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## Reshaping American Jurisprudence in the Trump Era – The Rise of “Originalist” Judges

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## RESHAPING AMERICAN JURISPRUDENCE IN THE TRUMP ERA – THE RISE OF “ORIGINALIST” JUDGES

JEFFREY F. ADDICOTT\*

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## INTRODUCTION

*“I will appoint pro-life, conservative, second amendment Judges. Justices who will interpret the Constitution the way the founders wanted it interpreted.”<sup>1</sup>*

*Donald J. Trump*

One of the factors that is often cited as a key reason why President Donald J. Trump was elected as the forty-fifth president,<sup>2</sup> was his pledge to the American people to “make America great again”<sup>3</sup> by appointing “conservative judges” to the bench, particularly when it came to filling any vacancies that might open on the United States Supreme Court.<sup>4</sup> Since the never ending fight for securing an ideological majority on the Supreme Court is always viewed with great concern by both political parties, many wondered whether then candidate Trump was simply telling potential voters what they wanted to hear, or if he would actually keep his word.<sup>5</sup> In turn, others pondered exactly what Trump—a former Democrat now Republican from New York—meant by the word

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1. *Trump: I Will Appoint Pro-life, Conservative, 2nd Amendment Judges*, CNBC (Oct. 19, 2016, 9:08 AM), <https://www.cnn.com/video/2016/10/19/trump-i-will-appoint-pro-life-conservative-2nd-amendment-judges.html>.

2. Trump won forty-six percent of the popular vote, versus Hillary Clinton’s forty-eight percent. Gregory Krieg, *It’s Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>. Nevertheless, Donald Trump swamped Hillary Clinton in the electoral college by a very comfortable margin of victory—306 electoral votes versus Hillary Clinton’s 232. *Presidential Results*, CNN, <http://www.cnn.com/election/results/president> (last visited May 1, 2019); see also WILLIAM C. KIMBERLING, *THE ELECTORAL COLLEGE* (May 1992), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015029850503;view=1up;seq=6>. Trump won thirty states, while Clinton won twenty plus the Federal District of Columbia. *Id.*

3. See Pamela Engel, *How Trump Came Up with His Slogan ‘Make America Great Again,’* BUS. INSIDER (Jan. 18, 2017, 10:15 AM), <http://www.businessinsider.com/trump-make-america-great-again-slogan-history-2017-1>.

4. See Tessa Berenson, *President Trump Appointed Four Times as Many Federal Appeals Judges as Obama in His First Year*, TIME (Dec. 15, 2017), <http://time.com/5066679/donald-trump-federal-judges-record/>.

5. See David A. Graham, *Which Republicans Oppose Donald Trump? A Cheat Sheet*, ATLANTIC (Nov. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/11/where-republicans-stand-on-donald-trump-a-cheat-sheet/481449/>.

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*conservative*.<sup>6</sup> As the Trump Administration is now well past its mid-point, the firmly stated promises of then candidate Trump in this regard can be measured against a factual record of accomplishment.

In a nutshell, President Trump has not only kept his pledge to appoint ideological conservative judges to the federal judiciary, he has largely exceeded the expectations of his supporters and reduced the ranks of the so-called Republican “never Trumpers” to a mere handful.<sup>7</sup> Indeed, while the objective viewer of the Trump presidency can easily point to a number of impressive Trump successes, ranging from a booming American economy<sup>8</sup> to the geographic destruction of ISIS,<sup>9</sup> it is the philosophical sea change in the judiciary that will most likely extend as one of the most important and influential of the Trump legacies.

Beyond identifying the number of new Trump appointed federal judges that have passed through the process of confirmation in the Senate, including two new Supreme Court justices, the central purpose of this article is to explore the efficacy of categorizing judges according to their political philosophy. On the face of things, everyone would agree with Chief Justice John Robert’s remarks given at the University of Minnesota—just after Justice Kavanaugh’s confirmation in 2018—that judges “are to interpret the Constitution and laws of the United States . . . [with] independence from the political branches.”<sup>10</sup> Still, it is

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6. Max Boot, *Since When Does Being a Conservative Mean That You Have to Follow Donald Trump*, WASH. POST (Oct. 16, 2018), [https://www.washingtonpost.com/blogs/post-partisan/wp/2018/10/16/since-when-does-being-a-conservative-mean-that-you-have-to-follow-donald-trump/?utm\\_term=.87718a7af535](https://www.washingtonpost.com/blogs/post-partisan/wp/2018/10/16/since-when-does-being-a-conservative-mean-that-you-have-to-follow-donald-trump/?utm_term=.87718a7af535).

7. See Julia Manchester, *Trump Will Be Remembered for Appointing Conservative Judges, Says CBS Correspondent*, HILL (Nov. 16, 2018), <https://thehill.com/hilltv/rising/417106-trump-will-be-remembered-for-appointing-conservative-judges-says-cbs>.

8. See Peter Roff, *Good News Doesn’t Always Travel Fast*, U.S. NEWS (Jan. 16, 2018, 5:00 PM), <https://www.usnews.com/opinion/thomas-jefferson-street/articles/2018-01-16/the-economy-is-booming-under-trump-but-mainstream-media-wont-tell-you-that>.

9. *Ad-Dawlah al-Islāmiyah fīl-‘Irāq al-Shām* is known in the English-speaking world as Islamic State of Iraq and al-Sham (“ISIS”), although the group prefers the Arabic word *al-Shām* which means Islamic State (“IS”). See JEFFREY F. ADDICOTT, *RADICAL ISLAM WHY? CONFRONTING JIHAD AT HOME & ABROAD* (2016).

