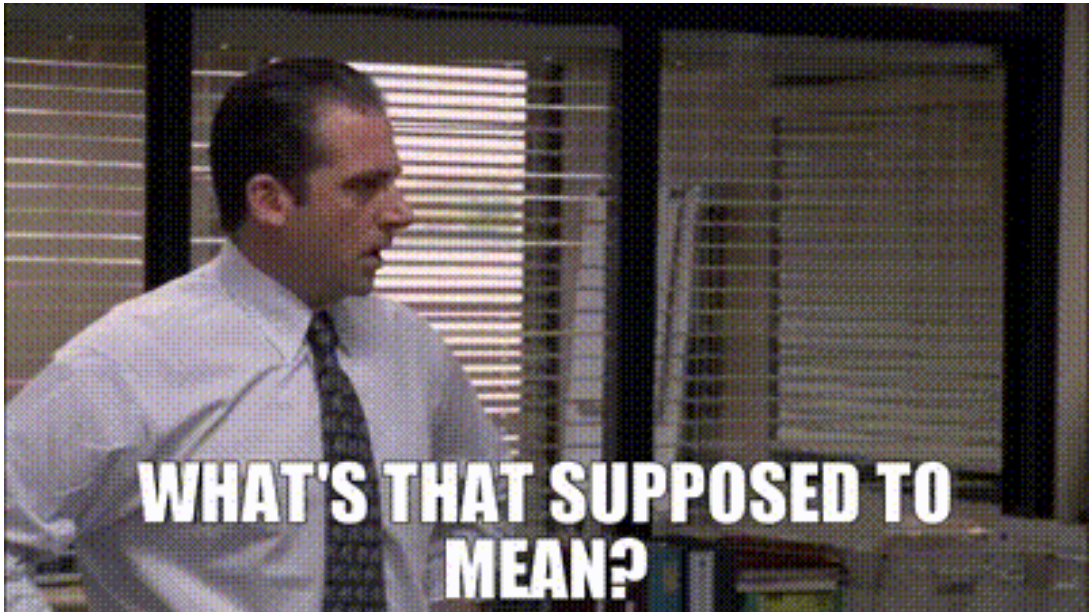




# THEORIES OF CONSTITUTIONAL INTERPRETATION

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WHY  
INTERPRETATION?

## TEXTUAL OPEN-ENDEDNESS

“The right of the people ... against unreasonable searches and seizures, shall not be violated.”

“The Congress shall have power to regulate commerce among the several states.”

“No person shall ... hold any office, civil or military, under the United States ... who, having previously taken an oath, as a member of Congress, or as an officer of the United States ... shall have engaged in insurrection or rebellion or the same.”

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## CONSTITUTION OF SETTLEMENT

- Age requirements for president, congresspeople
- Three-branch government
- How many senators per state?
- Etc.

## CONSTITUTION OF DISCUSSION

- Can Congress establish a draft?
- Can the President fire officers? When? How?
- Do federal courts have the power of judicial review?
- Etc.



TEXT  
VS.  
VALUES

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# MODES OF INTERPRETATION

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“[Originalism is] a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.”

Thomas B. Colby & Peter J. Smith, “Living Originalism,” 59 Duke L.J. 239 (2009)

“Just as it is not very meaningful for a voter to vote ‘non-Reagan,’ it is not very helpful to tell a judge to be a ‘non-originalist.’ If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one ... approach, but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be.”

Antonin Scalia, “Originalism: The Lesser Evil,” 57 U. Cinn. L. Rev. 849 (1989)

## ORIGINALISM

- 1) Meaning fixed at ratification (“Fixation Thesis”)
- 2) Historical meaning is authoritative

Textualism (?)

Text-and-Principle

Original Intent

Original Expected Applications

Original Public Meaning

Original Methods

## NON-ORIGINALISM

- 1) Meaning fixed at ratification (?)
- 2) Historical meaning is relevant, but not authoritative

Precedential

National Ethos

Pragmatism

Structural  
(Formalist /  
Functionalist)

Moral Reasoning



## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural

= focus on the **plain meaning** of the constitutional text

**Yes:**

Semantics

Syntax

Pragmatics

Dictionaries

**No:**

Legislative history

Framers' intent

Pragmatic considerations,  
value balancing, desired  
outcomes

# TEXTUALISM IN *MCCULLOCH V. MARYLAND*

## **Facts:**

- Congress creates Bank of the United States
- Maryland taxes the bank

## **Legal Questions:**

- Does Congress have the right to create the bank in the first instance?
- Is Maryland allowed to tax the bank?

## TEXTUALISM IN *MCCULLOCH V. MARYLAND*

“[The Congress shall have power] ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States” (Art. I, Sec. 8, Cl. 18).

## TEXTUALISM IN *MCCULLOCH V. MARYLAND*

“But the argument on which most reliance is placed is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the Government, but such only as may be ‘necessary and proper’ for carrying them into execution. The word ‘necessary’ is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory. [...]

Is it true that this is the sense in which the word ‘necessary’ is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to **its use in the common affairs of the world** or **in approved authors**, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is **generally understood** as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.”

## TEXTUALISM IN *MCCULLOCH V. MARYLAND*

“1st. The **clause is placed** among the powers of Congress, not among the limitations on those powers.

2d. Its **terms purport to enlarge**, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. . . . If [the] intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and **would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper."** Had the intention been to make this clause restrictive, it would unquestionably have been so **in form**, as well as in effect.”

## ORIGINALISM

Textualism (?)

Text-and-Principle

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## NON-ORIGINALISM

Precedential

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Moral Reasoning

Structural

= focus on the **intentions** of the drafters

**Yes:**

Legislative history  
Private or public  
writings that show  
framers' intentions

**No:**

Contemporary needs /  
intent  
Pragmatic considerations,  
value balancing, desired  
outcomes

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

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Meaning

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## NON-ORIGINALISM

Precedential

National Ethos

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Moral Reasoning

Structural

= focus on (1) what the text **would have meant to a reasonable person** who understood the context, or (2) what **literate and informed members of the public** understood the text to mean

**Yes:**

Historical dictionaries  
Comparable state  
constitutions from same era

**No:**

Contemporary understanding  
Legislative history  
Pragmatic considerations, value  
balancing, desired outcomes

## ORIGINAL PUBLIC MEANING IN *DISTRICT OF COLUMBIA V. HELLER*

“From there, we ... looked to history ... . After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found ‘no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.’

We then canvassed [...] the ‘analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment’ and ‘how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. ... In assessing [this] postratification history, we looked to four different types of sources. First, we reviewed ... founding-era legal scholars [who] interpreted the Second Amendment in published writings. Second, we looked to ‘19th-century cases that interpreted the Second Amendment’ and found that they ‘universally support an individual right’ to keep and bear arms. Third, we examined the ‘discussion of the Second Amendment in Congress and in public discourse’ after the Civil War, ‘as people debated whether and how to secure constitutional rights for newly freed slaves.’ Fourth, we considered how post-Civil War commentators understood the right.”



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Structural

= rely on rules, principles, and interpretations from **prior Supreme Court decisions**

**Yes:**

Past cases

**No:**

Contemporary understanding

Legislative history

Pragmatic considerations, value  
balancing, desired outcomes

# PRECEDENTIAL INTERPRETATION IN *JUNE MEDICAL SERVICES V. RUSSO*

## Background:

- In *Whole Women's Health v. Hellerstedt* (2016), SCOTUS strikes down Texas law that requires physicians who perform abortions to have admitting privileges at a hospital within 30 miles
- In 2020, challenge to nearly identical Louisiana law

“In this case, we consider the constitutionality of a Louisiana statute, that is almost word-for-word identical to Texas’ admitting-privileges law. As in *Whole Woman’s Health* [where the Supreme Court struck down the Texas law], the District Court [in this case] ... Conclude[d] that the [Louisiana] law imposes an undue burden and is therefore unconstitutional. ... We have examined the extensive record carefully and conclude that it supports the District Court’s findings of fact. Those **findings mirror those made in *Whole Woman’s Health*** in every relevant respect **and require the same result**. We consequently hold that the Louisiana statute is unconstitutional.”

## ORIGINALISM

Textualism (?)

Text-and-Principle

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Meaning

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## NON-ORIGINALISM

Precedential

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Pragmatism

Moral Reasoning

Structural

= consider and balance the **likely consequences** of possible interpretations

**Yes:**

Predicted consequences  
Desired outcomes

**No:**

Historical sources

## PRAGMATISM IN *UNITED STATES V. LEON*

### Legal Question:

- Does 4<sup>th</sup> Amendment require courts to suppress or exclude illegally-obtained evidence if the officers were acting in good faith?

“[This issue] must be resolved by **weighing the costs and benefits** of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.”

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

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Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural

Moral Reasoning = interpret using broad **moral principles** derived from the text

National Ethos = interpret according to America's **distinct national character, values, commitments**

# MORAL / IDENTITY INTERPRETATION IN *WEST VIRGINIA BOARD OF EDUCATION V. BARNETTE*

## Legal Question:

- Can a state enact a law requiring students to Salute the American flag?

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural

= interpret in ways that will **preserve the balance of powers** between  
three branches of government

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural



## TWO SENSES OF “MEANING”

	Scalia	Original Expected Applications	Text-and- Principle
Semantic Meaning	Textual or OPM	Textual or OPM	Textual or OPM
As-Applied Meaning	Textual or OPM	Textual, OPM, or Original Intent	Moral reasoning

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural

Original Expected Applications = when deciding how to apply the text to a new situation, ask how the framers would have expected the text to apply

Text-and-Principle = when deciding how to apply the text to a new situation, ask what the overarching moral principles of the text require

## ORIGINALISM

Textualism (?)

Text-and-Principle

Original Intent

Original Expected  
Applications

Original Public  
Meaning

Original Methods

## NON-ORIGINALISM

Precedential

National Ethos

Pragmatism

Moral Reasoning

Structural

= interpret using the interpretive methods that the framers endorsed



ADVANTAGES? DISADVANTAGES?