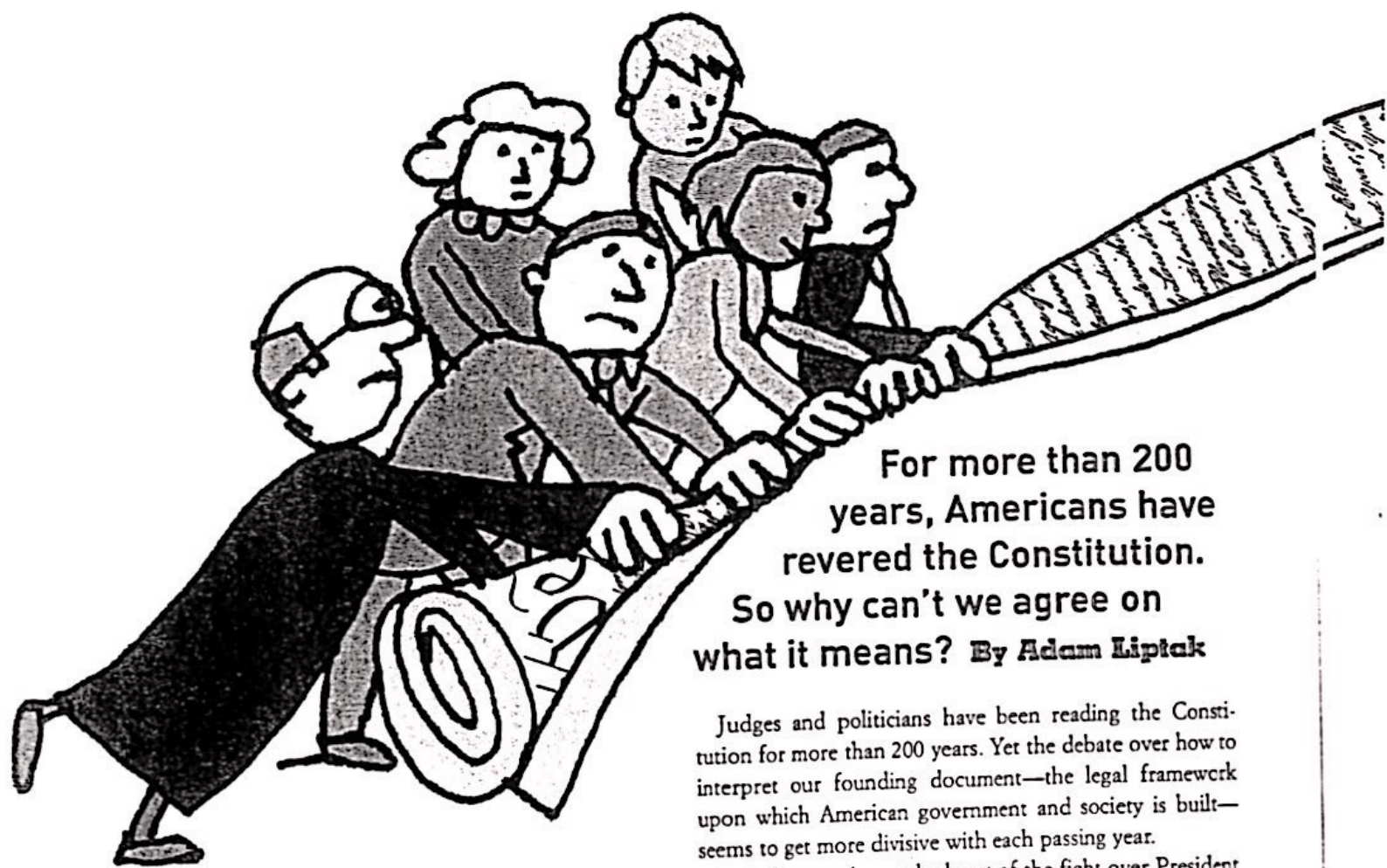


NATIONAL

War of Words



For more than 200 years, Americans have revered the Constitution. So why can't we agree on what it means? **By Adam Liptak**

Judges and politicians have been reading the Constitution for more than 200 years. Yet the debate over how to interpret our founding document—the legal framework upon which American government and society is built—seems to get more divisive with each passing year.

It is the question at the heart of the fight over President Bush's appointments to the federal courts, sparking increasingly emotional debates in the Senate, which must confirm or reject the President's nominees. And all of that is just a warm-up for the real battle: filling the first vacancy on the U.S. Supreme Court in more than a decade, following the resignation of Justice Sandra Day O'Connor in July.

TWO SCHOOLS OF THOUGHT

To follow the action in Washington, you need to understand the two broad schools of thought on how to interpret the Constitution: originalism (sometimes called strict constructionism) and the "living Constitution" school.

The Constitution is a brisk little document, a mere 8,000 words, including its 27 Amendments. You can read it in half an hour, and some of its language flows like poetry: "We the people of the United States," it starts, "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."



