Fair Construction to Living Constitution: Analyzing Constitutional Interpretation Throughout United States History

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Abstract

The proper method of constitutional interpretation has been debated throughout the history of the Supreme Court. This debate has been defined by the tension between the originalist and living constitution jurisprudences. Each has been dominant at one point in United States history. A fair construction jurisprudence was almost universally utilized by the Supreme Court to interpret the Constitution according to its original meaning until *Plessy v. Ferguson*. Then, due to an alliance between evangelicals and progressive scholars, a broader, more lenient living constitution jurisprudence developed which allowed justices to interpret the Constitution in light of changing social norms. Finally, following perceived excesses of the living constitution jurisprudence culminating in *Roe v. Wade*, evangelicals once again adopted a new jurisprudential philosophy to adhere to originalism which soon after grew in public acceptance. It is likely that the future of American jurisprudence lies in the hands of evangelicals who guide the dominant jurisprudence used by Supreme Court Justices.

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Introduction

Debate has been a cultural foundation of the United States. It has occurred not only in the public and political spheres but also in the legal sphere. The interpretive method used to decipher the paramount legal text, the Constitution, is important and has been hotly debated. Multiple philosophies have been developed for how to interpret the document including fair construction, original intent, aspirationalism, and living constitutionalism. However, most, if not all, of these philosophies can be boiled down to two categories: originalism and living constitutionalism.

Each category has been dominant at some point in the history of the American court system. From the Founding to the Civil War, a form of originalism in which the text was consulted and interpreted according to its original meaning was almost universally adopted. However, following the controversial *Dred Scott v. Sandford* and *Plessy v. Ferguson* decisions and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the public increasingly demanded societal changes regarding morality. When the legislative process was deemed ineffective at providing these changes, legal scholars developed new interpretive strategies that permitted the courts to allow the definitions of words in a legal document to change over time, and courts were given the ability to interpret the words according to these changes. As they developed, these strategies dominated the legal world and eventually became the jurisprudence of living constitutionalism. Justice Holmes was influential in gaining widespread acceptance for living constitutionalism. Though there was always latent resistance to living constitutionalism, this resistance exploded after a series of controversial cases. Cases such as *Griswold v. Connecticut* and *Roe v. Wade* were problematic to large swaths of the public,

especially evangelicals, because they seemed to have no justification in the text of the Constitution and promoted public immorality. As a result, originalism once again gained prominence in both the legal world and general society. Justice Antonin Scalia was the most prominent of the new originalists and championed the originalist technique of textualism. Today originalism and living constitutionalism are battling in the public and legal arena for dominance.

Background

Jurisprudence is the philosophy of law. Within this branch of philosophy, contentious debate exists about what law is, the role of law, and how laws should be interpreted. In modern America, the most debated question in jurisprudence is how the Constitution should be interpreted. Are the words of the Constitution set in stone the moment it is passed, or can its meaning change over time to adapt to new societal norms and desires?

Originalists contend that the original meaning of the Constitution should be used in its interpretation.[1] The original meaning is the meaning the writers of the document intended and the one their contemporaries understood.[2] Proponents claim originalism provides stability and objectivity when interpreting the Constitution.[3] Within originalism, there has been continuous debate about how exactly to determine the original meaning of a text. In the early republic, most Justices utilized fair construction. In this strategy, the words of the text were examined according to their clear meaning. If there was ambiguity, all potential meanings of the text were scrutinized with reliance on the purpose and context of the text. When all but one interpretation was found to

[1] John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* (Cambridge, MA: Harvard University Press, 2013), 1.

[2] Ethan Greenberg, *Dred Scott and the Dangers of a Political Court* (Lanham, MD: Lexington Books, 2009), 252.

[3] Herman Belz, *A Living Constitution Or Fundamental Law?: American Constitutionalism in Historical Perspective* (Lanham, MD: Rowman & Littlefield, 1998), 185.

be lacking, the Justice ruled according to this fair construction.[4] Since the modern rejuvenation of originalism, Saul Cornell has contended there have been three phases. The first phase focused on the intent of a text, the second phase focused on the public meaning of a text, and the third phase focused on the legal meaning of a text.[5] Another modern form of originalism, textualism, holds that one should rule based on "the original meaning of the text."[6] Justice Scalia popularized this form, and it is prevalent among modern Originalists.

Critics of originalism contend it is self-defeating and subjective. Judges frequently give in to the temptation to allow social pressure to influence decisions and, consequently, rulings are unjustified. Paul Finkelman has contended, "what we are really witnessing in these cases [cases decided by Originalists] is a deeply conservative 'living Constitution' jurisprudence, masquerading (rather poorly) as an original intent jurisprudence."[7] Another common criticism is that originalists are unable to provide due diligence to the history of a legal text required to understand it. Saul Cornell has concluded, "Until originalist scholars develop a genuinely historical approach to understanding the way the Constitution was read in the Founding Era, they will continue to distort the past, not illuminate it."[8] Originalists retort that it is better to attempt for an objective standard by which all judicial decisions can be weighed than promote a subjective standard where the will of the judge rules.

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[4] Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 138.

[5] Saul Cornell, "Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning," *Law and History Review* 37, no. 3 (2019): 823.

[6] Belz, *Living Consittution or Fundamental Law* 249.

[7] Paul Finkelman, "The Living Constitution and the Second Amendment: Poor History, False Originalism, and a very Confused Court," *Cardozo Law Review* 37, no. 2 (2015): 626.

[8] Cornell, "Reading the Constitution," 845.

In contrast, living constitutionalists argue that the Constitution incorporates intentionally vague language to allow future generations to legitimately interpret the text differently than the Framers. Living constitutionalists generally believe, "courts should, in a proper case, interpret the Constitution in new ways to meet changing times."[9] Societies and words change over time, and the Constitution should be allowed to adjust to these changes. Thurgood Marshall declared, "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention."[10] A common example of living constitutionalism is aspirationalism. This philosophy argues that judges should use their rulings to assist the public in aspiring to do good.[11] By allowing the Constitution to adapt with the times, it can remain relevant and productive in the modern day.

Critics of living constitutionalism argue that it is subjective and liable to changing on a judge's whim. Justice Scalia observed, "there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."[12] If the purpose of the Constitution was to adapt to the times, it is difficult to discern how and when those changes occur. What percentage of the population needs to believe homosexuality is a constitutionally protected liberty before a Justice is vindicated in modifying his rulings in response? Former Chief Justice William Rehnquist echoed Scalia's concerns when he argued, "Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may

[9] Greenberg, *Dred Scott*, 254.

[10] Thurgood Marshall, "The Constitution: A Living Document," *Howard Law Journal* 30, no. 4 (1987): 915.

