

Constitution: Living Document or Original Intent?

WASHINGTON - Conservatives and liberals will debate a variety of issues during the upcoming confirmation hearings for John Roberts.

But the key issue is how a Supreme Court nominee views the Constitution. Is it a "living document" that judges can interpret as they please? Or should judges stick to what the founding fathers intended?

The U.S. Constitution is the supreme law of the land, created by our founding fathers more than 200 years ago.

But the days of George Washington and Thomas Jefferson are gone. And one lasting document has now turned into two competing philosophies. Because in today's society, some see it as black and white, while others see it a little more blurry.

Put another way, it is a battle between old school and new school. The old school scholars say judges should interpret the Constitution as our founding fathers intended. The new school says that the Constitution changes and evolves.

Those new schoolers believe in what some call a "living constitution." In other words, the past is the past and today's world is much different than 200 years ago, so the Constitution needs to be interpreted in that light.

Elliot Minsberg is vice president of the liberal activist group People for the American Way. "It was the framers that intended that the Constitution would adapt to changing circumstances," he asserted.

That is not how the old schoolers look at it. Todd Gaziano is with the conservative think tank, The Heritage Foundation.

"There is one philosophy, original intent" Gaziano said. "That is the only legitimate means of interpretation under our written Constitution and all other philosophies which are illegitimate."

On the Supreme Court, Justice Ruth Bader Ginsburg, a liberal, is a believer in the living Constitution.

Justice Antonin Scalia believes in following the original intent of the founding fathers. He has warned that if judges start to redefine the constitutional text according to their own views, then they have rendered the Constitution useless.

Gaziano stated, "Only the judges that are faithful to the text in the original understanding of the text are following the rule of law."

Old schoolers say that looking at the Constitution as a living, breathing document is dangerous. They point to a long list of Supreme Court decisions that basically created new rights.

For example, abortion. The Roe v. Wade decision legalized abortion. Originalists say this is a new right that has been made up.

Same thing with gay rights in Lawrence v. Texas; the high court basically established a constitutional right to sodomy. And then there is the juvenile death penalty, where the high court, in Roper v. Simmons ruled that

children under 18 should not be subject to the death penalty.

Ginsberg defends this approach saying the Constitution must allow for broad interpretation.

"It's intended to be looked at in the context of contemporary events, in the context of history, in the context of past precedent, and the intent of the framers. Put all those things together and hopefully what you get is the right answer to some perplexing issue that the court is confronting," Ginsberg said.

Originalists do not agree, of course, and the President believes he has found one in Roberts. He hopes his pick for the Supreme Court will adhere to the principle that a judge should interpret the law, not make law from the bench.

The President, and other conservatives like him, believe if you want to change the Constitution, then pass a constitutional amendment. Otherwise, judicial activism sets in where judges start to take over the role of Congress and start legislating from the bench. In other words, making new laws.

The believers in original intent say that this is exactly what this living constitution theory is all about. "If judges can essentially do whatever they want in the guise of updating the constitution," said Gaziano, "making it real for today or choosing whatever silly phrase you want, then we might as well have a completely unwritten Constitution."

Minsberg said, "I would argue that it isn't judicial activism, that it's an interpretation of the fundamental intent of the founders in using intentionally broad phrases like equal protection or due process that were meant to be interpreted in light of our changing times."

The stakes are high in this fight. Liberals are concerned that originalists will roll back time and suppress civil rights.

For social conservatives, the nightmare scenario is a Supreme Court filled with judges who see the Constitution as a living, breathing document. That could lead to gay marriage, to religious expression being removed from the public square, and a host of other liberal causes.

Conservatives say it is a slippery slope that has already begun. "The question is whether we can stop and whether we can trudge back up the hill towards constitutionalism," declared Gaziano.

CBN News asked Gaziano how you accomplish this, and Gaziano replied, "You appoint the right justices to the Supreme Court."

But both sides have their own view on just what a 'right justice' should be.