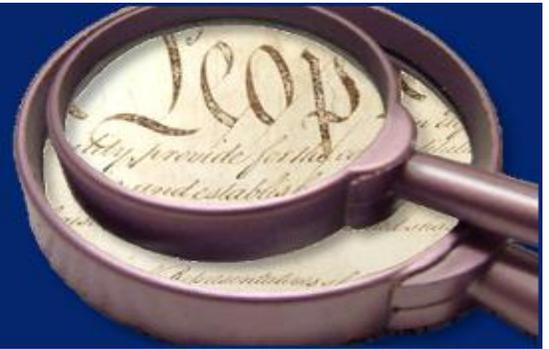




AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

The Framers' Constitution: Toward a Theory of Principled Constitutionalism

By Geoffrey R. Stone and William P. Marshall

September 2011

**All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.**

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

The Framers' Constitution: Toward a Theory of Principled Constitutionalism

Geoffrey R. Stone^{*} & William P. Marshall^{}**

For the past forty years, political conservatives have effectively framed the national debate over constitutional interpretation. According to the conservatives' narrative, their approach to constitutional interpretation adheres to the true meaning of the Constitution and to the Rule of Law, whereas "liberal" jurisprudence is concerned only with achieving specific desired outcomes, without regard to the text, history or meaning of the Constitution. The gains that conservatives have achieved by characterizing the debate in this manner cannot be overstated. Because the public has generally accepted the conservative account, Republican presidents have been much more aggressive than their Democratic counterparts in appointing judges with strongly ideological inclinations, and constitutional doctrine has veered sharply to the right as conservative jurists have become ever bolder in their pursuit of politically conservative results. Meanwhile, at the grassroots level, a new strain of conservative constitutionalism has recently emerged that insists that even such traditional legislative measures as civil rights laws and social welfare programs are unconstitutional, reflecting an even more aggressive conception of conservative judicial ideology.

The conservative constitutional narrative is deeply unprincipled and patently wrong, both in its defense of conservative judicial ideology and in its attack on what conservatives deride as a result-oriented "liberal" jurisprudence. In fact, most of the decisions the conservatives deride are premised on sound principles of constitutional interpretation and on the Framers' own understanding of our Constitution and of the essential role of courts in our constitutional system. But although progressives actually hold the high ground in this debate, we have generally failed in public discourse either to unmask the realities of conservative judicial methodology or to explain the logic, legitimacy and coherence of our understanding of constitutional interpretation. Unless we take up this challenge, we will continue to lose in the courts, in nomination battles, in the legislatures, and at the polls.

In this issue brief, we set the record straight about conservative constitutional jurisprudence and set forth a principled approach to constitutional interpretation that reflects the fundamental values and aspirations of those who framed the American Constitution over the course of more than two centuries and strikes the proper balance between judicial restraint and judicial activism by focusing on the circumstances in which judicial review is necessary to preserve our constitutional liberties and limitations.

I. The Framers' Vision

The Framers of the American Constitution were visionaries. They designed our Constitution to endure. They sought not only to address the specific challenges facing the nation

^{*} Edward H. Levi Distinguished Service Professor of Law, The University of Chicago, and Chair of the Board of the American Constitution Society.

^{**} William Rand Kenan, Jr. Distinguished Professor of Law, University of North Carolina, and former member of the Board of the American Constitution Society.

during their lifetimes, but to establish the foundational principles that would sustain and guide the nation into an always uncertain future.

The text of the Constitution reflects this vision. It defines our most fundamental freedoms in general terms: “freedom of speech,” “due process of law,” “free exercise of religion,” “equal protection of the laws,” “privileges and immunities of citizenship,” “cruel and unusual punishment.” The Constitution sets forth governmental powers in similarly general terms: Congress may regulate “commerce among the several states” and may enforce the Fourteenth Amendment “by appropriate legislation,” the president will “take care that the laws be faithfully executed,” the courts are authorized to decide “cases” and “controversies.”

These phrases are not self-defining. The Framers understood that they were entrusting to future generations the responsibility to draw upon their intelligence, judgment, and experience to give concrete meaning to these broad principles over time. As Chief Justice John Marshall observed almost two centuries ago, “we must never forget it is a Constitution we are expounding...intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”

This understanding reflects an approach that is true to what we might call “The Framers’ Constitution.” It recognizes that the Constitution sets forth broad principles and that a central challenge of constitutional interpretation is to define and then give life and substance to those principles in an ever-changing society. The principles enshrined in the Constitution do not change over time. But the application of those principles must evolve as society changes and as experience informs our understanding.

American constitutional law has long followed the path set by Chief Justice Marshall. As technological means of surveillance became more sophisticated, for example, the meaning of “search” in the Fourth Amendment came to include invasions of privacy that do not involve a physical trespass. The provision granting Congress the power to maintain the nation’s “land and naval Forces” was eventually seen as authorizing an air force. The guarantee of “equal protection of the laws” in the Fourteenth Amendment was understood in later decades as prohibiting discrimination not only against African-Americans but against women and gays and lesbians as well. “Commerce among the several states” came to be seen differently as the nation’s economy became more complex and integrated across state lines, and the concept of “liberty” came to encompass not only freedom from physical restraint, but also freedom from undue government intrusion into such fundamental personal decisions as whether to bear or beget a child or how to raise and educate one’s children.