[11] Greenberg, *Dred Scott*, 254

[12] Antonin Scalia and Amy Gutmann, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton, NJ: Princeton University Press, 1998), 45.

serve as a platform for the launching of moral judgments."[13] There is no justification to believe the morality of judges is superior to the morality of the public, so judges should not allow personal morality to control judicial decisions. Robert Bork noted, "The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else."[14] Nothing prevents the morality of nine judges from overruling the morality of the voting populace in living constitutionalism if the two groups conflict.

Studying the different eras of the Supreme Court provides a useful opportunity to understand the ongoing debate between originalists and living constitutionalists. A better understanding of the relationship between originalism and living constitutionalism in the present can be discerned by analyzing how and why different jurisprudences developed and proliferated.

The Jay Court

Established in 1789, the Jay Court was given the unenviable task of establishing the jurisprudence of the Supreme Court without any Supreme Court precedent. While the Judiciary Act of 1789 provided the structure and roles of the various federal courts (such as the number of justices on the Supreme Court and where the District Courts were located), it did not provide a jurisprudential framework for judicial decision making.[15] Because of this constraint, some have concluded the Jay Court established little Supreme Court judicial philosophy. Herbert Johnson has argued, "Jay's contributions must be evaluated in terms of their institutional, rather than their jurisprudential, worth."[16] Though the Jay Court contributed most substantially to the

[13] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54, no. 4 (1976), 704.

[14] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 242.

[15] Judiciary Act of 1789, 1 Stat. 73 (1789).

[16] Herbert A. Johnson, "John Jay and the Supreme Court," *New York History* 81, no. 1 (2000): 59.

development of the Supreme Court as a legitimate institution in the United States, it also provided a useful framework to examine Founding Era jurisprudence.

Because the Jay Court did not have Supreme Court precedent, it relied on the common law for guidance. The common law was, "The body of law derived from judicial decisions, rather than from statutes or constitutions."[17] This common law was fundamental to the British legal system, and, when the colonists arrived in America, they brought the common law tradition of England with them.[18] This tradition existed through the revolutionary era. Norman F. Cantor has noted, "when the Constitutional Convention met in a steamy summer in Philadelphia in 1787, it was with the assumption that English common law would continue unchanged in the United States."[19] The Founding Fathers largely consisted of lawyers trained in the common law.[20] Bernadette Meyler has concluded the common law could, "provide a set of background principles crucial to understanding the general terms of the Constitution, a text certainly of small compass if wide scope."[21]

However, though the common law was an important tool of the early republic's legal system, it was insufficient for making Supreme Court decisions. Meyler has noted, "writings from the founding era and materials from the states in the period following ratification

[17] Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary*, 11th ed. (St. Paul, MN: Thomson Reuters, 2019), s.v. "common law."

[18] Clarence Manion, "The Founding Fathers and the Natural Law: A Study of the Source of our Legal Institutions," *American Bar Association Journal* 35, no. 6 (1949): 462.

[19] Norman F. Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* (New York: HarperCollins Publishers, 1997), 354.

[20] Manion, "The Founding Fathers and the Natural Law," 461.

[21] Bernadette Meyler, "Towards a Common Law Originalism," *Stanford Law Review* 59, no. 3 (2006): 575.

demonstrate that the common law occupied a disunified field in the late eighteenth century."[22] As a result, many Founding Fathers, including James Madison, believed the common law could not entirely dictate the meaning of many of the Constitution's clauses.[23] It was up to the Jay Court to determine just how far the influence of the common law would extend to the federal judiciary given the presence of a written Constitution. The common law was restrained by the written word of the Constitution, and the Jay Court used an originalist jurisprudence informed by the common law to decide cases such as *Chisholm v. Georgia*.

In *Chisholm v. Georgia*, the issue was whether a state could be sued by a citizen of a different state.[24] In his opinion, Chief Justice John Jay traced the history of the Constitution and realized the people acted as the sovereigns in forming the Constitution and not the state.[25] The people had first compacted to form their state, and then they had compacted to form the country.[26] Jay next determined that citizens of one state could sue another state under Article III Section II of the Constitution.[27] Though states believed only the state could sue citizens of another state, Jay argued this ability is reciprocal because the words of the Constitution are unambiguous.[28] Jay's use of the plain meaning of the text to reach his verdict demonstrated the dominant originalist jurisprudence of the era.

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[22] Meyler, "Towards a Common," 567.

[23] Ibid.

[24] Chisholm v. Georgia, 2 U.S. 419, 469 (1793).

[25] *Id.* at 471.

[26] *Id.*

[27] *Id.* at 476.

[28] *Id.*

After widespread public discontent with the ruling, the 11th Amendment was passed in 1794 forbidding citizens from suing states. Matthew Van Hook has noted that the *Chisholm* decision was important for future Supreme Court rulings because the citizenry accepted the decision and used the proper method, ratification of the Constitution, to remedy what they believed to be the incorrect outcome.[29] Though Jay believed that the passage of the Amendment was a mistake, he applauded the citizenry for accepting the decision and using the proper channels to remedy a societally unsatisfactory but legally correct judicial decision.[30]

The Marshall Court

John Marshall was the fourth Chief Justice of the Supreme Court and served from 1801 to 1835. As Chief Justice, Marshall was an effective leader. Charles Hobson has argued that the Supreme Court was never more unified than it was under Marshall from 1812 to 1824.[31] Marshall presided over several important constitutional decisions including *Marbury v. Madison* and *McCulloch v. Maryland*. During his term, his Court established foundational judicial powers such as judicial review. Marshall was, like nearly all judges of his day, an adherent to fair construction which utilized a common law framework to analyze the written Constitution. This originalist jurisprudence held that a judge's subjective ideals and morals could be kept in check by using the time-tested principles and methods of interpretation of common law jurists.[32] He believed he could use the text of the Constitution as the basis for his decision-making process

[29] Matthew Van Hook, "Founding the Third Branch: Judicial Greatness and John Jay's Reluctance," *Journal of Supreme Court History* 40, no. 1 (2015): 13.

[30] Ibid.

[31] Hobson, *The Great Chief Justice*, 10.

[32] Ibid., 75.

and adhere to an objective legal standard of the Constitution.[33] For Marshall, "Courts possessed no 'will' independent of the laws. Their duty was merely to declare what the law *is*, not what it *should* be."[34] This duty included not projecting one's own belief structure onto the laws being interpreted. When determining the intention of a legislative act, "He understood 'intention of the Framers' to mean that intention as expressed in the words of the Constitution, not the private intentions individual framers may have expressed in speeches, debates, essays, and letters at the time the Constitution was under consideration."[35] Thus, Marshall utilized an interpretive strategy that would be considered originalist today. This originalist jurisprudence is displayed in his *Marbury v. Madison* opinion.

