Bridging the Chasmic Gap Between Two Methods of Constitutional Interpretation

Lauren M. Hausman

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BRIDGING THE CHASMIC GAP BETWEEN TWO METHODS OF CONSTITUTIONAL INTERPRETATION

LAUREN M. HAUSMAN*

ABSTRACT

The Article presented herein focuses on two different methods of constitutional interpretation: originalism and living constitutionalism. This Article seeks to explore the advantages and disadvantages of both methods of interpretation, while simultaneously focusing on how the gap between the two methods can be bridged. To do so, this Article evaluates the impact that an applied interpretation method can have (e.g., how cases are decided from the bench based on the way the justices interpret and understand the Constitution). To the extent that the methods of constitutional interpretation cannot be reconciled, this Article proposes solutions for how to bridge the gap between two seemingly juxtaposed methods of interpretation.

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INTRODUCTION

Judges resolve all manner of cases. Some cases, however, pose questions that are difficult to answer. To accomplish such a lofty task, there are a number of different tools in a judge’s arsenal. For instance, judges can employ different methods of constitutional interpretation. This Article will focus on the two most common methods of interpretation: originalism and living constitutionalism.

Both originalism and living constitutionalism present unique challenges and benefits. In Part I, this Article discusses the positive and negative aspects of these doctrines and explores how the method of interpretation used by the Supreme Court in various cases has impacted the outcomes of those cases. Part II and II, in turn, discuss the drawbacks and advantages of originalism and living constitutionalism. Part IV then uses a series of Supreme Court cases to further analyze the judicial impact of these constitutional interpretations. Finally, this Article concludes by attempting to bridge the divide separating the two doctrines by offering two possible solutions.

I. THE TWO METHODS OF INTERPRETATION

Two of the most prevalent ways to interpret the Constitution are originalism and living constitutionalism. These two methods of interpretation are as adversarial as our legal system itself. “The debate between living constitutionalism and originalism is, at its core, a disagreement over what constitutes the best means to interpret a written constitution if it is to withstand the test of time.”

3. Id.
A. Originalism at a Glance

Legal scholars who subscribe to originalism as their preferred method of interpretation “believe that the constitutional text [should] be given the original public meaning that it would have had at the time that it became law.”6 To discern what the Constitutional text means, originalists can turn to a variety of sources: “dictionaries, grammar books, and . . . other legal documents from which the text might be borrowed.”7 Meaning “can also be inferred from the background legal events and public debate that gave rise to a constitutional provision.”8

The original meaning of a constitutional text is therefore “an objective legal construct . . . exist[ing] independently of the subjective ‘intentions’ of those who wrote the text or of the ‘original expected applications’ that the Framers of a constitutional text thought that it would have.”9

Originalism calls for all constitutional provisions to be interpreted as written.10 Although this method of interpretation seems fairly simplistic, it encompasses two separate schools of thought.11 The two theories of originalism are “original intent” and “original meaning.”12 The former theory gives deference to the original intended meaning of the Constitution as defined by its enactors,13 whereas the latter gives deference to the original meaning of the Constitution as understood by a contemporary reader.14

At one point in time, it was understood that the rationale grounding the two schools of thought within originalism—original intent and

7. Id.
8. Id.
9. Id.
12. Id.
13. Id.
14. Id.
original meaning—differed widely on the fundamental nature of constitutional interpretation. Those who subscribe to the original intent approach base constitutional interpretation on what the original drafters meant when they created specific provisions. Given the increasing temporal distance between modern society and the Constitutional Convention, it is little wonder why original intent originalism has fallen out of favor. Determining the intent of those long passed is quite difficult, however, and so common understanding and acceptance of original intent originalism has shifted; some scholars no longer recognize this school of thought, opting instead to treat originalism as textualism. For this reason, all references to originalism in this Article will be discussed in terms of the original meaning theory.

15. See James Burling, What is the Difference Between Originalism vs. Textualism vs. Living Constitutionalism?, PAC. LEGAL FOUND. (Apr. 27, 2022), https://pacificlegal.org/originalism-vs-textualism-vs-living-constitutionalism/. Burling elaborates on the two distinct schools of thought within originalism: There were two slightly different understandings of originalism. One is “original intent” that says we should interpret the Constitution based on what its drafters originally intended when they wrote it. The other is that we should interpret the Constitution based on the original meaning of the text—not necessarily what the Founders intended, but how the words they used would have generally been understood at the time. Both versions of originalism—original intent and original meaning—contend that the Constitution has permanent, static meaning that’s baked into the text. Originalism, in either iteration, is in direct contravention of the ‘Living Constitution’ theory.


17. Id.

18. Burling, supra note 15. Burling discusses the tensions inherent between the origins of originalism and its practical, modern application:

When originalism was first proposed as a better alternative to living constitutionalism, it was described in terms of the original intention of the Founders. But when confronted with the difficulty, and indeed the inappropriateness, of trying to read the minds of the drafters of the Constitution, the advocates of originalism soon backed off...
Originalism places emphasis on a contemporaneous meaning analysis: essentially, one considers how the meaning of the constitutional provision in question would be interpreted by someone living at the same time as the drafting of that provision.19 This method, however, is fraught with concerning presumptions that can drastically impact analysis, which will be discussed in Part III.20

B. Living Constitutionalism at a Glance

The other primary method of constitutional interpretation is living constitutionalism. Legal scholars who support living constitutionalism believe that the Constitution should be “one that evolves, changes over time, and adapts to new circumstances without being formally amended.”21 A living constitution changes to conform to society’s needs.22 Living constitutionalists believe that the Constitution was drafted in broad terms to be flexible in how the provisions could be construed.23

A common criticism of living constitutionalism is that it is a “radical doctrine that is too far outside the mainstream to be taken seriously,” sanctioning “departures from the constitutional text.”24 This approach is further criticized by some theorists because it is ill-defined, except for as an opposition to originalism.25

Id.

20. See discussion infra Part III.
22. Id.
23. Solum, supra note 4, at 1276 (“When ‘living constitutionalism’ is used by scholars as the name for a constitutional theory, it should be used to refer to nonoriginalist constitutional theories that affirm the view that constitutional practice can and should change in response to changing circumstances and values.”); see generally Strauss, supra note 21; see also William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 S. TEX. L. REV. 433 (1986) (explaining the text of the Constitution as having “broad [phrasing] and the limitations of its provisions are not clearly marked.”).
25. Id. at 1259 (quoting Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 MICH. L. REV. 459, 514 n.240 (2010)).
To demonstrate how these antithetical interpretations work, consider the law surrounding the Eighth Amendment: specifically, the relationship between the Eighth Amendment and capital punishment. The Eighth Amendment bans cruel and unusual punishments. One of the most historically contentious areas of Eighth Amendment law is whether different applications of the death penalty can be considered cruel and unusual.

If an individual were to come before the Supreme Court arguing that the death penalty is cruel and unusual, an originalist Justice would likely come to a different outcome than a living constitutionalist Justice. Using a purely theory-based application of constitutional interpretation, the originalist would likely find that the death penalty is permissible, so long as the individual was not “deprived of life . . . without due process of law.” Ultimately, the originalist would consider what an individual would believe cruel and unusual to mean in 1791 when the provision was written.

26. U.S. CONST. amend. VIII.
27. Id.
29. Thomas C. Mizzone, Religions, the Framers, and the Death Penalty: How Does a Canvassing of Religion at the Time of the Founding Inform the Debates Surrounding the Eighth Amendment’s Original Meaning as it Pertains to the Death Penalty?, SETON HALL L. (2022), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2289&context=student_scholarship#:~:text=The%20more%20traditional%20originalism%2C%20the,Unusual%20Punishments%20Clause%27s%20original%20meaning%20(“The%20more%20traditional%20originalism%2C%20the,original%20meaning%2C%20advocates%20that%20without%20constitutional%20amendment%2C%20the%20death%20penalty%20cannot%20be%20unconstitutional%2C%20at%20least%20not%20if%20the%20Court%20is%20to%20remain%20true%20to%20the%20Cruel%20and%20Unusual%20Punishments%20Clause%27s%20original%20meaning.”) (citing John F. Stinneford, Death, Desuetude, and Original Meaning, 56 Wm. & MARY L. REV. 531, 540 (2014) (emphasis in original)).
30. U.S. CONST. amends. V, XIV. It is important to note that the same language appears in the Fourteenth Amendment of the Constitution in the Due Process Clause. Id.
A living constitutionalist would use a much different approach. A living constitutionalist would criticize an originalist for deferring to what a 233-year-old provision meant to someone in 1791. While the death penalty is a 416-year-old practice in the United States, practically the only part of the death penalty that has remained the same is the actual practice of putting a criminal to death. The crimes carrying a sentence of death, as well as the manner of execution have changed drastically, as have the processes surrounding the imposition and execution of such a sentence.

In modern times, only the most heinous crimes warrant a death sentence and execution methodologies have changed to take humaneness into account. The first execution with an electric chair happened in 1890 and the first execution by lethal injection occurred in 1982. The drafters of the Constitution could not have conceived either of these methods of execution when they laid down the Eighth Amendment. Accordingly, the absence of these methods during the Framers’ time makes it difficult to analyze whether the Framers would have considered death by electrocution or lethal injection as “cruel and unusual.” Therefore, a living constitutionalist would view the terms

34. Id.
35. *Sentencing*, OFFS. OF THE U.S. ATT’YS U.S. DEP’T OF JUST., https://www.justice.gov/usao/justice-101/sentencing#:%3E;text=The%20penalty%20can%20only%20impose%20death (last visited Jan. 9, 2024) (explaining that the death penalty can only be imposed on defendants convicted of capital offenses, such as murder, treason, genocide, or killing a Federal Officer).
“cruel” and “unusual” as broad umbrella terms that carry little to no meaning and must be interpreted in accordance with the “evolving standard of decency that mark[s] the progress of a maturing society.”

