

United States Constitutional Law: Theory, Practice, and Interpretation

Class 6: Interpreting the Constitution

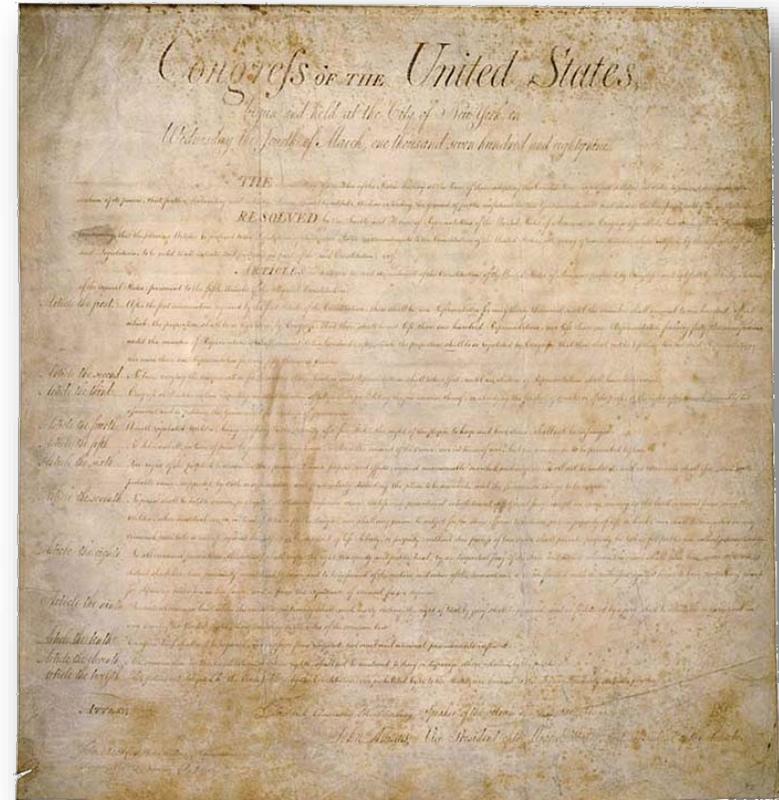
Monday, October 4, 2021



Dane S. Ciolino
A.R. Christovich Professor of Law
Loyola University New Orleans

United States Constitutional Law: Theory, Practice, and Interpretation

- 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

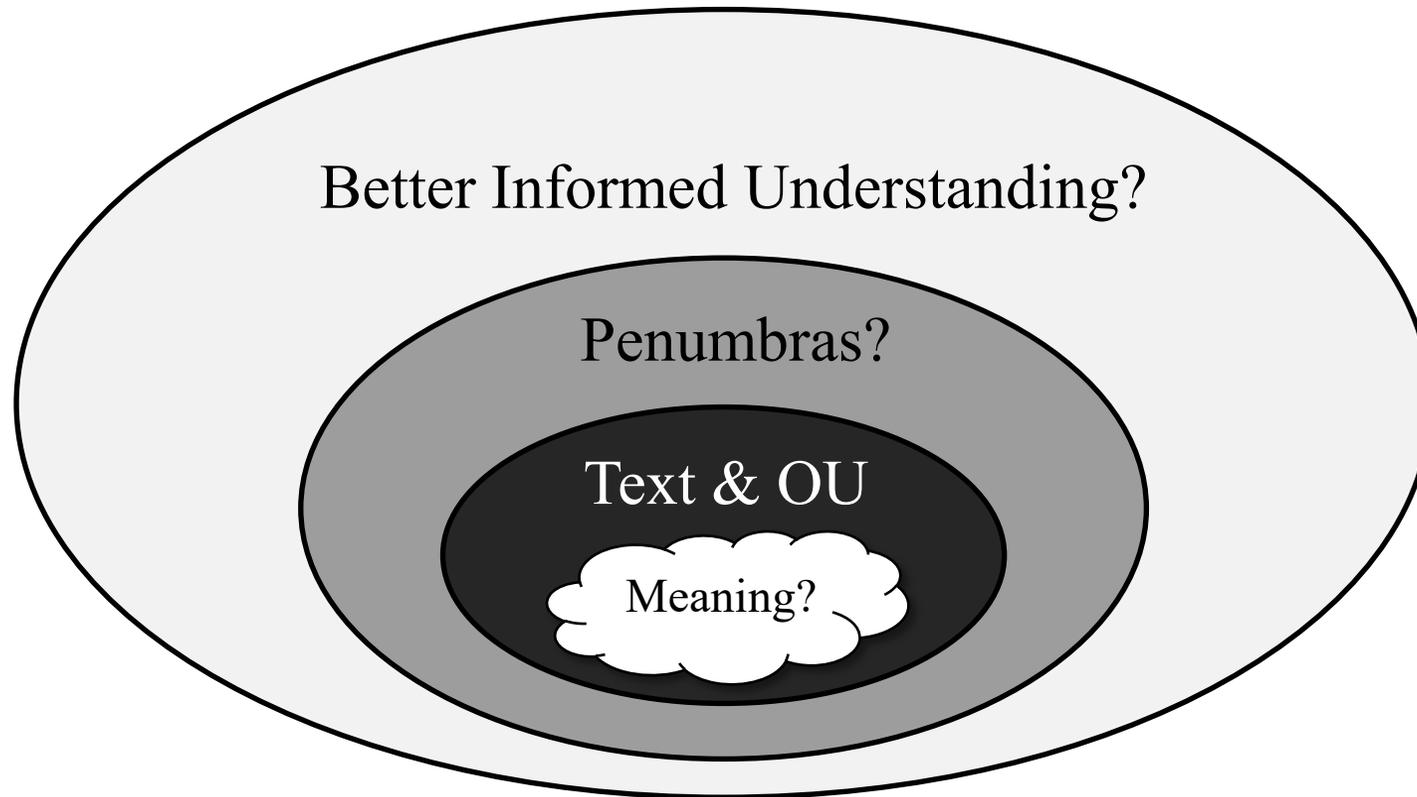
Importance of “Interpretation”