In the waning days of his administration, President John Adams issued several judicial appointments including a justice of the peace nomination for William Marbury Jr. However, not all of the nominations were delivered before Thomas Jefferson took office, and, when he discovered the undelivered nominations, he instructed Secretary of State James Madison to not deliver the remaining nominations.[36] Marbury and the others who had not received their nominations brought suit to get a writ of mandamus under Section 13 of the Judiciary Act of 1789, and the Supreme Court heard the case in February 1803.[37]

In *Marbury v. Madison*, the Supreme Court dealt with three legal questions: did Marbury have a right to the commission, was there an available legal remedy, and was the Supreme Court

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[33] Hobson, *The Great Chief Justice*, 81.

[34] Ibid., 151.

[35] Ibid., 75.

[36] Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court* (New York: Basic Books, 2018), 87.

[37] Ibid., 88.

able to give him this remedy.[38] Marshall concluded Marbury's appointment began at the signing of the commission by the President and the affixing of the seal by the Secretary of State, and Marbury had a right to the commission.[39] Further, the Judiciary Act of 1789 provided Marbury a legal remedy to require Madison to deliver his appointment by giving the Supreme Court the ability to issue writs of mandamus.[40] However, Marshall determined that the Constitution did not permit this power, and, therefore, the clause in Section 13 of the Judiciary Act of 1789 was "repugnant to the constitution."[41] Because a congressional law conflicted with the Constitution, Marshall realized there were only two options. He wrote:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.[42]

Marshall concluded that the constitution is paramount, and legislative acts which conflict with the Constitution can be declared unconstitutional and nullified by the Supreme Court. He wrote:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[43]

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[38] Marbury v. Madison, 5 U.S. 137, 154 (1803).

[39] *Id*. at 162.

[40] *Id*. at 168.

[41] *Id.* at 176.

[42] *Id*.

[43] *Id*. at 177.

In effect, Marshall ruled that, though the Supreme Court had been granted the ability to issue writs of mandamus by Congress, it had not been given this ability by the Constitution, and, consequently, that section of the judiciary act was void. Thus, Marbury was unable to receive a writ of mandamus from the Supreme Court.

The decision established the principle of judicial review in which the Supreme Court could rule acts of Congress unconstitutional. Curiously, judicial review was already an accepted practice at the time of the ruling, and Marshall's primary goal was to set the Supreme Court precedent in a case that the public would accept.[44] *Marbury* was an effective case to pick because it declared an act of Congress void which expanded the power of the Court. Consequently, Marshall was able to secure the constitutional power of judicial review for the Supreme Court in a ruling that was perceived by the public to limit the Supreme Court's power.

The Taney Court

Roger Taney succeeded Marshall as Chief Justice and served from 1836 until 1864. The Taney Court's jurisprudence was in many respects similar to the Marshall Court, but it demonstrated the dangers of an originalist jurisprudence that the Marshall Court had largely avoided. Specifically, *Dred Scott v. Sandford* shone a light on these dangers. Dred Scott was a slave from the slave state of Missouri who traveled with his master John Emerson to the free state of Illinois and the free territory of Minnesota before returning with Emerson to Missouri.[45] Emerson was an army doctor and had Scott join him in the free states.[46] Scott spent a total of six

[44] Hobson, *The Great Chief Justice*, 58.

[45] Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006), 18.

[46] Greenberg, *Dred Scott*, 17.

years from 1834 to 1840 in the free state of Illinois and the free territory of Minnesota.[47] Eventually Emerson died and John Sanford became the executor of his will.[48] Scott sued for his freedom, and the case eventually reached the Supreme Court. All nine justices wrote opinions but the two most important are Chief Justice Taney's majority opinion and Justice Curtis's dissenting opinion.

In his opinion, Chief Justice Taney argued that Dred Scott was not entitled to his freedom because the Supreme Court did not have jurisdiction over Scott under Article III of the Constitution. His analysis hinged on the notion that the phrases "people of the United States" and "citizens" were synonymous in the Constitution.[49] Regarding the question of the Scotts' citizenship, he argued, "they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[50] Taney utilized an originalist approach to discern the meaning of the words citizen and people of the United States at the time they were written. Thus, he was unable to find for Dred Scott and his wife.

Though Chief Justice Taney's opinion demonstrated how a justice could use originalism to reach a morally indefensible result, Justice Curtis's dissent demonstrated the opposite. In his dissent, Justice Curtis forcefully argued that, at the time of the Constitution's adoption, United States citizens would have been the citizens of the Confederation which included free black

[47] Greenberg, *Dred Scott*, 21.

[48] Graber, *Dred Scott*, 19.

[49] Dred Scott v. Sandford, 60 U.S. 393, 404 (1857).

[50] *Id*.

men.[51] State governments decided citizenship in the Articles of Confederation period, and, in that period, all native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina (including those descended from slaves) were considered citizens.[52] It was impossible for the Constitution to have forbidden citizenship to all black men as Taney had argued. Scott should have been potentially allowed to sue. In this way, the *Dred Scott* case demonstrated an originalist jurisprudence facilitated both morally correct and morally incorrect verdicts that were each legally justifiable.

The *Dred Scott* ruling's effects jurisprudentially were widespread and long-lasting. The case is universally regarded today as one of the worst Supreme Court cases in American history. *Dred Scott* was the first Supreme Court case to declare a substantive federal statute unconstitutional.[53] The ruling also further polarized the country contributing to the outbreak of the Civil War and demonstrated the limitations of the originalist philosophy of the era. As noted by Michael Collins and Ann Woolhandler, the *Dred Scott* decision demonstrated the flaws that had existed in the Taney Court's reasoning throughout the pre-Civil War period.[54] Political goals had been interfering with the role of the Court under the guise of fair construction.

Worse, the text of the Constitution gave credence to many of the claims of pro-slavery individuals. Ethan Greenberg argues that the Supreme Court's ruling was not necessarily wrong in its methodology as both originalists and living constitutionalists contend today, but in the motives behind the ruling. He argues, "The pro-slavery justices who made up the *Dred Scott*

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[51] *Dred Scott*, 60 U.S. at 572.

[52] *Id.* at 573.

[53] Greenberg, *Dred Scott*, 2.

[54] Michael Collins and Ann Woolhandler, "Judicial Federalism Under Marshall and Taney," *The Supreme Court Review* 2017, no. 1 (2018): 380.

majority *and* the anti-slavery dissenters *all* employed an essentially 'originalist' approach. They disagreed with each other chiefly because they drew different lessons from the Framers' ambivalent original legacy concerning slavery."[55] However, he also notes, "In truth, Chief Justice Taney and the pro-slavery majority in *Dred Scott* did not go wrong because they employed a faulty 'methodology' or philosophy of constitutional interpretation. Instead, they deliberately and badly misread the law in order to reach a desired result."[56] He argues that, to facilitate the ruling he wished to give, Taney neglected fair construction in favor of political goals.[57] Chief Justice Taney wanted to find against Scott, and he used any methods at his disposal within the originalist framework to do it. *Dred Scott* represents the dangers a justice can bring to a case if he lets personal emotions and beliefs cloud his judicial process.

