Biblical Principles:
The Basis for America's Laws

PRINCIPLE	DOCUMENT	BIBLICAL REFERENCE
Sovereign authority of God, not sovereignty of the state, or sovereignty of man	Mayflower Compact, Declaration, Constitution, currency, oaths, mention of God in all 50 state constitutions, Pledge of Allegiance	Ex. 18:16, 20:3, Dt. 10:20, 2 Chron. 7:14, Ps. 83:18, 91:2, Isa. 9:6-7, Dan. 4:32, Jn. 19:11, Acts 5:29, Rom. 13:1, Col. 1:15-20, 1 Tim. 6:15
Moral absolutes, Fixed standards, Absolute truth, Sanctity of life	Declaration ("unalienable" rights—life, etc., "self-evident" truths)	Ex. 20:13, Dt. 30:19, Ps. 119: 142-152, Pr. 14:34, Isa. 5:20-21, Jn. 10:10, Rom. 2:15, Heb. 13:8
Rule of law rather than authority of man	Declaration, Constitution	Ex. 18-24, Dt. 17:20, Isa. 8:19-20, Mat. 5:17-18
All men are sinners	Constitutional checks and balances	Gen. 8:21, Jer. 17:9, Mk. 7: 20-23, Rom. 3:23, 1 Jn 1:8
All men created equal	Declaration	Acts 10:34, 17:26, Gal. 3:28, 1 Pet. 2:17
Judicial, legislative, and executive branches	Constitution	Isa. 33:22
Religious freedom	First Amendment	1 Tim. 2:1-2
Church protected from state control (& taxation), but church to influence the state	First Amendment	Dt. 17:18-20, 1 Kgs. 3:28, Ez. 7:24, Neh. 8:2, 1 Sam. 7:15-10:27, 15:10-31, 2 Sam. 12:1-18, Mat. 14:3-4, Lk. 3:7-14, 11:52, Acts. 4:26-29
Democracy/Republic	Constitution	Ex. 18:21, Dt. 1:13, Jud. 8:22, 9:6, 1 Sam. 8, 2 Sam. 16:18, 2 Kgs. 14:21, Pr. 11:14, 24:6
Bottoms up government, Self-control, Limited federal powers	First, Second, Ninth, and Tenth Amendments	Mat. 18:15-18, Gal. 5:16-26, 1 Cor. 6:1-11, 1 Tim. 3:1-5, Tit. 2:1-8
Establish justice	Declaration	Ex. 23:1-9, Lev. 19:15, Dt. 1:17, 24:17-19, 1 Sam. 8:3, 2 Sam. 8:15, Mic. 6:8, Rom. 13:4
Fair trial with witnesses	Sixth Amendment	Ex. 20:16, Dt. 19:15, Pr. 24:28, 25:18, Mat. 18:16
Private property rights	Fifth Amendment	Ex. 20:15,17
Biblical liberty, Free enterprise	Declaration	Lev. 25:10, Jn. 8:36, 2 Cor. 3:17, Gal. 5:1, James 1:25, 1 Pet. 2:16
Creation not evolution	Declaration	Gen. 1:1

Biblical capitalism not Darwinian capitalism (service and fair play over strict survival of the fittest)	Anti-trust laws	Ex. 20:17, Mat. 20:26, 25:14-30, 2 Thes. 3:6-15, 1 Pet. 2:16
Importance of the traditional family	State sodomy laws, few reasons for divorce	Ex. 20:12,14, Mat. 19:1-12, Mk. 10:2-12, Rom. 1:18-2:16, 1 Cor. 7:1-40
Religious education encouraged	Northwest Ordinance	Dt. 6:4-7, Pr. 22:6, Mat. 18:6, Eph. 6:4
Servanthood not political power	Concept of public servant	Ex. 18:21, Rom. 13:4, Php. 2:7
Sabbath day holy	"Blue laws"	Ex. 20:8
Restitution	Restitution laws	Lev. 6:1-5, Num. 5:5-7, Mat. 5:23-26

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THE CONSTITUTION
Evolving Document

