

**STRICT OR LOOSE CONSTRUCTIONISM? Two views about interpreting the Constitution**

Study the following arguments for the strict and loose constructionist viewpoints of Constitutional law. 1. On the back of this paper, draw a T-chart that summarizes the main points for each position. 2. Do you side more with the strict or the loose constructionists? Why? In a 4-5 sentence paragraph, explain your reasons.

<p><b>Strict Constructionist: Robert Bork—legal scholar and U.S. Court of Appeals</b></p>	<p><b>Loose Constructionist: Laurence Tribe—professor of Constitutional law at Harvard U.</b></p>
<p>1. What does it mean to say that a judge is bound by the law? It means that he or she is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute (a law), as generally understood at the [time of the] enactment. This philosophy of <b>original intent</b> or original understanding—that a judge is to apply the Constitution according to the principles intended by those who ratified the document—was once the dominant view of constitutional law...</p> <p>2. It is as important to freedom to confine the judiciary’s power to its proper scope as it is to confine that of the president, Congress, or state and local governments...The interpretation of the Constitution according to the original understanding is the only approach to what Justice Felix Frankfurter called the “fulfillment” of one of the greatest duties of a judge, the duty not to enlarge his authority.”</p> <p>3. When a court strikes down a statute (law), it always denies the freedom of the people who voted for the representatives who enacted the law. ...The Constitution...was designed to remove a number of subjects from democratic control, subjects ranging from the structure of Congress to the freedoms guaranteed by the Bill of Rights. But when the Court, without warrant in the Constitution, strikes down a democratically produced statute, that act substitutes the will of a majority of nine lawyers for the will of the people.</p> <p>4. We administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of a new law.</p> <p>5. Once upon a time, Justice Holmes and Justice Hand had lunch together. Afterward, as Holmes began to drive off in his carriage, Hand ran after him, crying, “Do justice, sir, do justice.” Holmes stopped the carriage and reprimanded Hand: “That is not my job. It is my job to apply the law”.</p> <p>6. A judge has no authority to impose a moral hierarchy upon society. People can and do disagree about moral and ethical principles. Because we disagree, we put such issues to a vote, and where the Constitution does not speak, the majority morally prevails. Where the Constitution does not apply, judges, while in their robes, must adopt a posture of moral abstention. They must avoid the temptations of politics.</p>	<p>1. Some would argue that constitutional adjudication is simply the job of correctly reading the Constitution. If the Supreme Court pays close attention to its words and avoid stretching their meanings---there will be few occasions for controversies. ...All that the president and the Senate need do is stop appointing “<b>activist</b>” judges who impose their own philosophies upon the document they are sworn to uphold, and appoint instead properly “<b>restrained</b>” jurists who know, and will not exceed, a judge’s properly limited place...This approach to <b>judicial review</b> is usually known as strict constructionism, and its guiding principle is exclusive attention to the constitutional text.</p> <p>2. The central flaw of strict constructionism is that words are inherently indeterminate—they can often be given more than one plausible meaning. If simply reading the Constitution the “right” way were all the justices of the Supreme court had to do, the only qualification for the job would be literacy, and the only tool a dictionary. Many of its most precise commands are trivial—such as the age requirements for offices—while nearly all of its most important phrases are deliberate models of ambiguity. Just what does the Fourth Amendment prohibit as an “unreasonable search”? ...And what, in heaven’s name, is “due process”? Such vague phrases not only invite but compel the Supreme Court to put meaning into the Constitution, not just to take it out.</p> <p>3. This is not to say that the Court is free to take the position of Humpty Dumpty, that “a word means just what I choose it to mean—neither more nor less”...The Constitutional text is not enough—we need to search for, and explain our selection of, the principles behind the words. The Constitution is the grand charter of a democratic republic ...and it was written in a broad, even majestic language because it was written to evolve.</p> <p>4. The strict constructionists will also say that the task of the Supreme Court, when confronted by ambiguous or open-ended language, is simply to divine what the framers and the authors of the amendments had in mind. One obvious problem with asking “what they meant” is that we must first determine who “they” are. For example, should we defer to the Federalists or Anti-Federalists? ...And even if the mythical beast of original intent could be captured and examined, how relevant would it be for us today? Should the peculiar opinions held by men who have been dead for two centuries always trump contemporary insights into what the living Constitution means and ought to mean? ..Should we permit others to rule us from the grave?</p> <p>5. Finally, the Supreme court just cannot avoid the painful duty of exercising judgment so as to give concrete meaning to a fluid Constitution. Strict constructionism—and original intent—are both built on the myth that the Supreme Court does not make law, but finds law ready-made by others. .</p>

