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THE LIVING DOCUMENT PARADOX: ORIGINALISM, EVOLUTION AND THE PROBLEM OF CONSTITUTIONAL ETERNITY

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Abstract

The constitutional text is fixed and fluid at the same time. It was created at a moment after all and when everything was determined. It is the text to be invoked to control the circumstances the designers could not foresee or even imagine. Herein lays the dilemma of the interpretive paradigm of the constitution, tension between the textual confined act of popular sovereignty of the constitution and the living one, the one where the constitution is conceived as a highly vibrant framework of governance change. Originalists believe that constitutional loyalty means that one should follow the original public intent of the text of the constitution; living constitutionalists hold that a document that cannot be amended is a document doomed to extinction. This paper discusses the normative implications, practical implications as well as the theoretical theories underpinning this argument. It contends that neither pure originalism nor living constitutionalism without any constraints can provide any satisfactory explanation of constitutional interpretation and that the most justifiable interpretive theories lie between fundamentalism and judicial free improvisation. The paper also argues that the problem of constitutional eternity, or the desire to construct a governing document which would enforce all future generations, is not just an idea of mere interest to theorists, but a form of constitution-making whose presence all serious interpretive theories should address.

Keywords: Constitutional Interpretation, Originalism, Living Constitutionalism, Constitutional Eternity, Judicial Review.

I. Introduction

Any written constitution is a case of variation of the same dilemma. It is written by the human beings who exist in a specific historical era that the group has a certain conception of politics, rights and governance, which is influenced by the circumstances, tendencies, and knowledge of that specific time. But it is not only officials who write constitutions hoping to solve problems now and in the present but to offer a lasting model to the administration of

communities that will outlast them by many generations.¹ Having been penned by men who never dreamed of the administrative state, of the internet, of contemporary warfare, of social changes of the industrial age, and the post-industrial one, the Constitution of the United States is now over two centuries old. But it is invited every day to settle disagreements occasioned by very these facts. This is the acacia in paradise of the living document: a set text which rules an unset world.²

That contradiction creates the main paradox of the American constitutional theory: must the courts rely on the original public interpretation of the text of the constitution as it was originally established, at the time the Constitution was ratified and will it remain reading as a living document that can evolve with changing times, values and social conditions?³ Originalists of all kinds - including the orthodox intentionalism of previous decades, and more advanced forms of originalism of public meaning subject to modern conservative constitutional theory have held that obedience to the constitution implies obedience to its original meaning. Due to the common law traditions of gradual evolution and based on the concept of changing societal standards, consciousness and living constitutionalists insist that a constitution that is preserved in its original state when it was enacted is a constitution that can never fulfill its governing role in a transformed world.⁴

Such discussion is not a mere academic one. Its decision has had a direct implication on some of the most significant and controversial issues of modern constitutional law: the right to abortion, the validity of the Second Amendment, the constitutionality of same-sex marriage, the use of executive authority in emergencies of national security, and the constitutional regulation of the online economy.⁵ The systematically different answers to such questions provided by different methodologies of interpretation are themselves, and the conflict between originalists and living constitutionalists is an imperfect but recognizably accurate registration on the fault lines of modern American politics.⁶

This paper is divided into seven substantive sections. Part II traces the intellectual

¹ Akhil Reed Amar, *The Document and the Doctrine*, 114 Harv. L. Rev. 26, 29 (2000).

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 851 (1989).

³ Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 601 (2004).

⁴ Jack M. Balkin, *Living Originalism* 3–21 (Harvard Univ. Press 2011).

⁵ Lawrence B. Solum, *Semantic Originalism*, Ill. Pub. L. & Legal Theory Res. Papers Series No. 07-04, at 1, 4 (2008).

⁶ Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 206 (1980).

history of the originalism/living constitutionalism debate, identifying its origins and its major theoretical developments. Third part discusses the best forms of originalist theory and critically analyses them. Part IV develops the living constitutionalist position and its principal variants. Part V describes the issue of constitutional eternity the desire of framers to unite all future generations as a specific theoretical issue that the two camps will need to discuss. Part VI discusses the performance of the major interpretive theories in the application of landmark cases. Part VII suggests a theoretical synthesis. Part VIII concludes.