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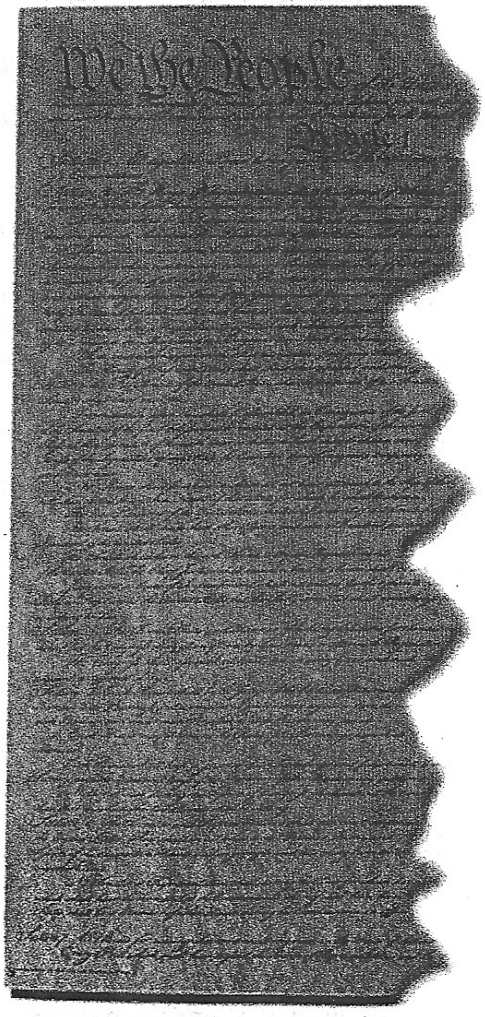

BY ALAN DERSHOWITZ

From the earliest days of our constitutional history, debate has raged about how to interpret the open-ended words of our charter of government. Should these words, written years earlier, be constantly reinterpreted to address current problems and current needs? Or should they mean precisely what those who wrote them intended them to mean? The "reinterpretation" school is best represented by the judicial opinions and writings of Justice William J. Brennan, who served on the Supreme Court from 1956 to 1990. The "original understanding" approach is best represented by current Supreme Court Justice Antonin Scalia, who joined the high court in 1986.

Both sides to the debate begin by agreeing with the broad principles enunciated by Chief Justice John Marshall in 1803, that "it is a constitution we are expounding" – a constitution that was "designed to approach immortality as nearly as any human institution can approach it." The disagreement is about whether the "reinterpretation" approach or the "original meaning" approach is more likely to assure immortality.

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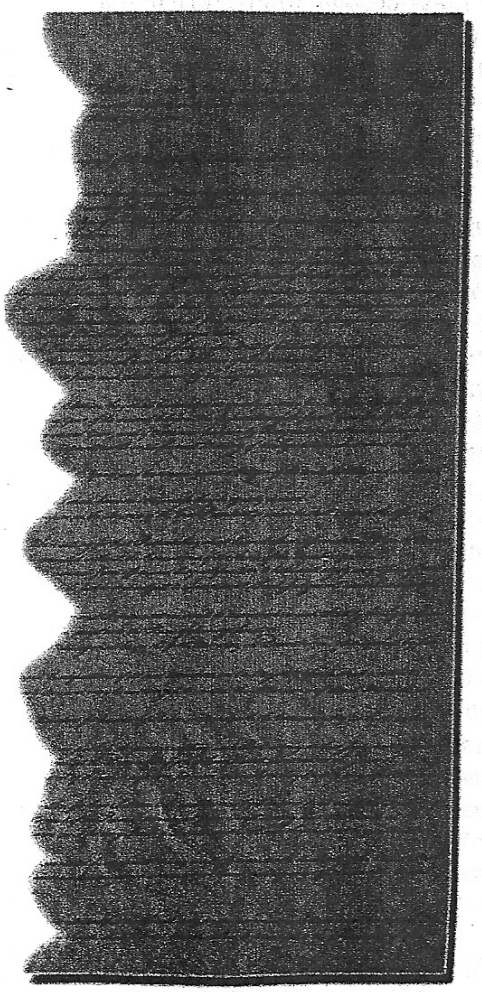

Our founding document will evolve, but the question is how.

BY DAVID BARTON

The subject of constitutional interpretation may seem a topic best fitted for an ivory-tower debate, but it actually has a very real and dramatic impact on the daily lives of all Americans. In recent years, two competing viewpoints have emerged.

Most citizens had their first exposure to the two views during the 2000 presidential debates. When asked what type of judges should be placed on the bench, candidate George W. Bush responded, "I believe that the judges ought not to take the place of the legislative branch of government ... and that they ought to look at the Constitution as sacred ... I don't believe in liberal, activist judges; I believe in strict constructionists." Candidate Al Gore countered, "The Constitution ought to be interpreted as a document that grows ... I believe the Constitution is a living and breathing document ... We have interpreted our founding charter over the years and found deeper meanings in it, in light of the subsequent experience in American life."

So, the two choices are to follow original intent or to continuously reinvent a "living" constitution.

