

Interpreting the Constitution

CLI 2023

NPSC

If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.

John Roberts, Confirmation Hearing, 2005



**Whose job is it to interpret the
constitution?**

**Is the US Air Force
Constitutional?**

**Can the President pardon
himself?**

Can the Government enter into a contract with Google to read your email?

**Can the any US Government
outlaw TikTok?**

Can the President be a woman?

Constitutional Interpretation cannot be a simply mechanical process

Without exception — all theories of constitutional interpretation make historical claims — either about the nature of language, or about the circumstances of its agreement

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.

William Blackstone, *Commentaries*, Bk 1

And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

- 1. Words are generally to be understood in their **usual and most known signification***; not so much regarding the propriety of grammar, as their general and popular use.
- 2. If words happen to be still dubious, we may establish their **meaning from the context**, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament
- 3. As to the subject matter, **words are always to be understood as having a regard thereto**, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase provisions

at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called provisions, we shall see that the restraint is intended to be laid upon such provisions only.

- 4. As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.
- 5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is **by considering the reason and spirit of it**; or the cause which moved the legislator to enact it.

Method

- Sources
- Methodology
- Tests

Living Constitutionalism

Originalism - Original Meaning

Original Public Meaning

Textualism

Constitutional Interpretation cannot be a simply mechanical process

Without exception — all theories of constitutional interpretation make historical claims — either about the nature of language, or about the circumstances of its agreement

... *it's complicated*

**‘Congress shall make no law
abridging the freedom of speech’**

Some however of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and goods.²⁴ As to the first, privilege of speech, it is declared by the statute 1 W. and M. st. 2, c. 2, as one of the liberties of the people, “that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.”

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Constitutional Interpretation cannot be a simply mechanical process

Without exception — all theories of constitutional interpretation make historical claims — either about the nature of language, or about the circumstances of its agreement

Does the free