

Constitutional Theory

Terms

Judicial Review	primary rules/secondary rules
Strict Construction	Original Intent
Contemporary Ratification	Representation Reinforcement
Positive/negative rights	Natural Law
Customary Law	Statutory Law

Judicial Interpretation

Assigned Cases and Readings: Web: *DeShaney v. Winnebago County*; **Readings:** Strauss, "Due Process ...," 47-59; Brennan, "Constitutional Interpretation," 60-70; Klarman, "Rethinking ...," 323-29.

Questions for Reading Assigned Cases and Readings:

DeShaney v. Winnebago County revolves around the distinction between positive rights and negative rights. The majority does not find that children at risk for abuse have a positive right to state protection, while the dissenters argue that such protection is a right that must be enforceable to ensure children's other rights, including life and the opportunity for a meaningful life. Which position do you find more convincing as a matter of constitutional law? Which leads to better policy? Should the state of Wisconsin create such a right?

Justice Brennan makes the case that, because judges necessarily have to interpret the law as it applies to contemporary concerns, they should read constitutional rights in the modern context rather than as they would have been during the Constitution's ratification. Do you accept this argument? Does this place too much power in the hands of judges? And how do judges know which constitutional principles apply in which ways today, especially as they disagree among themselves so often?

Michael Klarman attempts to puncture the myth that the Supreme Court, and other courts, often stand up to majorities intent on abridging the rights of minorities. Does Klarman present a sufficient case to limit concerns about judges following their own beliefs? Are the courts more attentive to popular opinion and the other branches than many of their critics believe?