10. University of Minnesota Law School, *The 2018 Stein Lecture: John G. Roberts, Jr., Chief Justice of the United States*, YOUTUBE (Oct. 22, 2018), [https://www.youtube.com/watch?v=9i3RwW0y\\_kE](https://www.youtube.com/watch?v=9i3RwW0y_kE); see Adam Liptak, *Trump Takes*

blatantly obvious to even the most casual observer that judges do in fact have ideological/political positions. Thus, the task of understanding judicial philosophy cannot be accomplished without entering, to some degree, into the realm of politics. Then again, considering the hyper-partisan environment in America, everything appears politicized.<sup>11</sup>

Before embarking on any objective analysis dealing with President Trump it is vitally important to restate two observations.<sup>12</sup> First, President Trump most certainly possesses a penchant for hyperbolic expression.<sup>13</sup> Anyone even marginally familiar with the tenor and tone of President Trump understands that he is, at times, full of defiance and prone to express his views with an acidic passion as if he were at war with everything and everyone, yet enjoying every moment of the battle.<sup>14</sup> Second, President Trump is constantly harangued by a hostile “mainstream media” whose unacceptable level of bias<sup>15</sup> can negatively

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*Aim at Appeals Court, Calling It a ‘Disgrace’*, N.Y. TIMES (Nov. 20, 2018) <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html>.

11. See, e.g., Molly Ball, *Nation Divided*, TIME, Nov. 19, 2018, at 26 (describing the bitter chasm that exists between political parties calling it a “fight [that] is about to get even worse.”).

12. See Jeffrey F. Addicott, *Prosecuting the War on Terror in the Trump Administration: The Trump Doctrine – Is There Really a New Sheriff in Town?*, 11 ALB. GOV’T L. REV. 209 (2018); Jeffrey F. Addicott, *The Trump Travel Ban – Reality vs. Rhetoric*, 44 DAYTON L. REV. (forthcoming 2019).

13. See, e.g., FOX NEWS Channel, *Cavuto Live*, YOUTUBE (Dec. 29, 2018), <https://www.youtube.com/watch?v=V9knEpm7xWs>. Former independent counsel Ken Starr remarked on his objections to President Trump’s language, but nevertheless supported his policies: “Even though President Trump tweets – I wish he wouldn’t tweet to the extent that he does and saying the things that he says, but that’s his business, he’s the president . . . so some nasty things being said, but the right things being done.” *Id.*

14. AFP, *Trump Tics: Making Hyperbole Great Again*, TIMES OF ISR. (Aug. 17, 2016, 4:14 PM), <https://www.timesofisrael.com/trump-tics-making-hyperbole-great-again/>.

15. See Jennifer Harper, *Numbers Don’t Lie: Media Bias Against Trump is Entrenched, Vicious, Persistent*, WASH. TIMES (June 29, 2017), <https://www.washingtontimes.com/news/2017/jun/29/inside-the-beltway-media-bias-against-trump-is-ent/>; see also Jennifer Harper, *Unprecedented Hostility: Broadcast Coverage of President Trump Still 90% Negative, Says Study*, WASH. TIMES (Mar. 6, 2018), <https://www.washingtontimes.com/news/2018/mar/6/trump-coverage-still-90-negative-says-new-study/> (“Out of a total of 712 evaluative comments made on the air, only 65 were positive, or 9 percent. The rest—647 comments—were negative, amounting to 91 percent.”); Stephen Dinan, *Networks’ Coverage of Trump Immigration Policy 92*

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impede those who endeavor to obtain factual, let alone favorable, information about Trump policy positions or actions.<sup>16</sup> Without understanding this “Scylla and Charybdis” predicament it is impossible to rightly divide the truth concerning almost any issue associated with President Trump..

## I. ORIGINALIST VS. LIVING CONSTITUTIONALIST

*“What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional? . . . The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”<sup>17</sup>*

*Justice Antonin G. Scalia*

To those not inclined to think too deeply on the topic, the general impression is that federal judges are expected to set aside their

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*Percent Negative*, WASH. TIMES (July 24, 2018), <https://www.washingtontimes.com/news/2018/jul/24/networks-coverage-trump-immigration-policy-92-perc/> (demonstrating staggering negativity across ABC, CBS, and NBC towards Trump’s immigration policy); Thomas E. Patterson, *News Coverage of Donald Trump’s First 100 Days* (Harvard Kennedy School, Working Paper, RWP17-040, Sept. 2017) (“Trump’s coverage during his first 100 days was not merely negative in overall terms. It was unfavorable on every dimension. There was not a single major topic where Trump’s coverage was more positive than negative.”); Tom Engelhardt, *The Media Have a Trump Addiction*, NATION (Mar. 27, 2018), <https://www.thenation.com/article/the-media-has-a-trump-addiction/> (exhibiting the historic amount of media coverage of President Trump: “no human being in history has ever been covered in this fashion . . .”).

16. See Charles M. Blow, *Soul Survival in Trump’s Hell*, N. Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/opinion/soul-survival-in-trumps-hell.html> (arguing that living in the Trump Administration is the equivalent of existing in a living Hell); Jeremy W. Peters, *As Critics Assail Trump, His Supporters Dig In Deeper*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/politics/republican-voters-trump.html> (discussing the harsh responses to President Trump’s decisions); see also Howard Kurtz, *Behind the Vitriol: Are Trump’s Critics Mimicking His Tactics?*, FOX NEWS (Apr. 26, 2018), <http://www.foxnews.com/politics/2018/04/26/behind-vitriol-are-trumps-critics-mimicking-his-tactics.html> (examining the media’s coverage of the Trump administration).

