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| Theories of Constitutional Interpretation  The issue:  What are appropriate sources of authority to guide interpretation of the Constitution and what relative weight should be assigned to the various appropriate sources? | | |
| **Eight Reasons to be an Originalist**  **1. Originalism reduces the likelihood that unelected judges will seize the reigns of power from elected representatives.**  **2.  Originalism in the long run better preserves the authority of the Court.**  **3.  Non-originalism allows too much room for judges to impose their own subjective and elitist values.** **Judges need neutral, objective criteria to make legitimate decisions.  The understanding of the framers and ratifiers of a constitutional clause provide those neutral criteria.**  **4.  *Lochner vs. New York* (widely considered to be a bad non-originalist decision).**  **5.  Leaving it to the people to amend their Constitution when need be promotes serious public debate about government and its limitations.**  **6.  Originalism better respects the notion of the Constitution as a binding contract.**  **7.  If a constitutional amendment passed today, we would expect a court five years from now to ask what we intended to adopt. [Can the same be said for a court 100 or 200 years from now?]**  **8.  Originalism more often forces legislatures to reconsider and possibly repeal or amend their own bad laws, rather than to leave it to the courts to get rid of them.**     . | **Introduction**  **There are five sources that have guided interpretation of the Constitution: (1) the text and structure of the Constitution, (2) intentions of those who drafted, voted to propose, or voted to ratify the provision in question, (3) prior precedents (usually judicial), (4) the social, political, and economic consequences of alternative interpretations, and (5) natural law.  There is general agreement that the first three of these sources are appropriate guides to interpretation, but considerable disagreement as to the relative weight that should be given to the three sources when they point in different directions.  Many interpreters of the Constitution have suggested that the consequences of alternative interpretations are never relevant, even when all other considerations are evenly balanced.  Natural law (higher law, God's law) is now only infrequently suggested as an interpretive guide, even though many of the framers of the Constitution recognized its appropriateness.  Persons who favor heavy reliance on originalist sources (text and intentions) are commonly called "originalists."  Persons who favor giving a more substantial weighting to precedent, consequences, or natural law are called "non-originalists."  In practice, disagreement between originalists and non-originalists often concerns whether to apply heightened judicial scrutiny to certain "fundamental rights" that are not explicitly protected in the text of the Constitution.** | **Eight Reasons to be a Non-Originalist**  **1.  The framers at the Convention in Philadelphia indicated that they did not want their specific intentions to control interpretation.**  **2.  No written Constitution can anticipate all the means that government might in the future use to oppress people, so it is sometimes necessary for judges to fill in the gaps.**  **3.  Intentions of framers are various, sometimes transient, and often impossible to determine.  Text is often ambiguous and judicial precedents can be found to support either side.  In such cases, why not produce the result that will best promote the public good?  It's better than flipping a coin.**  **4.  Non-originalism allows judges to head off the crises that could result from the inflexible interpretation of a provision in the Constitution that no longer serves its original purpose.  (The amendment process is too difficult and cannot be relied upon to save us.)**  **5.  Non-originalism allows the Constitution to evolve to match more enlightened understandings on matters such as the equal treatment of blacks, women, and other minorities.**  **6.  *Brown vs Board of Education* (on originalist grounds, it was decided incorrectly).**  **7.  Originalists lose sight of the forest because they pay too much attention to trees.  The larger purpose--the animating spirit--of the Constitution was the protection of liberty, and we ought to focus on that.**  **8.  Nazi Germany: Originalist German judges did not exercise the power they might have to prevent or slow down inhumane programs.** |