Regardless of the conclusion reached by the Court, both originalism and living constitutionalism approach difficult questions of interpretation with genuinely good intentions. The method a Justice uses in analyzing the Constitution, however, can drastically alter the outcome of a case, and have legal impacts that are far broader and deeper than the case itself. Consider this effect in the recent Supreme Court case Dobbs v. Jackson Women’s Health Organization. The Dobbs decision was ultimately a 6-3 split which overturned Roe v. Wade. “Roe built on earlier cases in which the Court held that the constitutional right to privacy protected an individual’s rights to reproductive autonomy.” The right to privacy, however does not exist in the United States Constitution. The following statement, taken from Justice Kavanaugh’s concurring opinion, appears to indicate that the majority relied upon originalism to support their determination to


[The founders] used flexible, open-ended language like “cruel and unusual” without explaining exactly what they meant, it seems clear that they were deliberately inviting future generations to interpret and reinterpret these words—the very opposite of what textualists and originalists propose . . . For example, instead of using the imprecise phrase “cruel and unusual” to lock in any particular punishment (like the death penalty), it stands to reason that [the Founders] meant it to lock out whatever punishments future generations deemed unconscionable.

Id.; see also Strauss, supra note 21.

42. Id.
overturn *Roe*: “The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion.” In contrast, the dissent appeared to advocate for a living constitutionalist interpretation.

The majority ruling in *Dobbs* provides insight into the originalist framework: focusing on two areas of our nation’s history for justification. These two areas of focus were the English common law theorists and legislation dating from around the time of the Fourteenth Amendment’s ratification. Concerning the first point, the *Dobbs* decision cites scholars including Henry de Bracton, Sir Matthew Hale, Sir Edward Coke, and William Blackstone. The Court refers to these theorists as “eminent common-law authorities” giving judicial weight to the propositions of these men. Furthermore, the nineteenth-century statutes the majority justices used for justification in overturning *Dobbs*, cite, for example, statutes that were in place in 1868 in twenty-eight of the thirty-seven states, criminalizing abortion. The justices highlight the “history and traditions” test, focusing on events surrounding the time period when the Fourteenth Amendment was

45. See *Dobbs*, 142 S.Ct. at 2304 (Kavanaugh, J., concurring).
46. *Id.* (at Breyer, Sotomayor, Kagan, JJ., dissenting). The dissent asserted the following:

“The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So, they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation.

*Id.* (internal citations omitted).

48. *Id.*
49. *Id.* (citing *Dobbs*, 142 S. Ct. at 2249).
51. *Id.* at 2252–53.
ratified to establish that the United States does not have a history and tradition of allowing abortion.52

Our society constantly grows and changes, as illustrated above, and to some extent, originalism fails to account for advances in technology and morality that occurred after the Constitution was drafted.53 A prime example of this concept is the technological advancement of firearms.54 When the Constitution was drafted, the most widely available firearm was a musket.55 Accordingly, the guns the Framers likely contemplated are entirely different from guns today; consider, for example, the difference in magazine capacity.56 Today’s firearms are capable of inflicting far more carnage than anything the framers could have imagined.57 To be sure, the Framers displayed prudent imaginations; but their collective imaginations, however prudent, were limited. The Framers could not have predicted how society would have looked more than 200 years in the future. Scientific, technological, and cultural progress have catapulted our nation forward; our Constitution ought to grow with us.

52. Id. at 1253. For a more in-depth discussion on the effects of Dobbs on constitutional rights, see Len Niehoff, Unprecedented Precedent and Original Originalism: How the Supreme Court’s Decision in Dobbs Threatens Privacy and Free Speech Rights, ABA COMM’S LAWYER (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/.

53. Craig S. Lerner, Originalism and Criminal Law and Procedure, 11 CHAP. L. REV. 277, 281 (2005) (“The basic criticism [of] originalism, of course, in bare bones, is that the cultural, technological, legal environment has been so transformed over the past 210 years that the original meaning of the Constitution does not and should not provide any or much guidance.”).


55. Id.

56. Id.

57. See generally Ron Cogburn, The Past, Present and Future of Automated Predictive Technology, FORBES (May 13, 2019, 9:15 AM), https://www.forbes.com/sites/forbestechcouncil/2019/05/13/the-past-present-and-future-of-automated-predictive-technology/?sh=22737bab5317 (“Though predictive technology has been around in some capacity throughout history, it’s only in recent years that automation, AI and machine learning have begun to improve the way we predict the future.”).
II. ORIGINALISM ANALYSIS

“Originalism is a theory of interpreting legal texts holding that a text in law, especially the U.S. Constitution, should be interpreted as it was understood at the time of its adoption.”\(^{58}\) More simply, originalism holds that the Constitution should be understood and applied with the meaning the text had when it was written.\(^{59}\) In this Part, this Article will explore in greater depth the criticisms and benefits of an originalist interpretation of the Constitution.

A. **Originalism’s Criticisms**

Justice Brennan warned that “originalism was ‘arrogance cloaked as humility.’”\(^{60}\) Justice Brennan’s criticism of originalism evoked the question, “Who are we to deduce what the average person could have understood a provision to mean?” His criticism also brings forth the issue that those interpreting the law today were not present at the time the Constitution and its Amendments were created, and so, while an originalist can rely on context clues, it is impossible to know with any certainty the true meaning simply from the Constitution’s text. Originalists may argue that “cruel and unusual” has retained the same meaning it has always had, and only the mode of execution has changed. That logic, however, teeters on aligning with a First Amendment standard employed by Justice Stewart’s claim concerning obscenity and the First Amendment: “I know it when I see it.”\(^{61}\) Justice Stewart received heavy criticism for applying such an amorphous standard to the law.\(^{62}\) Ultimately, it cannot be ascertained what anyone speaking 200 years ago meant or thought with absolute certainty.

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Without this certainty, approaching judicial decisions through the originalist lens (such as in *Dobbs*) has far-reaching implications.

Another criticism of originalism is that it is not always possible to determine what the Framers meant in the Constitutional provisions.63 Referring to the Eighth Amendment death penalty example,64 “cruel and unusual” is a broad, sweeping term open to many possible interpretations. When a term could have so many potential interpretations, how could a court conceivably assign a static meaning to this phrase? Ironically, as much as originalists criticize living constitutionalists for making decisions based on their own predilections,65 there is evidence in case law to suggest that originalists do the same.66 Through judicial holdings like *Dobbs*, originalists impute their own opinions of what they thought drafters and citizens in

63. See *Original Meaning and Constitutional Interpretation*, CONSTITUTION Annotated (last visited Oct. 18, 2023), https://constitution.congress.gov/browse/essay/intro.8-3/ALDE_00001304/ (“Those who are skeptical of this mode of interpretation underscore the difficulty in establishing original meaning. Scholars cannot always agree on original meaning, and, perhaps, people living at the time of the Constitution’s adoption may not have agreed on a particular meaning either.”).

64. *Infra* Section IV.B.

65. See Erwin Chemerinsky, *The Dangerous Fallacy of Originalism*, YALE U. PRESS (June 22, 2023), https://yalebooks.yale.edu/2023/06/22/the-dangerous-fallacy-of-originalism/ (discussing the “remarkable willingness of originalists to abandon originalism when it fails to produce conservative results”). Chemerinsky argues that this willingness “shows that the theory was never the constraint on the judiciary that its boosters promised. It is simply convenient rhetoric, used by conserva tives to make it seem that their decisions are a product of something other than their political views. *Id.*

66. See *id.* (quoting ERIC J. SEGALL, ORIGINALISM AS FAITH, 128 (2018)) for a critique of the practical application originalism by certain justices:

Originalists frequently look to practices at the time a constitutional provision was adopted to determine its original meaning. By this measure, the original meaning of the Fourteenth Amendment as it relates to affirmative action could not be clearer. Yet originalists such as Scalia and Thomas pay no attention to this original meaning. They make no effort to justify their opposition to affirmative action in originalist terms because it can’t plausibly be done. As Professor Eric Segall noted, “Neither Justice Scalia nor Justice Thomas addressed this specific history or even the original meaning of the Fourteenth Amendment as applied to limited racial preferences.” Affirmative action is a very powerful example of how conservative political ideology is far more important to these justices than their commitment to originalism.

*Id.*
the 1700s believed the Constitution to mean. While the end results from originalists and living constitutionalists tend to be different (e.g., the 6-3 decision in *Dobbs*), the processes used may be more similar than they first appear (i.e., both camps of Constitutional interpretation inevitably rely on their own predilections to achieve their desired outcome). In particular, living constitutionalists criticize originalism because they argue that originalist justices and judges almost always reach a result favoring politically conservative values.

Justice Brennan has been an outspoken advocate against originalist interpretation of the Constitution, rebuking arguments for originalism that were made in the 1980s:

> We current Justices read the Constitution in the only way that we can: as twentieth century Americans. . . . We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

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70. *Id.*
Justice Brennan’s bold critique of originalism is accompanied by others: originalism is laden with racism and sexism.\textsuperscript{71} If we look at the state of the world in 1791, many were without a voice. Not “all men [were] created equal.”\textsuperscript{72} History, especially American history, favored white, educated, property-owning men.\textsuperscript{73} In addition to its cloak of humility, originalism dons a mask to cover its eyes to the disparities that historically riddled society. “Men” as noted in the preamble did not then include men of color, women, or any marginalized group.\textsuperscript{74} Therefore, if we were to ask what someone in 1791 thought a provision meant, the answer could only come from, and be, white men. Yet our society is comprised of much more than a handful of educated white men. Consequently, living constitutionalists posit that we should read the Constitution broadly.\textsuperscript{75} As read in the context of 1791, the term “men,” was narrow and quite literal.\textsuperscript{76} In today’s world, however, the


\textsuperscript{72} THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).


\textsuperscript{75} Alex Tobin, The Warren Court and Living Constitutionalism, 10 IND. J.L. & SOC. EQUAL. 221, 231 (2022) (“The Constitution is vague; its text is ‘broad and the limitations of its provisions are not clearly marked,’ giving rise to the need for interpretation.”) (quoting William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 S. TEX. L. REV. 433, 433 (1986).