Civil War and Reconstruction Era Supreme Court

One of the most important developments in the history of Supreme Court jurisprudence was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments broadened the reach of the national government and, as a result, the Supreme Court. Of these Amendments, the Fourteenth was the most influential in shaping constitutional jurisprudence due to its emphasis on the equality of citizens. The Fourteenth Amendment states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[58]

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[55] Greenberg, *Dred Scott*, 3.

[56] Ibid., 4.

[57] Ibid., 130.

[58] U.S. Const., amend. XIV, § 1.

Following the passage of this amendment, states would be accountable for not treating citizens equally under the law. As a result, the Supreme Court could take more aggressive action in regulating state actions. Thurgood Marshall has even declared, "While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws."[59] However, the effects of this "new" Constitution would not be fully realized until the mid- and late-twentieth Century.

The Post-Reconstruction Court

The Post-Reconstruction Period was a time of great social change and modernization. As a result, some began to view fair construction originalism as an inadequate interpretive method. This critique culminated in the development of living constitutionalism. After the settlement of war issues in the Reconstruction Amendments, fair construction was attacked for its formalism and a ritualistic devotion to the Constitution ill-suited to deal with the issues of modern life.[60] Further, during the mid- to late-nineteenth century, there were increased calls for greater government involvement in public morality.[61] Large segments of the population believed slavery, lotteries, and alcohol were public evils that should be regulated and even banned.[62] Though slavery was the most deplorable and pervasive evil due to its enshrinement in the

[59] Belz, *Living Constitution or Fundamental Law?*, 180.

[60] Ibid., 6.

[61] John W. Compton, *The Evangelical Origins of the Living Constitution* (Cambridge, MA: Harvard University Press, 2014),

[62] Ibid., 20.

Constitution, it was eliminated through the passage of the Reconstruction Amendments. Advocates believed other social evils could also be gotten rid of through legislative means.[63] When legislative actions were mostly fruitless, reformers searched for non-legislative means to change society and embraced living constitutionalism.

Evangelicalism was a key factor in the push for public morality laws. Between 1776 and the 1840s, the percentage of Americans who were a part of a church congregation had doubled.[64] The Second Great Awakening, which occurred between 1800 and 1830, resulted in significantly increased church membership and called for cross-denominational cooperation.[65] During this movement, evangelicals rejected the doctrine of innate depravity and believed people could be perfected on earth.[66] The job of Christians and the church generally was to promote perfection in the present. John Compton summarized this point, noting, "if moral perfection was not only possible but also a God-ordained duty, it followed that legal prohibition was the only morally acceptable response to vice; laws that merely *regulated* common vices like drinking and gambling, on this view, amounted to little more than official complicity in sin."[67]

Another contributing factor to the widespread acceptance of a living constitutional approach was the case *Plessy v. Ferguson*. Homer Plessy, a one-eighth African American man, was denied access to a train car required by law to be used only by white people. The Supreme

[63] Compton, *The Evangelical Origins*, 92.

[64] Ibid., 3.

[65] Ibid., 29.

[66] Ibid., 31.

[67] Ibid., 33.

Court found such laws did not violate the Fourteenth Amendment.[68] Justice Brown used originalism to help justify this position. The essence of his argument was that legal equality was different than social equality, only legal equality was protected by the Fourteenth Amendment, and legal equality did not require social equality.[69] Having determined this fact, he stated:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[70]

By using the phrases "the object of the amendment" and "could not have been intended," Justice Brown conveyed to the public the perception that the ruling was not the result of personal views but the legitimate interpretation of the text's original meaning.

Justice Harlan's dissent also utilized an originalist interpretive strategy but reached the opposite conclusion. He wrote, "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[71] Justice Harlan used originalism to show the purpose of the statute was not to treat people equally but to treat them differently based on race. To reiterate his adherence to the will of the legislative body, Justice Harlan contended, "the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by

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[68] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[69] *Id.* at 557.

[70] *Id.* at 544.

[71] *Id*. at 557.

the people through their representatives."[72] Because the Court had failed to properly discharge its duty, Harlan predicted the *Plessy* ruling would eventually be viewed with the same disdain as the *Dred Scott* decision.[73] He concluded with the now famous declaration, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."[74] Harlan understood the original meaning of the Fourteenth Amendment was equality of all under the law and applied it to the case. A comparison of Justice Brown's opinion and Justice Harlan's dissent exhibits the fallibility of the fair construction jurisprudence but also its potential for success.

Having witnessed originalism produce morally unjust rulings in *Dred Scott* and *Plessy*, advocates of using the legal process for social change began seeking a more conducive jurisprudential philosophy. Around 1890, scholars began to examine the origins of the Constitution, and eventually rejected the creative and divine inspiration views of the Constitution as well as the revolutionary theories for its origins.[75] This development allowed for a very interesting coalition to develop. Somewhat astonishingly, the evangelicals found an ally in the secular early twentieth-century progressives. Though unsympathetic to the moral policies of evangelicals, "even the most secular of twentieth-century progressives agreed with the nineteenth-century evangelicals on one critical point: the primary aim of the constitutional enterprise was *not* to protect established property rights or ancient jurisdictional boundaries, but

[72] *Plessy*, 163 U.S. at 558.

[73] *Id*. at 559.

[74] *Id.* at 559.

[75] Belz, *Living Constitution or Fundamental Law?*, 44.

rather to provide for the wellbeing of the present generation of Americans."[76] Through their alliance, secular scholars and evangelicals accelerated the progression towards a living constitution jurisprudence.

Beginning of the Living Constitution Era

Probably the most influential individual of the early living constitution era was Oliver Wendell Holmes Jr. Justice Holmes was key in promoting the expansion of the protections of the First and Fourteenth Amendments, especially the Freedom of Speech, by liberally construing the text of the Constitution. Interestingly, Holmes was not initially a strong advocate for free speech. Thomas Healy has noted, "It wasn't that Holmes had a particular dislike of free speech. What irked him was the notion of individual rights in general, the idea that there are limits on what a democratic majority can do."[77] However, through the lobbying effort of his more liberal friends such as Harold Laski and Felix Frankfurter and their social ostracization for political speech, Holmes became an ardent defender of free speech.[78] Throughout his career, Justice Holmes was influential in promoting the concept of a living constitution.

An important case was the 1905 case *Lochner v. New York*. In the case, the majority struck down a New York statute barring a worker from working more ten hours a day or sixty hours a week.[79] They contended that the law set a dangerous precedent it had no limit on state police powers. Justice Peckham wrote, "Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and

[76] Compton, *The Evangelical Origins*, 135.

[77] Thomas Healy, "The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind Abrams v. United States," *Journal of Supreme Court History* 39, no. 1 (2014): 36.

[78] Ibid., 56.

[79] Steven Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas*, (New York: W.W. Norton & Company, 2019), 291.

control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government."[80] The government could not regulate workers for a reason as ambiguous as public health.