II. The Intellectual History of Constitutional Interpretation

The modern argument between originalism and living constitutionalism has an extensive and convoluted intellectual antecedent, but the labels and the acuity of the theoretical point of contention are comparatively new. Throughout American constitutional history, judges and scholars have not stated clearly whether their approach was originalist or evaluative; rather they applied the entire body of resources of interpretation (text, structure, history, precedent, and principle) without being forced to identify themselves as committed to one of the approaches as particularly true. The constitutional revolution of the Warren Court period and the scholarly and political response that it generated is what solidified the debate into its contemporary definition.⁷

An identifiable modern form of the originalist movement started to take shape in the 70s and 80s, both as an intellectual response to what came to be seen as the activism of the Warren Court, and as a project in legal theory, most notably through the Federalist Society.⁸ The most known example of an invitation to originalism as a political constitutional system instead of a background assumption to interpretive practice is the famous 1985 speech by Attorney General Edwin Meese, which proposed the label jurisprudence of original intention. Originalism was most powerfully expressed in the early years of its systematic development when Robert Bork wrote *Tempting of America* which advocated original understanding as the only legitimate method by which constitutional adjudication can be made.⁹

The living constitutionalist tradition has older and more diffuse roots. The pragmatic jurisprudence of Justice Oliver Wendell Holmes, the progressive constitutionalism of the New

⁷ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 887 (1985).

⁸ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (Thomson/West 2012).

⁹ Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 89–110 (Princeton Univ. Press 2004).

Deal, and the overt notion of the evaluative approach called the philosophy of living constitutionalism as put forward by Justice William Brennan, all helped to form the intellectual underpinnings of the evaluative approach.¹⁰ An eloquent reply to Meese, and issued on the same year as his originalist manifesto was the Georgetown address of Brennan, which pointed to the majestic generalities of the constitution not as something to freeze eighteenth-century perceptions but as a vessel of perennial values that could react appropriately to the changing standards of decency which characterized the development of a maturing society.¹¹ This was a general description of the constitutional interpretive venture and, based on the jurisprudential tradition of the eighth amendment.¹²

Originalism and living constitutionalism have been subjected to extensive theoretical development since the 1980s. The replacement of an universally unworkable and theoretically unsound question of what the framers actually might personally have intended the text to mean by the question of how a reasonable reader of the text at the time of ratification would reasonably have construed it to mean was, on the originalist side, an important methodological improvement.¹³ The theory still owes significant development in the more recent emergence of new originalism, led most prominently by Lawrence Solum, Randy Barnett and Jack Balkin, which further developed the theory by disaggregation of constitutional interpretation (constitutional interpretation being the determination of original meaning) and constitutional construction (the determination of legal content in cases where original meaning is no longer possible or determinable).

III. The Case for Originalism: Arguments and Their Limits

Originalism is based on three main arguments, namely; the rule of law argument, the democratic legitimacy argument and the constraint argument.¹⁴ They are both chiefly strong, and they are combined to bring about the gravest intellectual difficulty to any evaluative theory of constitutional interpretation. The secret to any adequate account of the living document paradox would lie in their knowledge of their own force as well as their limitations.¹⁵

¹⁰ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 952 (1995).

¹¹ William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695 (1976).

¹² Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 194 (2008).

¹³ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 2–15 (Harvard Univ. Press 1996).

¹⁴ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1985).

¹⁵ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 882 (1996).

The argument of the rule of law is that the rule of law stipulates that the people under the legal rules ought to know what the rules demand beforehand. A constitution that is modulated to suit this or that era, in other words that says something different in one era and something different in another due to the changes in moral values of those who interpret it, cannot offer the stable rule of law required under the rule of law.¹⁶ Assuming the constitution is what the Supreme Court now declares it is, and now that the Court is at liberty to modify its interpretations with the changing of the social values, the constitution will contain no greater check on the governmental power than the Court itself feels it appropriate to give. The rule of law is destroyed into the rule of judges and the line between law and discretion is swept away.¹⁷

The close one is the democratic legitimacy argument. In a democracy polity, the law making and amending power rests with the people, who are the elected representatives.¹⁸ Judges being unelected and not accountable to the people do not have the democratic mandate to amend the meaning of the constitution according to the dynamics of the social values. The constitutional change process is the amendment, as stipulated in Article V, and painfully and intentionally so; both hard and super majoritarian. A judicial system that interprets the constitution the way it changes it, by using a means other than an amendment, is robbing itself of a human and competitive privilege with the people themselves and their delegates. This objection by Rehnquist to the living constitution, which it represents a formula of an end run around popular self-governance, is one of the most effective criticisms of evaluative interpretation.¹⁹

