

# Conversations on the Constitution:

## Judicial Interpretation with Justices Antonin Scalia and Stephen G. Breyer



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Essential Question: How does philosophy affect the way a judge reads the Constitution and what is the effect of that?

### Standards (Center for Civic Education)

- I. What are civic life, politics, and government?
  - a. civic life, politics, and government; purposes of government
  - b. essential characteristics of limited and unlimited government
  - c. nature and purposes of constitutions
- II What are the Foundations of the American Political System?
  - c. American political culture
  - d. Basic values and principles

### Outcomes

As a result of this lesson, students will be able to:

- Recognize that justices have different views as to how the Constitution should be interpreted.
- Understand the philosophical differences between the two principal approaches to the Constitution.
- Comprehend how the application of those different approaches can result in differing decisions by the Court (extension activity).
- Better understand the concept of “tyranny of the majority” (extension activity).

### Materials

- *A Conversation on the Constitution: Judicial Interpretation with Justices Antonin Scalia and Stephen G. Breyer*
- Video also available online at <http://www.annenbergclassroom.org/page/a-conversation-on-the-constitution-judicial-interpretation>
- Blank note card for each student
- If desired, Extension Activities (recommended) can be used and worksheets printed back to back.

### Preparing to Teach

- Read the Teacher Briefing provided
- Copy worksheets for Extension Activities, if desired
- Set up online video

## LESSON

### Activating Prior Knowledge (5-10 minutes)

1. Ask students to stand up.
2. Tell them that the 8th Amendment to the Constitution bars cruel and unusual punishment. They should pretend they are Supreme Court justices.
3. Ask them how many would find imposing the death penalty on persons aged 17 to be cruel and unusual punishment? Tell them to stand on one side of the room. How many would feel that it was not cruel and unusual punishment to give that person the death penalty? They should stand on the other side of the room.
4. Now, ask them this: If they knew that at the time the Constitution was implemented (1790s), the death penalty for 17-year olds was an acceptable practice, would they change their opinions? Those who change their minds should go to the other side of the room.
5. Now, ask them this: If they knew that over half the states had laws on the books which allowed for the imposition of the death penalty on someone aged 17, would they change their minds? Those who change their minds should switch sides.
6. Finally, ask them if they knew that those laws (allowing executions of 17 year olds) were on the books but seldom applied, would they change their minds? Those who change their minds should switch sides.
7. Tell students to note which side of the room they are on – for or against the death penalty in this case – and to return to their seats and write their side on their note cards. (They should hold on to the note cards. They'll be using them during and after the video.)
8. Briefly, ask students: what did that exercise show them?

### Processing (35 minutes)

1. Prepare students to watch the film. Tell students to listen in order to determine which justice took the same position they did (for or against the death penalty in the 17 year old's case) and why. Tell students to also:
  - a. Listen closely to the part of the film where Justice Breyer indicates the six factors which influence his decision: Words and context, History, Traditions, Precedent, Purpose and values, Consequences.
  - b. Write that list on the card.
  - c. Answer these questions:
    - i. Which does Justice Breyer emphasize?
    - ii. Which does Justice Scalia emphasize? (Students could put an S or B next to those factors.)
2. Begin the film.

### Synthesizing (5-10 minutes)

1. Ask students to flip the card over and write which justice, Scalia or Breyer, took the same position they did with regards to the death penalty for juveniles. In at least two sentences, students should write why they think the justice took that position.
2. Ask students to share their responses.
3. Finally, ask students to write down these five words: TEXTUALIST, STRICT CONSTRUCTIONIST, ORIGINALIST, EVOLUTIONIST, and DEVELOPMENTALIST. They should circle the ones which could apply to their justice's position.

## EXTENSION ACTIVITY (RECOMMENDED)

Extension activities will be important for this lesson. Students will need a chance to think about and work with the concepts introduced. Here are two options:

1. Tyranny of the Majority Worksheet: Provide each student with a copy of Handout 1. Students will write a definition of this concept as introduced in the film. They will give three examples of a situation where the majority of persons supported a position, but the position was later determined to be wrong. They will indicate how situation was resolved.
2. Application to Contemporary Issues Worksheet: Provide each student with a copy of Handout 2. Next to each listed issue, students will indicate how each philosophy of interpretation would decide the issue.