People who favor a "living Constitution" say that it is a special kind of legal document, purposefully studded by the Founding Fathers with ambiguities and meant to adapt to changing times and the changing views of the nation.

"The drafters were using general terms," says Mark V. Tushnet, a constitutional scholar at Georgetown University in Washington. "They weren't spelling it out, and they knew it. That was either because they wanted future generations to resolve it or because they couldn't agree."

Originalists, on the other hand, including President Bush, look to the meaning the Constitution had in 1789. It is, they believe, a legal document like any other—no different from a contract or a statute. Its words are plain and its meaning should not change over time, no matter what the views of a modern-day judge are.

Originalists say the idea of a "living Constitution" invites what they call "judicial activism" and "legislating from the bench"—judges creating rights that are not explicitly spelled out in the Constitution and getting involved in areas

that should be handled by Congress and state legislatures.

"The big lie of the 'living Constitution' is that it helps adapt the country to changing times," says M. Edward Whelan III, a former official

in the Justice Department and law clerk to Supreme Court Justice Antonin Scalia. "What the 'living Constitution' does is lock in place for all Americans the policy preferences of five Justices."

"Five Justices" constitute a majority on the nine-member Supreme Court. Ever since *Marbury v. Madison*, the 1803 case in which Chief Justice John Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is," judges have decided which laws are consistent with the Constitution, and which are not.

That power is known as judicial review and it means that federal judges, who are appointed and serve for life, can strike down laws passed by elected representatives in Congress and the states if they find the laws unconstitutional.

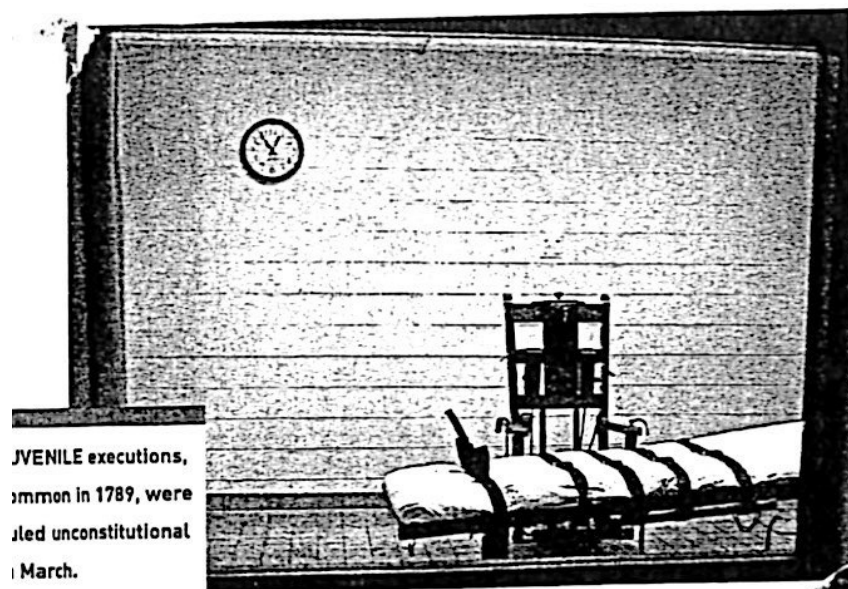
Much of the debate over the President's judicial nominees centers on how aggressively judges should use that power. Politically conservative judges, who tend to favor



THE CONSTITUTION TODAY

the first in a series

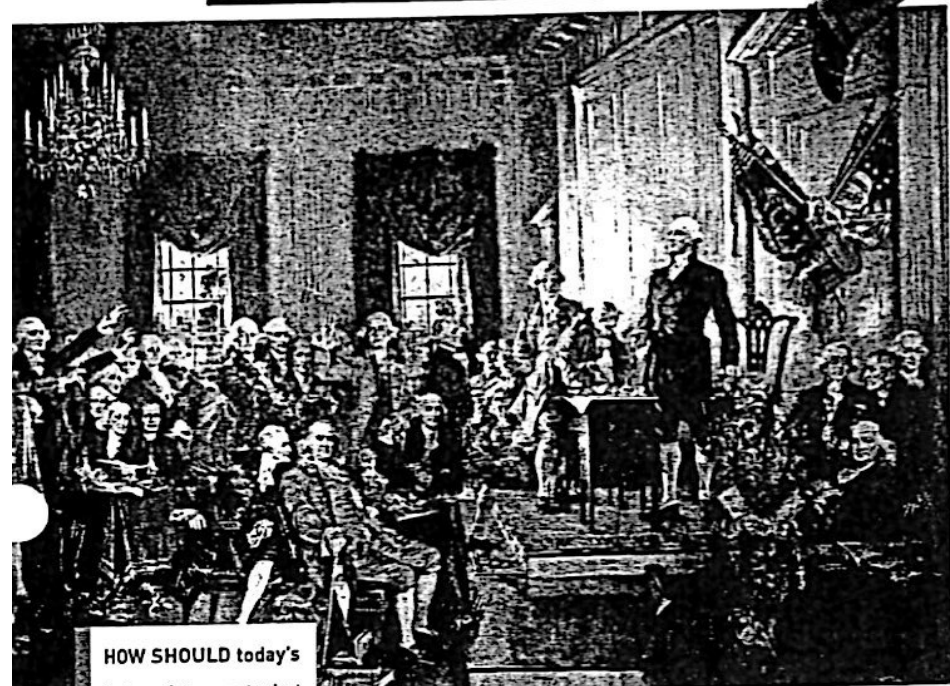
Adam Liptak is national legal correspondent for The New York Times.