The constraint argument is that originalism gives real constraint to judicial discretion unlike living constitutionalism does. In case the original public meaning of the constitution determines the current meaning, judicial interpretation is merely a constrained business: the judges need to find the preexisting meaning, and not define the meaning they would like to define.²⁰ Living constitutionalism, in its turn, necessarily authorizes the judges to project their own tastes in morality and politics on to the behalf of the discovery of new social values - a process that is, on this objection, no better than the political judge-legislation.²¹ The essence

¹⁶ Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 *Const. Comment.* 193, 196 (2015).

¹⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 1–14 (Harvard Univ. Press 1980).

¹⁸ Mark V. Tushnet, *Taking the Constitution Away from the Courts* 9 (Princeton Univ. Press 1999).

¹⁹ William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 695 (1976).

²⁰ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 11 (Oxford Univ. Press 2004).

²¹ Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Calif. L. Rev.* 535, 540 (1999).

of the issue has been expressed quite characteristically by Scalia, who described the living constitution as a nice euphemism of a document that empowers the judges.²²

These arguments are not empty in their strength, and both are heavily criticized. The rule of law thesis is excessive: it includes the condemnation of not only living constitutionalism, but the system of common law as a whole, in which rules are established by the accretion of precedent. When it is true that legal development by judicial ruling cannot be combined with the rule of law, then in such a system common law is structurally flawed, a conclusion which is counterintuitive as well as inconsistent with the realized practice of the rule of law in common law jurisdictions.²³ Democratic legitimacy argument does not recognize counter-majoritarian role of constitutional rights: constitutional rights exist to provide a protection of some individual and minority interests against democratic majorities and a linkage-to-what-was-approved-in-the-eighteenth-century interpretation of constitutional rights can offer a systematic under protection of rights in manners that defeat constitutional democracy, not support it.²⁴

The most serious problems concern the constraint argument. Informative meaning Original judicial meaning is, in most instances, truly indeterminate: the historical record is imperfect, disputed, and subject to preferential treatment, and even the best historical practice cannot restore a uniquely right meaning to many constitutional texts in the constitution. That originalism is the only way of giving real limitation to judicial discretion and leaves living constitutionalism without any, is an exaggeration: both approaches entail a good deal of interpretive discretion, and the originalist judge who can find convenient original meanings to the conclusions which she is inclined to hold anyway is no more truly constrained than the living one.²⁵ The impossibility indeed the impossibility, which actually belongs to originalism, may not be a constraint of what the judge concludes, but a constraint of the register in which he is required to substantiate the conclusions, which he comes to.²⁶

²² Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 5 (2009).

²³ Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 12 (2009).

²⁴ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113, 1118 (2003).

²⁵ Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1170 (1993).

²⁶ Bruce Ackerman, *The Living Constitution*, 120 *Harv. L. Rev.* 1737, 1741 (2007).

IV. The Living Constitution: Theory and Its Challenges

Living constitutionalism is not a unitary theory but more of an extended family of approaches that are based on the belief that the meaning of the constitution can and needs to be changed over time according to new developments, values and social circumstance.²⁷ Common law constitutionalism, approaches based on moral reading and approaches based on structural and doctrinal evolution are all part of the family. Such approaches are united by the fact that they reject the originalist assumption that the original meaning of the constitution was established at the time of ratification and any deviation out of the original meaning was a deviation out of the constitution.²⁸

The defence of common law constitutionalism written by David Strauss provides one of the most advanced explanations of the living constitution. According to Strauss, the constitution, like the common law, can be understood not as a code the meaning of which is determined by their texts and history but as a tradition of reasoned decision-making that is produced by the continual accretion of precedent.²⁹ According to this view, constitutional meaning is mainly derived out of the case law rather than the text: the text supplies a contour and certain rigid guidelines, but it is the development of constitutional law through judicial decision making that supplies most of the content of constitutional law. The advantage of this method is that it explains what constitutional lawyers in fact do, in that they to a significant extent argue by precedent as well as by text, and it explains the real advances themselves in constitutional doctrine of which evolutionary development has provided.³⁰

