Government, Civics, Law, and Current Events courses	Group work, Document Based Question	II. A. What is the American idea of constitutional government? III. D. What is the place of law in the American constitutional system?

## Essential Question

How do judges interpret the Constitution?

## Outcomes

As a result of this lesson, students will be able to do the following:

- Explain the basic tenets of the Originalist and the Living Constitution approaches to Constitutional Interpretation.
- List several factors that judges consider when interpreting the Constitution.
- Apply knowledge about Constitutional Interpretation to critically evaluate Supreme Court opinions.

## Handouts

- I. Background & Video Viewing Guide
- II. DBQ—Originalism & a Living Constitution
- III. Evaluating Opinions—*Roper v. Simmons*

## Credits

This lesson was developed with support from the Supreme Court Historical Society.

## Preparing to teach

As written, this lesson includes 3 main activities spread over two days. The activities will not be necessary or appropriate for all students, so you should decide which components to use to meet the needs of your class. There are also suggestions for extension activities and differentiation strategies at the end of the lesson.

Before teaching, copy the handouts for all students, and test the link for the video used on Day 1.

## Day 1

### Introduction

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- 1) Remind the students of a divided ruling in an important Supreme Court case that they have studied recently. For example, in *Texas v. Johnson*, the Supreme Court ruled that the government couldn't make burning the American flag a crime. They said such laws were prohibited by the First Amendment. Have a volunteer read the text of the portion of the Constitution at issue in the case. In this example, the text reads "Congress shall make no law ... abridging the freedom of speech."
- 2) Ask the students if it's absolutely clear to them what those words mean, and that (in this example) a law about burning a flag would be prohibited by them. Tell the students that many people disagree about exactly what all the words in any part of the Constitution mean, and that the Constitution doesn't come with a guide to figuring it out.
- 3) The job of figuring out what it means and applying it belongs to judges. Judges must carefully study the law and the cases before them to figure out how the law applies. It's not always easy, and they sometimes disagree about what a law or the Constitution means.

### Constitutional Interpretations: The Justices' Thoughts

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- 4) Ask the students why it was tough to figure out what the Constitution meant when it listed the requirements for being a member of the House of Representatives. Ask what clues they used to figure it out. If students don't suggest the following, point them out as options:
  - The words – their definitions
  - History – how elections have been handled in the past
  - Consequences – what will happen as a result of their decision
  - Purpose or intent – why was the rule or law written that way in the first place
  - Precedent – how have other courts and judges decided similar cases

- 5) Tell them that much as they did, the justices on the Supreme Court sometimes disagree about how to figure out what the Constitution means. Share background information with students, either by distributing and having students read the first page of **Handout 1: Background & Video Viewing Guide**, or by stating the concepts in your own words.
- 6) Tell students that they'll now get to hear what two Supreme Court justices think about interpreting the Constitution. The video is a discussion with Justice Stephen Breyer and Justice Antonin Scalia, filmed at the Supreme Court as part of the 2010 Leon Silverman Lecture Series. The video is available at [www.c-spanvideo.org/program/Intenta](http://www.c-spanvideo.org/program/Intenta). Tell them that Justice Scalia is considered an Originalist, and Justice Breyer is a Living Constitutionalist. In the video, they'll talk about their different philosophies and why they approach tough cases that way. Have students turn to the second page of **Handout 1: Background & Video Viewing Guide**. If students need extra support, review the guide with them:
  - Justice Scalia will begin by talking about who he's thinking of when he reads "We, the People" in the Constitution, and what those people thought about the death penalty.
  - Justice Breyer will talk about how the Constitution must last indefinitely. He will list six things judges look at in difficult cases. Write them down in the chart. He will also mention which four of those Justice Scalia prefers to consider. Write them down in the chart.
  - Both justices will then outline Justice Scalia's problems with Justice Breyer's approach. Describe Justice Scalia's concerns.
- 7) Watch the video. Start the video at 15:30, and play until 24:30. If students need extra support, rewind key passages and watch again.
- 8) Discuss the video and the points students recorded on their Viewing Guides. Answer questions that the students have about the justices' remarks.

## Document Based Question – Originalism or Living Constitutionalism?

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- 9) The DBQ (Handout 2) asks students to examine which approach is better – Originalism or Living Constitutionalism. The handout provides excerpts of speeches or writing from four Supreme Court justices and a former attorney general. Select the excerpts you want to use with your students (note that the John Marshall excerpt has particularly difficult vocabulary and phrasing). Instruct students to carefully read each excerpt and answer the accompanying questions. After reading all excerpts, they should use the chart on the fifth page of the handout to organize the arguments for each constitutional interpretation approach. Students should restate key points in their own words and note which document the argument comes from. You might assign students to finish the assignment for homework, or you might complete the activity on Day 2.

- 10) Distribute **Handout 2: DBQ – Originalism & a Living Constitution**. Tell students how long they have to work in class.