17. *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 688–89, 711 (1996) (Scalia, J., dissenting).

ideological predilections when rendering judicial decisions—particularly when ruling on applicable provisions of the United States Constitution. With rare exceptions, most justices will adamantly assert that their reasoned legal opinions are rendered solely as a consequence of following “the law.”<sup>18</sup> Nevertheless, everyone understands that the “law they follow” is often dictated by their positions set along an ideological spectrum, which ranges from the conservative “originalist”<sup>19</sup> interpretation of the Constitution to the liberal “living constitutionalist,” i.e., a “living, breathing document”<sup>20</sup> view of the Constitution. The historical evidence for this phenomenon is obvious. Clearly, if judges were supposed to follow the “law” in rendering neutral decisions from the bench, why do so many Supreme Court opinions not only fail to achieve unanimity but seem to easily fall into fixed ideological camps? In other words, however one wishes to label it, the existence of two distinct judicial *weltanschauungs*<sup>21</sup> most certainly exists, allowing commentators in many instances to easily prognosticate exactly how, for example, the nine justices on the Supreme Court will split - the conservative vs the liberal wing.<sup>22</sup>

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18. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge’*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

19. See Eric Segall, *The Supreme Court Is About to Get a Lot Less Honest About Its Fake Originalism*, SLATE (July 16, 2018, 1:45 PM), <https://slate.com/news-and-politics/2018/07/the-supreme-court-is-about-to-get-less-honest-about-fake-originalism.html> (“[Justice Kennedy] will be sorely missed because, although all the justices decide cases based on their own modern sensibilities, Kennedy was one of the few, left or right, to openly admit it.”).

20. See Mark W. Hendrickson, *The U.S. Constitution: Living, Breathing Document or Dead Letter?*, CTR. FOR VISION & VALUES (May 28, 2009), <http://www.visionandvalues.org/2009/05/the-us-constitution-living-breathing-document-or-dead-letter/> (“Liberals and progressives believe that the Constitution is a living, breathing document that should evolve with the times. They want Supreme Court justices to be flexible in interpreting the Constitution and adapting 18th-century language to 21st-century applications.”); Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. The Living Constitution* 29 REGENT U. L. REV. 9, 14 (2016).

21. See OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/weltanschauung> (defining “weltanschauungs” as “a particular philosophy or view of life; the world view of an individual or group”).

22. STUDENT NEWS DAILY (2005), <https://www.studentnewsdaily.com/conservative-vs-liberal-beliefs/>.

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Appreciating all that has been written or spoken about the two competing judicial philosophies, boiling the matter down to its base essentials reveals a bright line distinction. On the one hand there are the originalists who assert that “the Constitution is supposed to represent a consensus among we the people in the states [sic], not a national democratic vote or poll and not the policy preferences of unelected judges.”<sup>23</sup> While on the other hand, the living constitutionalist asserts that judges must consider that “rights come not from ancient sources alone,”<sup>24</sup> but also rise “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own times.”<sup>25</sup>

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23. Duncan, *supra* note 20, at 32.

24. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

25. *Id.* In the 2015 landmark case of *Obergefell v. Hodges*, a 5-4 ruling by the Supreme Court, Justice Kennedy provided the tie breaking swing vote to require States to perform and recognize the marriages of same-sex couples. In finding this right under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, Kennedy embraced the view of the living constitutionalist. Kennedy wrote:

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. *See M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (Kennedy, J., concurring in judgment); *Bearden v. Georgia*, 461 U. S. 660, 665 (1983). This interrelation

### A. *The Living Constitutionalist*

While the living constitutionalist may disdain other descriptive terms such as *progressive* or *activist*, such labels are more fitting designations simply for the fact that living constitutionalists passionately believe that the Constitution, as originally written by the founding fathers, is horribly outdated.<sup>26</sup> They are frustrated. For them the Constitution is “frozen in amber” because in the main it does not address the concerns of those who advocate for the adoption of a whole realm of “modern” agendas, such as the so-called emerging third-generation human rights which obligate a government to provide or guarantee for its people such things as standardized jobs, clean air, clean energy, health care, education, housing, etc.<sup>27</sup> Thus, in order to rectify the unacceptable rigidity in the Constitution, the liberal judge has no problem seeing the U.S. Constitution as a “living, breathing document,”<sup>28</sup> allowing them to employ interpretations in accordance with whatever set of desirable norms or mores that they wish to promote. Clearly, this methodology of

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of the two principles furthers our understanding of what freedom is and must become.

*Id.*

26. See Adam Liptak, ‘We the People’ Loses Appeal with People Around the World, N.Y. TIMES (Feb. 6, 2012), <https://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>. Written charters and constitutions modeled from the U.S. Constitution have rapidly declined. The author cites a study (by David S. Law of Washington University in St. Louis, and Mila Versteeg of the University of Virginia) that concludes:

The turn of the twenty-first century [saw] the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.

*Id.*

27. In contrast to first- and second-generation human rights which prohibit the government from engaging in certain clearly defined acts against citizens depriving them of life or liberty interests, so-called third-generation human rights focus on the government’s obligation to provide certain social and welfare benefits to its citizens. Third generation human rights include such “rights” as social security, education, health care, resource development, food, education, humanitarian assistance, and working conditions. See JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 367-368 (7th ed. 2014).

28. See Joe Carter, *Justice Scalia Explains Why the ‘Living Constitution’ is a Threat to America*, ACTON INST. (May 14, 2018), <http://blog.acton.org/archives/101616-justice-scalia-explains-why-the-living-constitution-is-a-threat-to-america.html>.

