

Handout 1: Background & Video Viewing Guide

Background

Many people—judges, legal scholars, political leaders, and citizens—disagree about the best way to interpret the different provisions in the Constitution. Two major competing approaches exist:

- Some “Originalists” argue that the document should be interpreted according to the original intent of the people who wrote it in 1787 (often called “the Framers”), while others—including Justice Scalia—argue that it should be interpreted according to the original understanding of Americans when it went into effect in 1789.
- Proponents of a “Living Constitution” argue that historical analyses can’t provide all the answers for modern situations and that where they don’t, judges must apply the values of the Constitution in light of modern circumstances.

Originalists criticize the Living Constitution approach because they believe it allows judges to substitute their own, personal values and desired outcomes for the will of the people. Living Constitutionalists criticize the Originalist approach because they believe we can’t tell what the Framers intended it to mean, or what the people of the time understood it to mean. They also believe that for the Constitution to endure, it must be adaptable to circumstances that the Framers could not imagine.

It is worth noting that the Constitution itself says nothing about how it should be interpreted.

As you watch the video, answer the questions below.

Justice Scalia says that when deciding cases, he cares for the people who ratified the Constitution. What does he say those people thought of the death penalty?

Justice Breyer says the Constitution created a workable democracy that is supposed to last for a long time. What is a judge's job?

List the things that Justice Breyer considers when interpreting the Constitution "in difficult cases" in the left column. List the things he says Justice Scalia is "happier" considering in the right column:

Justice Breyer considers:	Justice Scalia considers:
1.	1.
2.	2.
3.	3.
4.	4.
5.	
6.	

Why does Justice Breyer think his approach makes Justice Scalia nervous?

Justice Scalia says that the Constitution is not an _____ of change, but rather that it's purpose is to _____ change. How does the Constitution provide a flexible system?