“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 Benjamin Hoadly in a 1717 sermon before the English King.

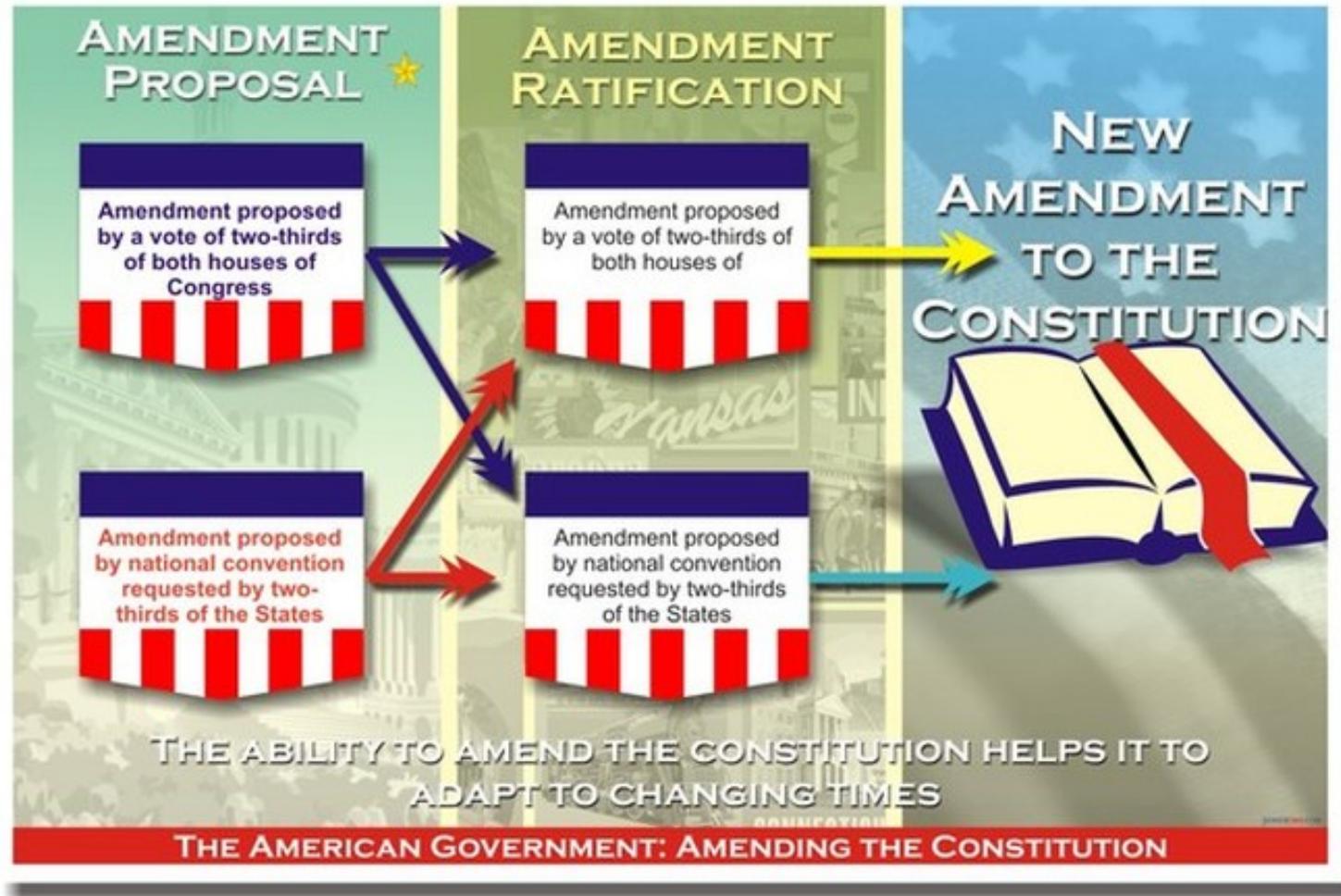
Constitutional Interpretation



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 text of the Constitution say about the issue?”
 - Is there an individual right regarding that issue in the text of 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?

Amending the United States Constitution



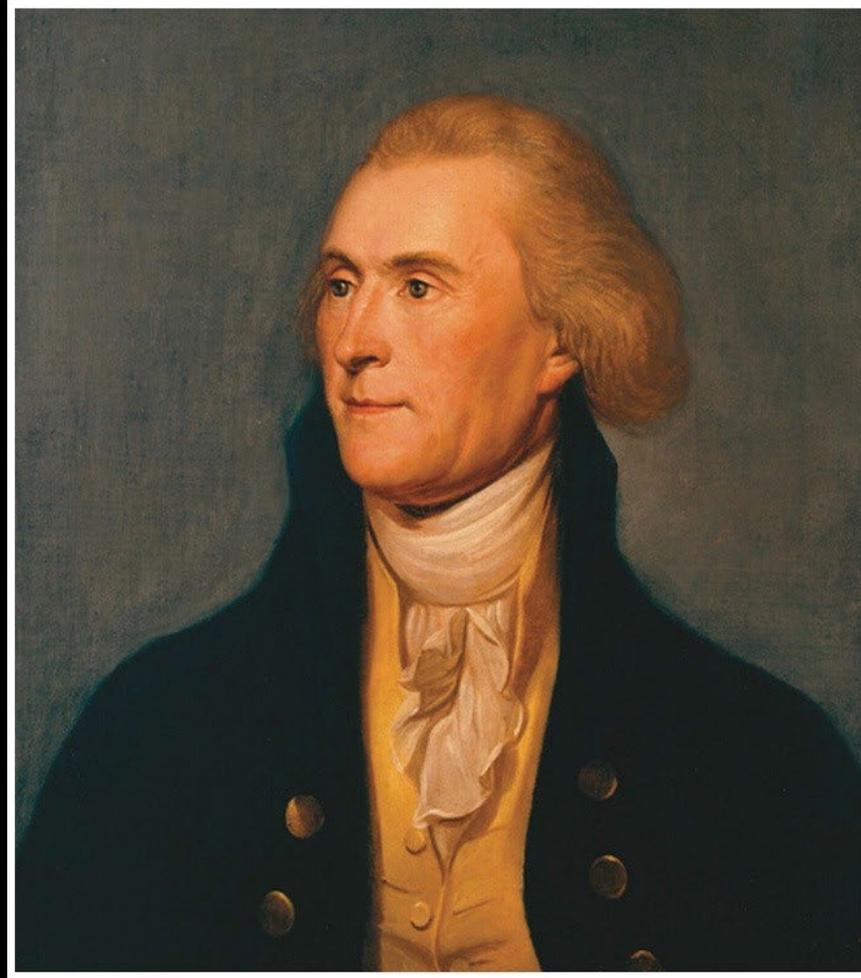
The Rule of Law



A government of laws, and not
of men.

~ John Adams

WWW.THEFEDERALISTPAPERS.ORG



RULE OF LAW

“In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution”

Principal Dichotomy



Originalists

- Constitution established 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, democracy, federalism, and the separation of powers?
- Is this actually constitutional amendment under the guise of constitutional 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
- Is there 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 some 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 amendment masquerading as constitutional interpretation
- “Living constitutionalism” robs the Constitution of its ability to guide, limit, and constrain
- “Living constitutionalism” violates principles of the rule of law, democracy, federalism, and the separation of powers
 - Threatens the rule of law by permitting judges to create law on whim
 - Threatens democracy by permitting policymaking by democratically *unaccountable* judges
 - Violates federalism principle by diminishing state power through *federal* judicial invalidation of state and local legislation
 - Violates separation-of-powers principle by permitting *judicial* policymaking without the usual legislative resources and inputs

Living Constitutionalism: Issues and Variation

- **Basic Proposition:** Constitutional practice can and must change in response to changing circumstances and values.
- **Evolution at Work:** “Evolving standards of decency that mark the progress of a maturing society.”
 - Have we evolved or have the facts changed (at least our understanding of them)?
 - Does the meaning of the words change, or how the words apply to the current circumstance?
- **Different Flavors—How Far From the Text Can You Go?**
 - Popular Constitutionalism
 - Extra-national Constitutionalism
 - Pragmatism

Living Constitutionalist Criticism of “Originalism”

- Originalists ignore the fact that the founders knew society would evolve in unforeseen ways.
- Originalism leads to “bad” outcomes.
- Originalism isn’t pre-ordained by the Constitution. We’ve been using some form of “Living Constitutionalism” since ratification.
- There isn’t even such a thing as a true “Originalist.” While there may be some academics who are true “Originalists,” all judges are at most “faint-hearted Originalists” who dress up “conservative” outcomes in the guise of constitutional theory.

Next Class: Case Discussions and
the Constitution in Action

Supreme Court Case Presentations

- Background
 - Who were the parties?
 - What happened (what were the facts of underlying the dispute)?
 - How did the case get to the Court (what was the procedural history)?
- Court's ruling, justices' votes, and final disposition
 - Who won (which party prevailed) and what did the Court do (affirm or reverse the last lower court)?
 - How did each justice vote (to affirm or to reverse)?
 - 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?