In response, Justice Holmes contended that the Constitution did not protect the economic theory of capitalism but the rights of the citizens.[81] In a now popular aphorism, he wrote, "General propositions do not decide concrete cases."[82] The aphorism indicates one should go beyond the dead letter of the Constitution to decide present cases. He also shifted the definition of liberty. He argued, "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[83] Holmes concluded that liberty rested more with the people voting and not with the workers or employers working. By making this shift, Justice Holmes demonstrated his growing use of a living constitution to shift words like liberty to address present debates.

The case that most explicitly signaled Justice Holmes's adherence to a living constitution jurisprudence was the 1914 case *Gompers v. United States*. Samuel Gompers was a labor leader who was given a contempt conviction, but the Supreme Court overturned the verdict because the contempt charge occurred too late (three years after proceedings began).[84] In his opinion, Holmes argued, "the provisions of the Constitution are not mathematical formulas having their

[80] Lochner v. New York, 198 U.S. 45, 59 (1905).

[81] *Id*. at 75-6.

[82] *Id.* at 76.

[83] *Id*.

[84] Gompers v. United States, 233 U.S. 604, 612-13 (1915).

essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[85] His argument asserted that the provisions of the Constitution should be viewed as *living* institutions subject to change, not fixed institutions set in stone.[86] The Constitution should not be viewed as static, but capable of transformation outside the normal legislative means. The statement served as the foundation of living constitutionalism. Indeed, Holmes seemingly rejected originalism when he contended that judges should not simply take a dictionary to interpret the words of a legal text.

The New Deal and World War II Court

Though living constitutionalism rose in popularity and legal acceptance throughout the early 1900s, it was not dominant in Supreme Court jurisprudence when Franklin Roosevelt took office in 1933. In response to the Great Depression, President Roosevelt wished to institute sweeping changes to the relationship between the federal government and the people through his New Deal programs. From 1937 until his death in 1945, Roosevelt successfully nominated nine men to the Supreme Court who were favorable to key aspects of his New Deal legislation.[87] These nominations resulted in an era of the Supreme Court which expanded the role of the federal government and protection of individual civil rights and liberties.[88]

The acceptance of New Deal legislation was largely accomplished through judicial deference in which the Supreme Court acted as subordinate to the Executive and Legislative

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[85] *Gompers*, 233 U.S. at 610.

[86] *Id.* at 610.

[87] Joshua E. Kastenberg and Eric Merriam. *In a Time of Total War: The Federal Judiciary and the National Defense - 1940-1954*, (Burlington, VT: Ashgate, 2016), 23.

[88] Ibid., 23.

branches and judicial activism in which the Court intervened to directly protect political processes and minority populations.[89] Another factor was the growing sentiment of some justices that the foundation of the Supreme Court's federalism and economic due process jurisprudence had become untenable[90] As a result, proponents of living constitutionalism began arguing that the United States had an unwritten Constitution which could be modified over time without any formal, written changes being necessary.[91]

This period was also marked by deference to the military establishment. Joshua Kastenberg and Eric Merriam have argued that no period of the Supreme Court exhibited greater deference to the Executive than 1946 to 1953.[92] This is likely due to the fact that there was, at this time, a very real threat to America's long-term survival in Communism.[93] With the perceived national threat from Communism, the Supreme Court took a more lenient approach to legislative and executive actions allegedly tied to national security. Eventually, possibly when President Truman failed to assert national security as a basis for an industry seizure in Youngstown, a distrust of the executive branch, especially regarding foreign policy, developed.[94]

The Warren Court

Widely considered the most liberal Supreme Court ever, the Warren Court demonstrated the dominance of the living constitution jurisprudence throughout the mid to late twentieth century. From civil rights to personal liberties, expansive readings of the protections of the first

[89] Belz, *Living Constitution or Fundamental Law?*, 181.

[90] Compton, *The Evangelical Origins*, 10.

[91] Belz, *Living Constitution or Fundamental Law?*, 182.

[92] Kastenberg and Merriam, *Total War*, 128.

[93] Ibid., 179.

[94] Ibid., 234.

eight amendments and the Fourteenth Amendment became routine. Nominated by President Dwight Eisenhower, Earl Warren quickly exhibited the living constitution approach to be taken by the Supreme Court in the coming decades.

The most celebrated case of this era was *Brown v. Board of Education of Topeka*. It ruled segregating public schools based on race was unconstitutional. Justice Warren, writing for a unanimous Supreme Court, insisted, "…we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[95] Instead, the Supreme Court needed to take a more expansive view of the Constitution. He wrote, "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[96] After analyzing the present situation and determining that separating children based on race generated a feeling of inferiority in black children that could not be remedied, the Court determined, "Separate educational facilities are inherently unequal."[97] By relying on the present-day situation of the school systems to determine the validity of the separate but equal policy, the Supreme Court engaged in a living constitution jurisprudence. The Court was less concerned with the Fourteenth Amendment's original meaning than what equal protection meant in the present and the effects of the ruling. In many ways, the *Brown* decision was the pinnacle of living constitutionalism. The justices went beyond the original meaning of the Fourteenth Amendment to produce a morally correct verdict.

[95] Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

[96] *Id*. at 492.

[97] *Id*. at 495.

Another important case of the era was *Griswold v. Connecticut*. In the case, the Supreme Court ruled that laws forbidding contraceptive use between a married couple were unconstitutional. Writing for the majority, Justice Douglas wrote that "…the First Amendment has a penumbra where privacy is protected from governmental intrusion."[98] He then argued that many of the Amendments (the First, Third, Fourth, Fifth, and Ninth specifically) have emanations of a right to privacy because these amendments create "zones of privacy."[99] These zones indicated the Constitution created a general right to privacy, and this right protected contraceptive use between spouses (though not the manufacture or sale of contraceptives).[100]

The consequences of the ruling for living constitutionalism were substantial. The Court determined that a right existed which was not expressly written in the Constitution. The ruling permitted virtually any right to be discovered if vaguely connected to an enumerated right or to the newly discovered right of privacy. In a concurring opinion, Justice Goldberg made the living constitution influences in the decision more explicit when he wrote, "Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection."[101] This logic is consistent with that of the *Brown* case. A judge needed to examine the effects of a policy and determine whether the effects aligned with the perceived goal of the Fourteenth Amendment in light of modern circumstances.

In his dissent, Justice Black effectively summarized the flaws of the majority opinion. He reasoned, "The Court talks about a constitutional 'right of privacy' as though there is some

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[98] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[99] *Id*. at 484.

[100] *Id*. at 485.

