

## What's A Constitutional "Originalist"?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

Now that President Trump has nominated Judge Neil Gorsuch – identified with the "original intent" school of constitutional interpretation – to replace Justice Antonin Scalia (the justice popularizing the original intent approach on the modern Court), *Constitutional Context* listeners are likely to hear lots of media reporting and pundit commentary about "originalism."

The numerous approaches to interpreting our brief, general and often vague Constitution are complicated and nuanced. Still, some useful generalizations can be made about what originalism is and is not. Especially helpful is contrasting originalism with its chief rival, the "evolving constitution" approach.

The "original intent" approach seeks to the extent possible to base decisions on the constitutional concepts of those who drafted the relevant language. Originalists believe that the Constitution's central purpose was to enshrine core rights and understandings and place them beyond change by a mere majority – whether in Congress or on the Supreme Court. Thus, in determining whether putting to death juvenile criminal offenders unconstitutionally violates the Eighth Amendment, originalists focus on the meaning the Amendment's drafters intended to convey through the words "cruel and unusual" punishment. And they seek to implement the assumptions reflected in founding-era laws and social attitudes about the death penalty.

Not that "original intent" equates with "strict construction." A conscientious originalist stays true to the intent of the framers, whether strict or loose. For example, original-intent exemplar Scalia thought that the authors of the Sixth Amendment had a broad conception of the right to trial by jury. Scalia accordingly led the Court to rule in favor of criminal defendants and against mandatory sentencing laws viewed as undermining the jury's role.

This brings up the related point that originalism does not inherently dictate politically conservative results. It is certainly true that in the last couple of decades originalists have come down mainly on the ideologically conservative side -- opposing death-penalty restrictions, rejecting abortion and same-sex-marriage rights, and the like. But originalism also led Justice Scalia to write the most anti-Bush-Administration opinion in a case challenging the president's right to indefinitely detain an American citizen thought to be an "enemy combatant."

Two other potential misunderstandings about originalism deserve debunking. First, originalists do not restrict constitutional rights to only those applications a provision's drafters could foresee. For example, intentionalists shouldn't refuse to apply Fourth Amendment privacy rights to telephones or the internet simply because the

Amendment's 1791 drafters didn't anticipate these technologies. Second, originalists don't oppose constitutional change per se; they just think that the appropriate way to change the Constitution is through the (admittedly arduous) amendment process the original document lays out.

Ultimately, originalism is best understood in contrast to its chief (and these days, more popular) rival, the "evolving constitution" theory. Like intentionalists, evolving constitutionalists "start with the text" and specific indicators of framer intent. But in the face of the typical ambiguity that usually still remains, evolving constitutionalists reject recourse to the "dead hand" of legal and social tradition. Instead, evolving constitutionalists emphasize the broad language of the Constitution and the fact that it was mainly written by Enlightenment-era thinkers who believed in human progress. Evolving constitutionalists believe that constitutional understandings were meant to change over time – to reflect the insights of natural and social sciences, changing social attitudes and developing notions of justice and fairness. Evolving constitutionalists thus seek to implement what a 1958 death-penalty decision called "the evolving standards of decency that befit a maturing society."

Both "originalism" and "evolving constitutionalism" have their adherents, on and off the Supreme Court. And, it will be interesting to see just how many of the questions at Judge Gorsuch's Senate confirmation hearings and the arguments in the Senate confirmation debate are *really* rooted in ongoing disputes about how best to interpret our core constitutional document.