## Day 2

- 13) Finish DBQ in class, if not done for homework.

## Identifying Interpretations: *Roper v. Simmons*

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- 14) Discuss the students' work on the DBQ – what arguments did they identify as being in favor of the Originalist approach? The Living Constitutionalist? Which were the most compelling to them?
- 15) Tell students that they will now work to apply their understanding of Originalism and Living Constitutionalism by examining quotes from actual Supreme Court opinions. Distribute **Handout 3: Evaluating Opinions: *Roper v. Simmons***. Instruct students to read the background information and then examine each quote. For each, decide whether it demonstrates Originalism or Living Constitutionalism. Label each quote with an O or LC, accordingly. The purpose of this activity is to have students begin to think about the ways in which the justices' stated philosophies work in practice.
- 16) After students have recorded their thoughts, have them discuss their answers with a partner. Bring the class back together and go over each quote – have students share what made them think a quote was an example of Originalism or Living Constitutionalism. Discuss the differences between the approaches taken in these quotes. Citations and comments for this Handout are provided in the Teacher Guide, at the end of this lesson.

## Summary and Debrief

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- 17) Ask the students: What challenges do judges face in interpreting the Constitution? How does each approach embody American notions of democracy? What approach would the students try to take if they were responsible for deciding difficult cases?
- 18) Consider assigning students extension activities, including:
- Give students Justice Breyer's checklist of the things a judge examines when deciding a case (text, history, traditions, precedent, values, and consequences) and have them read a Supreme Court opinion and identify examples of the analyses listed. *Kyllo v. United States* is one case you might use for this exercise.
  - Write an essay describing the student's preferred interpretation approach that lists supporting arguments.

- Write their own opinion in a Supreme Court case using a chosen or assigned Constitutional interpretation approach.

### **Note: Suggestions for Differentiation**

To accelerate the activities for advanced students, consider providing them with longer passages for DBQ analysis, or even complete speeches. The sources for the DBQ readings are listed in the Teacher Guide. The extension activities suggested above are also appropriate for advanced students.

To support students with lower reading levels, consider providing vocabulary words and close reading techniques for the DBQ. You might need to define the following words with students before they complete the DBQ: jurisprudence, fundamental, incumbent, ratified, defect, misconceive, abreast, unwavering, inconceivable, objective, fidelity, doctrinaire, incarnation, vantage, glean, eschew, and static. Also consider removing the John Marshall passage from the DBQ, as it uses particularly difficult language, and using the alternative version of Handout 3: Evaluating Opinions. The alternative Handout provides paraphrased versions of the quotes from the *Roper v. Simmons* opinions.

# Teacher Guide

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## Additional information

The following terms tend to show up in class, textbooks, and in the media. They are not terms that are truly helpful in understanding constitutional interpretation, but it's helpful to know what they are used to mean.

### Judicial activism

It's bad to be accused of judicial activism. This term is used when there is (allegedly):

- a failure to defer to a political branch of government
- a failure to follow constitutional text
- a failure to follow established precedent
- a decision based on a judge's political values
- a decision you just plain don't like

This term is not reserved for use exclusively with politically liberal or conservative decisions. Both sides accuse the other of being "activist."

### Judicial Restraint

It's good to be accused of judicial restraint. This term is used when there is (allegedly):

- proper deference to a political (democratic) branch (or to a state court decision)
- adherence to constitutional text
- adherence to established precedent
- "judicial modesty"
- a decision you do like

This term is not reserved for use exclusively with politically liberal or conservative decisions.

### Strict Constructionist

This is a political term that doesn't have a serious meaning. Various presidents, for example, have said they wanted to appoint federal judges (including Supreme Court justices) who are "strict constructionists." At different times in the last 40 years this term has been used to identify judges who adhered to the text of the constitution, did not invent new rights and were: against school desegregation, against abortion rights, for states rights, for the death penalty, etc.

Clearly the term doesn't mean what it says – people who support having strict constructionists appointed to the Court do not think that "Congress shall make no law..." in the First Amendment really means NO LAW, or that the word EQUAL in the equal protection clause of the 14<sup>th</sup> Amendment really means EQUAL. A more legal and less political interpretation of this phrase is that it means being a textualist, or deferring to the actual text of the constitution – although no

one is really against deferring to the text of the constitution where the text makes the outcome of a case clear.

## Answers

### HANDOUT 1: BACKGROUND & VIDEO VIEWING GUIDE

Justice Scalia ... What does he say those people thought of the death penalty?

He says there is no doubt that no American ever voted for a limited death penalty when they voted to ratify the Eighth Amendment—death was the penalty for all felonies. Saying that the Constitution prohibits the death penalty is not being faithful to the will of the people.

Justice Breyer ... What is a judge's job?

To apply the words to circumstances today.

List the things that Justice Breyer considers... List the things he says Justice Scalia considers.