\textsuperscript{76} What Does “All Men Are Created Equal” Mean?, NAT’L CTR. FOR CONST. STUD. (May 3, 2023), https://nccs.net/blogs/weekly-constitution/what-does-all-men-are-created-equal-mean. It is worth noting that the word “nonbinary” and other gender fluid terms were not culturally used in the discourse until approximately 2000. Surya Monro, Non-binary and genderqueer: An overview of the field, NAT’L LIBR. OF MED. (Jan. 21, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6830997/#:~:text=The%20earliest%20use%20of%20terms,Unseen%20Genders%3A%20Beyond
term “men” surely cannot be read so narrowly. “Men” in today’s society includes women, non-binary individuals, and people of color.77 Because originalism grounds its interpretation in the notions of a racist and sexist era,78 it follows that applying originalism would continue to perpetuate the systemic racism and patriarchalism still reverberating in present-day society.

Originalism also ignores the fallibility of the Constitution.79 Such fallibility is evidenced by the existence of an amendment process. Only the first ten amendments, known as the Bill of Rights, were ratified in 1791, while seventeen additional amendments have been ratified over the years. However, as noted by Dobbs v. Jackson Women’s Health Org.,142 S. Ct. 2228, 2325 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting), the dissent asserted that:

[t]hose responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Id.

77. Morris D. Forkosch, Who are the “People” in the Preamble to the Constitution, 19 CASE W. RSRV. L. REV. 644, 711 (1968).


The Declaration of Independence declared that “all men are created equal,” and in 1788, the U.S. Constitution purported to “secure the blessings of liberty” to the American people. These rights and liberties, however, were meant only for white men of property. The Founding Fathers never imagined that women, African Americans (both slave and free), or men without property could be the equal of the propertied white men entrusted with participation in the civic arena. Nonwhite men who were of other than African descent were also excluded, as Congress had stipulated in the Naturalization Act of 1790 that only “free white persons” could become citizens. Ironically, the majority of white males who became naturalized citizens between 1830 and 1860 enjoyed manhood suffrage and other rights denied to native-born nonwhites.

79. See Strauss, supra note 21.
throughout the Nation’s history. In acknowledging the existence of gaps or mistakes, the judiciary should be able to recognize that there may be fundamental flaws in the letter and spirit of our Constitution. Accordingly, we should not rely on what a handful of white men meant when they drafted the Constitution 233 years ago.

Justice Antonin Scalia believed the best way to resolve constitutional issues was to leave the matters to the legislature. Other originalists believed that the amendment process is the best way to resolve constitutional issues. Both approaches fail to consider a few notable issues. First, the voting age in the United States is eighteen, meaning that for seventeen years of a person’s life, there is no way to meaningfully participate in politics. Second, elected officials may not represent every constituent’s interests, which poses problems when elected officials are on the Congress floor lobbying for amendments. Although there was no way to foresee how politically divided our nation would become, the current tenor of political discourse would make passing an amendment—which would require bipartisan cooperation—all but impossible at this point.

To understand why it would be nearly impossible to ratify an amendment, it is important to understand the ratification process. The
ratification process requires a two-thirds vote for proposal of the amendment, and a three-fourths vote for passing it. Since 1959, the Senate has had 100 seats. At the time of publication, the United States will be on the 118th Congress. In the recent history of the 100 seat Senate, very few Congressional classes have ever had a political party hold two-thirds of the seats. Setting aside the makeup of the House of Representatives, the numbers from the Senate alone in recent years illustrates why passing an amendment would likely be difficult. While lawmakers can and sometimes do vote against their party, (e.g., Republican Senator Mitt Romney voting to impeach Republican President Donald Trump), there is generally a culture of lawmakers voting along party lines in modern American politics. In a political era where lawmakers tend to vote in line with their respective party’s agenda, and the parties have not taken majority control of both houses, passing an amendment to the Constitution would be nearly impossible.

88. Id.
89. Id. (the 86th Congress, the 88th Congress, and the 89th Congress have seen Democrats hold a two-thirds majority).
92. See How Do Major Political Parties Split Control of Congress?, U.S. EMBASSY & CONSULATES IN IT. (Jan. 12, 2023), https://it.usembassy.gov/how-do-major-political-parties-split-control-of-congress/ (noting that although “presidents often first sweep into office with their party controlling both the House and Senate along with the executive branch, every president since 1980 has faced divided government, with the opposing party capturing the majority of at least one chamber of Congress, for at least some of his tenure.”).

https://scholarlycommons.law.cwsl.edu/cwlr/vol60/iss2/3
B. Originalism’s Benefits

In this section, this Article will assume arguendo that originalism and textualism are companion methods to be applied together because originalism tends to be synonymous with textualism. Textualism, as applied to the law, is the “legal philosophy that laws and legal documents (such as the U.S. Constitution) should be interpreted by considering the words used in the law or document only as they are commonly understood.”93 The main benefit of originalism is that it purports to remove subjectivity.94 Naturally, most individuals have opinions and preferences. If judges confine themself to the words of the text, however, the gray space where those judges would impose their opinion is removed. A judge is meant to be an objective, impartial arbiter of the law.95 Originalism allows a judge to set aside their personal bias and abide by the law and the will of the people who ratified or voted for that law.96 An originalist will take the Constitution at face value and encourage the amendment process if change is desired.97 Thus, originalism opts for a “black and white” approach, thereby eliminating the murky grey that originalists loathe98 and circumventing judges’ attempts to impose their own policy preferences, biases, and predilections.99

94. See Gorsuch, supra note 82.
96. See Calabresi, supra note 6; Millhiser, supra note 67.
97. See Calabresi, supra note 6.
98. See Gorsuch, supra note 82. (explaining that originalism teaches that the Constitution’s original meaning is fixed, and that the original meaning can be assessed in the same way an English teacher assesses the meaning of Beowulf or Shakespeare).
Further, originalism promotes the separation of powers deemed essential at the nation’s founding.100 It is understood that one “purpose of the Constitution is to divide and allocate power in four different ways.”101 Indeed, originalists are not opposed to amending the Constitution.102 In fact, originalists believe it is the right of the people.103 Through our elected officials, citizens of the United States can establish new laws.104 Originalists rely on the fact that the amendment process is already present in the Constitution, and therefore that the founders must have foreseen that change would inevitably be necessary.105 This is why the founders provided a clause that allows for Constitutional changes.106 Through elected officials, American citizens indirectly influence what amendments are passed.107 Originalism thus reins in justices and prohibits nine unelected officials from dictating the laws from the highest bench in the land.108

100. Calabresi, supra note 6.
101. Id.
102. See id.
103. See id.
104. See Gorsuch, supra note 82.
105. Id.
106. U.S. CONST. art. V.
107. Gorsuch, supra note 82; see Calabresi, supra note 6.

Ideally, the Constitution should be the law that’s figured out by lawyers. Ultimately if the people take control of what the Constitution means, you have destroyed the Bill of Rights, because the Bill of Rights is meant to protect you and me against the people. So, unless you can figure out a system that doesn’t leave it to the people but doesn’t leave it to be made up by nine unelected unaccountable lawyers, you are in a terrible fix.

Id.
Moreover, originalism provides consistency.\textsuperscript{109} Consistency and precedent are two notable pillars respected in the law.\textsuperscript{110} Such is evidenced by the deference judges give to \textit{stare decisis}.\textsuperscript{111} Originalism allows an individual to predict what the judges will likely hold now and in the future because originalists believe that the Constitution has a fixed meaning, and if change is needed, Amendments can be passed.\textsuperscript{112} According to originalism, the Constitution’s text plainly means what is written on its pages.\textsuperscript{113} Because originalists appear to interpret the Constitution under a more static meaning, originalist judges’ decisions should be consistent and therefore predictable.\textsuperscript{114} The American people agreed to be bound by the Constitution as it was ratified\textsuperscript{115} and originalism ensures that the government is limited to this agreement.\textsuperscript{116}

\section*{III. LIVING CONSTITUTIONALISM ANALYSIS}

Scholars who subscribe to living constitutionalism believe that “constitutional law can and should evolve in response to changing circumstances and values.”\textsuperscript{117} Nonetheless, living constitutionalism has its critics.

\textbf{A. Living Constitutionalism’s Criticisms}

Justice Scalia believed that when originalism was the prevailing theory of constitutional interpretation, “activist” judges had to find

\begin{itemize}
\item \textsuperscript{111} Id.
\item \textsuperscript{112} U.S. CONST. art. V.
\item \textsuperscript{113} Calibresi, \textit{supra} note 6.
\item \textsuperscript{114} Gorsuch, \textit{supra} note 82.
\item \textsuperscript{115} “We the People of the United States, in Order to form a more perfect Union . . . establish the Constitution for the United States of America.” U.S. CONST. pmbl.
\item \textsuperscript{116} Gorsuch, \textit{supra} note 82.
\item \textsuperscript{117} Solum, \textit{supra} note 4, at 1244.
\end{itemize}
creative ways to work around the Constitution to get the outcomes they wanted.  

Much like originalism, living constitutionalism is subject to criticisms from those opposed to its premises. One issue raised by critics is the separation of powers. If the Supreme Court can interpret law under living constitutionalism, critics argue that the Justices will legislate from the bench. In *Bostock v. Clayton County*, Justice Brett Kavanaugh opened his dissent with the following question: “Who decides?” Kavanaugh criticized the majority’s decision, arguing that the judiciary blurred the lines between the legislative and judicial powers. Justice Kavanaugh contended that “[u]nder the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”

In particular, critics argue that living constitutionalism permits nine unelected lawyers to make the laws, adding another problematic layer to the criticism that living constitutionalism violates the separation of powers. Axiomatic to our democracy is that laws are created by the legislature, enforced by the president, and interpreted by the judiciary. The legislature is comprised of elected public officials. The nine Justices are lawyers appointed by the President and confirmed

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121. *Id.* at 1822 (Kavanaugh, J., dissenting).

122. *Id.*

123. *Id.*

124. U.S. CONST. art. II, § 2, cl. 2 (directing that presidents “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”).


126. *Id.*
by the Senate.\textsuperscript{127} In the most creative construction, an attenuated chain could illustrate how we, as citizens of the United States, partially have a hand in selecting our Justices. Indeed, citizens vote for a president, and the president appoints judges to the Supreme Court. Accordingly, a citizen’s vote for president may end in a type of selection-by-proxy of a Supreme Court Justice. Such a chain, however, is unconvincing. There are too many weak points where the chain can break (\emph{e.g.}, voter suppression, representatives from opposing parties, not being of age to vote, etc.), and the chain is simply too long to make cognizable sense.

Living constitutionalism also militates against predictability. Arguably, living constitutionalism allows for too much judicial activism; and we do not want Justices making up the law as they go along.\textsuperscript{128} Under the living constitutionalism approach, the potential for varying interpretations of the Constitution on a case-by-case basis poses another problem: people need to know what law governs, which living constitutionalism makes nearly impossible.\textsuperscript{129}

\textbf{B. Living Constitutionalism’s Benefits}

Despite its faults, living constitutionalism carries benefits. First, living constitutionalism allows the Court to address modern issues with modern interpretations.\textsuperscript{130} The Constitution was ratified in 1788.\textsuperscript{131} In today’s world, we cannot ignore our nation’s social, cultural, and technological evolutions since the Constitution’s ratification. The confines of the “eighteenth century straitjacket”\textsuperscript{132} become ever-present if we do not allow Justices to interpret the Constitution in accordance with modern times and values. Living constitutionalism thus allows modern societal values and morals to shape the impact of the Constitution.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} Samet, supra note 119 (explaining the detriments of the living constitutional theory).
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} Solum, supra note 4, at 1243, 1257.
\item \textsuperscript{131} \textit{The Day the Constitution Was Ratified}, NAT’L CONST. CTR. (June 21, 2020), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.
\item \textsuperscript{132} Schor, supra note 5, at 962 (“Proponents of the living constitution fear that originalism places the Constitution in an eighteenth century straitjacket that is incapable of dealing with the problems of contemporary America.”).
\item \textsuperscript{133} Solum, supra note 4, at 1257.
\end{itemize}
Moreover, the Constitution generally speaks in broad terms. Although the Eighth Amendment’s cruel and unusual punishments clause is considered its most important but controversial part, the words “cruel and unusual punishment” themselves carry little meaning, as exemplified in Part II. \(^{135}\) In *Moore v. Texas*, \(^{136}\) the Court decided that the words ‘cruel and unusual’ are interpreted by looking “‘to the evolving standards of decency that mark the progress of a maturing society,’ recognizing that ‘the Eighth Amendment is not fastened to the obsolete.’”\(^{137}\)

Second, living constitutionalism allows for the recognition of unenumerated rights. \(^{138}\) As a society, we greatly value our right to privacy. \(^{139}\) However, the right to privacy is not explicitly stated in the language of the Constitution. \(^{140}\) While originalists criticize living

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134. The Eighth Amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants yet does not specify how to measure punishment as “cruel and unusual.” U.S. CONST. amend. VIII.

135. There has been significant debate as to the meaning of “cruel and unusual.” Before the United States ratified the Eighth Amendment in 1791, England adopted a Bill of Rights that prohibited cruel and unusual punishments, which was also subsequently adapted into the Declaration of Rights drafted for the Commonwealth of Virginia by George Mason. It is known, however, that the Eighth Amendment was proposed to limit the ability of governments to leverage punishment as a tool for oppressing the people. See Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, Nat’l Const. Ctr., https://constitutioncenter.org/the-constitution/amendments/amendment-viii/ clauses/103#:~:text=The%20Eighth%20Amendment%20to%20the,as%20the%20price%20for%20obtaining (last visited Oct. 9, 2023).


137. *Id.*

138. See generally *Right to Privacy*, Legal Info. Inst.: Cornell L. Sch., https://www.law.cornell.edu/wex/right_to_privacy (last visited Oct. 2, 2023) [hereinafter *Right to Privacy*] (“In Griswold, the Supreme Court found a right to privacy, derived from penumbras of other explicitly stated constitutional protections. The Court used the personal protections expressly stated in the First, Third, Fourth, Fifth, and Ninth Amendments to find that there is an implied right to privacy in the Constitution. The Court found that when one takes the penumbras together, the Constitution creates a ‘zone of privacy.’”) (quoting Griswold v. Connecticut, 381 U.S. 479, 485 (1965)). But see Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 Chi.-Kent L. Rev. 981 (1988) (discussing how originalism recognizes unenumerated rights through the 9th amendment).

139. See generally *Right to Privacy*, supra note 138.

constitutionalists’ recognition of unenumerated rights as inappropriate judicial activism, living constitutionalists would respond that reading between the lines of the Constitution ultimately benefits the people, and therefore is justified. Thus, living constitutionalist interpretation serves important policy goals in our ever-evolving society.

IV. A CASE-BY-CASE BASIS: THE IMPACTS OF DIFFERENT INTERPRETATIONS

To illustrate how originalism and living constitutionalism operate in a practical matter, this Article explores select landmark Supreme Court cases.

A. District of Columbia v. Heller

_District of Columbia v. Heller_ was a big win for originalism and is its prototypical case. _Heller_ boils down to a Second Amendment issue: whether the provisions regulating handguns in homes in the District of Colombia violated the Second Amendment.

141. See Colby & Smith, supra note 88 (“[O]riginalists insist[] originalism is not merely a legitimate method of constitutional interpretation, but rather is the only legitimate interpretive approach, and the only alternative to ‘judicial activism.’”).

142. A prime example of people being benefitted by judges reading between the lines of the Constitution is the Supreme Court finding a right to privacy, which is an unenumerated right. See generally Alexandra Christensen, _What Are the Pros and Cons of Judicial Activism?_, ELAWTALK (Aug. 2, 2022), https://elawtalk.com/pros-and-cons-of-judicial-activism/ (“Judicial activism is a judicial ideology that states courts can and should consider broader societal ramifications of their judgments in addition to the applicable law. It’s occasionally used as an antonym for judicial restraint. The word usually connotes that judges make decisions based on their personal preferences rather than precedent.”).


144. Kyra Babcock Woods, _Corpus Linguistics and Gun Control: Why Heller is Wrong_, 2019 B.Y.U L. REV. 1401, 1402 (2020) (“Perhaps the most pertinent and public example of the originalism debate is enshrined in [Heller] . . . . [T]he Court offered its own take on originalism . . . . Unsurprisingly, however, the Court still managed to come to radically different conclusions in its 5-4 decision, even with the same baseline originalist theory and the same founding-era documents.”).

Justice Antonin Scalia wrote for the majority and Justice Paul Stevens wrote for the dissent.146 Interestingly, both Justices relied on history—a practice associated with the originalism approach—yet reached opposite conclusions.147 The Court ultimately held that owning a gun did not need to occur in association with a militia and could be kept in the home for protection.148

The dissent believed that “a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”149 The dissent highlights that the Second Amendment’s scope cannot be deciphered through its textual language alone, alluding to the need for living constitutionalism.150 While the originalist voting bloc won the majority and issued the opinion of the Court,151 the Justices seemed to go beyond their usual method of Constitutional interpretation. Indeed, traditionally originalist Justices, whether they recognized it or not, seemed to venture into the murky gray of living constitutionalism.

The majority asked what the reasonable person back in the late 1700s could have thought the Second Amendment to mean.152 The majority believed, as did the dissent, that the brief Second Amendment could still be broken into two parts—the “prefatory clause” and the “operative clause,” whereby the prefatory clause did not limit the operative clause, but in fact prefaced the purpose of the operative clause.153 Interestingly, the majority stepped outside of originalism by

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147. *Id.* at 714.
148. *Id.* at 635–36.
149. *Id.* at 636.
150. *Id.*
152. *Id.* 576–77.
153. *Id.* at 577. The “prefatory clause”, also referred to as the “justification clause” is separate from the “operative clause” of the Second Amendment, and refers to the text, “A well regulated militia, being necessary to the security of a free State. Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. REV. 793, 793 (1998). The justification (or prefatory) clause, it is suggested, provides that the right is necessary “so long as a militia is necessary. Amdt 2.4Heller and Individual Rights to Firearms, U.S. CONST. ANN. https://constitution.congress.gov/browse/essay/amdt2-4/ALDE_00013264/ (last visited Mar. 3, 2024). The “operative clause” of the Second Amendment is the language stating that the right to keep and bear arms belongs to “the people.” *Id.* For a more in depth discussion on the prefatory and
proposing that the Second Amendment could be rephrased, which seems to directly contradict reading the Amendment exactly how someone during the Framers’ time would have read the Amendment.\textsuperscript{154}

The majority’s analysis is oversimplified. To be sure, the majority raised fair points throughout the opinion, writing for example that “logic demands that there be a link between the stated purpose and the command.”\textsuperscript{155} In the time period that the Amendment was written, however, automatic handguns did not exist.\textsuperscript{156} While originalists often will also be textualists as opposed to advocates for purposivism, the majority ignores the intention behind the Amendment.\textsuperscript{157} “Perhaps the justification clause, see Note, Skylar Petitt, Tyranny Prevention: A “Core” Purpose of the Second Amendment, 44 S. ILL. U. L.J. 465–67 (2020); see also, generally Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. REV. 793 (1998).

\begin{itemize}
\item \textsuperscript{154} Heller, 554 U.S. at 577.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} David Grace, Guns & America In 1791 Were Worlds Away From The Guns & America Of Today, MEDIUM (Sept. 12, 2019), https://medium.com/technology-taxes-education-columns-by-david-grace/guns-america-in-1791-were-worlds-away-from-guns-america-today-e1f502674d4a. Though it should be noted that since Heller, the Court has come to the following conclusion, “[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” Caetano v. Massachusetts, 577 U.S. 411 (2016).
\end{itemize}

The impetus for the American right to bear arms was born directly out of experiences of the War for Independence, along with ideological and philosophical concerns about the concentration of governmental power and its use of armed force. The founding fathers detested standing armies. . . . The framers created a collective right to bear arms that demonstrated an antagonism toward standing armies that was pervasive among English and Americans.

\begin{itemize}
\item \textsuperscript{Id.; see also Heller, 554 U.S. at 637 (Stevens, J., dissenting). The dissent attempts to flesh out the intention behind the adoption of the Second Amendment:
\end{itemize}

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm
most common mistake made by contemporary gun advocates is equating the right to bear arms with a right to use weapons for self defense.”158 “There is a difference between bearing arms in service of the community and keeping weapons to protect against home invasions . . . .”159 Further, the text of the Second Amendment, if read plainly, indicates that the gun is to be owned in connection to a well-organized militia.160 Owning a gun in the home for protection or recreation is not inscribed in the text.161

Heller presents an interesting paradox. The majority seemingly both acknowledged and ignored what a reasonable person could have understood the Amendment to mean when it was ratified.162 Yet, the majority passed a broad, sweeping rule that guns could be owned in the home, which now included possession by women.163 If the majority had interpreted the Second Amendment through an eighteenth-century lens, the Court would not have come to the conclusion that the framers meant that a woman could own a gun.164

The most reasonable explanation is that the Framers recognized that the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

Id.

158. Campbell, supra note 157, at 28.

159. Id.

160. See generally Heller, 554 U.S. at 640. See id. for a discussion of a textualist reading of the Second Amendment:

The text of the Second Amendment is brief. It provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Three portions of that text merit special focus: the introductory language defining the Amendment’s purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

Id. (emphasis added).

161. U.S. Const. amend. II.

162. Heller, 554 U.S. at 577.

163. Id.

164. See Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. Rev. 1521, 1545 (2010) (“[S]ince only ‘First-Class citizens’ were allowed to vote, bear arms, and serve on juries, many other citizens—poor whites, women, minors, free blacks—were denied
interpretation from a historical standpoint is that someone at the time the Constitution was written would likely believe the Amendment to mean that one could own a musket to arm themselves against an enemy country in defense of America.165

Thus, while Heller was a historic win for originalism, this Article posits that the Justices in the majority actually ventured into a gray area in between originalism and living constitutionalism. Indeed, the originalists in the majority applied their own “predilections” to determine what the framers meant when they gave citizens the right to bear arms, and went a step further as to permit today’s arms to be protected by an Amendment that could not possibly have foreseen the technological advancements in weaponry. Essentially, the Justices in the majority, under the guise of originalism, utilized the interpretation they so criticize to reach the outcome that they so desired.

B. Griswold v. Connecticut

A prime example of when living constitutionalism carried the day was Griswold v. Connecticut.166

In Griswold, Estelle Griswold challenged “a Connecticut law that criminalized the encouragement or use of birth control.”167 In a 7-2 decision, the Court held that the “the Constitution protect[s] the right of

165. During the Framers’ times, a musket was the most common weapon. See Letters from Readers: Gun Rights Advocates Distort Meaning of Second Amendment, FLA. TIMES-UNION (Jan. 11, 2013, 3:05 PM), https://www.jacksonville.com/story/opinion/letters/2013/01/11/letters-readers-gun-rights-advocates-distort-meaning-second/15841533007/ (“The Second Amendment was approved in 1791 at a time when the main weapon was a flintlock musket allowing one shot at a time. The reloading took more time. A well-trained infantry man could load and fire four rounds per minute.”).


marital privacy against state restrictions on a couple’s ability to be counseled in the use of contraceptives.”

Justice Douglas delivered the opinion of the court. He stated, “the Amendment has a penumbra where privacy is protected from governmental intrusion.” He further noted “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . .” The majority took great liberties to find a constitutional right to privacy. Broad terms like penumbras and emanations demonstrate how the Court utilized a living constitutionalism analysis, extracting an expansive meaning from the few words of the Constitution the Court was focused on.

Justice Hugo Black and Justice Potter Stewart dissented, noting that “[t]he Court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision . . . [b]ut there is not.” While Justices Black and Stewart may have in a personal regard enjoyed privacy, as originalists, they were confined by the plain text of the Constitution. Nonetheless, much like Judge Richard Posner points out about medical advances, the Founders could not have considered a right to birth control, because it had not yet been developed.

Whether the majority went too far in finding a right to privacy implicit in the Constitution is a valid question; in this modern era, however, many people feel quite strongly about their right to privacy, and would likely find no issue with the majority’s approach in this

170. *Id.* at 484.
171. *See generally id.*
172. *Id.*
173. *Id.* at 508 (Black, J., dissenting).
174. Debra Cassens Weiss, *Posner Apologizes, Says His Controversial Comments Were About a ‘Living Constitution’*, ABA (July 5, 2016, 9:49 AM), https://www.abajournal.com/news/article/posner_apologizes_says_his_controversial_comments_were_about_a_living_const (explaining that “the choice for the modern judge is: dismiss the bulk of the Constitution as nonjusticiable because it doesn’t address modern problems, or decide many constitutional cases by broad interpretation of the Constitution’s vague provisions.”)
instance. This case highlights why modern values should guide Justices’ decisions when interpreting the Constitution.

C. Lawrence v. Texas

The Court’s decision in Lawrence v. Texas\(^1\) stood on the shoulders of Griswold. Authored by Justice Anthony Kennedy, the majority opinion appears to embrace notions of living constitutionalism. In Lawrence,\(^2\) the Court overturned precedent established in Bowers v. Hardwick.\(^3\) The Court held that a Texas statute prohibiting sodomy was unconstitutional.\(^4\) The majority determined that there is a constitutional right to individual autonomy “that includes freedom of thought, belief, expression and certain intimate conduct . . . in its spatial and more transcendent dimensions.”\(^5\)

In fact, the majority’s opinion carried no hint of an originalist analysis. Justice Scalia, an avid originalist, dissented.\(^6\) He found that no constitutional right to sodomy existed.\(^7\) By and large, originalists admire consistency and precedent. Had originalism carried the day, Lawrence, which had nearly identical facts to those in Bowers, would have likely had a similar outcome to that of Bowers.\(^8\) By overturning

\(^{176}\) Lawrence v. Texas, 539 U.S. 558 (2003).
\(^{177}\) Id. at 563–64.
\(^{179}\) Lawrence, 539 U.S. at 579.
\(^{180}\) Id. at 562.
\(^{181}\) Id. at 586 (Scalia, J., dissenting).
\(^{182}\) Id.
\(^{183}\) In Bowers, Michael Bowers was found to be engaging in sodomy within his home, violating a Georgia statute against engaging in sodomy. Bowers, 478 U.S. at 187–88. In a 5-4 decision, the Supreme Court held that the Georgia statute was legal, as there was no constitutional protection for acts of sodomy. Id. at 195. In Lawrence, John Geddes Lawrence Jr. was found to be engaging in sodomy within his home, violating a Texas statute. Lawrence, 539 U.S. at 563. In a 6-3 decision, the Supreme Court held that making it a crime for two people—regardless of gender—to engage in consensual sex was a violation of the Due Process Clause. Id. at 578. There were very few differences between the cases. The differences to note include that the cases were heard by the Supreme Court seventeen years apart, and the make-up of the bench was different; however, the facts of the two cases are nearly mirrored. Claude J. Summers & Craig Kaczorowski, Bowers v. Hardwick / Lawrence v. Texas,
Bowers, the majority thus rejected the need for stability and certainty, taking a living constitutionalist approach to the issue.\textsuperscript{184}

D. \textit{Obergefell v. Hodges}

In the landmark case \textit{Obergefell v. Hodges}, Justice Kennedy—once again writing for the majority—stated that a constitutional right to same sex marriage existed.\textsuperscript{185} Justice Kennedy relied on similar principles found in \textit{Griswold} and \textit{Lawrence}, focusing on autonomy and privacy.\textsuperscript{186} In \textit{Obergefell}, Justice Kennedy and the majority justices went a step further, noting that marriage is unique.\textsuperscript{187} The dissent consequently criticized the majority for acting as legislators.\textsuperscript{188} In summary, Chief Justice Roberts is attributed with arguing that “while same-sex marriage might be good and fair policy, the Constitution does not address it, and therefore it is beyond the purview of the Court to decide whether states have to recognize or license such unions.”\textsuperscript{189} Roberts felt that while it may have been a day of celebration for the public, there was no victory for the law, because in reaching its decision, the Court had acquiesced to the will of the public and strayed from its duties to interpret the law impartially.\textsuperscript{190}


\textsuperscript{186} \textit{Id.} at 663–64.

\textsuperscript{187} \textit{Id.} at 656–57. See Nina Totenberg, \textit{Supreme Court Changes Face of Marriage in Historic Ruling}, NPR (June 26, 2015, 7:00 PM), https://www.npr.org/2015/06/26/417840345/supreme-court-changes-face-of-marriage-in-historic-ruling (“‘No union is more profound than marriage,’ [Justice Kennedy] wrote, ‘for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than they once were.’”).

\textsuperscript{188} \textit{Obergefell}, 576 U.S. at 694 (Roberts, J., dissenting).


\textsuperscript{190} \textit{Obergefell}, 576 U.S. at 687.
E. Bostock v. Clayton County

Justice Gorsuch penned the majority opinion in Bostock v. Clayton County.191 Notably, Justices Gorsuch and Kavanaugh took opposing views in the opinion.192 While both Trump-appointed Justices “were widely expected to be jurisprudential twins,” they have diverged from each other in many ways.193 Justice Gorsuch employs originalism when approaching constitutional questions.194 Justice Kavanaugh is a self-proclaimed originalist.195 Since both Justices are “originalists,” one would expect them to have reached the same conclusion on the Bostock case.196 Yet, Justice Kavanaugh, under a reading of textualism, reasoned that Title VII does not prohibit discrimination on the basis of sexual orientation, and therefore, the extension of Title VII by the Court to prohibit discrimination on basis of sexual orientation status represents a transgression against the separation of powers established by the constitution.197

Justices Alito and Thomas also dissented, criticizing their fellow originalist justice.198 In their dissent, Justices Alito and Thomas admonished the majority for trying to “pass off its decision as the inevitable product of the textualist school of statutory interpretation,”

192. Id.
194. Id.
195. Sydney Black, What We Know so Far: Kavanaugh’s Claim to Originalism Not Borne Out, SCOTUS O (June 14, 2019), https://scotusoa.com/kavanaugh-originalist/ (“When asked at his Supreme Court confirmation hearing whether he was an ‘originalist,’ then-Judge Brett Kavanaugh answered, simply and directly, ‘That’s correct.’”).
198. Id. (Alito, J. & Thomas, J., dissenting).
and claimed the majority was altering Title VII to “better reflect the current values of society.”

The question then becomes, what was lurking in the background that led these ideologically similar justices to reach different opinions? Perhaps originalism is not as categorically defined as previously thought (or as was previously used in judicial interpretation). The split within the originalist bloc demonstrates the need for an alternative category—a third option that may bridge the chasm between originalism and living constitutionalism.

V. SUGGESTIONS FOR BRIDGING THE GAP

A. Living Consequentialism

Justice Scalia noted that of the two evils—originalism and non-originalism—he prefers originalism. He believed that originalism relied on history, which is objective, as opposed to the preferences of the judge. Justice Scalia, however, mischaracterizes non-originalists. Living constitutionalism is not about a Justice’s predilections. At its

199. Id. at 1756–57.

200. Two originalist jurists reaching different conclusions begs the following questions: are these jurists who rely primarily on the text and intent of the framers doing the thing they criticize the “liberal voting bloc” for the most? Are these jurists substituting in their own ideals and beliefs to make determinations on the law? There is also another, simpler possibility that stringently classifying a jurist as liberal, conservative, textualist, originalist, purposivist, living constitutionalist, etc., simply does not work. People cannot be put into boxes, and perhaps neither can judges. However, it is exceedingly difficult to explain why “jurisprudential twins” somehow reach different conclusions when they have the same set of facts before them. Adam Liptak, Kavanaugh and Gorsuch, Justices With Much in Common, Take Different Paths, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/12/us/politics/brett-kavanaugh-neil-gorsuch.html (explaining that Justices Kavanaugh and Gorsuch were expected to be “jurisprudential twins” based on their Ivy League education, Supreme Court clerkships for Justice Anthony Kennedy in the same term, Federalist Society and Heritage Foundation memberships, and prior seats as appeals court judges; nonetheless, the two have disagreed significantly on issues, often aligning with different justices in the Court.)


202. Id. at 864.

core, it focuses on societal values and morals in their totality. Justice Scalia noted that if one is going to reject originalism, then it must be replaced. Originalism’s appropriate replacement could either be living constitutionalism (an existing method of constitutional interpretation), or in the alternative, a new method of interpretation: living consequentialism.

Consequentialism, in the context of statutory interpretation, focuses on the results of interpreting a statute in a certain way. Living consequentialism would function in a similar way, but with a modern twist. Living consequentialism would function as a two-step bridge between originalism and living constitutionalism. First, living consequentialism would begin with an originalist approach, with justices analyzing whether the outcome of applying the laws as the Framers intended makes sense in today’s society. If it does not make sense in modern society, the living consequentialist analysis would proceed to the second step. Under the second step, justices would take a more living constitutionalist approach, looking at how society has evolved, to society’s values and morals, and to the consequences of how the Court’s proposed interpretation would impact society. Justice Scalia said that he took “the need for theoretical legitimacy seriously.” Living consequentialism would go one step further and look at the practical legitimacy of a proposed interpretation.

Living consequentialism strikes a balance between originalism and living constitutionalism. Originalism in its purest form can be too restrictive, while living constitutionalism can stretch the bounds of Constitutional interpretation too far. In applying a living consequentialist approach, the Court could incorporate methods of originalism and living constitutionalism, reaching a decision that is balanced by the impact it will have on society.

204. Id. arguing that “in a dynamic society[,] the Bill of Rights must keep changing in its application or lose even its original meaning.’”). Reich further argues that “[t]here is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy.” Id.

205. Scalia, supra note 201, at 855.


207. Scalia, supra note 201, at 862.
The right to bear arms demonstrates how living consequentialism can be applied. When the Second Amendment is interpreted from an originalist standpoint, there can be no question that a citizen has every right to own a gun under our Constitution. The difficulty arises in determining the scope of gun ownership: not whether gun ownership is Constitutionally valid. Does the gun have to be owned in connection to a militia? Does the right to bear arms extend only to the arms that were available when the Constitution was written? These questions, while addressed and answered by the Court in *Heller*, illustrate how the Court may approach a similar constitutional question using consequentialism.

In terms of the Second Amendment as well as *Heller*, living consequentialism may establish that citizens have a right to bear arms that is not contingent on membership or participation in a well-organized militia. Rather, this right is subject to limitations that consider the progression of modern society and the consequences of leaving the right to bear arms wholly unchecked. Consequentialists would approach the issue by looking at the fact that muskets are no longer the firearm of choice for most citizens, and then consider the consequences of an unfettered Second Amendment right in light of today’s modern societal and moral progression.

The consequences of allowing this right to go unchecked would be significant. Consequentialists look at the consequences through the lens of modern society, considering both positive and negative effects of allowing an unfettered right to firearms. At the time of the drafting of the Second Amendment, automatic rifles did not exist and were not in contemplation of the drafters. Allowing such rifles to be acquired

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208. Allowing gun rights to go without any checks is dangerous to society. Guns are weapons that are easily accessible and very capable of killing large numbers of people in a small amount of time. Leaving the Second Amendment right to stand on its own without any checks is simply reckless.

209. Through the modern lens, we find that the high circulation of guns has led to an exorbitant amount of unnecessary deaths and mass shootings. *See* Jennifer Mascia & Chip Brownlee, *A Decade of Mass Shootings, By the Numbers*, TRACe (Oct. 5, 2023), https://www.thetrace.org/2023/10/mass-shootings-gun-violence-how-many/ (“There have been 4,283 of them in the past 10 years, killing 4,298 victims and wounding at least 17,632, a first-of-its-kind analysis by The Trace of 10 full years of data shows.”).

210. *See* Joe Purkey, *Guns Have Changed Since the Second Amendment was Written*, KNOX NEWS (Feb. 21, 2018), https://www.knoxnews.com/story/opinion/readers/2018/02/21/guns-have-changed-since-2nd-amendment-written-letters-feb-
under the Second Amendment could be detrimental, such that the cost could be innocent individuals’ lives.211

Living consequentialism can bridge this divide. Utilizing living consequentialism, judges and legislators alike can evaluate the consequences of allowing a right to be strictly interpreted based on what someone in the eighteenth century may have believed a law to mean. This approach would look at the intent of the Framers, what our society needs today, and the effect of the Court’s decision. A living consequentialist decision may have a holding whereby citizens do have a right to bear arms, but allow legislative restrictions on the arms (e.g., not all types of firearms are protected under the Amendment, allowing States to regulate safety measures like the number of rounds that can be purchased or implementing background checks or mandatory “cooling off” periods). This would be a living consequentialist outcome because the Court would look to the intent of the framers (the right to bear the arms in general), what our society needs (the right to bear arms remains, but with certain limitations), and the effect of the Court’s decision (the right to bear arms remains with restrictions such that hunting and home defense can be achieved without military-grade weapons being circulated to civilians).

Consider another example of a difficult legal question which may be resolved with living consequentialism: Mississippi’s law banning nearly all abortions after fifteen weeks gestational age unconstitutional.212 Dobbs historically overturned Roe v. Wade, greatly limiting a woman’s right to privacy and bodily autonomy. The majority, seeming to utilize an originalist method of constitutional interpretation, found that the Constitution is silent on abortion. In being so focused on the framers’ intention, the majority ignored the consequences of their decision and the needs of today’s society. The dissent based its argument in living constitutionalism, using stare decisis and relying on a long history of cases supporting the unenumerated right to privacy. Dobbs illustrates the need for living consequentialism, which, instead of focusing on any one justice’s preferred interpretive methodology or personal predilection, would

21-2018/355232002/ (explaining that the primary weapon available at the time the Second Amendment was written was a single-shot musket).

211. See Mascia & Brownlee, supra note 209.

focus on the impact the decision would have on society. Again, a living consequentialist outcome would look to the intent of the Framers (no right to privacy supporting abortion), what our society needs (strong reproductive healthcare rights), and the effect of the Court’s decision (the right to privacy remains with restrictions such that abortion may not be available in all cases).

B. Term Limits on the Bench

All methods of interpretation are not without issue. Even living consequentialism would pose problems.\textsuperscript{213} Another workable solution may be setting term limits for not only Supreme Court Justices, but for all judges.

Setting term limits would not be without its challenges. First, there is the question of implementation in courts comprised of current judges with lifetime appointments. Should this change be applied retroactively, or only prospectively? Second, there is no guarantee that judges would live out their term on the bench, making it difficult to regulate an equal amount of term appointments. Finally, there is no guarantee which political party will hold the presidential office or legislative branch at the time of appointments. For example, say every eighteen years that a judicial seat opens up on the Eleventh Circuit Court of Appeals, and a Democratic president is in office during both times, the sheer luck of timing will preclude a conservative judge from ever being appointed to that seat on the Eleventh Circuit Court of Appeals.

Further, while the presidency and congressional positions are voted on by the public, judicial positions are done by executive appointment. This goes beyond a distinction without a difference: the difference is drastic. For reasons already noted, the chain between individual voter and justice is too attenuated to give an individual a meaningful say in choosing a justice who can make life-altering decisions during their

\textsuperscript{213} Living consequentialism may be viewed as just another method of interpretation for jurists to disagree on. Living consequentialism is a grey hybrid of interpretation methods that already exists. The idea behind living consequentialism is to combine the best of the current methods of interpretation, while keeping the wellbeing of society at the forefront; however, introducing yet another possible interpretation into the arena may not prove the best solution. While living consequentialism may be beneficial, as it presents a compromise for all jurists to give up their chosen method of interpretation for a more common ground, the addition of a new method may just make jurists that much more divided.
lifetime tenure. The other branches of government—while possessing equally immense power—both have term limits. While the lifetime appointments of judges in the Federal Judiciary were originally set to insulate judges from political pressures, today’s longer terms “have [led to an] increasingly political confirmation process and a court more likely to be out of touch with the general public.”

Notwithstanding possible implementation issues, term limits could be beneficial. Term limits would allow a justice to interpret the constitution whichever way they see fit, but not for an indefinite period. The limit on the term would constrain the potentially dangerous impact the justice might have on the bench. In the Federalist Papers, Alexander Hamilton regarded the judicial branch as the least dangerous branch of government. History, however, seems to have disproven this notion. The judicial branch has been highly influential, impacting many controversial issues, including but not limited to school segregation, the full and equal right of all persons to marry, and the governing of an individual’s bodily autonomy. The impact of these decisions on voters’ liberty and self-determination demonstrates the potential dangers that accompany such power.

The Supreme Court’s rulings have monumental impacts on Americans’ liberties and freedoms. Examples of such rulings include:

214. Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. AM. PROGRESS (Aug. 3, 2020, 4:00 AM), https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/. (proposing a staggered 18-year term limit to bring regular turnover to the Supreme Court bench, suggesting that the result would be a Court that “better reflects prevailing public values.”).


Brown v. Board of Education,\textsuperscript{220} Obergefell v. Hodges,\textsuperscript{221} and Bostock v. Clayton County.\textsuperscript{222} The holdings fashioned by the Supreme Court in these landmark cases shaped our democracy.\textsuperscript{223} The Supreme Court has vindicated rights that range from the holy grail of juristic authority—judicial review—to every citizen’s sacred freedom from self-incrimination, grounded in their \textit{Miranda} rights.\textsuperscript{224}

In our polarized country, we have come to a juncture where partisan labels are placed on our jurists.\textsuperscript{225} We label Justices as conservatives, liberals, textualists, purposivist, originalists, living breathing constitutionalists and the like.\textsuperscript{226} Realistically, these labels are often arbitrary. Consider, for example, Justice Anthony Kennedy and Chief Justice John Roberts. Justice Kennedy was once considered the swing

\textsuperscript{221} Obergefell, 576 U.S. at 675.
\textsuperscript{222} Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020) (holding that employment discrimination on the basis of sex, a violation of Title VII of the Civil Rights Act of 1964, includes discrimination based on an individual’s sexual orientation).
\textsuperscript{224} \textit{Id.} \textit{Miranda} rights are understood as the right to certain “procedures which assure that [an] individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.” \textit{Miranda} v. Arizona, 384 U.S. 436, 439 (1966).
vote,\footnote{Colin Dwyer, A Brief History of Anthony Kennedy's Swing Vote—and The Landmark Cases It Swayed, NPR (June 27, 2018, 7:00 PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing.vote-and-the.landmark.cases-it-swayed (noting that with the departure of Justice Kennedy, the court also loses “his three decades of experience on the bench and, more politically pressing, his moderate legal philosophy. It was this centrist streak that made his vote the key in many deeply divisive cases—so many, in fact, that Kennedy earned himself a reputation as the court’s quintessential ‘swing vote.’”.
} a title that has since passed to Chief Justice Roberts.\footnote{Astrid Shamsi, ‘Strategic Considerations’: John Roberts’ Swing Votes All About Politics, Court Watchers Say, ALL. FOR JUST. (July 5, 2020), https://www.afj.org/article/strategic-considerations-john-roberts-swing-votes-all-about-politics-court-watchers-say/.

The lineup was a shocker: Roberts joined the court’s four moderate/liberal justices in upholding the act. Court-watchers knew Roberts would be in the majority, whichever way the case came out, but we expected Justice Anthony Kennedy to be there, too. He wasn’t; Kennedy joined fellow conservative Justices Scalia, Thomas, and Alito in a vehement (and—departing from court practice—jointly signed) dissent.

\textit{Id.} (emphasis added).}

Chief Justice Roberts, however, concerned about the legitimacy of the Court,\footnote{Franklin, \textit{supra} note 229 (“Though surely not immune from the kind of ‘motivated reasoning’ that polarizes political and legal thinking alike, the chief justice must feel a special institutional responsibility.”). A concern for the legitimacy of the Court appears to be a recurring worry for Chief Justice Roberts, who just recently publicly defended the legitimacy of the Court.
} was not troubled by labels, or how he “should” vote.\footnote{See id. ("Indeed, the chief justice was the only justice who cast a vote on the individual mandate that was contrary to the political position of the party of the president who appointed him."). Chief Justice Roberts does not appear to be troubled by voting with a liberal or conservative bloc, and simply votes on the law before him.
} He simply voted.\footnote{Chief Justice Robert has explicitly addressed and defended the legitimacy of the Court on more than one occasion. See Colleen Slevin, \textit{Chief Justice John Roberts: A Swing Vote for the Court of Law, Not Politics}, 105 Harv. L. Rev. 1991 (1992).}
Such labels have also been cast aside in some important cases. In *Loving v. Virginia*, for example, the Court held that interracial marriage was a constitutional right and struck down Virginia’s miscegenation laws as unconstitutional. Many would believe this case was a win for living constitutionalists, presuming racism did not reflect the public’s values and morals. However, racism did continue to reflect the public’s values and morals. In fact, as “72 percent of the public opposed the Court’s decision;” the ruling clearly went against public opinion at the time. Nonetheless, the Court enforced the right to interracial marriage. Interestingly, the State of Virginia argued a more textualist and originalist interpretation of the Fourteenth Amendment, and the Court rejected that argument. It is difficult to identify what method of interpretation was at play in this case. The Court looked at the history of marriage, an originalist approach. The Court also considered what was morally right and what would be consistent with the evolving standards of decency in a society (even if what was morally right and decent was a bit ahead of society’s time)—a living constitutionalist approach. Accordingly, *Loving* may be a case where living consequentialism could be said to have been applied by the Court.

While there may be little agreement concerning which method of interpretation is proper, no Justice should be called an inherently poor jurist solely based on the method of interpretation they choose. Consider two of the most distinguished justices of recent times: Justice

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235. *Id.*

236. *Id.* (“Many decried it as judicial overreach and resisted its implementation for decades.”).


238. *Id.* at 8.

239. See generally *id.*
Ruth Bader Ginsburg and Justice Antonin Scalia.\textsuperscript{240} The late Justice Ginsburg is often recognized for her liberal jurisprudence,\textsuperscript{241} whereas her close and personal friend, Justice Antonin Scalia, was known for his conservative stance on most legal issues.\textsuperscript{242} They were both remarkable justices, and their approaches to constitutional interpretation could not have been more juxtaposed.\textsuperscript{243}

Undoubtedly, justices and Article III judges wield significant influence over the direction of our democracy, partially due to their lifetime tenure.\textsuperscript{244} But should this be the case? Alexander Hamilton believed that granting judges lifetime appointments was “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”\textsuperscript{245} Conversely, Thomas Jefferson, who once supported life tenure, later reversed his...
stance. Thomas Jefferson first believed that judges “should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior.” He later expressed concerns that the Court’s decision in *Marbury v. Madison* could usher in “the despotism of an oligarchy.” Jefferson then became an ardent advocate against lifetime tenure, saying “[i]n England, . . . it was a great point gained, by fixing [judges] for life, to make them independent of that executive. But in a government founded on the public will, this principle operates in an opposite direction, and against that will.”

When one compares the respective schools of thought advocated for by Hamilton and Jefferson, Jefferson makes the stronger case. Judges who have life tenure have little to no accountability. The only explicit limitation placed on tenured judges is that they must avoid committing treasonous crimes. The Supreme Court Justices interpret


250. The only Supreme Court justice to ever be impeached under this Constitutional limitation was Associate Justice Samuel Chase in 1805, for reasons including drunkenness and insanity. *Impeachment Trial of Justice Samuel Chase, 1804–05*, U.S.S., https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm (last visited Jan. 11, 2:07 PM). The House of Representatives impeached Justice Chase; however, the Senate acquitted him. *Id.* Although, federal judges other than Supreme Court Justices have been impeached at greater frequency than Supreme Court Justices. *Art. II.S4.4.10 Judicial Impeachments*, CONST. ANN.: ANALYSIS & INTERPRETATION OF THE U.S. CONST., https://constitution.congress.gov/browse/essay/artII-S4-4-10/ALDE_00000697 (last visited Jan. 11, 2024). As of late, Justice Clarence Thomas has been in the spotlight for negative reasons involving acceptance of elaborate (and unreported) gifts. Alison Durkee, *Clarence Thomas: Here Are All the Ethics Scandals Involving the Supreme Court Justice Amid Unpaid RV Loan Revelations*, FORBES (Oct. 26, 2023, 4:56 AM), https://www.forbes.com/sites/alisondurkee/2023/09/22/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-koch-network-revelations/?sh=9a83ef35df75.
laws from the ivory tower for as long as they please, so long as they act with good behavior. Relying on Jefferson’s perspective and the sentiments of several likeminded legal scholars, there seems to be a compelling argument in favor of instituting term limits.

In the ongoing discourse surrounding judicial reform, several legal scholars advocate for a system reminiscent of the Senate’s structure, characterized by term limits and staggered turnovers. Specifically, a proposal gaining traction is the establishment of eighteen-year term limits for Justices, with staggered turnovers occurring every two years. This framework would empower a sitting President to nominate a new Justice biennially. Though an eighteen-year tenure might initially seem protracted, Justices are serving significantly longer tenures. By instituting term limits and creating an established norm that every President will make two nominations during their term, ambiguities surrounding Supreme Court vacancies in election years could be clarified. Further, this structure aims to mitigate the

251. U.S. CONST. art. 2, § 4, cl. 10 (“... all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

252. Buchanan, supra note 214.

253. Id. (“Justice Breyer has argued that an 18-year term period would give justices enough time to fully learn the job and develop jurisprudence—a position bolstered by the fact many justices have voluntarily retired after a similar period of service on the court.”).


255. See Chelsey Cox, Fact Check: Senate Republicans Moving to Confirm Trump’s Supreme Court Nominee but Blocked Obama’s, USA TODAY (Oct. 20, 2020, 7:11, PM), https://www.usatoday.com/story/news/factcheck/2020/10/20/fact-check-gop-senators-blocked-nomination-merrick-garland-2016/5916555002/. When Justice Scalia passed away unexpectedly, President Obama had about eight months
unpredictability of vacancies due to unforeseen circumstances, potentially reducing the political acrimony witnessed during the untimely passings of Justices Scalia and Ginsburg in close proximity to presidential elections.256

Furthermore, institutionalizing term limits for Justices aligns with our democratic principles. Articles I and II of the Constitution already prescribe term constraints for members of Congress and the President.257 While there are reasons not to instate term limits, with the increasing politicization of the Court, the benefits of instituting a term limit appear to outweigh the disadvantages.258 Historically, the notion of lifetime tenure was to depoliticize the Judiciary, thus allowing judges to render decisions while remaining insulated from public whims.259 Yet, with the current trend of partisan nominations, there is diminished separation of politics from the bench.260 Instituting a singular extended term for justices could restore some semblance of the intended insulation.

As discussed, the justices are not truly chosen by the people of the United States: the people elect the President and their representatives to Congress.261 The selection process for Supreme Court Justices involves an additional layer: nomination by the President and subsequent left in his term as President, but the Senate blocked Merrick Garland’s confirmation. Id. President Trump had approximately less than two months before the general election when Justice Ginsburg passed away, yet the Senate seemingly expedited Justice Barrett’s confirmation. Id. 256. See Totenberg, supra note 228; see also Evan Osnos, The Death of Antonin Scalia, NEW YORKER (Feb. 13, 2016), https://www.newyorker.com/news/news-desk/the-death-of-antonin-scalia (describing the political implications of replacing a Supreme Court Justice in an increasingly polarized environment).

257. See U.S. CONST. art. I, id. art. II.

258. It is worth noting that advantages to lifetime appointments exist. See Judicial Independence, JUD. LEARNING CTR., https://judiciallearningcenter.org/judicial-independence/ (last visited Jan. 2, 2023). A primary benefit behind lifetime appointment is that it allows federal judges—at all levels—to achieve judicial independence. Id. (“The lifetime term provides job security, and allows appointed judges to do what is right under the law, because they don’t have to fear that they will be fired if they make an unpopular decision.”).

259. See Buchanan, supra note 214 (“The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then but is becoming commonplace today.”)

260. Id.

confirmation by the Senate. This indirect mechanism distances the Court from a true representation “of the People.” The aspect of Supreme Court appointments escaping direct public influence is problematic. Lifetime appointments confirmed by the Senate become inherently political, despite the intended impartiality of the Judiciary.

Consider Florida as a case in point. With two Republican Senators, Marco Rubio and Rick Scott, Floridians who identify as either Democratic, or simply more liberal, may feel inadequately represented by their senators. That representation has a six-year term limit. The people can vote Senators out of office if they feel they do not advocate for the best interest of the people whom they represent. The people have no say, however, in how their Senators vote for a Justice that is granted a lifetime appointment, if their Senators do not represent their best interest. The crux of the problem is not the Senate’s role in confirming the President’s nomination, but the perpetual nature of the resultant appointment. Term limits would help curb the politics inherent in lifetime appointments by a “red” or “blue” Senate.

262. U.S. CONST. art. II, § 2, cl. 2 (providing the Constitutional basis for the nomination of Supreme Court Justices by the President and their subsequent confirmation by the Senate).

263. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

264. Judicial Impartiality, supra note 95 (providing insight into the challenges posed by lifetime appointments to the Judiciary).


266. The Constitution establishes six-year terms for senators, but does not set any term limits, allowing for unlimited reelectitions. U.S. CONST., art. I, § 3.

267. Senate seats have six-year terms, allowing voters to cast their votes for reelection or to oust the incumbent at the end of each term. Id.


Additionally, when the Framers crafted the Constitution, the sociopolitical and demographic landscape of the United States was markedly distinct from today. During the 19th century, the average life expectancy hovered around forty years. Fast forward to the present, and life expectancy has doubled to approximately eighty years. Consequently, the implications of a “lifetime” appointment today bear greater weight than during the Framers’ era, primarily due to the average person living longer.

While passing term limits would require an amendment to the Constitution, such a change is essential. The Constitution has long been referred to as a living, breathing document, evolving with the nation’s pulse. This fluidity is due to the Constitution not remaining stagnant from the moment its ink dried. This adaptability should be mirrored in decisions issued by the Supreme Court, and limiting terms can assist in achieving this goal.

Term limits, on the one hand, may be confined to the Supreme Court, and not to all Article III judges, due to the inherent checks and balances of the federal judiciary. Given the judiciary’s tiered structure, it essentially balances itself out: while federal district and appellate judges wield significant authority and undoubtedly garner the utmost respect, their rulings can be reversed and remanded. The Supreme


272. Id.


274. Since its ratification, the Constitution has been amended twenty-seven times. U.S. CONST. amends. I-XXVII.

275. See generally Aaron-Andrew P. Bruhl, The Remand Power and the Supreme Court’s Role, 96 NOTRE DAME L. REV. 171 (2020) (discussing the remand power and the Supreme Court’s role in relation to lower court rulings); 28 U.S.C. §
Court possesses the prerogative to scrutinize the determinations of both the District and Circuit courts. Some contend that the Supreme Court is kept in check by Congress; however, Congress is not a neutral body. Congress is politicized and highly partisan. In contrast, the Supreme Court, in its role, is designed to be an impartial arbiter of the law, especially when evaluating Circuit Courts’ decisions.

Term limits, on the other hand, may be applied to all Article III judges, which would do away with the concept of a lifetime appointment altogether. Returning to the previous idea of the Supreme Court being able to overturn decisions by district courts and appellate courts, if all three levels of federal courts had term limits, the years per term should vary based on the court. For example, at the district court level, the judges make decisions, whereas the appellate and supreme courts will generally review those decisions. Because the two levels of appellate courts can overturn the decision of a lower court, this Article proposes that the United States District Courts have a twenty-year term, the Courts of Appeal have a sixteen-year term, and the Supreme Court have a twelve-year term. This would allow for turnover in four-year increments. Going one step further, this is not to say that the idea of more than one term could not be explored; but the primary purpose of term limits is to limit the impact a judge may have when given the...
promise of a lifetime tenure. That said, as America evolves, our judicial framework must correspondingly adapt.

CONCLUSION

While the two primary methods of constitutional interpretation—living constitutionalism and originalism—have distinct advantages and challenges, only one seems more aligned with our current realities. The fact of the matter is “[e]ighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century. Which means that the original Constitution . . . do[es] not speak to today.”281 Living constitutionalism is arguably more adept at meeting the needs of today’s society. The U.S. Constitution remains silent on the precise manner the Framers wanted it to be interpreted.282 Given this absence of explicit guidance, interpreting the Constitution following the sensibilities of modern society is reasonable.

In light of established jurisprudential principles, the underpinnings of originalism are even challenged by foundational tenets of property law. Courts have consistently recognized and adhered to the Rule Against Perpetuities (“RAP”).283 Central to the policy considerations behind the RAP is the principle that the deceased should not exert undue influence over the living.284 If we apply the same logic to constitutional interpretation, it becomes evident that an approach rooted in living constitutionalism aligns more with these foundational ideals. The Framers crafted the Constitution for a vastly different iteration of the United States, one that has undergone significant transformations both socially and


282. Schor, supra note 5, at 963 (noting that constitutions, including the U.S. Constitution, often lack explicit language instructing future generations on how to interpret them).

283. Rule Against Perpetuities, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/rule_against_perpetuities (last visited Oct. 6, 2023) (providing an explanation of the Rule Against Perpetuities and its impact on property law, which in turn influences the dynamics between originalism and established jurisprudential principles).

284. Id.
politically. The Constitution should be interpreted such that it reflect those changes. Adopting an originalist approach risks enshrining an interpretation shaped by the ideals of a bygone era, potentially constraining present and future generations through the lexicon of the past.

Setting aside whether one of the two existing methods of interpretation is better than the other, there exists a moderate middle ground: living consequentialism. This new proposed method of interpretation combines the best of both worlds to create a new method that focuses on the text before the jurist, the needs of today’s society, and the greater impact the decision will have.

In sum, while originalism and living constitutionalism seem diametrically opposed, there are ways to reconcile the two. One potential solution is to consider adopting living consequentialism, a hybrid approach aiming to combine the strengths of both interpretive methods. Alternatively, or in combination with the latter suggestion, imposing judicial term limits upon the federal judiciary may alleviate the disconnect between the Federal Judiciary and the general public. Implementing term limits would alleviate the pressures associated with influencing a justice’s or judge’s interpretive leanings due to the transient nature of their tenure.285 Ultimately, strategies to bridge the seemingly chasmic gap between originalism and living constitutionalism are within reach.

285. Buchanan, supra note 214 (suggesting that regular appointments due to term limits could reduce the stakes of each individual nomination, potentially leading to less focus on a nominee’s interpretive leanings—whether originalist or living constitutionalist—and more on a broader understanding of judicial duty, because winning the presidency would come with the expectation of appointing two justices).