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Living vs. Dead. Those who advocate the "reinterpretation" approach argue that in order to assure that words written more than two centuries ago remain relevant today, they should to be interpreted in light of changing experiences. According to this view, the framers of our Constitution purposely used "broad and majestic terms" – such as "equal protection of the laws," "due process," "cruel and unusual punishment," and "liberty" – that were "left to gather meaning from experience."

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Twentieth-century Supreme Court justices, in cases such as *National Insurance Co. v. Tidewater Co. Board of Regents* and *State Colleges v. Roth*, have recognized that "only a stagnant society remains unchanged." Justice William J. Brennan Jr., in a speech at the Text and Teaching Symposium at Georgetown University in October 1985, said, "The genius of our constitution is not in any static meaning it might have in a world that is dead and gone, but the adaptability of the great principles to cope with current problems and current needs." In order to remain faithful to the real meaning of the Constitution, its broad phrases must be reinterpreted as times change in order to implement the substantive value choices of the framers and apply them to new circumstances that these men could not have contemplated when they wrote the Constitution. By reinterpreting the Constitution to make it relevant to changing conditions, the judges bring it alive. It becomes a living document.

This "living-constitution" school of interpretation is opposed by a school that argues that the original meaning of the document's words must always govern. If this original meaning does not suit modern times, then the Constitution should be changed by the popular branches of government through the amending process. It should not be changed by the elite judiciary whose job it is to apply existing law rather than to bring it up to date by repeated reinterpretation.

The most vocal proponent of this school has been Justice Antonin Scalia, who has provocatively characterized the U.S. Constitution as a "dead" document. He rejects as "conventional fallacy" the idea that the Constitution is a "living document'" – that is, a text whose meaning may differ from generation to generation with changing experiences. Instead, he believes the Constitution is "dead," in that it means precisely what it meant when it was adopted.

Ideological Debate. In recent decades, this debate over the proper mode of constitutional interpretation has taken on a distinctively ideological tone. Liberals such as justices William J. Brennan Jr., Arthur J. Goldberg, Earl Warren and Ruth Bader Ginsburg have argued in favor of a "living" constitution whose rights are capable of being "expanded beyond its original narrow purview." Ginsburg argues that an important part of our history "is the story of the extension of constitutional rights and protections to people once ignored or excluded." These liberals see the constitution as "evolving" – that is, moving toward more liberty, more equality and more due process. They fear that the opposite trend will move us backward toward a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."

Nor do they agree with those who claim that a "dead" constitution will "depoliticize" or limit the power of the judiciary in an ideologically neutral manner. They argue instead, "The political underpinnings of such a choice should not escape notice. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social process and eschew adaptation of overarching principles and changes of social circumstance."

In other words, liberals acknowledge that their preferred mode of interpreting their living constitution serves to expand rights, because they see the Constitution as an evolving document that moves in one direction. According to them, it is a ratchet that locks movement only in the forward position – toward more liberty, equality and due process. They insist however, that conservatives' preferred mode of interpreting their dead constitution serves to contract rights by limiting them to "the standards that prevailed in 1685 when Lord Jeffreys presided over the Bloody Assizes or when the Bill of Rights was adopted." According to this view, the conservative approach is anything but neutral. It reflects old-fashioned views of limited rights that just happen to correspond largely with the ideological preferences of those who feel bound by the original understanding of the Constitution.

The liberals are surely correct as a descriptive matter. Most

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Not Whether, But How. Proponents of a living constitution believe we should not be bound by what dead white guys wrote two centuries ago when slavery was legal, women could not vote and horses were the fastest means of transportation. Instead, we should live under a constitution that is alive and vibrant, reflecting today's values and beliefs.

Such rhetoric makes a living constitution sound appealing, but this is actually a complete misportrayal of the difference between the two philosophies. In reality, both accommodate an evolving society. In fact, under the strict construction – or originalist – viewpoint, Article V of the Constitution requires that the Constitution be a living document. The real difference between the two approaches is not whether the Constitution should evolve, but rather how those changes should occur – and who should make them.

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"The real difference between the two approaches is not whether the Constitution should evolve, but rather how those changes should occur – and who should make them."

Under the "living" constitution approach, history and precedent are largely irrelevant. Instead, unelected judges create policy to reflect modern needs through the constitution they themselves write. As explained by Chief Justice Charles Evans Hughes, "We are under a constitution, but the constitution is what the judges say it is."