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interpretation is fueled by and embraces a broader social movement of the “enlightened class” consisting of the progressive elites and their allies. Again, the living constitutionalist feels that the Constitution should not be viewed as a collection of fixed mandates and laws. For them, because the Constitution only envisions a government that “promote[s] the general Welfare,” instead of “providing” for the general Welfare, it is not to be praised as the oldest written national constitution on the planet.<sup>29</sup> It is to be viewed simply as an open invitation to apply contemporary meanings.

In the words of Supreme Court Justice Ruth Ginsburg—who is widely celebrated by the living constitutionalists as the central head of the liberal wing of the Supreme Court<sup>30</sup>—the United States Constitution does not provide the necessary flexibility when it comes to addressing these new social “imperatives.” For instance, in a 2012 interview given to an Egyptian television station, Justice Ginsburg admitted that she would “not look to the U.S. Constitution”<sup>31</sup> for guidance in drafting a new Egyptian constitution:

You [those tasked with drafting the anticipated new Egyptian constitution] should certainly be aided by all the constitution writing that has gone on since the end of World War II. I would not look to the U.S. Constitution if I were drafting a constitution in 2012. I might look to the constitution of South African. That was a deliberate

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29. See U.S. CONST. pmb.

We the People of the United States, 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.

*Id.*

30. See Stephanie F. Ward, *Justice Ruth Bader Ginsburg Has Become an Unlikely Pop Culture Icon*, ABA J. (Oct. 2018), [http://www.abajournal.com/magazine/article/ruth\\_bader\\_ginsburg\\_pop\\_culture\\_icon](http://www.abajournal.com/magazine/article/ruth_bader_ginsburg_pop_culture_icon); see also Samantha Schmidt, *Ruth Bader Ginsburg Says She Has ‘At Least 5 More Years’ on the Supreme Court. Her Fans Rejoice.*, WASH. POST (July 30, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/07/30/ruth-bader-ginsburg-says-she-has-at-least-5-more-years-on-the-supreme-court-her-fans-rejoice/?utm\\_term=.b7ed4dab84db](https://www.washingtonpost.com/news/morning-mix/wp/2018/07/30/ruth-bader-ginsburg-says-she-has-at-least-5-more-years-on-the-supreme-court-her-fans-rejoice/?utm_term=.b7ed4dab84db).

31. See Joshua Keating, *Why Does Ruth Bader Ginsburg Like the South African Constitution So Much?*, FP (Feb. 6, 2012, 6:07 PM), <https://foreignpolicy.com/2012/02/06/why-does-ruth-bader-ginsburg-like-the-south-african-constitution-so-much/>.

attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary . . . . It really is I think, a great piece of work that was done. Much more recent than the U.S. Constitution – Canada has a Charter of Rights and Freedoms. It dates from 1982. You would almost certainly look at the European Convention on Human Rights.<sup>32</sup>

Setting aside the desirability, or even feasibility, of embracing a given social justice cause—the South African constitution praised by Justice Ginsburg is extremely complex with well over 100 pages—the central problem of a living constitutionalist jurisprudence is predictability. In other words, those who have the temerity to interpret the U.S. Constitution as a document that can mean anything, means, of course, that it means nothing. By definition, such a position is nothing less than the devil’s own playground. While such flexibility may produce great “good,” it might also produce great harm at some future time.

Predictably, the influence of living constitution ideology permeates modern American society at every corner. The false narrative that the living constitution philosophy has always been the mainstream in American thinking – at least amongst the “intelligent class” – is not just relegated to the mantra of large portions of academia, or the progressive culture as a whole. Adherents tirelessly work to insert this idea into the very historical record of the nation, promoting it in order to convince the public that it has always been the norm for the truly enlightened American. For instance, if one visits the public museum located in the basement of the fabulous Jefferson Memorial in Washington, D.C., there is a large colored display depicting a sitting female with an American flag and a Greek goddess with outstretched hand standing to her right, as if instructing the sitting female. It is obvious that the Greek goddess represents the enlightened voice of change and the sitting figure represents America. Above the drawing there is a quote from Thomas Jefferson. The first sentence of the quote is set out in very large font. It reads as follows:

Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and

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32. *Id.*

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opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. Thomas Jefferson, 1816.<sup>33</sup>

Of course, to the serious student of American history this display at Jefferson’s Memorial is an outrage. It is a perfect example of “fake history.”<sup>34</sup> In order to foist the views of the living constitutionalist on an unsuspecting public, the words of Jefferson are grossly taken out of context. Given that the full quotation would actually support originalism, not living constitutionalism, some unprincipled individual(s) employed to create the imagery has deleted the first sentence of Jefferson’s famous remarks. That first sentence which rubricates all that follows says: “I am certainly not an advocate for frequent and untried changes in laws and Constitutions. But . . .”<sup>35</sup> In addition, the person who crafted the so-called quote at the museum display also intentionally chose not to put brackets around the first word in their display use which is “Laws.” Thus, their Jefferson quote should have been: “[L]aws . . .” This would at least alert the reader that the display’s creator had broken into the Jefferson sentence for their quote, prompting the inquisitive to look up the full quote to see what preceded the word “laws.”<sup>36</sup>

### B. *The Originalist*

In contrast to the living constitutionalist, the originalist is primarily concerned with what the original *writers* meant when they drafted the Constitution and the attendant amendments. Greatly valuing the genius of the founders, the originalist seeks to comprehend, with as much precision as possible, the original intent of the author and does not agree with the idea that the U.S. Constitution and Bill of Rights are now

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33. The display is in the small museum, under the Jefferson Memorial, detailing Thomas Jefferson’s life and beliefs.