II. A Principled Approach to Constitutional Interpretation

But how should we give concrete meaning to the open-textured provisions of the Constitution? On the one hand, judges must have sufficient interpretative authority to ensure that constitutional rights and limitation endure over time. On the other hand, judges must not have such broad interpretative discretion that they can freely substitute their own personal, political, religious, social, and economics values for those of the People. The best solution, which is grounded in the vision of the Framers across the centuries, has a long and honorable tradition in

American constitutional law. It has two essential elements. First, at the very core of The Framers' Constitution is the recognition that, in a self-governing society, courts must generally defer to the preferences of the majority. Although courts may always review governmental action to guard against arbitrariness or unreasonableness, the starting point must be a presumption of judicial restraint. This is an essential tenet of any theory of principled constitutionalism.

Second, respect for The Framers' Constitution requires us to recognize that although the Framers thought majority rule to be the best system of government, they knew it to be imperfect. They understood that political majorities may be tempted to enact laws that entrench their own authority; that driven by fear, self-interest or short-sightedness, majorities may sometimes too quickly cast aside fundamental freedoms and critical structural limitations; and that prejudice, hostility, and intolerance may at times lead governing majorities to give short shrift to the legitimate needs and interests of political, religious, racial, and other minorities.

The Framers intended courts to play a central role in addressing these concerns. When proponents of the original Constitution argued in 1790 that a bill of rights would be pointless because political majorities would run roughshod over its guarantees, Thomas Jefferson responded that this argument ignored "the legal check" that could be exercised by the judiciary. When James Madison faced similar concerns when he introduced the Bill of Rights in the first Congress, he maintained that "independent tribunals of justice will consider themselves . . . the guardians of those rights [and] will be naturally led to resist every encroachment" upon them. And in *Federalist 78*, Alexander Hamilton stated that constitutional protections and limitations could "be preserved in practice no other way than through the medium of courts of justice," which must "guard the constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people."

This understanding of The Framers' Constitution found expression in the modern era in a series of Supreme Court opinions in the 1930s and 1940s. For example, in the Court's famous footnote 4 in *Carolene Products*, decided more than seventy years ago, the Court suggested that there are some circumstances in which there may be "narrower scope" for the usual "presumption of constitutionality." Specifically, the Court noted that "more exacting judicial scrutiny" may be appropriate when legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and when laws disadvantage groups like "religious or racial minorities," because "prejudice" against such groups "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect" us against injustice. Put simply, the Court recognized in *Carolene Products* that courts should not be so quick to defer to the outcomes of the political process when there is good reason to believe that that process itself may have been tainted.

Following this approach, the Supreme Court has properly departed from the presumption of judicial restraint when governing majorities disadvantage historically vulnerable groups (such as African Americans, ethnic minorities, political dissidents, religious dissenters, women, and persons accused of crime); when they use their authority to stifle critics, entrench their own political power, or undermine the constitutional structure of checks and balances; and when majorities act in moments of high crisis. In such circumstances, it is necessary and proper for courts—Madison's "independent tribunals of justice"—to exercise a "more exacting judicial

scrutiny” in order to protect our most fundamental freedoms and guard against those malfunctions of majority governance that most concerned the Framers. This, too, is an essential tenet of principled constitutionalism.

Invoking this understanding of judicial responsibility, the Supreme Court has issued a series of landmark decisions that faithfully interpret and apply The Framers’ Constitution. These decisions ended *de jure* racial segregation, recognized the principle of “one person, one vote,” forbade government suppression of political dissenters, established an effective right to counsel for persons accused of crime, struck down government discrimination against women, limited the authority of government to interfere with women's reproductive choices, and upheld the right of “enemy combatants” to due process of law, to cite just a very few examples. These decisions animate the most fundamental aspirations of our Constitution in circumstances in which judicial intervention is both proper and *necessary*.

III. The Myths of Conservative Jurisprudence

For the past half-century, however, conservatives have argued that the Supreme Court went too far in the 1950s and ‘60s in its efforts to preserve the vitality of self-governance and protect the rights of those most in need of judicial attention. In the late 1960s, for example, conservatives like Richard Nixon and Strom Thurmond condemned what they derided as “judicial activism” and demanded the appointment of judges and justices committed to judicial restraint. But although judicial restraint in appropriate circumstances is essential to principled constitutionalism, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the American constitutional system. It is no more appropriate for judges to refuse to enforce the Constitution against intolerant or overreaching majorities than it is for the president to refuse to defend the nation against enemy invasion.