Ironically, under this modern approach, judicial policymakers are regularly out of step with modern society. For example, although 80 percent of the nation currently opposes flag desecration, judges favoring a living constitution have ruled that the people are wrong on this issue and that the flag cannot be protected. Similarly, 90 percent of citizens in the federal Ninth Circuit supported keeping "under God" in the Pledge of Allegiance, but their living constitution judges pronounced them wrong.

Equally striking is the number of recent occasions in which judges favoring a living constitution have overturned statewide votes in which the people clearly expressed their will, such as striking down votes in New York and Washington that banned physician-assisted suicides, votes that enacted term limits in Arkansas and Washington and votes that rejected a tax increase in Missouri.

Each of these popular votes would be valid under original intent because in that approach, the people – not unelected judges – determine their policies and values. And whenever the people want a change, they do not rely on a judge to make it. Instead, they update their constitution to reflect their views, as they have done on more than two dozen occasions.

Samuel Adams, pointing out the strength of this approach, said: "The people alone have an incontestable, unalienable and indefeasible right to institute government and to reform, alter or totally change the same when their protection, safety, prosperity and happiness require it. And the federal Constitution – according to the mode prescribed therein (Article V) – has already undergone such amendments in several parts of it as from experience has been judged necessary."

This unique American guiding principle made its appearance in the Declaration of Independence as "the consent of the governed." State constitutions penned after the Declaration reiterated this precept. For example, the Massachusetts constitution, written in 1780, stated, "All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority – whether legislative, executive or judicial – are their substitutes and agents and are at all times accountable to them."

The same axiom then was established in the Constitution with the three-word phrase "we the people."

Today's living-document proponents decry such an approach as "majoritarianism" – the so-called "tyranny of the majority." Perhaps, but what is the alternative? "Minoritarism"? That a small group should be able to annul the will of the people and enforce its own desires upon the masses? Such an option is unacceptable under original intent. As explained by George Washington, "The fundamental principle of our Constitution ... enjoins (requires) that the will of the majority shall prevail."

Thomas Jefferson agreed, "The will of the majority (is) the natural law of every society (and) is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived."

Does this original principle therefore mean that minorities are to be disregarded or trodden upon? Of course not. As Jefferson further explained, "Though the will of the majority is in all cases to prevail, that will to be rightful

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contemporary justices and scholars who advocate a living constitution are, in fact, liberals whose personal perspectives favor an expansive, evolving approach to constitutional rights. And most of those who advocate a dead constitution are, in fact, conservatives whose personal predispositions favor a narrowing of constitutional rights.

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A Proposed Third Approach. There is, however, a third approach beyond the "liberal-living-evolving" constitution, on the one hand, and the "conservative-dead-original meaning" constitution on the other hand. A living constitution capable of adapting to changing circumstances need not always move only in one direction. It need not always expand or evolve. A capacity to adapt to changing circumstances may also entail, on occasion, some contraction, some moving backward, some devolution.

Although Justice Brennan always tried to push his living constitution in one direction only, he seemed to recognize that backward movement is possible as well. He wrote that "each generation has the choice to overrule or add to the fundamental principles enumerated by the framers." He recognized that the Constitution must adapt to "good or bad tendencies of which no prophecy can be made."

In our current age of terrorism, when weapons of mass destruction are capable of destroying so much so quickly, we may have to re-evaluate the scope of certain rights and the trend toward their expansion. Consider, for example, the right to anonymity, which the Supreme Court has recognized in several important contexts, especially where disclosure of one's identity might chill the exercise of speech, press or assembly rights. Surely today, no one could reasonably argue that an individual's right to anonymity should deny the government the power to demand proper identification from anyone seeking to board an airplane. Nor would this power be limited only to optional means of travel, such as airplanes. There is little doubt that the government may properly demand identification from anyone seeking to enter a government building, including a courthouse or a legislative chamber in which there is a right to petition government for a redress of grievances. Proper identification may also be required of train, bus and ship travelers – as well as car drivers, taxpayers, Social Security recipients and others. If Congress were to impose a national identification system on all adults, I believe it would be upheld today, though I would not have been as certain 40 years ago. The threat of terrorism has altered the balance between the right of anonymity and the need for security. Experience is pressuring us to contract the former as we expand the latter.

Thus, at the same time as experience pushes us in the direction of expanding certain privacy rights – most notably the right to engage in private homosexual conduct without governmental intervention – other aspects of that same right are being contracted.

The same can be said about the right against self-incrimination. The Supreme Court reaffirmed the Miranda rule in the context of traditional police interrogation designed to elicit incriminating admissions about past crimes, while at the same time giving a green light to government officials to elicit intelligence information deemed necessary to prevent future terrorist attacks.