34. See William Jeynes, “*Fake History*” is More Dangerous Than “*Fake News*”, PUB. DISCOURSE: J. WITHERSPOON INST. (May 15, 2017), <https://www.thepublicdiscourse.com/2017/05/19322/>.

35. Letter from Thomas Jefferson to Samuel Kercheval (Jul. 12, 1816) (on file with the National Archives: Founders Online, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>).

36. Of course, one need only go to the Jefferson Memorial itself and look up at one section of the wall to see the actual quote!

outmoded, or will ever be outmoded, in terms of providing prosperity and liberty to the people. It contains intrinsic truth for the ages.

Understanding the flaws inherent in human nature, a central commonality of all major religions, the originalist celebrates the fact that the U.S. Constitution constructively addresses the challenge of sustaining a ruling system that both promotes individual privacy rights while providing basic protections from an overreaching central government. He rejects absolutely the siren song of the living constitutionalist as a “fraud and a delusion.”<sup>37</sup> An originalist then, is best defined as one who believes that the text within the United States Constitution should be interpreted based on the context surrounding the creation of the Constitution and the intent of the framers.<sup>38</sup> Former Supreme Court Justice Scalia said it best:

[T]he notion that the advocates of the Living Constitution want to bring us flexibility and openness to change is a fraud and a delusion. All one needs for flexibility and change is a ballot box and a legislature. The advocates of the Living Constitution want to bring us what constitutions are designed to impart rigidity and difficulty of change. The originalists’ Constitution produces a flexible and adaptable political system. Do the people want the death penalty? The Constitution neither requires nor forbids it, so they can impose or abolish it, as they wish. And they can change their mind—abolishing it and then reinstating it when the incidence of murder increases. When, however, living constitutionalists read a prohibition of the death penalty into the Constitution . . . all flexibility is at an end. It would thereafter be of no use debating the merits of the death penalty, just as it is of no use debating the merits of prohibiting abortion. The subject has simply been eliminated from the arena of democratic choice. And that is not, we emphasize, an accidental consequence of the Living Constitution: It is the whole purpose that this fictitious construct is designed to serve. Persuading five Justices is so much easier than persuading Congress or 50 state legislatures—and what the

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37. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 410 (2012).

38. Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT’L L. 780, 789 (2014); see also Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation>.

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Justices enshrine in the Constitution lasts forever. In practice, the Living Constitution would better be called the Dead Democracy.<sup>39</sup>

One of the more illustrative areas of debate between the originalist and the living constitutionalist involves the constitutionality of the death penalty. Under the Eighth Amendment, individuals convicted of a crime have the absolute right to be free of “cruel and unusual punishment.”<sup>40</sup> Some legal activists groups, such as the American Civil Liberties Union (ACLU), dogmatically believe that the death penalty “inherently violates the constitutional ban against cruel and unusual punishment,”<sup>41</sup> regardless of the framers’ intent on the matter. Instead of seriously exploring the original intent of the framers, the ACLU’s primary concern is the “denial of civil liberties . . . [which] is inconsistent with the fundamental values of our democratic system.”<sup>42</sup> Apart from the ACLU’s failure to understand that Americans have lived in a “democratic system” from the start, their opposition to the death penalty simply reflects an emotional preference—undoubtedly shared by all living constitutionalists—for the advancement of a strongly held subjective belief system over the clear language of the Constitution. When their personal preferences conflict with the wording of the Constitution, they have no problem upending the entire understanding and meaning of the original Constitution.

Although the 1972 Supreme Court case of *Furman v. Georgia*<sup>43</sup> struck down the death penalty, it was only due to objections associated with how the various State death penalty laws were being applied, not to the legality of the act itself.<sup>44</sup> Understanding the Court’s concerns, new death penalty statutes were quickly drafted and enacted into law. For

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39. SCALIA & GARNER, *supra* note 37, at 410.

40. U.S. CONST. amend. VIII.

41. See *The Case Against the Death Penalty*, ACLU (2012), <https://www.aclu.org/other/case-against-death-penalty>.

42. *Id.*

43. *Furman v. Georgia*, 408 U.S. 238 (1972).

44. *Id.* The Court referred to the application as “harsh, freakish, and arbitrary.” Concurring, Justice Stewart stated: “petitioners were among a capriciously selected random handful upon whom the sentence of death was imposed, and that the Eighth and Fourteenth Amendments could not tolerate the infliction of a sentence of death under legal systems which permitted this unique penalty to be so wantonly and so freakishly imposed.” *Id.*

instance, the new Georgia statute, which the Court approvingly accepted in *Gregg v. Georgia*,<sup>45</sup> a short four years later, provided “objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death.”<sup>46</sup> Most importantly, the Court in *Gregg* clearly affirmed the constitutionality of the death penalty as a State power that “does not invariably violate the Constitution.”<sup>47</sup> In this ruling, the originalist abides quite easily. Coupled with the fact that the death penalty existed and was in full use in 1791, is the fact that capital punishment is specifically mentioned in the Constitution as a lawful function of the State.<sup>48</sup> One can certainly not like the death penalty for a variety of reasons associated with a whole host of rational arguments about its efficacy in stopping crime, etc., but these objections do not wash away the absolute Constitutionality of the death penalty *ab initio*.