[101] *Id*. at 495.

constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."[102] Concerning the assertion that the Ninth Amendment permitted a freedom of privacy not specifically enumerated in the Bill of Rights, he retorted, "That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."[103] Justice Black used the historical context of the Ninth Amendment to determine its original meaning indicating a segment of the Supreme Court was still unwilling or unable to fully adopt the living constitution framework that had become dominant. The *Griswold* decision became the foundation of the most contentious modern Supreme Court ruling and was important in driving many individuals back to a jurisprudence of originalism. However, widespread embrace of originalism would not occur until polarizing case of *Roe v. Wade* in the 1970s.

Post-Warren Court

Following the End of the Warren Court in 1969, the jurisprudence of living constitutionalism continued to enjoy supremacy in legal thought and Supreme Court jurisprudence. However, the issue of abortion shattered this supremacy.

Roe v. Wade

Few cases have been as lastingly contentious as *Roe v. Wade*. In the decision, the Supreme Court ruled that state laws regulating abortion were unconstitutional until the baby

[102] *Griswold*, 381 U.S. at 508.

[103] *Id*. at 520.

reached viability.[104] Writing for the majority, Justice Blackmun argued that the right of privacy was a factor in the case, but it was not sufficient. He wrote. "…the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[105] He concluded that the state could regulate abortion when the baby becomes viable because at this point the baby has the capability of having a meaningful life outside of the womb.[106] The majority once again embraced the theory of living constitutionalism. It allowed for the existence of a right of privacy not expressed in the Constitution and from this right derived the right to abortion by concluding that abortion was a private act until the baby was viable.

In his dissent, Justice Rehnquist argued that Roe was not an appropriate plaintiff because she was not in her first trimester when she brought suit and the Supreme Court had ruled on the constitutionality of first trimester abortion laws.[107] Further, even if the right to privacy existed, it was not a factor in the case. He wrote:

> I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.[108]

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[104] Roe v. Wade, 410 U.S. 113, 164 (1973).

[105] *Id*. at 154.

[106] *Id*. at 164.

[107] *Id.* at 196.

[108] *Id*. at 197.

Justice Rehnquist concluded by stating that, though society was shifting in a pro-abortion direction, abortion was not as societally accepted as the majority contended.[109]

The public was both outraged and overjoyed with the ruling. Conservatives condemned the ruling as a travesty of justice which trampled over the life of the unborn. Conversely, progressives championed the ruling as correctly acknowledging the bodily autonomy of the mother. The ruling resulted in a dramatic shift in public perception of the Supreme Court. Evangelicals realized the living constitution approach they had helped to foster in the late 19th and early 20th Century had been used against them to justify an action to which they were morally opposed. As they had done when the Court ruled immorally regarding lotteries and alcohol, evangelicals began searching for a jurisprudential philosophy that better aligned with their moral framework. They eventually found that philosophy in originalism.

Rejuvenation of Originalism

After *Roe,* large segments of the population believed the Supreme Court was engaging in illegitimate judicial activism. Though they supported judicial activism to create morality laws regulating lotteries and alcohol, the use of judicial activism to destroy morality laws was unacceptable.[110] Culminating in the *Roe* decision, large segments of the Christian population became disenchanted with the idea of a living constitution.[111] In response, they began to return to originalism as a viable method of constitutional interpretation.

Though *Roe* was the catalyst for the rejuvenation of originalism, it had been developing under the surface for decades. James Bradley Thayer, a Harvard Law professor, called for a

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[109] *Roe,* 410 U.S. at 198.

[110] Compton, *The Evangelical Origins,* 38.

[111] Mary Ziegler, "Originalism Talk: A Legal History," *Brigham Young University Law Review* 2014, no. 4 (2014): 895.

return to judicial restraint as early as 1893.[112] During the 1940s and 1950s conservative jurists were divided between moderates afraid of alienating centrists and activists wishing to promote essential principles.[113] By the 1960s and 1970s, the idea of original intent had become influential as a critique of the Warren Court.[114] Robert Bork had vocally supported originalism, and his nomination to the Supreme Court in 1987, though he was not confirmed, was important because he openly challenged the living constitution consensus in a large public forum.[115] His book *The Tempting of America*, which documented his judicial philosophy and confirmation hearing, was also influential in gaining adherents.[116]

A major factor in originalism's appeal was its perceived objectivity. Robert Bork asserted, "When lawmakers use words, the law that results is what those words ordinarily mean."[117] This perception of objectivity was comforting to large swaths of the public. Further, by adopting originalism, one was able to promote a constitutional stability that had been in flux during the Warren Court.[118] The Constitution once again had a fixed meaning that could not be openly rejected by the judicial system in favor of social improvement.

Another important factor in the shift to originalism was the political sacrifices of its proponents. In the early 1970s, pro-life advocates, many of them evangelicals, attempted to build on living constitutionalism to establish a fundamental right to life rooted in the Fourteenth

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[112] Ziegler, "Originalism Talk," 877.

[113] Ibid., 875.

[114] Ibid., 877.

[115] Belz, *Living Constitution or Fundamental Law?*, 221.

[116] Ibid., 228.

[117] Bork, *The Tempting of America*, 144.

[118] Belz, *Living Constitution or Fundamental Law?*, 185.

Amendment.[119] After *Roe*, these advocates attempted to pass a constitutional amendment prohibiting abortion, but the amendment was too vague and difficult to implement.[120] Bork's nomination hearing caused pro-life advocates to become more favorable towards originalism because they realized it was the best path forward. In order to accept this position, though, they were forced to give up their most desired wish: to make abortion illegal nationwide through the courts. As Mary Ziegler has noted, "The stated position of Bork and other originalists was not that the Constitution protected a right to life but rather that the Constitution did not protect a right to abortion."[121] Though originalist rulings would not make abortion illegal, it would ensure abortion was not a protected right. Pro-life advocates accepted this framework and adopted an originalist jurisprudence. In doing so, they formed a solid base of support for originalism to find judicial success on the road to legislative success. The rapid rise of originalism in the post-*Roe* era was due to a variety of factors including the perceived overreach of the Supreme Court regarding morality laws.

Antonin Scalia

The rejuvenation of originalism reached its fulfillment with the confirmation of Justice Antonin Scalia to the Supreme Court in 1986. Justice Scalia utilized a strict textualist jurisprudence.[122] Scalia wrote, "What I look for in that Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[123]

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[119] Ziegler, "Originalism Talk," 897.

[120] Ibid., 899-900.

[121] Ibid., 919.

[122] Ralph A Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (Lawrence: University Press of Kansas, 2006), 3.

[123] Scalia and Gutman, *A Matter of Interpretation*, 38.

However, if a text is ambiguous, he believed adherence to the traditions of the past was vital to preserve the values of the past and prevent backsliding in society.[124] Further, he was confident that the meaning of the Constitution did not change. He argued, "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away."[125] Never one to back down from a debate, Scalia employed his sharp wit and incisive legal reasoning to demolish fellow justice's opinions he believed were based on faulty living constitutionalism. This ability is especially evident in his opinions of social issues cases.