Perhaps recognizing that a theory of unbounded judicial restraint is constitutionally irresponsible, political conservatives next came up with the modern theory of “originalism.” First popularized by Robert Bork, Edwin Meese, and Antonin Scalia in the 1980s, their version of originalism presumes that courts should exercise judicial restraint unless the “original meaning” of the text clearly mandates an activist approach. Under this theory, for example, it is appropriate for courts to invoke the Equal Protection Clause to invalidate laws that deny African Americans the right to serve on juries, but not to invalidate laws that deny women that same right, because that was not the “original meaning” of the Equal Protection Clause.

Originalism, however, is fundamentally flawed. First, because those who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the specific meaning of “freedom of speech” or “due process of law” or “regulate Commerce...among the several States” or “privileges or immunities” or “equal protection of the laws,” it is difficult if not impossible to know with any certainty what they did or did not think about concrete constitutional issues. As a consequence, judges purporting to engage in originalist analysis often project onto the Framers their own personal and political preferences. The result is an unprincipled and often patently disingenuous jurisprudence. There is no evidence, for example, for the claims advanced by originalists that the original meaning of the

Equal Protection Clause prohibited affirmative action or that the original meaning of the First Amendment guaranteed corporations a constitutional right to spend unlimited amounts of money to dominate the election of public officials. Both of these claims, however, are central to today's conservative constitutional agenda.

The second problem with originalism is even more disqualifying, for it reveals the theory to be internally incoherent. Originalism asserts that those who crafted and ratified our Constitution intended the meaning and effect of their handiwork to be limited to the specific understandings of their time. But this view erroneously attributes to the Framers a narrow-mindedness and short-sightedness that belies their true spirit. As Justice Louis Brandeis observed more than 80 years ago, the Framers believed “courage to be the secret of liberty.” They were not timid men. Moreover, originalism ignores that those who framed our Constitution were steeped in a common-law tradition that presumed that just as reason, observation, and experience permit us to gain greater insight over time into questions of biology, physics, economics, and human nature, so too would they enable us to learn more over time about the content and meaning of the principles they enshrined in our Constitution. Indeed, the notion that any particular moment's understanding of the meaning of the Constitution's provisions should be locked into place and taken as constitutionally definitive would have seemed completely wrong-headed to the Framers, who held a much bolder and more confident understanding of their own achievements and aspirations.

For these reasons, the conservative doctrine of “originalism” has been largely discredited as a serious method of constitutional interpretation. This is not to say, however, that the views of the Framers are irrelevant. To the contrary, their values, concerns and purposes, as reflected in the text of the Constitution, must inform and guide the process of constitutional interpretation, but in a principled and realistic manner. They must be considered as the Framers themselves understood them—as a set of general principles and aspirations, rather than as a collection of specific and short-sighted “rules.” To be true to The Framers' Constitution, we must strive faithfully to implement the Framers' often far-sighted goals in an ever-changing society. That is central to any theory of principled constitutionalism.

Moreover, the values, concerns and purposes of the Framers must be understood in light of the inescapable reality that the American people have repeatedly amended the Constitution over the past two centuries to make it more inclusive and more progressive. By outlawing slavery in the 13th Amendment, guaranteeing due process, equality, and privileges and immunities in the 14th Amendment, and consistently expanding the franchise in the 15th, 19th, 24th, and 26th Amendments, the people of the United States have themselves made clear time and again that our Constitution is a fundamentally progressive document. This history must guide judges and justices in their interpretation and implementation of the Constitution.

Instead, we have now entered a new and even more troubling phase of conservative constitutional jurisprudence. It is best characterized as “conservative activism.” Justices who readily dismiss constitutional claims by women, political dissenters, and racial, ethnic, and religious minorities, but at the same time aggressively strike down affirmative action programs, restrictions on corporate political expenditures, gun control laws, regulations of commercial advertising, federal civil rights laws prohibiting age discrimination and domestic violence, and

the laws of the state of Florida in the 2000 presidential election, have hijacked the power of judicial review. Conservative justices today exercise that authority in a highly selective and politicized manner that cannot credibly be explained or justified by *any* principled theory of constitutional interpretation. Indeed, despite all of the conservative rhetoric about originalism, “strict construction,” “judicial restraint,” “applying rather than making the law,” and “calling balls and strikes,” this pattern of decisions raises grave questions about the considerations that actually drive the jurisprudence of our conservative justices.

In the end, of course, constitutional interpretation is not a mechanical enterprise. It requires judges to exercise judgment. It calls upon them to consider text; history; precedent; values; changing social, economic, technological, and cultural conditions; and the practical realities of the times. Above all, it must be grounded in an understanding of the judiciary’s unique strengths and weaknesses and in a proper appreciation of the most fundamental reasons for judicial review. Courts must have the authority to invalidate acts of the elected branches of government, not so they can pursue conservative or liberal agendas, but so they can serve as an essential check on the dangers of majoritarian dysfunction. This understanding of constitutional law was central to much of the work of the Warren Court and it has long been central to the progressive understanding of constitutional law.

It is time now for a new era of principled constitutionalism. It is time to return to The Framers’ Constitution.