While the living constitutionalist often laments that the written Constitution is a road block to imposing progressive agendas, the truth is that the Constitution, as drafted, contains the means for change through an amendment process that provides a “flexible system of government with the capacity of passing laws necessary to meet the needs and challenges of contemporary America.”<sup>49</sup> The originalist does not disavow the actual written Constitution because within its inherent flexibility, the Constitution remains dedicated to “certain liberties deemed essential by a consensus of we the people in the several states who ratified them.”<sup>50</sup>

While those who advocate for a living Constitution spurn the actual written Constitution, the originalist embraces the written Constitution as the supreme law of the land in accordance with Article VI, clause 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby,

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45. *Gregg v. Georgia*, 428 U.S. 153 (1976).

46. *Id.*

47. *Id.*

48. *See* U.S. CONST. amend. V.

49. SCALIA & GARNER, *supra* note 37, at 89.

50. *Id.*

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any Thing in the Constitution or laws of any State to the Contrary notwithstanding.<sup>51</sup>

Free men and women should reject governance by the “decrees of an unelected body of judges”<sup>52</sup> dreamed up outside the parameters of the written Constitution. According to one commentator, this is not the rule of law; it is the rule of man, a notion that would have been anathema to the founding generation.<sup>53</sup>

Finally, although conservatives embrace the appointment of originalist-minded men and women to the federal bench, originalism should not be confused with “literalism,” and it should not be assumed that the originalists views himself as intellectually locked into the physical *historical* conditions of a bygone age. Indeed, since the writer of any document might employ a variety of literary techniques to enshrine his thoughts on paper, the originalist is apt to shun the literalist as much as he does the living constitutionalist. Because the overarching desire of the originalist is to capture the exact thought of the drafter, they consider the rule of law in question under the rubric of isagogical,<sup>54</sup> categorical, and exegetical<sup>55</sup> (ICE)<sup>56</sup> thinking, whereas the literalist might simply attach a literal reading to the text in question. Without fully understanding and applying the ICE factors to arrive at a true interpretation, the literalist, who only narrowly views the words as

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51. U.S. CONST. art. VI, cl. 2.

52. Duncan, *supra* note 20, at 20.

53. *Id.*

54. See MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/isagogics> (defining “isagogics” as the “introductory study of a branch of theology that is preliminary to actual exegesis and deals with the literary and external history of the Bible”).

55. See OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/exegesis> (defining “exegetical” as “critical explanation or interpretation of a text, especially of scripture.”).

56. The acronym ICE was promoted by the late Biblical scholar and Pastor/Teacher Lt. Colonel R. B. Thieme, Jr. See, e.g., John Layton Wall, Bob Thieme’s Teachings on Christian Living (1978) (published Th.D. dissertation, Church Multiplication, Inc.), [http://withchrist.org/thieme\\_by\\_joe\\_wall.pdf](http://withchrist.org/thieme_by_joe_wall.pdf); *The Importance of Doctrine*, WEST BANK BIBLE CHURCH, <http://www.westbankbiblechurch.com/LGMerrittBooks/091113Importance%20of%20Doctrine.pdf> (last visited May 1, 2019); Exegesis, Isagogics, Categories, KUKIS.ORG, <http://kukis.org/page2.html> (last visited May 1, 2019).

written, can often arrive at bizarre conclusions. For example, many are familiar with the words Jesus of Nazareth spoke at the Sermon on the Mount (*The Beatitudes*), calling on a man to cut off his hand if it “made him stumble.”<sup>57</sup> Obviously, this verse should not be taken literally. In the gospel of Matthew, Jesus said:

If your right hand makes you stumble, cut it off and throw it from you; for it is better for you to lose one of the parts of your body, than for your whole body to go into hell.<sup>58</sup>

Without too much intellectual effort, the ICE scholar understands that Jesus, who repeatedly claimed to be the promised Messiah<sup>59</sup>—the lamb of God who would take away the sin of the world<sup>60</sup>—was vividly providing a warning that nothing in this world should stand in the way of a person accepting His offer of salvation by grace,<sup>61</sup> as the alternative was to spend eternity in separation from their Creator.

Admittedly, the Supreme Court itself has sometimes fallen prey to literalism. In 1928, the Supreme Court in *Olmstead v. United States*<sup>62</sup> ruled on the constitutionality of law enforcement “wiretapping” the telephones of individuals in their homes without a search warrant.<sup>63</sup> Because there were no phones at the time of the adoption of the Fourth Amendment in 1791, the Court essentially ruled that there was no protected right to privacy because wiretapping did not constitute an actual physical intrusion of the person or property! Consequently, law enforcement dramatically increased the use of wire taps, prompting Congress to intervene with legislation.<sup>64</sup> Finally, the 1967 landmark

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57. *Matthew* 5:30 (New American Standard Version).

58. *Id.*

59. The Greek word *christos* is the exact equivalent of the Hebrew word *messiah*. The English translation for *christos* is Christ.

60. *See John* 1:29 (“The next day he [John, the Baptist] saw Jesus coming to him and said, ‘Behold, the Lamb of God who takes away the sin of the world!’”).

61. *See* KATHERINE S. TAPPING & CATHERINE B. YEAMANS, EDS., *THE LEGACY OF THE DOCTRINAL TEACHINGS OF ROBERT B. THIEME, JR.* (2014) (providing an excellent discussion of the grace mechanics of salvation).

62. *Olmstead v. United States*, 277 U.S. 438 (1928).

63. *Id.*

64. *See* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG. (Apr. 2018), <https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/>.