In the 1992 case *Planned Parenthood v. Casey,* the Supreme Court reaffirmed the ruling in *Roe.* The plurality opinion, penned by Justices O'Connor, Kennedy, and Souter, demonstrated the continued strength of living constitutionalism with declarations such as, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[126] This statement represented the base assertion of the living constitution framework. Not only could the Supreme Court shift the definition of liberty to match the times, but each individual could define liberty for himself or herself. It was against this framework Justice Scalia responded.

In his dissent, Scalia asserted that the issue was "…not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by

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[124] Rossum, *Antonin Scalia's Jurisprudence*, 51.

[125] Scalia and Gutman, *A Matter of Interpretation*, 40.

[126] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

the Constitution of the United States. I am sure it is not."[127] People have a general ability or liberty to do whatever they want. This does not mean they have a constitutional right to that action. To reach this answer he employed the standard he always did in culturally significant constitutional issues. He wrote, "I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected – because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."[128] The text of the Constitution did not grant a woman the right to an abortion, and American history had been consistently opposed to the practice until recently. Scalia appealed to the words of Justice Curtis in the *Dred Scott* decision and warned that abandoning a strict interpretation of the Constitution would only lead to a government of men and not of laws.[129] By not utilizing a textualist strategy, the Court was making the situation more confusing, not more legitimate. Scalia concluded with a warning, stating, "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[130] Justice Scalia used his textualist jurisprudence able to identify the flaws of the reasoning of the majority and explain why the Supreme Court should not be involved in the abortion debate.

Another example of his textualist approach was the 2003 case *Lawrence v. Texas*. In this case, the Court ruled that laws prohibiting homosexual behavior were unconstitutional. In his

[127] *Planned Parenthood*, 505 U.S. at 960.

[128] *Id*.

[129] *Id.* at 985.

[130] *Id*. at 1002.

dissent, Justice Scalia began with a blistering rebuke of the majority opinion given its previous ruling in *Planned Parenthood v Casey*. He maintained:

> Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if*: (1) its foundations have been "eroded" by subsequent decisions… (2) it has been subject to "substantial and continuing" criticism... and (3) it has not induced "individual or societal reliance" that counsels against overturning... The problem is that *Roe* itself--which today's majority surely has no disposition to overrule--satisfies these conditions to at least the same degree as *Bowers*.[131]

Before venturing into the facts of *Planned Parenthood*, Scalia undermined the majority's reasoning by highlighting its inconsistency with previous cases. The Supreme Court had previously been unwilling to overrule *Roe* by the standard it was now using to justify overturning *Bowers v. Hardwick*. The implied reason for this discrepancy was that the Court liked the result of the ruling in *Roe* but did not like the result in *Bowers* which ruled sodomy laws constitutional. The majority used stare decisis as a pretense to rule in accordance with personal political desires.

Having dismantled the Court's stare decisis reasoning, Scalia turned to its use of the Fourteenth Amendment. He argued, "The Fourteenth Amendment expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided."[132] As long as the action is not deeply rooted in the history of the nation, it may be restricted by a law that is legitimately related to a state interest.[133] Even though there were not homosexual laws deep in American history, it was undeniable that general sodomy laws had been on the books since the Founding. Regarding the majority's contention that other countries had loosened sodomy laws, Justice Scalia retorted, "Constitutional entitlements do not spring into existence because some

[131] Lawrence v. Texas, 539 U.S. 558, 588 (2003).

[132] *Id*. at 592.

[133] *Id*. at 593.

States choose to lessen or eliminate criminal sanctions on certain behavior."[134] The Supreme Court should care only about the Constitution and the statutes of the United States.

Scalia concluded his dissent by arguing that public morality was a rational basis for the challenged law. He asserted that there are many different types of moral conduct, such as bigamy, fornication, adultery, and obscenity, which are still enforced but would be undermined by the ruling in *Lawrence*. He wrote, "If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational basis review."[135] He continued by accusing the majority of taking a side in the culture wars by arguing that the criminalization of homosexuality was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[136] In doing so, they had allowed their politics to enter their decision-making process. A strict interpretation of the text of the Constitution would have allowed the majority to realize they had incorrectly decided the case. In his opinion, Scalia demonstrated his adherence to a textualist originalism in order to determine that the law was not unconstitutional.

Throughout his tenure, Justice Scalia demonstrated an adherence to the text of the Constitution that became the backbone of the modern Originalism movement in the United States. Though he did not always rule in perfect alignment with his textualist sensibilities, he demonstrated the constructive rulings that could occur using an Originalist jurisprudence. Since Justice Scalia's ascendancy to the Supreme Court, several Justices have been confirmed who adhere to a strong Originalist framework. Notable Justices have been Justice Clarence Thomas,

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[134] *Lawrence,* 539 U.S. at 598.

[135] *Id*. at 599.

[136] *Id.* at 523.

Justice Samuel Alito, and Justice Neil Gorsuch. In the current court, there is significant division between the liberal and conservative wings of the aisle with Conservatives adhering to an originalist jurisprudence and Liberals using a living constitution jurisprudence.

This division was exemplified in the 2015 case *Obergefell v. Hodges*. In the case, the Supreme Court ruled in 5-4 majority that same-sex marriage was a constitutional right. Justice Kennedy, writing for the majority, stated, "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[137] Same-sex marriage had been recently discovered to be a part of liberty. Regarding the contention that *Lawrence* had already protected homosexual activity, Kennedy contended, "it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[138] Thus, it was essential for the court to recognize the institution of marriage for same-sex couples. The majority opinion clearly revealed the continued success of living constitutionalism. The foundation of the argument was that the writers of the Constitution and Fourteenth Amendment intended for the definition of liberty to change over time to encompass the modern morals of America (or at least the morals of a majority of the Justices).

Each dissenting Justice wrote his own opinion strongly denouncing the majority's use of living constitutionalism. Chief Justice Roberts wrote, "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding

[137] Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

[138] *Id.* at 667.

that right on a question of social policy to unaccountable and unelected judges."[139] Justice Scalia, in his own dissent, remarked, "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."[140] Justice Thomas observed, "By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority."[141] Finally, Justice Alito echoed his fellow Justices' concerns, writing, "If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate."[142] The dissenting Justices refused to accede the idea that word liberty in the Constitution and Fourteenth Amendment could encompass actions not accepted as liberty by anyone of the time period the statute was written. Thus, the general divide in the public was represented on the Supreme Court Roughly half were committed to a living constitutionalism while the other half was committed to originalism. However, such narrow margins mean neither side is dominant. It remains to be seen which side will prevail.

Conclusion

In conclusion, the history of Supreme Court jurisprudence provides an interesting framework to understand the modern-day tension between living constitutionalists and originalists. Originalists argue that the original purpose, meaning, or intent of the Constitution

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[139] *Obergefell*, 576 U.S. at 709.

[140] *Id*. at 715.

[141] *Id*. at 722.