The moral reading of the constitution as offered by Ronald Dworkin offers a more normative explanation. Dworkin has put forward the argument that abstract moral language of the constitution as in the following terms due process, equal protection, cruel and unusual punishment, had been purposely crafted to establish general principles of morality and not to establish the historical meaning.³¹ In the process of forbidding cruel and unusual punishment, the framers did not forbid whatever practices in their day particularly they happened to consider cruel; they were declaring the polity to the abstract moral heuristic that punishment should not be cruel, and it was the task of the oppressed generations to decide what cruelty

²⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992) (plurality opinion).

²⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (Jackson, J.).

²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

³⁰ David A. Strauss, *The Living Constitution* 1–15 (Oxford Univ. Press 2010).

³¹ *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

necessitated in their situation. The judge who interprets the Eighth Amendment with a referral to the current moral standard laws is not in any way breaching the original constitutional promise but is merely carrying it out in full.³²

The main problem with any variant of constitutional living constitutionalism is the indeterminacy objection: to the extent that the meaning of the constitution can change, what limits its change? Without having an original meaning, against which criterion do the judges find the direction of constitutional evolution?³³ It is argued that without originalism, the concept of living constitutionalism is merely a judicial taste wrapped in constitutional jargon. All the great living constitutionalist theories seek to respond to this dilemma. Strauss calls to the discipline of the common law tradition: the need to be consistent with precedents, the need to develop a rationale based on principles that cuts across cases, the slowness of common law development all serve as real limitations on what could be considered constitutional evolution. The moral reading, which is characterized by Dworkin, is an appeal to the study of political philosophy: judges have to recognize the principle which portrays the moral commitments of the constitution in the best light and this is not free even when moral reasoning is involved.³⁴

Another issue regards the validity of moral re-modeling of the judiciary. It is not immediately clear that unelected judges should be the agents of the development of the abstract provisions of the constitution even in those cases where one believes that such development was intended. Constitutionalism of influential process through influential constitutionalism has tried to deal with this challenge by restricting the role of the judiciary to the requirement of preventing the destruction of democratic processes but not the promotion of certain substantive moral values: the courts can legitimately strike down legislations that threaten the existence of fair democratic deliberation but should otherwise respect legislative decisions that concern controversial substantive moral matters.³⁵ This beautiful solution has elicited both praise and blame: praise because it is democratic in its sensibility and blame since the distinction between process and substance in practice is not that easily preserved.³⁶

³² Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 2–15.

³³ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

³⁴ *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

³⁵ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022).

³⁶ Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 *Stan. L. Rev.* 1, 8 (2000).

V. The Problem of Constitutional Eternity

The constitutional eternity dilemma perhaps the desire of constitutional authors to create a document of governance that would shape all future generations in an unconditional manner, is not just a philosophical interest.³⁷ It is a constitutional attribute that frames the business of interpretation in such a manner that neither the originalist approach of pure originalism nor everyday constitutionalism of living standards has theorized. All written constitutions include what we may term an eternity aspiration, the suggestion, explicit or implicit, that its terms are not only the desirable dispensation of the generation which made it but a constitutional law and shall be observed and upheld by future generations.³⁸

The eternity problem is unwounded to define the argument of constitutional unamendability. The constitutions of some countries, most notoriously those of Germany by their eternity clause and the Constitution of India by its doctrine of basic structure, include these sorts of clauses that render some characteristics of the constitution inaccessible to formal amendment.³⁹ These terms simply give the question of whether any generation can properly bind all future generations when it comes to fundamental design of the constitution. The most acclaimed contention of Jefferson is that the earth is of the living, and that every generation must be in a position to re-create its constitutional provision, without being subjected to the will of its deceased ancestors.⁴⁰

In a way, the originalist answer to the eternity problem is to accept it: the entire idea of originalism is that the constitution is that which it was when it was made, and which the future generations will be bound to take under those conditions which were outlined by the founding generation on the terms which the founding generation would establish. Article V amendment is the legitimate process of amending the constitution; a judicial interpretation is not the legitimate one.⁴¹ According to this perception, the amenorrhea of constitutional eternity, the commitment of future generations to the premonitory settlement of the constitution, is an attribute rather than a vice of constitutional democracy: it reflects the foundational act of popular sovereignty through which the people constituted themselves as a political community

³⁷ Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 893 (2003).

