

# Townhall

## President Biden's Shifting Constitutional Interpretation Has No Foundation

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President Joe Biden apparently believes the U.S. Constitution that he swore to uphold and defend is different today than when he was sworn into office. In his mind, the Constitution isn't the foundational bedrock upon which our rights are guaranteed and our laws are rooted.

The president's uninformed remarks came during a press availability when he met with the Chair and Ranking Member of the U.S. Senate Judiciary Committee, Sens. Dick Durbin (D-Ill.) and Chuck Grassley (R-Iowa) to discuss his pending nominee to the U.S. Supreme Court.

"You know, there's always a renewed national debate, every time we nominate, any president, nominates a justice, because the Constitution is always evolving slightly in terms of additional rights, or curtailing rights," President Biden said, according news reports. "And it's always an issue."

President Biden revealed the diverging schools of thought when it comes to Constitutional jurisprudence, or judicial philosophy. Does the Constitution mean what is written in the context of what the words meant at the time it was written or do definitions and interpretation shift over time to meet whims of society? Think of it this way. Is the Constitution the solid foundation upon which we build the house we live in, or is it just the tent stakes that can be uprooted and moved from time-to-time as the sands shift? The genius of the Constitution is it provides a means for amending it in a democratic fashion, which has been used 27 times since it was ratified in 1788. A "living constitution" revised by unelected judges is undemocratic.

There are those, like President Biden, who believe the courts are a way to pursue a revisionist agenda, or an attempt to rewrite the nation's founding principles. Here's why that's a dangerous idea.

**Words Have Meaning**

The U.S. Supreme Court is predominantly filled with justices that describe themselves as “originalists.” That is, they ascribe to the legal theory that the words of the Constitution mean what they say in the understanding of what those words meant at the time the text was written. Simply put, the words in the Constitution mean what they say, not what would be reinterpreted 10 years or 100 years from now. Those remain constant.

The late Justice Antonin Scalia was a fierce defender of originalism. He joked once that, “My burden is not to show that originalism is perfect, but that it beats the other alternatives, and that, believe me, is not difficult.”

That was apparent when Justice Scalia authored the 2008 landmark Heller decision that upheld the Second Amendment as an individual right. Justice Scalia pored over the 27 words comprising the amendment and examined the definitions of those words at the time they were written. That’s where he determined that the words “bear arms” meant that included bearing arms for individual defense, as it was defined in English law that provided the historic context for the drafting of the Second Amendment.

“All these questions pose enormous difficulty for non-originalists, who must agonize over what the modern Constitution ought to mean with regard to each of these subjects, and then agonize over the very same questions five or 10 years later, because times change,” Justice Scalia explained in a University of Virginia lecture.

Today’s Supreme Court has six justices who describe themselves as originalists or textualists, including Chief Justice John Roberts, Justices Clarence Thomas, Thomas Alito, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. That’s the balance of the court. The three remaining seats are filled by retiring Justice Stephen Breyer, and Justices Sonia Sotomayor and Elena Kagan. They ascribe to a judicial philosophy of a “living Constitution,” or the text is applied as the meaning is understood in modern society. Even if President Biden nominates another with a similar legal theory, the Court’s balance will remain unchanged.

### **Definitions Drift... One Way**

The problem of ripping the words of the Constitution from their anchors is that these definitions will drift. When it comes to the Second Amendment, that drift always seems to be in one direction. Gun control advocates never cede that the tide changes on their pet issue and that one year the public may favor tighter restrictions, but those attitudes ebb as we’ve seen lately with support for gun control at historic lows.

A favorite talking point among gun control advocates is that the Founding Fathers could never have imagined Modern Sporting Rifles, or AR-15-style rifles, in existence today. That’s bunk.

David Kopel, a gun rights advocate and Cato Institute scholar wrote in The Washington Post that repeating arms were in existence before the founding of the American colonies. Multi-shot firearms and repeating firearms were not just invented, but used. The Puckle gun, a repeater, was patented in 1718.

Still, the tidal patterns never shift back in their “living Constitution.” That’s despite evidence that the Founding Fathers could never have imagined such levels of gun control, especially since they held an aversion to an overzealous centralized government that wielded too much authority.

Federalist No. 51, which provided context for the Founding Fathers’ notions on government, proved that. “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary,” credited to James Madison under the pseudonym *Publius*.

That underscores the danger in presidents reinterpreting the Constitution to fit their beliefs instead of respecting that the Constitution is a social contract with “We the People.” That doesn’t change, shift or evolve.