[142] *Id*. at 742.

must be strictly adhered to in order to derive judicial results that are just. In contrast, living constitutionalists argue a broader approach is necessary when interpreting the Constitution to allow the Constitution to adapt to societal changes.

In the foundational years of the American Supreme Court, a fair construction originalist jurisprudence was used to determine outcomes. The Jay, Marshall, and Taney Courts all used this strategy and demonstrated its associated advantages and disadvantages. The cases of *Chisholm v. Georgia*, *Marbury v. Madison*, and Justice Curtis's dissent in *Dred Scott v. Sandford* demonstrated that morally, legally, and jurisprudentially correct verdicts could be derived using an originalist jurisprudence. However, the majority opinions of *Dred Scott v. Sandford* and *Plessy v. Ferguson* demonstrated how this jurisprudence could be abused to allow politically beneficial rulings to be reached undermining the legitimacy of the method.

The failure of fair construction to facilitate social change allowed living constitutionalism to develop. An alliance between late nineteenth century evangelicals who wished to impose moral reforms but had been unable to do so legislatively and twentieth century progressives who wished to promote societal wellbeing in the present generation produced this development. As a result, expansions in the meanings of free speech, due process, and equality occurred. Justice Holmes was key in advocating for a living constitution in his *Lochner v. New York* and *Gompers v. United States* opinions. These advances culminated in *Brown v. Board of Education of Topeka* when the previous separate but equal standard was abandoned. However, the alliance slowly eroded through social cases such as *Griswold v. Connecticut* which offended the moral beliefs of evangelicals. This erosion culminated in the dissolution of the alliance following *Roe v. Wade*. Having realized the judicial activism of living constitutionalism could be used against them, evangelicals searched for a new jurisprudential framework.

Eventually, evangelicals found this framework in the modern originalist movement. This movement emphasized a stable Constitution and allowed them to join originalists such a Robert Bork in advocating judicial restraint. However, they were forced to give up their goal of nationally prohibiting abortion through the Supreme Court in favor of joining a successful political movement that would at least make abortion regulation in states legal. A key figure of the originalist movement was Justice Scalia who argued forcefully in favor of textualism in the social cases of *Planned Parenthood v. Casey* and *Lawrence v. Texas*. As a result of this movement, the modern Supreme Court is sharply divided between originalists and living constitutionalists, and it remains to be seen which will achieve dominance.

After analyzing the history of American jurisprudence, it appears that one of the most essential factors in determining the dominant jurisprudential philosophy is evangelicals. During the early years of the United States, evangelicals were a smaller portion of the population and had little jurisprudential influence. However, after the Second Great Awakening, evangelicals began to assert their dominance in politics and embraced living constitutionalism. Over time, largely due to the cultural sway of these evangelicals, living constitutionalism became dominant in America. Later, when the living constitutions jurisprudence moved away from their policy goals in the 1960s and 1970s, they embraced originalism. In about a decade, originalism rose in prominence and became a viable interpretive method on the national stage. This was in large part due to the strong evangelical cultural support for the judges promoting originalist jurisprudence. Therefore, the future of American jurisprudence may lie with evangelicals and whether they continue to embrace originalism as their preferred jurisprudence.

Bibliography

Belz, Herman. *A Living Constitution Or Fundamental Law?: American Constitutionalism in Historical Perspective*. Lanham, MD: Rowman & Littlefield, 1998.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990.

Brookhiser, Richard. *John Marshall: The Man Who Made the Supreme Court*. New York: Basic Books, 2018.

Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Budiansky, Stephen. *Oliver Wendell Holmes: A Life in War, Law, and Ideas*. New York: W.W. Norton & Company, 2019.

Cantor, Norman F. *Imagining the Law: Common Law and the Foundations of the American Legal System*. New York: HarperCollins Publishers, 1997.

Chisholm v. Georgia, 2 U.S. 419 (1793).

Collins, Michael and Ann Woolhandler. "Judicial Federalism Under Marshall and Taney." *The Supreme Court Review* 2017, no. 1 (2018): 337-384.

Compton, John W. *The Evangelical Origins of the Living Constitution*. Cambridge, MA: Harvard University Press, 2014.

Cornell, Saul. "Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning." *Law and History Review* 37, no. 3 (2019): 821-845.

Dred Scott v. Sandford, 60 U.S. 393 (1857).

Finkelman, Paul. "The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court." *Cardozo Law Review* 37, no. 2 (2015): 623-662.

Garner, Bryan A., and Henry Campbell Black. *Black's Law Dictionary*. 11th ed. St. Paul, MN: Thomson Reuters, 2019.

Gompers v. United States, 233 U.S. 604 (1915).

Graber, Mark A. *Dred Scott and the Problem of Constitutional Evil*. Cambridge: Cambridge University Press, 2006.

Greenberg, Ethan. *Dred Scott and the Dangers of a Political Court*. Lanham, MD: Lexington Books, 2009.

Griswold v. Connecticut, 381 U.S. 479 (1965).

Healy, Thomas. "The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind Abrams v. United States." *Journal of Supreme Court History* 39, no. 1 (2014): 35-78.

Hobson, Charles F. *The Great Chief Justice: John Marshall and the Rule of Law*. Lawrence: University Press of Kansas, 1996.

Johnson, Herbert A. "John Jay and the Supreme Court." *New York History* 81, no. 1 (2000): 59-90.

Kastenberg, Joshua E. and Eric Merriam. *In a Time of Total War: The Federal Judiciary and the National Defense - 1940-1954*. Burlington, VT: Ashgate, 2016.

Lawrence v. Texas, 539 U.S. 558 (2003).

Lochner v. New York, 198 U.S. 45 (1905).

Manion, Clarence. "The Founding Fathers and the Natural Law: A Study of the Source of our Legal Institutions." *American Bar Association Journal* 35, no. 6 (1949): 461-529.

Marbury v. Madison, 5 U.S. 137 (1803).

Marshall, Thurgood. "The Constitution: A Living Document." *Howard Law Journal* 30, no. 4 (1987): 915-920.

McGinnis, John O., and Michael B. Rappaport. *Originalism and the Good Constitution*. Cambridge, MA: Harvard University Press, 2013.

Meyler, Bernadette. "Towards a Common Law Originalism." *Stanford Law Review* 59, no. 3 (2006): 551-600.

Obergefell v. Hodges, 576 U.S. 644 (2015).

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Rehnquist, William H. “The Notion of a Living Constitution.” *Texas Law Review.* 54, no. 4 (1976): 693-706.

Roe v. Wade, 410 U.S. 113 (1973).

Scalia, Antonin and Amy Gutmann. *A Matter of Interpretation: Federal Courts and the Law: An Essay*. Princeton, NJ: Princeton University Press, 1998.

Ziegler, Mary. "Originalism Talk: A Legal History." *Brigham Young University Law Review* 2014, no. 4 (2014): 869-926.