³⁸ Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 574 (1987).

³⁹ Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 Stan. L. Rev. 737, 742 (2001).

⁴⁰ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 245 (2009).

⁴¹ Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 4 (Harvard Univ. Press 1999).

and chose the terms of their self-governance.⁴²

The answer to the eternity problem provided by living constitutionalism is that constitutional eternity is not possible or even good. Un-adaptable constitutions, in the genuine sense, viz. those which must leave each generation to follow in the constitutional decisions of their forebears and in which there is no adaptive interpretation to the changing circumstances they have to face, are constitutions which either will fall into non-enforcement or they will be formally defeated by revolution or replacement.⁴³ Interpretative flexibility of constitutional meaning is such views hold, neither a reverse to the constitutional project nor its prerequisite: it is only a constitution flexibility that can and will survive, and only a lasting constitution that can and will bind future generations at all. The seeming contradiction is solved: the constitutional permanence must be constitutional changeability.⁴⁴

The most advanced responses to the problem of eternity acknowledge that it raises a real issue, which cannot be solved by either pure originalism or standard living constitutionalism. The constitutional moments theory, proposed by Ackerman, tries to explain authentic constitutional change when it is not a constitutional amendment, by pointing at the times of the great popularity of constitutional participation, the founding, Reconstruction, the New Deal, and constitutional moments when the role of We the People as the active changers of the constitutional order is realized.⁴⁵ However, this theory has the drawback of defining when a political settlement becomes a constitutional moment and when it is simply the politics of great majority. The border between constitutional evolution and constitutional substitution is an elusive one, and both the theoretical literature as well as the judicial cases has not identified to come up with an unqualified criterion to draw the boundary between the two.⁴⁶

VI. Interpretive Theories in Constitutional Adjudication

The practical consequences of the debate of originalism/living constitutionalism are best traced in the manner in which the two approaches to constitutional interpretation are applied in landmark constitutional cases - cases where both approaches would come up with different

⁴² Laurence H. Tribe, Comment, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 70 (Princeton Univ. Press 1997).

⁴³ Walter F. Murphy, The Art of Constitutional Interpretation: A Preliminary Showing, in *Essays on the Constitution of the United States* 130, 138 (M. Judd Harmon ed., Kennikat Press 1978).

⁴⁴ Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 895 (2003).

⁴⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁶ Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 641 (1989).

results on the topic and where either is adopted does have far reaching effects to the rights of people and the structure of the state authority.⁴⁷ Four cases should be singled out: *Marbury v. Madison*, *Brown v. Board of Education*, *Heller* and the two *Obergefell* and *Dobbs*.⁴⁸

Marbury v. Madison also lays down an interesting originalism test. The concept of judicial review, which was founded by Marshall, the ability of the court to strike down unconstitutional laws, is based on structural or logical argument and not textual originalism: in the constitution there is no single provision that specifically endows the power of the judiciary, but the historical record of the intentions of the framers on the issue is ambivalent. But judicial review is an essential element of the constitutional order, as it has been calculated by all successive generations. *Marbury* defendants who are originalists have to either appeal to structural argument of the sort which is traditionally allied with non-originalist approaches to interpretation, or contend that original meaning in the relevant use. Each of those options exists, both is not without issues, and the fact that originalists have easily accommodated *Marbury* indicates that even strongly originalists use more than original public meaning to arrive at the inferences they cannot get out of the conclusions of pure original meaning analysis.⁴⁹

Brown v. Board of Education is the hardest case for originalism. As there is strong evidence that indicates, the Congress that adopted the Fourteenth Amendment did not have the purpose of outlawing racially segregated public schools: the Congress that was conducting the suggestion of the Amendment also retained racially segregated schools in the District of Columbia.⁵⁰ Considering originalism demands following the particular expectations of the generating generation, *Brown* was mistakenly resolved to a decision that will barely be conceded by even the wiser constitutional scholars. McConnell has used various originalist tactics to justify accommodation of *Brown*, including the influential argument of Bork, that the result was correct, even though the reasoning was not; and the direct admission of some originalists that *Brown* is a case in which the original meaning should be dispensed with, in favor of some sufficiently powerful considerations of justice.⁵¹

⁴⁷ Akhil Reed Amar, *America's Constitution: A Biography* 3–25 (Random House 2005).