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privacy decision of *Katz v. United States*<sup>65</sup> held that Fourth Amendment protections extended to government intrusions based on the “privacy rights” of individuals as well as to actual physical intrusions. Obviously, when faced with new technology or factual developments which did not exist at the time the Constitution or Bill of Rights—to include those created by Congress—the originalist has no problem using common sense to extrapolate or argue by historical analogy.

For example, in *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*,<sup>66</sup> the Court had to decide whether a civil action, totally unknown in 1791, was entitled to a jury trial under the provisions of the Seventh Amendment.<sup>67</sup> Since the Seventh Amendment only made civil actions triable to a jury at the time of the adoption of the Bill of Rights in 1791, the right to a jury trial did not include actions brought before courts of chancery (equity). Today, however, modern federal pleading combines both law and equity into a single pleading called a civil action. The courts logically adopted a “historical test”<sup>68</sup> to determine whether there is a right to a jury trial in any particular instance. If the plaintiff was entitled to a jury trial in 1791, he would be entitled to one in 2019. While the historical test worked well enough, it faced a new problem when dealing with a cause of action that was unknown to either law or equity courts in 1791. This was the dilemma in *Chauffeurs*, where the historical test was impotent. Accordingly, led by originalist thinking, the Court first unsuccessfully analogized to similar situations, before ruling that the plaintiffs were entitled to a jury trial because the modern cause of action in question sought monetary damages, a key component of “courts of law.”<sup>69</sup>

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65. *Katz v. United States*, 389 U.S. 347 (1967).

66. *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

67. *Id.* The Seventh Amendment provides: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.”

68. See STEPHEN YEAZELL & JOANNA SCHWARTZ, *CIVIL PROCEDURE* 617–19 (9th ed. 2016). “Presumably the drafters of the Seventh Amendment were thinking of a world in which there were separate courts of law and equity, a world in which one could only “preserve” a right to jury trial in suits at common law. Because there had never been a right to jury trial in equity, there was nothing to preserve and no right to jury trial.” *Id.* at 618.

69. *Chauffeurs, Teamsters, & Helpers, Local No. 391*, 494 U.S. at 573.

## II. THE TRUMP JUDGES

*“This was an Obama judge.”*<sup>70</sup>

*Donald J. Trump*

The methodology for selecting federal judges is rather straightforward. The Constitution provides that the President shall select qualified candidates and that the United States Senate shall then confirm them.<sup>71</sup> Given that the President is most certainly going to appoint men and women to the bench that reflect his ideological position, the confirmation process not only allows for a period of questioning and deliberation but allows a great degree of political maneuvering before a final up or down vote is taken by the Senate. Up until recently, Senate rules and custom mandated that federal judges were approved by a super majority of the Senate, sixty votes, but now only a majority is required.<sup>72</sup>

Early in his run for office President Trump vowed to appoint conservative originalists to the Supreme Court and the federal benches, even announcing a pool of potential candidates from a list provided by the Federalist Society.<sup>73</sup> Although President Trump later added some names to that list, those individuals were also firmly in the camp of the originalist. Within his first two years, President Trump’s picks of federal court judges, Neil Gorsuch and Brett Kavanaugh, were confirmed and sworn in without either receiving a super majority vote from the Republican party held Senate.<sup>74</sup>

In addition to filling two seats on the Supreme Court, the Republican controlled Senate has confirmed eighty-five federal judges in the first two years of the Trump Administration.<sup>75</sup> The Trump record of

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70. See Liptak, *supra* note 18.

71. U.S. CONST. art. II, § 2, cl. 2.

72. See Russell Berman, *How Democrats Paved the Way for the Confirmation of Trump’s Cabinet*, ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/01/democrats-trump-cabinet-senate/513782/>.

73. See Lydia Wheeler, *Meet the Powerful Group Behind Trump’s Judicial Nominations*, HILL (Nov. 16, 2017, 6:00 AM), <https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations>.

74. See Alana Abramson, *Brett Kavanaugh Confirmed to Supreme Court After Fight That Divided America*, TIME (Oct. 7, 2018, 5:11 PM), <http://time.com/5417538/bett-kavanaugh-confirmed-senate-supreme-court/>.

75. See John Gramlich, *With Another Supreme Court Pick, Trump is Leaving his Mark on Higher Federal Courts*, PEW RES. CTR. (July 16, 2018), <https://www.pew>

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accomplishment in this regard is impressive and will surely continue to rack up more originalist jurists. In comparing Presidents Trump’s confirmations within the first two years of his presidency to President Obama’s confirmations in his first three years, President Obama barely beats Trump’s numbers: ninety-seven to eighty-five.<sup>76</sup>

## CONCLUSION

*“We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>77</sup>*

*Chief Justice John Roberts*

In late November 2018, President Trump publicly complained about an Obama-appointed federal judge, Judge Jon S. Tigar, who ordered the Trump Administration to accept asylum seekers who entered the United States illegally from Mexico.<sup>78</sup> Trump referred to the California district judge as an “Obama judge” and went on to lambast the liberal Ninth Circuit Court of Appeals as a “disgrace.”<sup>79</sup> The next day, Chief Justice John Roberts publicly responded to President Trump in an attempt to defend what he deemed an attack on “judicial independence.”<sup>80</sup> Chief Justice Roberts stated:

We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before

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research.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts/. As of April 2019, the number is over 100.

76. See Philip Klein, *Republicans Should Accelerate Confirmation of Judges in 2019*, WASH. EXAMINER (Dec. 28, 2018, 12:01 AM), <https://www.washingtonexaminer.com/opinion/columnists/republicans-should-accelerate-confirmation-of-judges-in-2019>; see also Russell Wheeler, *Judicial Nominations and Confirmations After Three Years-Where Do Things Stand?*, BROOKINGS (Jan. 13, 2012), <https://www.brookings.edu/research/judicial-nominations-and-confirmations-after-three-years-where-do-things-stand/>.

77. See Liptak, *supra* note 18.

78. Liptak, *supra* note 10.

79. *Id.*

80. See Liptak, *supra* note 18.

them. That independent judiciary is something we should all be thankful for.<sup>81</sup>

While it is undeniable that the judiciary must remain independent of the other two branches of government, Chief Justice Roberts certainly knows that we do, in fact, have “Obama judges” and “Trump judges.” The expression “Obama judge” does not imply that judges do the bidding of the president who appointed them. It does, however, recognize the reality that such judges were chosen precisely because they embraced, to some degree, the same ideological stance of the person that choose them. The result? All judges interpret the Constitution and the laws of the United States in different ways. An “Obama judge” will generally fall into the category of the living constitutionalist, while a “Trump judge” will generally fall into the category of the originalist.

Understanding the obvious implications, plaintiffs will file lawsuits in federal courts that they calculate will rule in their favor. This certainly was the case in the lower court challenges to President Trump’s travel ban, which the Supreme Court ultimately upheld in *Trump v. Hawaii*.<sup>82</sup> This was also the case in the initial court challenges to President Trump March 2019 emergency declaration which would allow him to shift federal funds in order to build a physical barrier along parts of the U.S. southern border with Mexico.<sup>83</sup> According to one commenter:

Three liberal groups – Public Citizen, Center for Biological Diversity and the environmental group Earthjustice – filed separate in federal district court for the District of Columbia, where 11 of 14 judges were named by Democratic presidents.<sup>84</sup>

Still, while plaintiffs “forum-shop” for judges that share a certain viewpoint, they cannot exactly target which federal district judge will hear their case, as caseload assignments are usually done at random. All sides use this strategy. According to one source:

Plaintiffs challenging the Obama administration’s health care, immigration and other programs often filed their lawsuits in Texas

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81. *Id.*

82. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

83. See Richard Wolf, *Border Battle Goes to Courts – “Forum Shopping” Common, But Not Choice of Judges*, USA TODAY at A1 (Mar. 18, 2019).

84. *Id.*

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before conservative judges. The State of Texas alone sued the Obama administration at least 48 times, according to a survey conducted by *The Texas Tribune*.<sup>85</sup>

Whatever else is said about the contentious 2018 Kavanaugh Senate hearings, it is certain that both sides of the ideological divide realized the importance of selecting new federal judges, with Supreme Court appointees serving as crown jewels. In this regard, President Trump and his Republican majority Senate<sup>86</sup> have done a yeoman’s job in appointing federal judges that are originalists. Additionally, President Trump and the Senate majority Republicans have the upper hand for the next two years up to the end of 2020, and neither seem to desire appointing a candidate who sits somewhere in the ideological center. Speculation aside, the number of Trump judges will most certainly grow and may even include another Supreme Court originalist.<sup>87</sup>

For those that are opposed to the appointment of more originalists to the Court, history has shown that judicial appointees sometimes stray over time from their ideological stances.<sup>88</sup> While all sides should agree that a judge must cherish and exhibit “common sense,”<sup>89</sup> there exists a great ideological divide in our judiciary. Nevertheless, it is also true that there is common ground on many issues. Furthermore, even the staunchest originalist understands that, in a real sense, the Constitution is a “living, breathing, document”—it is flexible and various judge made “tests” are essential to its continued viability. While the core meanings

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85. Liptak, *supra* note 10.

86. The 2018 mid-term elections saw the Republican majority grow from 51 to 53 in the U.S. Senate. See Mary Kay Linge, *Why Republicans Actually Have the Upper Hand After the Midterms*, N.Y. POST (Nov. 10, 2018, 1:04 PM), <https://nypost.com/2018/11/10/why-republicans-actually-have-the-upper-hand-after-the-midterms/>.

87. See Alex Swoyer, *Brett Kavanaugh Best Described as ‘Originalist,’ Say Legal Scholars*, WASH. TIMES (Sept. 3, 2018), <https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/>.

88. See Josh Gerstein, *Gorsuch Swings Against Trump in Deportation Case*, POLITICO (Apr. 17, 2018, 6:26 PM), <https://www.politico.com/story/2018/04/17/immigration-ruling-gorsuch-528749>.

89. *‘I Will Do Equal Right to the Poor and the Rich’: Brett Kavanaugh’s Remarks to the Senate Committee*, USA TODAY (Sept. 4, 2018, 7:07 PM), <https://www.usatoday.com/story/news/politics/2018/09/04/brett-kavanaugh-supreme-court-nominees-remarks-senate-committee/1196833002/> (“In deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: ‘the rules of legal interpretation are rules of common sense.’”).

protecting individual liberties must always remain inviolate, the Constitution does change and common sense must prevail in this regard. In his opening remarks to the Senate Judiciary Committee in 2018 now Justice Brett Kavanaugh said, “In deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: ‘the rules of legal interpretation are rules of common sense.’”<sup>90</sup>

Finally, elections have consequences. There is no question that the federal judiciary is undergoing a marked shift in terms of originalist thinking due to ever-growing appointments of new “Trump judges.” Indeed, if President Trump is reelected in 2020 and the Senate remains in the hands of the Republican party this trend of seating young originalist judges is certain to continue, shaping the third branch of government in a manner that will, to some degree, bring the nation back closer to its original and founding principles.

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90. *Id.*