JUVENILE executions, common in 1789, were ruled unconstitutional in March.



PRESIDENT Bush favors a strict interpretation of the Constitution.



HOW SHOULD today's judges interpret what the Framers meant 200 years ago?

Constitution" idea, can reach very different conclusions when deciding cases involving contentious issues like free speech, religion, abortion, race, and the death penalty.

SPECIFIC & ABSTRACT

Not all cases are so hard to decide, since some parts of the Constitution are quite specific. Only people over 35, for example, can be President, plain and simple. But many of the Constitution's key provisions—like "freedom of speech," "due process," and "equal protection"—are a lot more abstract.

The Founding Fathers, of course, could not have envisioned every possible development in modern American

originalism, and liberal judges, who tend to favor the "living

say about electronic wiretaps?

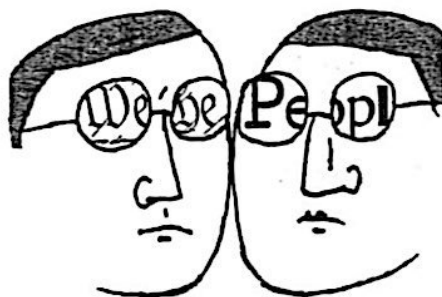
And while the Constitution gives Congress the power to grant "for limited time to authors and inventors the exclusive right to their respective writings and discoveries," what

does that mean in 2005 for file-sharing services like Grokster? Does downloading MP3s without paying the musicians violate copyright law?

The words by themselves, "living Constitution" proponents argue, do not provide more than general guidance in such situations.

Take the question of capital punishment for teenagers. An originalist

would say that there is nothing in the Constitution that expressly forbids it. And since teenagers were routinely executed in 1789, they argue, it should not be considered cruel and unusual punishment in the 21st century.



1973: Protesting the Supreme Court's decision in *Roe v. Wade*, still hotly debated today

Others say that the Constitution should be responsive to evolving notions of decency and justice. And, indeed, by a 5-to-4 vote, the Supreme Court in March struck down the death penalty for people who were younger than 18 at the time of their crimes.

A RIGHT TO PRIVACY?

The series of cases that most troubles originalists—and which figures in many of today's most hotly debated social issues—involves a right to privacy that all sides agree does not appear explicitly in the text of the Constitution. It started with a 1965 Supreme Court decision, *Griswold v. Connecticut*, which struck down a Connecticut law that denied married people access to birth control. The Court, in a nutshell, said that married couples, at least when it comes to birth control, had the right to decide what went on in the privacy of their homes, without government interference.

The privacy right first granted in the *Griswold* decision led directly to *Roe v. Wade* in 1973, in which the Supreme Court struck down state laws banning abortion (and thus made it legal throughout the United States), and to other controversial rulings in the last three decades.

With President Bush set to fill one or more Supreme Court vacancies during his second and final term, most observers expect his nominees to be closely questioned at their Senate confirmation hearings about their views of



HOW DO JUDGES figure out what the Constitution "says" about something like downloading MP3s?

culture and popular views and may take those into account in their decisions, along with legal considerations and their judicial philosophy.

That may have been the case, for example, in *Brown v. Board of Education*, the landmark 1954 Supreme Court



A CONFIRMATION BATTLE is expected in the Senate over President Bush's nomination to replace Sandra Day O'Connor on the Supreme Court. The current Justices: (from left) Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist (Chief Justice), Scalia, Souter, Stevens, and Thomas.

these cases, and, in particular, of whether *Roe v. Wade* was an accurate interpretation of the Constitution or whether it constituted "judicial activism."

It's important to remember, however, that judges are not automatons who strictly adhere to one philosophy in every one of the hundreds or thousands of cases they decide.

In fact, judges are human beings just like the rest of us. They watch television, go to the movies, read the newspaper, surf the Internet, and, it is often said, "follow the election returns." In other words, they are aware of popular

decision that outlawed "separate but equal" racial segregation in public schools. The *Brown* decision is considered by many to have been the Court's finest hour. But leading constitutional scholars at the time, even those sympathetic to the result, criticized the decision as judicial activism.

"When you work with the Constitution, you inevitably find out that all of the methods of interpretation should be used," says Professor Tushnet, the constitutional scholar. "You're going to want to do some originalism. You're going to want to do some 'living Constitution.' Everybody does it." ☉