⁴⁸ Michael S. Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 178 (1981).

⁴⁹ John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 1–20 (Harvard Univ. Press 2013).

⁵⁰ Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 295 (2007).

⁵¹ Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 260 (2014).

District of Columbia v. Heller is the best victory of originalism in modern times, as well as the most questionable one. The conception expressed by Justice Scalia, as majority opinion, that the Second Amendment to the constitution obtains an individual right to bear and own arms as necessary to engage in self-defense activities unrelated to service in a militia deployed a highly detailed originalist interpretation of the text, structure and history of the amendment. Originalists have hailed the view as an example that their approach can be used to provide determinate answers in disputed cases and has been criticized by critics both as selective application of historical materials and as coming to a conclusion that the living constitutionalist tradition has been methodical about disapproving.⁵² Heller demonstrates the strength of the originalist methodology, and its weakness in grasping the main historical aspects, but, opponents of the approach have convincingly presented the argument that the historical analysis is shockingly good, but that such a rigorous approach might have resulted in a completely different set of findings.⁵³

The cases of Obergefell v. Hodges and Dobbs v. Jackson Women's Health Organization best highlight the practical implications of the originalism/living constitutionalism controversy.⁵⁴ In Obergefell, Justice Kennedy in the majority opinion based his perspectives on the right of same sex couples to marry on the broadly based ideas of liberty and dignity of the Amendment and not the historically grounded interpretation of the Amendment. In Dobbs, the majority opinion of Justice Alito quashed Roe v. Wade basing his argument on the ground that the right to abortion is not within the history and tradition of this Nation and as such it does not fall under the protection of the Due Process Clause. The incoherence in the methodology of the two decisions sheds some light on what critics view as the methodological incoherence in the selective application of interpretive methodologies by the Court: A Court that is originalist when it desires to limit rights and evaluative when it desires to broaden them is not applying tributary interpretive theory to decide when it chooses; rather, it is choosing post the factum the methodology that justifies its preferred answer..⁵⁵

⁵² Neil Gorsuch, *A Republic, If You Can Keep It* 115–30 (Crown Forum 2019).

⁵³ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol'y 817, 820 (2015).

⁵⁴ Randy J. Kozel, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2185, 2189 (2017).

⁵⁵ Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 293 (2005).

VII. Towards A Theoretical Synthesis

The above discussion implies that both pure originalism and uncritical living constitutionalism fail to provide a satisfactory explanation of the interpretation of the constitution and that indeed the most sensible take is one that is situated at the borderline between the two.⁵⁶ It is not a practical concession of the convenience of the theory but a real theoretical stand which seeks to combine the positions of both camps without the typical failures of each.⁵⁷ Its main argument is that the interpretation of the constitution must be faithful to the constitutional text and structure but must also be open to the purposes to which that text and structure were established and to altered circumstances, in which those purposes have to be fulfilled.⁵⁸

There is a robust argument in favor of taking the original meaning seriously which should be considered to full extent by any way sufficient interpretive theory. The text of the constitution is the result of a given act of popular sovereignty, which is created by a set of procedures aimed at achieving extensive deliberation and approval. Such fidelity to that act of popular sovereignty means that its product, the constitutional text, must be read by the successive generations of judges according to the sense it bore at the moment it was made law, and not refashioned by them by the image of the judges they are themselves. Original meaning gives a practical, albeit defective, restriction on judicial discretion and the values of rule of law implied by stable and predictable constitutional meaning are real and significant. A theory that completely does away with the original meaning leaves behind these values without sufficient substitute.⁵⁹

Simultaneously, the argument of constitutional adaptively is also quite strong. The most significant recent effort on integration of such revelations is called living originalism by Jack Balkin: original meaning is binding, yet the original meaning of the abstract principles in constitutions is sufficiently open-textured itself to allow, and indeed demand, its application to new circumstances in ways which may have little to do with the particular intentions of the framers. The Equal Protection Clause is what it was originally, equal protection of the laws,

⁵⁶ RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 4–18 (Harvard Univ. Press 2018).

⁵⁷ David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 735 (2021).

⁵⁸ ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 87 (Stanford Univ. Press 2013).