### Assessment

Assess student progress toward outcomes by evaluating:

- Students' engagement in Activating Prior Knowledge portion of lesson.
- Students' responses on note cards determine that their positions are consistent with the position of the justice they indicated and that the reasons given are accurate.
- Extension Activities, if included.

### Additional Resources

- *Roper v. Simmons* (2005) is the Supreme Court case which decided the issue of whether or not the execution of a 17 year old was cruel and usual punishment. A short summary of this case is available at [http://www.oyez.org/cases/2000-2009/2004/2004\\_03\\_633/](http://www.oyez.org/cases/2000-2009/2004/2004_03_633/)

A longer summary is available from Street Law, Inc.: [www.streetlaw.org/sccasesalpha](http://www.streetlaw.org/sccasesalpha).

(FYI: *Thompson v. Oklahoma* (1988) is the Supreme Court case which decided the issue of whether or not the death penalty was cruel and unusual punishment where the defendant participated in a murder at age 15.)

- The Congressional Research Service's Annotated Constitution is also published by the Cornell University Law School online at <http://www.law.cornell.edu/anncon/>, which is a good resource for a scholarly discussion of provisions of the U.S. Constitution.

Credits: Conversations on the Constitution: Judicial Interpretation with Justices Antonin Scalia and Stephen G. Breyer.

Created for the Annenberg Foundation Trust at Sunnylands Constitution Project by Street Law.

# HANDOUT 1- Tyranny of the Majority

## Conversations on the Constitution:

### Judicial Interpretation with Justices Antonin Scalia and Stephen G. Breyer

1. Define “tyranny of the majority.”
2. From history or modern times, give three examples where the majority of persons acted in a way which was later determined to be wrong.

Example	Problem	How was it corrected?

3. Which is the best way to correct situations where the majority is in the wrong? (Consider these questions before you respond: Should legislatures correct the problem? Should courts? Why or why not? Is there any one best way to fix problems? How effective and timely are the solutions?)

## HANDOUT 2- Application to Contemporary Issues

### Conversations on the Constitution:

#### Judicial Interpretation with Justices Antonin Scalia and Stephen G. Breyer

Directions: For each of the following issues, decide how justices would look at the issue depending on their philosophies. How would the textualists see the issue? Complete that box. How would developmentalists see the issue? Complete that box. At the end, write your own issue and address it.

Issue	Textualist View	Developmentalist View
Abortion: Can states restrict access to abortions?		
Privacy: Can states restrict the activity of people in their own homes?		
Gun Control: Can states deny persons the right to have a handgun?		
Exclusionary Rule: Should evidence which is unlawfully obtained by the police be admissible at trial?		
Write your own issue here and address it:		

Thought question: Do differing philosophies always mean different conclusions?

## Conversations on the Constitution:

The Importance of the Japanese-American Internment Cases with Justices Anthony M. Kennedy, Sandra Day O'Connor, and Stephen G. Breyer

# TEACHER BRIEFING

### Summary of the Subject Matter:

Different judges interpret the Constitution differently. This conversation between Justices Scalia and Breyer makes that clear. Justice Scalia describes his textualist, strict constructionist, originalist philosophy: the Constitution should be interpreted as it would have been in 1789 when the original Constitution was ratified or in 1791 when the Bill of Rights (the first ten amendments) was ratified. Justice Breyer describes his developmentalist, evolutionist philosophy: the Constitution must adapt to changing society if it is to be relevant and respected; the important thing is to find the underlying core values and determine what those values would require now.

Textualists tend to claim that judges who go beyond the original meaning of the constitution are acting as legislators and imposing their will instead of determining what the constitution means. Developmentalists maintain that text matters but that much of our constitutional language is general in nature and represents broad aspiration. They also suggest that there are problems that can't be solved simply by close reading of text and history.