We are likely to see more of this in the future as the courts look to the new experiences with terrorism to interpret our living constitution in ways which contract some rights and expand others, while leaving some essentially unchanged. This is the nature of a living, breathing constitution adapting to both good and bad tendencies. This is the true genius of the Constitution, resting not on any static meaning it might have had in a world before the threats of mass-destruction terrorism – a world that is dead and gone – but in the adaptability of the great principles to cope with current problems and current needs, such as those caused by terrorism.

The shoes are now on other feet. Those who advocate a living constitution must be prepared to consider some contraction of rights that seem incompatible with our current need to prevent terrorism. Those who claim that a "dead constitution" assures that rights will remain unchanged regardless of pressing social needs, must now resist any contraction of our rights, at least as their scope was understood by our founding fathers.

It will be interesting to see whether neutral principles of interpretation trump ideological result orientation. If they do, then Justice Scalia may emerge as the "liberal" during this age of terrorism, while those who advocate a living constitution may emerge as conservatives.

Alan Dershowitz is a professor of law at Harvard University. His latest book is "America On Trial."

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must be reasonable – the minority possess their equal rights which equal law must protect."

While the minority is not to prevail, with its constitutional guarantee of "free speech" it does have the "equal right" to attempt to persuade the majority to its point of view. The minority does have equal rights, but equal right is not the same as equal power; the minority is never the equivalent of the majority and should never exercise control over it.

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Living-constitution judges, however, view the majority as inherently wicked and depraved, always seeking deliberately to violate the rights of the minority with only judges standing between the minority and total annihilation. Therefore, under this anti-majoritarian view, the greater the public support for a position, the more likely a living-constitution judge is to strike it down.

"The living-constitution approach empowers an unaccountable elite to make decisions on behalf of the people."

The Minority's True Champion. U.S. history has proven that the best protector of minority rights is not the courts, but rather the people. For example, former slaves received their constitutional rights not from the courts but by the majority consent of non-slaves; women were similarly accorded the constitutional right to vote not by the courts but by the majority approval of men; the constitutional rights accorded to the poor by the abolition of the poll tax came at the majority approval of those who were not poor; and the constitutional right allowing 18-year-olds to vote was given by the majority approval of voters not 18 years old. Additionally, all the constitutional protections for individuals and minorities established in the original Bill of Rights – speech, religion, petition, assembly, bearing of arms – also were enacted by majority consent. In other words, all minority rights in the Constitution have been established by majority consent.

In fact, the courts have a poor record of protecting minority rights. Although living-constitution proponents love to point to the 1954 *Brown v. Board of Education* decision that ended segregation as proof that the courts protect minority rights, they conveniently omit the rest of the story. In 1875, Congress – by majority vote – banned all racial segregation, but in 1882, the unelected Supreme Court struck down that anti-segregation law. In 1896, the Supreme Court reaffirmed its pro-segregation position, but in 1954, the Court finally reversed itself and struck down segregation – 80 years after "we the people" had abolished segregation.

It is not surprising that judges are fallible. Jefferson said, "Our judges are as honest as other men, and not more so. They have – with others – the same passions for party, for power, and the privilege of their corps. … And their power the more dangerous as they are in office for life and not responsible – as the other functionaries are – to the elective control."

Certainly the majority will sometimes err, but as Jefferson observed, "its errors are honest, solitary and short-lived" and can be remedied by "elective control.' However, the errors created by judicial decisions are more severe and long-lasting.

While living-document enthusiasts disparage strict constructionists as being narrow or restrictive Justice Antonin Scalia counters, "Don't think the originalist interpretation constrains you. To the contrary, my (originalist) Constitution is a very flexible Constitution. You want a right to abortion? Create it the way all rights are created in a democracy: pass a law. The death penalty? Pass a law. That's flexibility." Scalia points out that it is just the opposite with living-constitution judges: "They want the whole country to do it their way, from coast to coast. They want to drive one issue after another off the stage of political debate."

In short, then, the living-constitution approach empowers an unaccountable elite to make decisions on behalf of the people; original intent empowers the people themselves. So profound is the potential impact on the culture from each of these two viewpoints that U.S. senators who embrace the living-document viewpoint have recently orchestrated the filibuster of numerous "strict-constructionist" judicial nominees to the federal Courts of Appeals.

In the upcoming election, citizens can indicate which view of constitutional interpretation they prefer.

David Barton is founder and president of Wallbuilders (www.wallbuilders.com), a national organization specializing in religious and family issues. He is author of "Original Intent: The Courts, The Constitution and Religion."

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