⁵⁹ Erwin Chemerinsky, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* 9 (Picador 2018).

but the question then becomes what equality at the present day would demand is an application of that timeless principle to present social facts, not to the applications which were contemplated by the enacting generation. This will preserve original meaning on the level of principle and allow constitutional development on the level of application.⁶⁰

The approach taken by Fallon in his construction zone is an augmentative resource. Fallon identifies the determinate meaning of the constitutional text as the meaning that can be determined through linguistic examination and the history of the constitution, which is the semantically fixed meaning, and the construction zone, which is beyond determinate semantic meaning, upon which the judges are called upon to make the application of the principles applying to new situations of the constitution.⁶¹ This difference does not ignore the factual limitation that original semantic meaning offers, but the factual interpretive judgment that must and necessarily be involved in constitutional construction. The synthesis that this article suggests incorporates loyalty to the original semantic sense and restrained commitment and strict building in the constitutional zone of construction - building based on the structure of the constitution, its history, and its aims and not according to the uncontrolled moral or political admiration of the judge.⁶²

VIII. Conclusion

The paradox of a living document the conflict between the constitution as a written text as a concrete historical text and as a living organism as a framework of governing principles is not a problem that should be fixed but a structural aspect of constitutional democracy that needs to be contained. Any sufficient theory of constitutional interpretation should accept and deal with this tension, instead of resolving it by decree through the dogmatic claim of one approach to interpreting the Constitution. Intelligent originalism, which fails to recognize the actual necessity of constitutional change, comes up with a constitution that is increasingly less competent to govern a transformed world.⁶³ It is pure living constitutionalism allowing it to disregard the realities of the textual and original meaning that results in a constitution that, practically speaking, is whatever five Supreme Court Justices just happen to like at any given

⁶⁰ Jack M. Balkin, *Living Originalism* 3–21 (Harvard Univ. Press 2011).

⁶¹ Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* 87 (Stanford Univ. Press 2013).

⁶² Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 540 (1999).

⁶³ Akhil Reed Amar, *America's Constitution: A Biography* 3–25 (Random House 2005).

point in time.⁶⁴

The issue of constitutional eternity, discussed in Part V, sheds light on an area of the interpretive debate that has not been fully addressed by either of the two sides.⁶⁵ The desire to craft a governing document that will bind posterity is not merely the desire to permanently bind the meaning of the constitution, but to place in place a mechanism of self-government which is capable of meeting the requirements of communities whose demands future generations could not possibly have anticipated. It was true that the earth is the property of the living-- but it was true also that in the sense that constitutional commitments must possess some form of stability with time, it is the locations of a community, any community whatsoever, its most fundamental constitutional commitments that cannot serve to reify as any sort of commitment at all. The tension side of this issue cannot be resolved by an opposition between originalism and living constitutionalism but by a more elaborate conception of the dialogue between constitutional text, constitutional meaning and constitutional purpose.

As the cases of Part VI show the most honest and intellectually justifiable judicial decision rely on a variety of interpretive resources: text, structure, history, precedent, and principle, not instead of indulging in a strictly organized and prescribed methodology. Marbury or Brown or even the other major privacy and equality cases of the modern age, all engage constitutional reasoning that is more complicated, more circumstantial, and more responsive to the entire spectrum of constitutional materials than either pure originalism or pure living constitutionalism can explain. The constitutionally implausible cases of the Courts are the ones where one methodological commitment has been dogmatized to the extent of effectively ruling out the valid contributions of its rival approaches.

The hypothetical synthesis offered in Part VII - of faithfulness to initial semantic sense with disciplined and principled construction by reference to constitutional constitution, constitutional history, and constitutional end - is not new to hold but is the restoration of the best of the constitutional interpretive tradition. It is, simply put, the practice, which the judicial majority in its highest constitutional judicial forms, which Marshall to Harlan, which Brennan,

⁶⁴ Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *Const. Comment.* 289, 293 (2008).

⁶⁵ Erwin Chemerinsky, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* 9 (Picador 2018).

has exercised, whatever the interpretive sticks they or their opponents have attached to it. This living document problem, however, is not one of the problems, which theory of the constitution would solve someday. It is not simply the status of permanent constitutional form in a democratic society: the impossibility of not living under a law that is simultaneously our and not our, that is our time and all time, that is fixed and incomplete.