This can result in different positions which are reflected in the different majority, concurring, and dissenting opinions written by the justices. It also means that at different times, different combinations of justices could render different opinions.

Another implication is that the appointment of judges can influence the outcome of decisions, not just because they might be political – judges are not allowed to swap votes or logroll – but because among judges there are sincerely held, but in some instances significantly different, convictions about what the judiciary should do and what should be left to the legislatures.

### Lesson Overview and Teacher Guide:

**Activating Prior Knowledge:** The point is for students to realize that factors like text, context, state action, and state practice might influence a justice's opinion about interpreting the wording of the Constitution.

**Processing and Synthesizing:** Student responses should be consistent. In the death penalty case which the justices discuss, Justice Scalia would support the imposition of the death penalty relying on words, tradition, history, and precedent. Descriptions like Textualist, Strict Constructionist, and Originalist would apply to his position. Justice Breyer would not support the imposition of the death penalty, relying more heavily on evolving values and consequences. Developmentalist and Evolutionist would apply to his position. Students should identify correctly the justice who would agree with their own position and indicate why.

## EXTENSION ACTIVITY: TYRANNY OF THE MAJORITY- Answers

1. Define “tyranny of the majority.”

The majority makes the decisions (especially in legislatures, majority rules), but sometimes those decisions are wrong or unfair.

2. From history or modern times, give three examples where the majority of persons acted in a way which was later determined to be wrong.

Student answers will vary. Some examples:

Example	Problem	How was it corrected?
Slavery	Responses vary	Amendment
Segregation	Responses vary	Court case Federal legislation
Denial of vote to women	Responses vary	Amendment
Child labor	Responses vary	Federal legislation
Internment of Japanese-Americans	Responses vary	Apology, court comment

3. Which is the best way to correct situations where the majority is in the wrong? (Consider these questions before you respond: Should legislatures correct the problem? Should courts? Why or why not? Is there any one best way to fix problems? How effective and timely are the solutions?)

Responses will vary. Legislatures are entrenched, slow, and subject to special interests. Their members are concerned about re-election. Federal judges are not elected, not accountable to people, not a legislative body, and have a separate role in checks and balances.

## EXTENSION ACTIVITY: APPLICATION TON CONTEMPORARY ISSUES- Answers

Directions: For each of the following issues, decide how justices would look at the issue depending on their philosophies. How would the textualists see the issue? Complete that box. How would developmentalists see the issue? Complete that box. At the end, write your own issue and address it.

Issue	Textualist View	Developmentalist View
Abortion: Can states restrict access to abortions?	Nothing in the Constitution stops state legislatures from restricting.	Abortion is protected by the right to privacy and involves a liberty that states should not limit.
Privacy: Can states restrict the activity of people in their own homes?	Word “privacy” does not appear in the Constitution; states can limit	“Penumbra” around other rights makes clear that privacy is a core value
Gun Control: Can states deny persons the right to have a handgun?	Textualists can disagree with each other here. Some argue guns allowed only in context of militia. Other argue that the militia and gun ownership clauses of the Second Amendment are separate. Historically, there was gun ownership, so historians are inclined to allow it.	Evolving values means access to guns can be limited. For example, the country is more urban now. Some weight should be given to the will of the people as expressed through legislative acts like gun control laws.
Exclusionary Rule: Should evidence which is unlawfully obtained by the police be admissible at trial?	Nothing in Constitution says unlawfully obtained evidence can’t be used; therefore allow it in.	Values require that the government not have the use of evidence which it has obtained unlawfully; therefore exclude it.
Write your own issue here and address it:	Responses will vary.	Responses will vary.

Thought question: Do differing philosophies always mean different conclusions?

Different philosophies do not always create different results. Justices Breyer and Scalia said the Court is unanimous 20 – 30% of the time (in recent years, the Court has been unanimous 40-50% of the time). In addition, it is not always the same groups of justices who take different sides; the divisions shift among the justices.