

United States Constitutional Law: Theory, Practice, and Interpretation

Class 6: Interpreting the Constitution

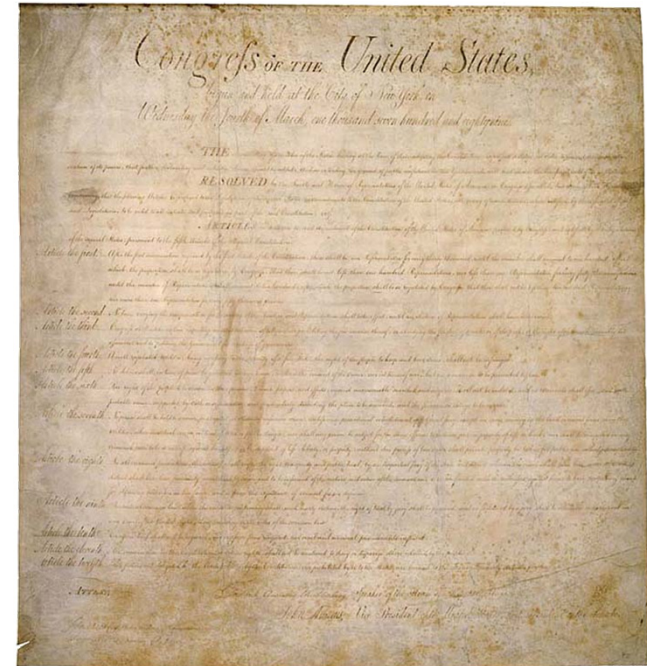
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- Introduction
- Governmental structure
- Individual rights
- Enforcing the Constitution
- Interpreting the Constitution
- The Constitution in action



Constitutional Interpretation

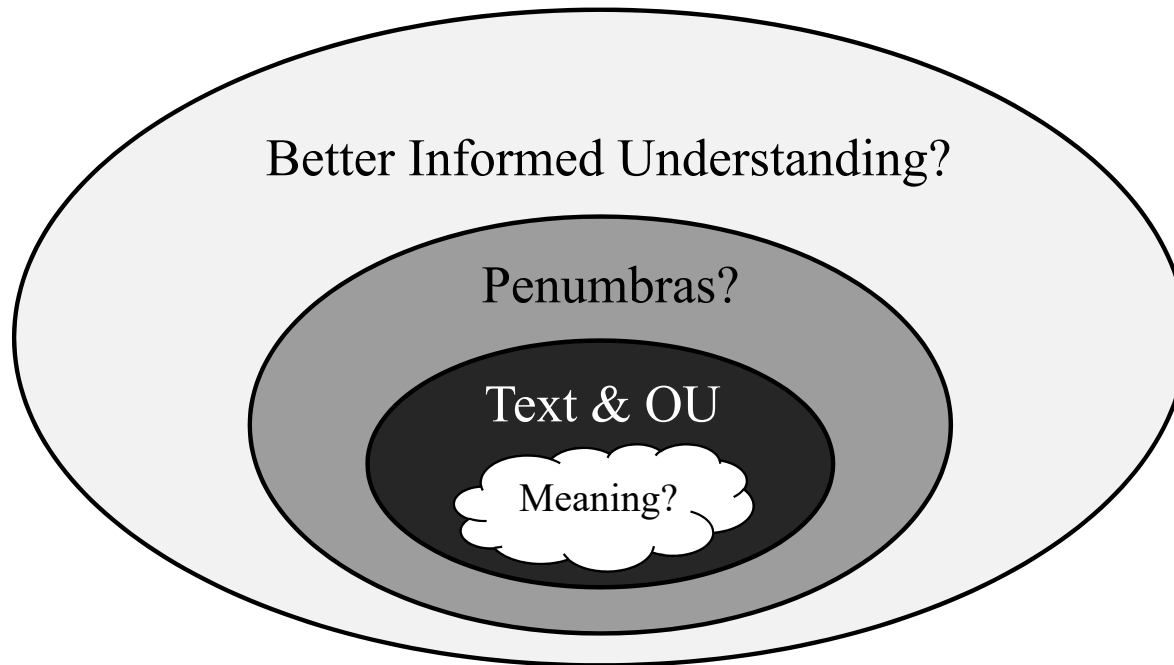
- Introduction and the problem of interpretation
- “The Living Constitution”
- Textualism and originalism
- Other approaches to interpretation

Importance of “Interpretation”

“Whoever hath an ultimate authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them.”

Bishop Hoadly in a 1717 sermon before the English King.

Constitutional Interpretation



Honesty in Constitutional Interpretation

- Ask first: “What do I personally think about this issue as a matter of social policy?”
- Then ask: “What does the Constitution say about the issue?”
 - Is there an individual right regarding that issue in the Constitution?
 - To which governmental institution did the Constitution delegate the power to regulate as to the issue?
 - To the States, the Federal government or both?
 - If to the Federal government, to Congress, the President, or the Judiciary?

Principal Dichotomy



Originalists

- Constitution establishes a fixed governmental framework
- Consider intention of framers or original public understanding
- Questions about moral and political soundness of policy are historical
- Is this overly conservative and tied to the “dead hand of the past”?
- Is this approach incapable of rational and responsible change?

Living Constitutionalists

- Constitution is evolving in response to changing circumstances and improved moral and political beliefs
- Reasoning resembles development of common law
- Is this threatening to the rule of law and the separation of powers?
- Is this constitutional amendment under the guise of interpretation?

Originalism: Issues and Variation

- Originalism comes in a wide variety of forms
- Object of interpretation is to remain fixed by factors such as original public understanding or authorial intentions
- Any room for leeway (or faint-hearted originalism)?
 - Discernable and profound sea change in popular view (like equal protection and *Brown v. Board of Education*)
 - Can established precedent trump original understanding?
- Does general language chosen by Framers sometimes reflect “original understanding” to accommodate change (“cruel and unusual” and “unreasonable”)?

Originalist Criticisms of “Living Constitutionalism”

- Constitutional interpretation by “living constitutionalists” is merely unconstrained constitutional creation masquerading as interpretation
- “Living constitutionalism” robs the Constitution of its ability to guide, limit, and constrain
- “Living constitutionalism” violates the separation-of-powers principle
 - Undemocratic because allows law creation by democratically unaccountable judges
 - Allows policy making without legislative resources and inputs

Next Class: Case Discussions and
the Constitution in Action

Supreme Court Case Briefs

- Background
 - Who were the parties?
 - What happened (what were the facts underlying the dispute)?
 - How did the case get to the Court (what was the procedural history)?
- Court's ruling, justices' votes, and final disposition
 - What did the Court do (affirm or reverse the last lower court)?
 - How did each justice vote (to affirm or to reverse)?
 - Who won (which party prevailed)?
 - What happens next (did the Court remand and, if so, to where and for what)?
- Rationale and reasoning of each opinion (majority; concurrences; dissents)
 - What approach to constitutional interpretation did each opinion take?
 - What role did precedent and *stare decisis* play in each opinion?