1. Read the words 2. Look at the history 3. Examine traditions surrounding words 4. Look at precedent 5. Consider the purpose or values 6. Look at the consequences of the decision through the lens of values	1. Read the words 2. Look at the history 3. Examine traditions surrounding words 4. Look at precedent
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Why does Justice Breyer think his approach makes Justice Scalia nervous?

Justice Scalia's afraid judges will substitute their subjective ideas for something objective.

Justice Scalia says that the Constitution is not an instrument of change, but rather that it's purpose is to impede change. How does the Constitution provide a flexible system?

You can persuade your fellow citizens to join your position and vote.

### HANDOUT 2: DBQ

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

The Constitution must be adapted to new crises and problems. The Framers couldn't have foreseen all potential problems, and they necessarily wrote an adaptable document.

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

That the framers chose their words carefully and debated minute points at great length.

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

Judges will create new powers and new rights that are at odds with the logic of our Constitution.

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

Through the popularly elected branches (not the unelected judiciary).

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

It is less objective than it appears to be because history often fails to provide specific objective directions.

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?

No, he thinks it is arrogant to assume we could gauge their intent. It is problematic to figure out what they would have thought about today's problems.

What does Justice Brennan think is the 'genius of the Constitution'?

Its adaptability to cope with current problems and current needs.

Organization of the arguments:

Student's lists will differ. Generally arguments for the Originalist approach will come from documents B and C, while arguments for the Living Constitutionalist approach will come from documents D and E. Students should paraphrase accurately and completely.

### **HANDOUT 3: EVALUATING OPINIONS – ROPER V. SIMMONS**

“We share a common history with the United Kingdom....” — Justice O'Connor, Dissenting Opinion

This is best categorized as an Originalist interpretation, as Originalists are concerned with the way that the people of the 1700's would have understood each word and phrase of the Constitution. Living Constitutionlists do this as well, but they look at the history more for background than for guidance.

“If the meaning of [the Eighth] Amendment had been frozen...” — Justice Stevens, Concurring Opinion

This is best categorized as a Living Constitutionalist interpretation, as Living Constitutionlists believe that the meaning of provisions in the Constitution can change over time to reflect current societal standards. Here, Justice Stevens refers to “evolving standards of decency,” indicating that people today no longer think it's ok to execute young children.

“...Court determined that executing mentally retarded offenders...” — Justice Kennedy, Majority Opinion

This is best categorized as a Living Constitutionalist interpretation, as Living Constitutionlists are more likely to consider how the nation as a whole has come to regard



the issue at hand. This does not necessarily determine their decisions, but it is an important factor to consider.

“...the meaning of our Constitution has changed over the past 15 years...” — Justice Scalia, Dissenting Opinion

This is best categorized as an Originalist interpretation, as Originalists don't believe that “national consensus” can be used as a guide because it would cause the meaning of the Constitution to change so often as to nullify the fundamental principles of the document.

“...The Court thus proclaims itself sole arbiter of our Nation's moral standards...” — Justice Scalia, Dissenting Opinion

This is best categorized as an Originalist interpretation, as Originalists fear that interpreting the Constitution as a “living” document will ultimately result in important issues being decided solely by the preferences of the justices of the Supreme Court at any given time.

## Resources

Citations for the readings used in the DBQ:

- The Supreme Court's opinion in *McCulloch v. Maryland*:  
[www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0017\\_0316\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0316_ZS.html)
- Chief Justice William Rehnquist, The Notion of a Living Constitution, from the *Texas Law Review*, 1976: [www.law.harvard.edu/students/orgs/jlpp/Vol29\\_No2\\_Rehnquist.pdf](http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No2_Rehnquist.pdf)
- Attorney General Edwin Meese, Speech to the American Bar Association, 1985:  
[www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf](http://www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf)
- Justice William Brennan, Speech at Georgetown University, 1985:  
[www.pbs.org/wnet/supremecourt/democracy/sources\\_document7.html](http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html)
- Justice Stephen Breyer, *Making our Democracy Work*, 2010, Alfred A. Knopf: New York, NY, pages 83-84.

Street Law provides summaries of dozens of recent Supreme Court cases, as well as lessons and activities about other Constitutional concepts and Supreme Court procedures on its website:

- Lesson plans and teaching strategies: [www.streetlaw.org/sclessons](http://www.streetlaw.org/sclessons)
- Case studies: [www.streetlaw.org/sccasestopic](http://www.streetlaw.org/sccasestopic)
- Materials on 17 Landmark Supreme Court cases: [www.landmarkcases.org](http://www.landmarkcases.org)

## Note: Use of Community Resource People

While Street Law typically advocates the integration of legal professionals and community resource people into classroom lessons, this material may pose particular challenges. It may be difficult for teachers to find a legal expert who specializes in this area of constitutional law, but

still possesses the ability to make the material accessible to students. If you do invite a legal expert to join your class for this lesson, choose someone who you feel fits those criteria and share the lesson plan with them in advance.