

Constitutional Interpretation

How should we interpret documents?

- My wife wrote me a letter, in which she says that she “could care less” that I have a cold. Should I understand the document to mean:
 - What the words literally mean?
 - What the author actually intends?
- My landlord and I sign a lease stating that my rent is \$1600. A few months later he claims that he meant to say \$1700, and the original was a mistake. Should I understand the document to mean:
 - What the words literally mean?
 - What the author actually intends?

Originalism

Opinion

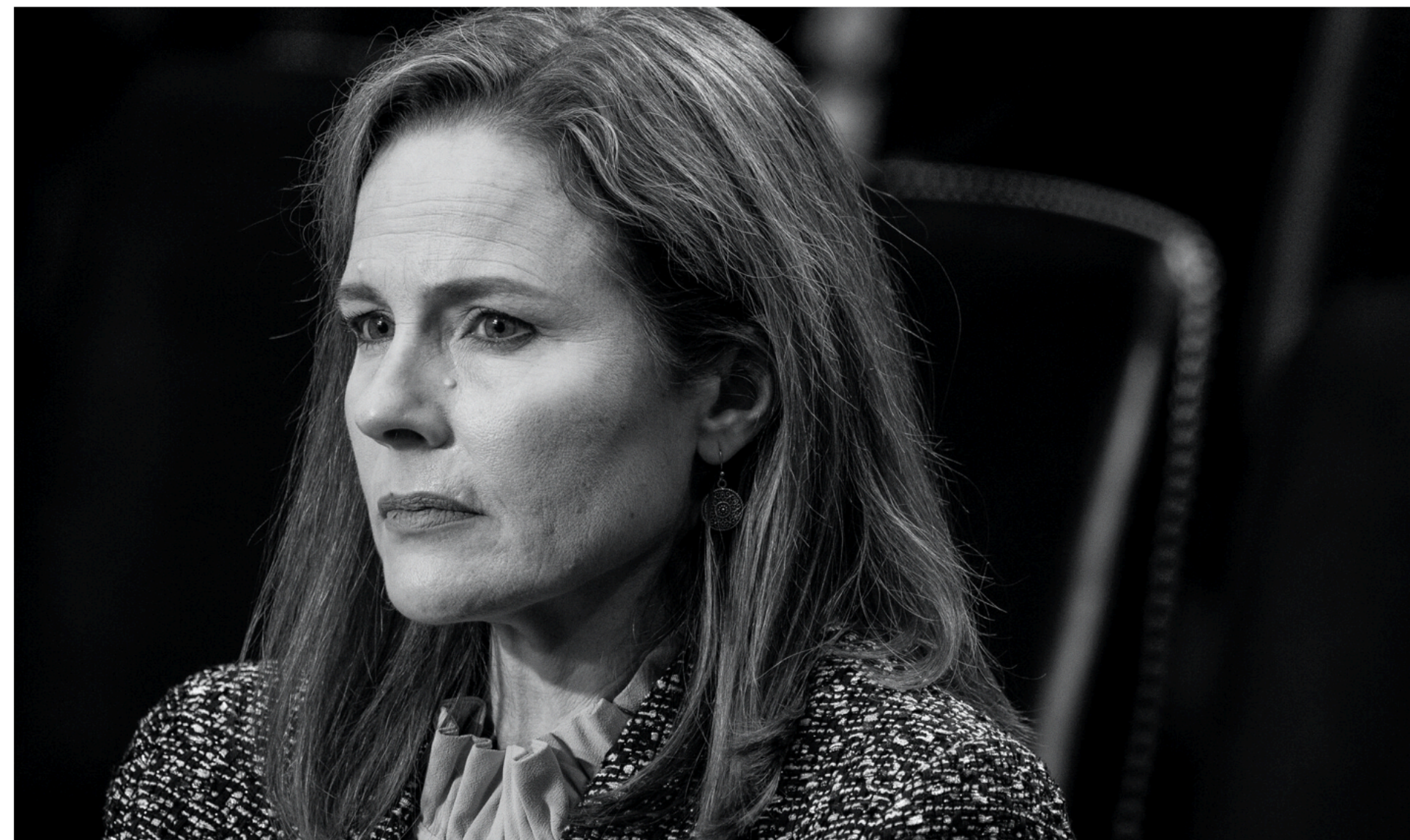
The Philosophy That Makes Amy Coney Barrett So Dangerous

Do we really want our rights to be determined by the understandings of centuries ago?

By Erwin Chemerinsky

Mr. Chemerinsky is dean of the law school at the University of California, Berkeley.

Oct. 21, 2020



Example: Originalism in practice

- The eighth amendment prohibits “cruel and unusual punishment.”
- The death penalty was not considered “cruel and unusual punishment” at the time of ratification.
- So the Constitution does not prohibit the death penalty, even if society comes to regard the death penalty as “cruel and unusual punishment.”

A. Unchanging meaning of documents

- P1 The Constitution is a written document
- P2 The meaning of written documents does not change
- C Therefore, the meaning of the Constitution has not changed.

Brewer (quoted in Munzer and Nickel)

The problem for originalism raised by stare decisis:

- Judges are supposed to interpret and apply the original public meaning of the Constitution.
- Judges are also supposed to affirm precedent, according to the doctrine of stare decisis

What should judges do when these two conflict?

Example: The Death Penalty

- Suppose that the USSC decides that capital punishment is always (or, in some cases) “cruel and unusual,” when it is highly unlikely that this was part of the original public meaning of “cruel and unusual punishment.”
- How should originalist judges rule in cases covered by this precedent?
 - according to stare decisis?
 - according to the original public meaning of “cruel and unusual”?

- Originalism holds that “the original meaning of the text controls because it and it alone is law”
- So, the original meaning must take priority over precedent.

Barrett's response

Other “rules of adjudication” prevent judges from overturning precedent, and so protect reliance interests:

1. Courts not required to “go looking” for errors in precedent
2. The Court has discretion to avoid hearing cases challenging precedent
3. Court prohibited from considering points of law unless presented in the petition for certiorari (i.e. review)
4. the Court need not consider every point of law presented in the petition for certiorari

The moral reading

Find the abstract moral terms!

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Abstract terms and abstract moral principles

Abstract moral term	Abstract moral principle
“the free exercise” of religion	Governments have a duty not to infringe upon the exercise of religion
“the freedom of speech”	
“the freedom of the press”	
“the right to peaceably assemble”	
right “to petition the Government for a redress of grievances”	
“the right of the people to keep and bear arms”	
right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures	