Judicial Review and Originalism: Do We Really Want a "Dead" Constitution

Albert E Poirier, Jr., American Public University

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JUDICIAL REVIEW AND ORIGINALISM:
DO WE REALLY WANT A “DEAD” CONSTITUTION?

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Albert E. Poirier, Jr.

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DEDICATION

This work is dedicated to my wife and companion of more than thirty years, who encouraged me to continue my education after retirement and whose patience and support, has made it possible to complete the work required.
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I would like to acknowledge the assistance I have received throughout my studies from the entire faculty of the Legal Studies department, and particularly Professor Tamara Herdener for her guidance in developing this work, and Professor Christina Eckman for her instruction in the Legal Research and Writing courses.
ABSTRACT OF THE THESIS

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by

Albert E. Poirier, Jr.

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Professor Tamara Herderner, Thesis Professor
INTRODUCTION

Life in America was quite different in 1953 than it is today. Then, it was illegal in many states for individuals of different races to marry. It was equally illegal in many states for doctors to prescribe contraceptives, even to married couples. Of course, in all states, abortion was illegal. Homosexuality, and other forms of “deviant” sexual behavior, even between consenting adults in the privacy of their own home, was a criminal act. Today, all of these things are legal and protected. It was legal for states to segregate races in almost all facets of life, most particularly in education. Hiring and firing could be decisions made based on race or gender, or unwillingness to submit to sexual demands. Today, these things are illegal.

There have been many causes for these changes; however, it is the premise of this thesis that the most significant cause of these changes is the concept of the “living Constitution.” The concept of a living constitution is defined as a constitution amenable to changes through judicial interpretation rather than amendment.¹ Take for example, in Brown vs. Board of Education,² the Supreme Court, under Chief Justice Warren found that, “in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.”³ Therefore, the Court found, segregation deprived African-Americans of the equal protection of the laws guaranteed by the Fourteenth Amendment. However, nowhere does the Fourteenth Amendment specifically mention school segregation, nor is it likely that the framers of the amendment considered it to ban such segregation. However, the Warren Court essentially amended the amendment to include such a ban. They found that the Constitution was amendable based on changing values and societal norms, rather than on legislative and ratification action.

³ Id. at 495.
In contrast to the living Constitution theory of judicial interpretation, a theory known as “originalism” has developed. The general principle of originalism is that the Supreme Court should interpret the Constitution, and its amendments in the light in which they were written, ratified, or understood at the time of their creation. This concept maintains that twenty-first century justices should read the Constitution through eighteenth or nineteenth century eyes. Again using the example of Brown, an originalist would point out that the framers of the amendment could have specifically mentioned education if that was their intent; therefore, it was not their intent. She would also point out that most of the states that ratified the amendment had segregated schools, and retained them after ratification, so they certainly did not believe that the banning such segregation was the object of the amendment. In addition, she would point out that the people living in 1868, for the most part, saw no evil in segregated schools. Therefore, as a strict originalist she would determine that the Court’s finding in Brown was in error.

As shown above, constitutional interpretation plays a direct and significant role in shaping our society. Therefore, it is important to examine the concept of judicial review and these opposing theories of constitutional interpretation, and to illustrate that a living constitution theory more faithfully represents the ideals and democratic intent of the Constitution’s framers, while reflecting the evolution of society over time.

Why is this important? Judicial interpretation is a significant factor, if not the most significant factor, in the legal evolution of American society. Without judicial interpretation, racial segregation of public schools would be constitutional.

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The government would be free to discriminate against women. The federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to. The Bill or Rights would not apply to the states. The states could freely violate the principle of "one person, one vote" in designing their legislatures. Many federal labor, environmental and consumer protection laws would be unconstitutional.\(^5\)

One can hardly imagine the Congress, in 1954, outlawing racial segregation in schools, nor is it likely that Congress, in 1973, or any other time, would vote to recognize a women’s right of privacy in matters as intimate as whether or not to have an abortion. Yet, today, most of us recognize these as accepted rights of citizens.

It is important to recognize the nature of the competing theories of judicial interpretation, Living Constitutionalism and Originalism, because viewing an issue under one theory is likely to have a result diametrically opposed to the results of viewing the issue under the other. For example, the Originalist would say that nowhere in the Constitution is there mentioned a right of privacy,\(^6\) however, a Living Constitutionalist finds such a right in the penumbra of the Third, Fourth, Fifth and Ninth Amendments.\(^7\)

If Americans, and the legal community, become more aware of the nature of the predominate theories of judicial interpretation, they will be more likely to support the appointment of justices who’s judicial philosophy is more akin to their belief in how the Constitution should be interpreted.

\(^5\) Strauss, supra note 4. at 33.
\(^7\) Id. at 484.
A BRIEF HISTORY OF JUDICIAL REVIEW

Today, most Americans assume that the United States Supreme Court has the power to review acts of Congress or the legislatures of the various states and to determine their constitutionality. It has not always been so. Before we can understand the importance of judicial review philosophy, it is important to know how the concept of judicial review itself became accepted as the norm in the American legal system.

There were individuals who, in 1787 recognized that the judicial review of congressional acts would become a function of the Supreme Court. One of the most telling and prescient commentaries on this point was by a New Yorker writing under the nom de plume of “Brutus.”

The judges "will give the sense of every article of the constitution that may from time to time come before them . . . And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the Supreme Court, whatever they may be, will have the forces of law, because there is no power provided in the constitution that can correct their errors, or controul [sic] their adjudications. From this court there is no appeal. And I conceive the legislatures themselves, cannot set aside the judgment of this court, because they are authorized by the constitution to decide in the last resort
The legislature must be controulled [sic] by the constitution, and not the constitution by them.\textsuperscript{8}

However, because the Court had no power to enforce their decisions, and, as Alexander Hamilton wrote, “[i]t may truly be said [the Supreme Court has] neither force nor will, but merely judgment; and [they] must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments,”\textsuperscript{9} the framers had no fear of this weakest of the branches of government.

When the framers wrote Constitution of 1787, they assumed that the Supreme Court would be the junior of the three branches of governments. As Alexander Hamilton wrote, “The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and it can take no active resolution whatever.”\textsuperscript{10} The Supreme Court had no method of enforcing its decisions.

It was not until 1803, that the Supreme Court saw an opportunity to exert its power to review acts of Congress. Article III, Section 2 of the Constitution states, “In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”

In his final days in office, John Adams signed a commission for William Marbury to be a justice of the peace for the District of Columbia. Though the president had signed the

\footnotesize{\textsuperscript{8} Rakove, supra note 1, at 213 (Quoting “Brutus”).
\textsuperscript{9} Alexander Hamilton (writing as Publius), Federalist Papers, 349 (Kevin Mark Smith, ed., 2011) (hereinafter Federalist).
\textsuperscript{10} Id. at 350.}
commission, it had not been delivered to Marbury before the Jefferson administration began, and it ended up on the desk of the Secretary of State, James Madison. When Marbury requested his commission, Madison refused to deliver it. Marbury filed suit in the Supreme Court requesting a writ of *mandamus* under Section 13 of the Judiciary Act of 1789, which had expanded the original jurisdiction of the Court to handle writs of *mandamus* against government officials.\(^\text{11}\)

Chief Justice John Marshall faced a dilemma, if the Court found against Marbury, it would appear as institutional weakness. However, if they found against Madison, they faced the prospect that the Jefferson administration would simply ignore the Court, an action that would demonstrate the Court’s weakness. Marshall’s response to the dilemma was brilliant. In his finding, he first established that Marbury was indeed entitled to his commission. He then found that the expansion of the original jurisdiction of the Court, under the Judiciary Act of 1789, violated Article III, Section 2 of the Constitution, and therefore the Court did not have original jurisdiction in the case. By this stratagem, Marshall was able to both have his cake and eat it too. He found for Marbury but made it easy for Jefferson to enforce the Court’s decision; he simply had to continue withholding the commission.\(^\text{12}\) By this clever maneuver, Chief Justice Marshall established the doctrine and precedent that the Supreme Court could hold that legislation passed by the Congress that it believed was “repugnant to the constitution, [was] void.”\(^\text{13}\)

Interestingly, Marshall, in his decision, demonstrated both originalism and living constitutionalism theories. The originalism is demonstrated when Marshall argued that the wording of Article III of the Constitution limits the areas under which the Supreme Court has original jurisdiction and, sans an amendment to the Constitution, declared that that part of the

\(^{13}\) 5 U.S. at 177.
Judicial Act of 1797 that expands such areas was unconstitutional. However, he embraced living constitutionalism by finding that the “judicial power” vested in the Court by Article III of the 1787 Constitution included the power to strike down a law passed by the Congress unconstitutional and therefore void. This de facto veto power is not in the Constitution and, even today, some originalists find Marshall’s holding in Marbury to be in itself unconstitutional. As Professor Lino Gaglia phrased it, “[j]udicial review was born in sin and has rarely risen above the circumstances of its birth.”

Even with his victory in Marbury, however, Marshall still faced that problem of having no method to enforce the Court’s decisions. This became startlingly clear in 1832, when the Court heard the case of Worcester v. Georgia.

The state of Georgia, in an attempt to isolate the Cherokee Indians, passed a law that required “all white persons residing within the limits of the Cherokee Nation to take an oath to support Georgia’s laws.” A New England missionary, Samuel A. Worcester refused to take the oath and was arrested and convicted of violating the law and was sentenced to four years at hard labor. Worcester’s attorney appealed to the Supreme Court arguing that Georgia’s law violated a treaty made by the United States, and that the Constitution made such treaties “supreme.” The Court found the Georgia law to be unconstitutional and ordered Worcester released. The governor of Georgia refused, and the president, Andrew Jackson, refused to enforce the Court’s decision. Supposedly Jackson stated, “John Marshall has made his decision, now let him enforce

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14 Id. at 173-4.
16 Id. at 74
17 31 U.S. 515 (1832).
18 Breyer, supra note 11, at 38.
it.”\textsuperscript{19} Jackson apparently did not recognize that failure to enforce the Court’s decision would embolden states to ignore federal laws they did not like.

That is exactly what happened a few months later when South Carolina passed a “Nullification Ordinance” which forbade the paying of duties imposed by certain federal statutes. Jackson saw the danger in allowing states to ignore federal authority, and the threat this posed to the Constitution. Jackson reversed course and said he would enforce the Court’s order. The governor of Georgia, to avoid federal action, offered a pardon to Worcester, which was accepted. Georgia released Worcester, and John Marshall had a second precedent for the Court’s authority to declare a law in violation of the Constitution.\textsuperscript{20}

There would be one more case that established the Supreme Court’s authority to review acts of Congress for constitutionality, and it would be the Court’s most infamous decision. In 1857, the Court heard the case of a slave whose master was an army officer. The officer, assigned to Fort Armstrong in the free state of Illinois and Ft. Snelling in the free Wisconsin Territory, brought his slave with him. When the officer returned to St. Louis, he brought his slave, the slave’s wife, and their infant daughter, with him. After two changes in ownership, the slave filed suit, first in state court, then in federal court, saying that his extended sojourn in free territory entitled him to his freedom. The case was \textit{Dred Scott v. Sanford}.\textsuperscript{21}

Chief Justice Roger Taney wrote the opinion in the case. He first found that, since Scott was a slave, he was not a citizen, and since the court could only hear cases “between citizens of different states,”\textsuperscript{22} then the Court did not have jurisdiction to hear Scott’s case. However, he

\textsuperscript{19} Id. at 38-40  
\textsuperscript{20} Id. at 40-41  
\textsuperscript{21} 60 U.S. 393 (1857).  
\textsuperscript{22} U. S. Const., Art. III, Sec. 2.
then went on to find on the merits of the case anyway. The Court’s finding was that a slave was 
property and the due process clause of the Fifth Amendment protected the slaveholder's property 
interest, even if the owner took their slaves into free territory for extended periods. In addition, 
the Court found that the congress’ attempts to limit the expansion of slavery, including the 
Missouri Compromise, were unconstitutional.23

While the decision was well received in the South, the response in the North was outrage. 
In fact, Abraham Lincoln, in his inaugural address, went so far as to say,

\begin{quote}
if the policy of the government upon vital questions, affecting the 
whole people, is to be irrevocably fixed by decisions of the 
Supreme Court . . . the people will have ceased to be their own 
rulers, having to that extent practically resigned their government 
into the hands of that eminent tribunal.24
\end{quote}

Despite Lincoln’s sentiment, Dred Scott continued as the law of the land until it was 
effectively reversed by the Thirteenth, Fourteenth and Fifteenth Amendments following the Civil 
War. Since Dred Scott there has not been a significant challenge to the Supreme Court’s 
authority to review legislation for constitutionality.

That is not saying that there have not been critics of judicial review. In 1997, an 
unsuccessful candidate for the Court, Robert Bork, recommended that there be a constitutional 
amendment allowing the congress to overrule an unpopular Court decision by a simple majority 
in both houses.25 Fortunately, such views are in the minority and most Americans accept that the

\begin{footnotes}
\item[23] Breyer, supra note 11, at 47-52.
\item[24] Id. at 57
\item[25] Robert H. Bork, Federalist Society Symposium: Tenth Anniversary Banquet 
\end{footnotes}
Court’s role in the governmental process includes the authority to find acts of congress or the states unconstitutional.

THE THEORY OF ORIGINALISM

Originalism, that is the concept that the Constitution be interpreted in the light in which it was written, ratified, or understood at the time it was written, has been part of American jurisprudence since its beginning. The term “originalism”, that now identifies the theory, was coined in the early 1980’s, when Professor Paul Brest defined it in this manner, “By “originalism” I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.” While the term may have recent origins, Supreme Court decisions have, in varying degrees relied on the concept since Marbury v. Madison in 1803.

Originalists and nonoriginalist agree that, when the text of the Constitution is specific (i.e. the president must be at least 35 years of age) there is no room for judicial interpretation. It is when the text is more general (i.e. the due process clause – what constitutes “due process?”) that even originalists disagree about how to interpret the Constitution.

One originalist school would use “original intention” as a guide. That is, what was the intention of the framers when they created the clause? Then Attorney General Edwin Meese placed original intention originalism on the judicial radar at a speech to the American Bar Association, where he stated,

The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.27

A second school of originalist thought is “original understanding.” That is, what did those who ratified the Constitution understand it to mean? Because what makes the Constitution more than just a statute is the fact that it required popular ratification, and thus was the will of people, original understanding originalists argue that what these ratifiers believed the meaning to be should determine how it is interpreted.28

One of the most recent variant of originalism is “original public meaning,” or, as it is sometimes referred to, “new originalism.”29 That is, “the view that the meaning of the text is determined by the conventional semantic meaning of the words and phrases at the time each provision was framed and ratified.”30 In other words, how would the “man on the street” with a reasonable knowledge of the English language, and a reasonable awareness of the proceedings of

28 Id. at 10 (referencing Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1275 (1996) (defining originalism as the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning.).
29 Id. at 15.
30 Id. at 28.
the Constitutional Convention, have understood the wording of the various provisions? One of the earliest proponents of this theory was Supreme Court Justice Antonin Scalia.\textsuperscript{31}

One final variant of importance is “original methods” originalism. That is, “the view that the original meaning is the meaning that would have been derived given the methods of interpretation (and possibly also construction) that were employed at the time each provision was framed and ratified.”\textsuperscript{32}

Originalists are not a homogeneous group and their philosophies range from the strict originalism of Justice Hugo Black and Robert Bork, through the “faint-hearted” originalism of Justice Antonin Scalia\textsuperscript{33} who supposedly commented in reference to his originalism versus Justice Clarence Thomas’, “I am an originalist, but I am not a nut!”\textsuperscript{34} At the other end of the spectrum of originalism is the “living originalism” of Professor Jack Balkin.\textsuperscript{35}

While there is considerable diversity in the theories of originalism, there is general agreement on certain principles. They may have different views on what original source should be used, but all believe that “those who make, interpret, and enforce the laws ought to be guided by the meaning of the United States Constitution – the supreme law of the land – as it was originally written [ratified or understood].”\textsuperscript{36} Professor Solum refers to this agreement as the

\begin{itemize}
\item \textsuperscript{31} Id. at 15
\item \textsuperscript{32} Id. at 19.
\item \textsuperscript{35} Jack M. Balkin, \textit{Living Originalism} (Kindle Ed., 2011).
\item \textsuperscript{36} David Forte, \textit{The Originalist Perspective}, The Heritage Foundation (September 16, 2009), \url{http://www.heritage.org/research/reports/2009/09/the-originalist-perspective?query=The+Originalist+Perspective}
\end{itemize}
“fixation theory,” that is, the meaning of each provision was fixed at the time of its framing or ratification.\textsuperscript{37}

Professor Jack Balkin, in his book, \textit{Living Originalism}, divides constitutional language into three types, text or rules, standards, and principles. Text refers to language that is specific, such as the requirement that the president be at least thirty-five years old, or that members of the House of Representatives serve two-year terms. Standards include such language as “cruel and unusual punishment,” and “due process of law.” Principles are much broader and include such language as “no prohibitions on the free exercise of religion.”\textsuperscript{38} As he points out, while text or rules are supreme, each generation must determine how standards and principles will be applied. In this way, Balkin attempts to reconcile originalism with living constitutionalism. As he states, “[w]hen the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time. When adopters use language that delegates constitutional construction to future generations, fidelity to the Constitution requires future generations to engage in constitutional construction. This is the essence of the method of text and principle.”\textsuperscript{39}

Robert Bork argues that originalism upholds the Constitution’s status as the supreme law of the land, and, as the law, it is binding on judges as well as on legislators and executives. He further states that judges do not have the constitutional right to create new rights or destroy old ones, and in so doing are not being faithful to their oath to uphold the Constitution.\textsuperscript{40}

\textsuperscript{37} Solum, \textit{supra} note 27, at 29.
\textsuperscript{38} Balkin, \textit{supra} at 55.
\textsuperscript{39} Id. at 61-63.
\textsuperscript{40} Theories of Constitutional Interpretation, Exploring Constitutional Conflicts, \url{http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html} (last visited Nov. 26, 2012) (hereinafter Theories).
THE CASE FOR ORIGINALISM

According to David Forte of the Heritage Foundation, originalism is the preferred method of interpretation for several reasons. Because the reasons are important for an understanding of the thought processes of those who support originalism, they are quoted at length here.

First, it comports with the nature of a constitution, which binds and limits any one generation from ruling according to the passion of the times. The Framers of the Constitution of 1787 knew what they were about, forming a frame of government for "ourselves and our Posterity." They did not understand "We the people" to be merely an assemblage of individuals at any one point in time but a "people" as an association, indeed a number of overlapping associations, over the course of many generations, including our own. In the end, the Constitution of 1787 is as much a constitution for us as it was for the Founding generation.

Second, originalism supports legitimate popular government that is accountable. The Framers believed that a form of government accountable to the people, leaving them fundamentally in charge of their own destinies, best protected human liberty. If liberty is a fundamental aspect of human nature, then the Constitution of 1787 should be defended as a successful champion of human freedom. Originalism sits in frank gratitude for the political, economic, and
spiritual prosperity midwifed by the Constitution and the trust the Constitution places in the people to correct their own errors.

Third, originalism accords with the constitutional purpose of limiting government. It understands the several parts of the federal government to be creatures of the Constitution, and to have no legitimate existence outside of the Constitution. The authority of these various entities extends no further than what was devolved upon them by the Constitution." [I]n all free States the Constitution is fix'd," Samuel Adams wrote, "& as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."

Fourth, it follows that originalism limits the judiciary. It prevents the Supreme Court from asserting its will over the careful mix of institutional arrangements that are charged with making policy, each accountable in various ways to the people. Chief Justice John Marshall, overtly deferring to the intention of the Framers, insisted that "that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."

Fifth, supported by recent research, originalism comports with the understanding of what our Constitution was to be by the people who formed and ratified that document. It affirms that the
Constitution is a coherent and interrelated document, with subtle balances incorporated throughout. Reflecting the Founders understanding of the self-motivated impulses of human nature, the Constitution erected devices that work to frustrate those impulses while leaving open channels for effective and mutually supporting collaboration. It is, in short, a remarkable historical achievement, and unbalancing part of it could dismantle the sophisticated devices it erected to protect the people's liberty.

Sixth, originalism, properly pursued, is not result-oriented, whereas much nonoriginalist writing is patently so. If evidence demonstrates that the Framers understood the commerce power, for example, to be broader than we might wish, then the originalist ethically must accept the conclusion. If evidence shows that the commerce power was to be more limited than it is permitted to be today, then the originalist can legitimately criticize governmental institutions for neglecting their constitutional duty. In either case, the originalist is called to be humble in the face of facts . . .

Steven Calabresi, a founder of the Federalist Society, and former law student of Antonin Scalia, puts forth the argument that, “[w]ithout originalism there can be no constitutionally limited government and no judicial review.” Calabresi points out that Chief Justice Marshall’s

\[41\] \textit{Id.}  \\
rationale in *Marbury v. Madison* was an originalist-like adherence to the specific text of Article III.\(^{43} \)\(^{44} \)

Professor Lino Graglia argues,

the nightmare of the liberal American intellectual, the typical elite academic, is that policymaking might be allowed to fall into the hands of the American people, who favor such policies as prayer in public schools, capital punishment, effective enforcement of the criminal law, suppression of pornography, and assignment of children to neighborhood schools.\(^{45} \)

To which he might have added, back-alley abortions and segregated schools. As stated earlier, the Congress, dominated by Southerners, was unlikely, in 1954, or any time since, to abolish segregation in schools. Graglia argues that the Congress would have eliminated segregation in the District of Columbia, if the Supreme Court “let it have the honor to do so.” Congress did indeed do so, but not until after *Bolling v. Sharpe*\(^{46} \) had required it.\(^{47} \)

Dominated by men, Congress was equally unlikely to recognize a woman’s right to control her own reproductive function. In fact, in the thirty years since *Roe v. Wade*\(^{48} \) Congress has repeatedly attempted to undermine that fundamental right.

**THE FALLACIES OF ORIGINALISM**

\(^{43} \) *Id.*

\(^{44} \) See page 7 supra (discussing Marshall’s use of both originalism and living constitutionalism in his decision).


\(^{46} \) 347 U. S. 843 (1954).

\(^{47} \) Graglia, *supra* at 78, note 28.

\(^{48} \) 410 U.S. 113 (1973).
"The world belongs . . . to the living."49 With these words, Thomas Jefferson encapsulated one of the seminal objections to Originalism. Strict Originalists are similar to strict Christian Fundamentalists. Both believe in the literal interpretation of a scripture. For the religious fundamentalist it is the Bible, supposedly written, or dictated, or revealed, by an omniscient, immortal Being; for the Originalist it is the U.S. Constitution and its amendments, undoubtedly written by fallible, mortal, men. The originalist would have our twenty-first century society ruled by the cold dead hands of eighteenth and nineteenth century individuals who, as amazing as they were, were still just men, capable of folly and misjudgment, just as we are today. Even Steven Calabresi, a leading spokesperson for originalism, admits, “Congress frequently passes laws without knowing what is in them.”50

The framers of the 1787 Constitution were great men, perhaps the true “greatest generation,” yet they were not omniscient or even particularly prescient. While it is correct and proper to give the greatest possible deference to the words and intent of the framers, what knowledge did they have of what life and society would be like in the twenty-first century? They had no concept of mass media, intercontinental travel, the internet, or birth control. There was no need, in a predominantly agrarian society located almost entirely along the Atlantic coast to deal with the problems of a continental nation, made up of millions of individuals of diverse ethnic, religious and linguistic backgrounds. The framers could not have foreseen the industrial revolution and the enormous changes it wrought in the fabric of American society.

In his defense of originalism for the Heritage Foundation, David Forte states that the first advantage of originalism is, “it comports with the nature of a constitution, which binds and limits

50 Originalism, supra at 32.
any one generation from ruling according to the passion of the times.”

Obviously, he has no problem being ruled according to the passions of the founding generation! It would seem better to be ruled by current passions then those long dead.

**The Problem with History:**

Even if we assume that the framers of the Constitution would want later generations to be ruled by their specific words, and there is nothing in the Constitution to evidence that they did, originalism still has problems. Not the least of which is, historically, it is very difficult to determine exactly what the framers intended, assuming that they even had a common intention, when they drafted the Constitution of 1787. As Professor Jack A. Rakove points out, “[T]he ideal of "unbiased" history remains an elusive goal, while the notion that the Constitution had some fixed and well known meaning at the moment of its adoption dissolves into a mirage.”

Justice Antonin Scalia, in discussing the difficulty of determining the “original intent” of a provision of the Constitution, points out that the current modus operandi of the Supreme Court, that is hearing and deciding cases in the same term, does not provide time for the careful evaluation of historical evidence necessary to truly determine the intent and rationale behind constitutional provision. Even though a leading originalist himself, Justice Scalia points out that one of the weakness of originalist theory is that it requires justices to put aside knowledge gained since the 1780’s and to put on “the beliefs, attitudes, philosophies, prejudices, and loyalties” of those who lived in that era.

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51 Forte, *supra* at note 35.
53 Scalia, *supra* at note 33 at 863–864,
54 *Id* at 856.
To recognize the difficulty of determining what is the actual “original meaning” of the Constitution, one need only look to District of Columbia v. Heller,\(^{55}\) where the Justices ruled on the constitutionality of the District of Columbia’s very strict gun laws. Because there is little case law on the Second Amendment, both the majority and dissent went to great lengths to determine the original meanings of the Second Amendment.\(^{56}\)

Both sides consulted dictionaries from the era and they examined the writings of the time. They reviewed the notes of the various ratifying conventions and pored over Madison’s drafts of the amendment. They parsed each of its twenty-seven words. The result was that the two sides came to diametrically opposed conclusions. The result was a five to four decision along predictable conservative/liberal lines.\(^{57}\)

**We, the People:**

Originalists at least partially base their theory on the concept of “popular sovereignty,” that is, on the fact that the 1787 Constitution was a constitution approved by “We, the People.” Of course, the “People” who voted for ratification, were primarily white property owners. Excluded were women and blacks and, for the most part, “those without wealth or property.”\(^{58}\) It was a constitution written primarily to protect property, not to insure the freedom of the common man. As Laurence Tribe points out, the first black justice of the Supreme Court, Thurgood Marshall, called the Constitution “defective,” and declared that the framers of the 1787 Constitution were “more bigoted than visionary,” and that they were willing “to protect slavery

\(^{56}\) “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.”
while professing to believe in freedom and equality.”

One can agree or disagree with Justice Marshall’s analysis but it is undoubtedly true that the framers were all propertied, educated white men, in a relatively homogenous society.

**Freedom of Speech:**

The best way to examine the fallacies of strict originalism is to examine a hypothetical example.

The great Supreme Court Justice Oliver Wendell Holmes wrote, “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

Or would it? The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” Justice Hugo Black, who many consider the first of the “originalist” justices, was famous for, when asked what “no law,” in the First Amendment, meant, pulling out his well-worn copy of the Constitution and pointing to the First Amendment saying, “no law means NO law.” To a strict originalist, the word no is an absolute, no means no, and to abridge is to diminish in some way. Therefore, the framers’ intent, given the wording, must have been that Congress could not, in any way, abridge freedom of speech, ergo it would have been perfectly acceptable to the framers for someone to falsely shout “fire” in a crowded theater. Obviously, that is an absurd proposition and, over the years, the Supreme Court has found several categories of speech that do not merit First Amendment protection.

59 Id. At 2.

60 Schenck v. United States, 249 U.S. 47, 52 (1919).

61 Solum, supra note 27.


63 BLACK’S LAW DICTIONARY, 6 (8th ed., 2004).
Among them is speech that is libelous, that would cause injury, or that would incite an imminent danger of a “breach of the peace.”

*Brown v. Board of Education:*

One case, above all others, gives originalist theory a problem. That case is *Brown v. Board of Education.* Any judge today, whether originalist or not, would agree that racial segregation in any part of society is wrong and should not be permitted; however, originalists have a difficult time reconciling the decision in *Brown* with originalist theory. It is difficult to imagine that the members of Congress who passed the Fourteenth Amendment intended it to prohibit racial segregation in schools – in fact, many would have thought such segregation was a good idea. It is equally difficult to imagine that the states that ratified the Fourteenth Amendment believed that its purpose was to end racial segregation in schools – if they had suspected that this would be the result of their ratification, it is certainly conceivable that the amendment would have failed ratification. Most of the states in 1868 had, either by law or *de facto*, racially segregated schools. How then can originalists reconcile their theory with the obvious rightness of the decision in *Brown?*

One who has tried is Stephen Calabresi. Calabresi claims that, because at the time of the ratification of the Fourteenth Amendment, “more than three-quarters of the states had provisions in their state constitutions defining a public education as a fundamental right.” He points out that such a fundamental right is protected under the “privileges and immunities” clause of the Fourteenth Amendment, which forbids the states from making or enforcing “any law which shall

66 *Originalism*, supra at Note 40, 32.
abridge the privileges or immunities of citizens of the United States.”67 However, nowhere does Section 1 of the Fourteenth Amendment mention race, it refers only to “citizens.” In Plessy v. Ferguson,68 the Supreme Court, in upholding the segregationist concept of “separate but equal,” echoed what was most certainly the sentiment of most Americans in the Nineteenth Century when it stated,

The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.69

This ruling, reflecting the attitudes of the people who wrote, ratified, and understood the amendment, is originalism writ large and must be the attitude of an originalist in order to be originalist. Interestingly, and somewhat hypocritically, Steven Calabresi, in a general condemnation of the Supreme Court, criticizes the Plessy decision that, he says, “sanctioned an

67 U. S. Const., Amend. XIV, Sec. 1.
68 163 U.S. 537 (1896).
69 Id. at 544.
era of state-sponsored segregation,” as if it did not already exist when 
Plessy was decided and the Court merely sanctioned the status quo.\textsuperscript{70}

What changed in the sixty years between 
Plessy and 
Brown? Certainly, the wording of the Fourteenth Amendment had not changed. Certainly, the intentions of those who wrote, ratified and interpreted it had not changed. What changed were the country’s social values and the decision in 
Brown v. Board of Education reflected those values. It was living constitutionalism at its finest.

\textit{Loving v. Virginia}:

Calabresi uses the same argument to connect originalism to 
Loving v. Virginia.\textsuperscript{71} \textit{Loving} struck down state laws banning marriages between different races. Again, according to Calabresi, marriage is a fundamental right, a “privilege and immunity,” and accordingly the Fourteenth Amendment forbids states from making or enforcing any law that abridges such a privilege or immunity. In response, we must once again look to the quotation from the decision in 
Plessy v. Ferguson.\textsuperscript{72} Undoubtedly, the members of Congress who passed the Fourteenth Amendment would be stunned to find out that it outlawed anti-miscegenation laws. Of course, the same can be said of the states that ratified it. In fact, in 1868, most states had anti-miscegenation statutes, and most of those retained them until 
Loving v. Virginia struck them down.\textsuperscript{73} The Supreme Court, in 
Pace v. Alabama,\textsuperscript{74} upheld that state’s anti-miscegenation law 15 year after the Fourteenth Amendment. Once again, the attitudes expressed in 
Plessy v.

\textsuperscript{70} \textit{Originalism,} supra at 15.
\textsuperscript{71} 388 U. S. 1 (1967).
\textsuperscript{72} See note 59 supra.
\textsuperscript{73} \textit{Anti-miscegenation,} NetHelper.com, \url{http://www.nethelper.com/article/Anti-miscegenation} (last visited Nov. 21, 2012).
\textsuperscript{74} 106 U. S. 583 (1883).
Ferguson are the originalist attitudes, and the decision in Loving reflected the changed social values of the country. To re-interpret the Constitution in line with changing social values is the essence of living constitutionalism.

Gay Marriage:

Unfortunately, Mr. Calabresi falls of his logical wagon when discussing the issue of homosexuality. Interestingly, Calabresi finds that marriage is a fundamental right and the right to marry a “privilege and immunity” protected by the Fourteenth Amendment, but he has no problem condoning discrimination against same sex couples who wish to marry. According to Calabresi, despite the fact that the Fourteenth Amendment bans the abridgement of privileges and immunities against “citizens” not just heterosexual citizens, it does not ban discrimination against gays. Mr. Calabresi believes that gays need a constitutional amendment before they can earn the same status granted to blacks and women.75 Interestingly he argues that the Fourteenth Amendment is a “ban on all systems of class legislation – a ban, if you will on caste systems in general,”76 but that it does not apply to gays and lesbians, who are thus placed in a lower “caste” than their heterosexual brothers and sisters.

The Ninth Amendment:

One of the issues that separate originalists from non-originalists is the issue of unenumerated rights. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”77 “[T]hat constitutional joker, the

75 Originalism, supra at 33.
76 Id.
77 U. S. Const., Amend. IX.
Ninth Amendment . . . Suggests that fundamental rights not mentioned in the Constitution can secure constitutional recognition.”

James Madison, who many consider the father of the 1787 Constitution, originally objected to the inclusion of a Bill of Rights because he thought that spelling out certain rights would imply that the people did not retain other rights. As he told the House of Representatives,

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.

One of the problems with originalism is that its proponents tend to forget that the Ninth Amendment exists, or insist that it only applies to rights recognized in 1787. For example, Justice Hugo Black could find no reference to a right of privacy in the Constitution. However, one could certainly argue that the framers of the constitution valued their privacy greatly and would have considered the right to privacy to be “fundamental.” One need only to read the Fourth Amendment, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,” to recognize how important privacy was to those who adopted the Bill of Rights. However, to this day, originalists

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78 Original Meanings, supra note 44 at 322.
argue that the finding in *Griswold v. Connecticut*, that a right of privacy did exist, was wrong and that justices should stick to the rights enumerated in the Constitution.

Justice Arthur Goldberg, in his concurring opinion in *Griswold* stated the argument for unenumerated rights effectively when he wrote, “the Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection [as enumerated rights] or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”

It would have been nearly impossible, and certainly cumbersome, to have included every right that Americans enjoyed in the text of the Constitution. It would also be nearly impossible to follow the cumbersome processes of Article V of the Constitution to amend the Constitution every time a new right is discovered (i.e. the right to be free from electronic eavesdropping – a right that could not have existed in 1787.) As Justice Steven Breyer wrote, “[t]he framers added this language [the Ninth Amendment] to make clear that "rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent dignity.”

As mentioned earlier, originalists have a problem with the concept of unenumerated rights. They argue that unless such a right existed, and could be considered fundamental, at the time of the ratification of the Constitution, it cannot be recognized without an Article V amendment.

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81 Id. at 492 (Goldberg, J., concurring).
THE CASE FOR A LIVING CONSTITUTION

“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.” With these words, Justice William J. Brennan points out the main argument in favor of a living constitution.

David Strauss asks the question, “why should we allow people who lived long ago, in a different world to decide fundamental questions about our government and society today?” Why indeed? Those living in the Eighteenth Century had no concept of the internet, a global society with instantaneous communication throughout the world, the concealable firearm, birth control pills, airplanes used as missiles – or airplanes in general. They could not have imagined a nuclear weapon, or the automobile, not to mention the global mega-corporations of the Twenty-first Century.

A constitution must be capable of modification as the centuries past and societies evolve. “Modification and interpretation are reciprocal; the more difficult it is to modify the instrument formally, the more exigent is flexible interpretation. [Originalists] are aware of the practical impediments to amending the Constitution but [are] unwilling to draw the inference that flexible interpretation is therefore necessary to prevent constitutional obsolescence.”

There are parts of the Constitution that must remain subject only to Article V amendment. Those provisions that are precise and easily understood – as Balkin called them –

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84 Strauss, supra at note 43, at 64-65.
85 Theories, supra at note 43,
text provisions should not and are not subject to judicial interpretation. For example, the requirement that a president be at least thirty-five years of age is a text provision can only be changed by an Article V amendment. That each state is entitled to two senators is a text provision, and this provision also is subject to change only by formal amendment.

There are provisions that establish standards or state general principles. These use working such as “due process of law” or “cruel or unusual punishment.” The provisions are and ought to be subject to change through judicial interpretation. What might have been due process in 1787 is certainly not the same as today. One need only look at the due process involved in a capital conviction today and compare it to a capital conviction then to see how due process has evolved. Today it takes years and even decades to conclude a capital conviction, in the 1780’s the conviction was followed close on by the execution. Certainly, what we today consider cruel and unusual punishment is very different from the punishments available in that distant time. Would originalists have us go back to public flogging and public hangings?

Like originalism, livingconstitutionalism has its sub-categories. For example, David Strauss champions what he calls the “common law approach,” while Steven Breyer advocates a “pragmatic” approach.

Professor Strauss gives four reasons why the common law approach, is superior to originalism as an interpretive theory:

First, it is more workable. Originalist judges, to be true to their philosophy, must be historians as well as judges whereas the common law approach allows them to be judges.

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86 Balkin, supra at note 34.
87 Id.
88 Strauss, supra at note 43, at 64.
89 Breyer, supra at note 52, at 90.
Second, it is more justifiable. As he points out, the past is not necessarily a “storehouse of wisdom, whereas the common law approach uses the accumulated wisdom of generations.

Third, the common law approach is more akin to reality. Originalists hold to the fixation theory that the meaning of a constitutional provision was fixed at the time it was drafted and ratified. Professor Strauss argues that that was not the intention of the framers and that their language was sufficiently vague to allow for interpretation as societal needs and values changed.

Fourth, the common law approach is capable of making judgments about fairness and policy, whereas originalism is not. By building on the decisions of the past, and adapting Constitutional principles to modern times, we are better able to insure

Another non-originalist theory is pragmatism. A pragmatist can be defined as one who considers both precedent and consequences when making a judgment. Unlike originalism, which is supposedly non-results driven, to a pragmatist, results are important and must be considered. One of the leading advocates of pragmatist theory is Supreme Court Justice Steven Breyer. Justice Breyer’s pragmatic approach requires that judges “focus not just on the immediate consequences of a particular decision but also on individual decisions as part of the law, which is to say, as part of a complex system of rules, principles, canons, institutional practices, and understandings.” Pragmatists rely not just on the wording of the text of the Constitution, but also on the intent of the writers as can be determined through studying the history, notes, and purposes behind the provision in question.

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90 Strauss, supra at 64-66.
91 Theories, supra
92 Breyer, supra at 90.
There is also a theory of interpretation known as the natural law theory. That is the theory that higher moral law ought to trump inconsistent positive law.”93 One can see natural law theory at work in such decisions as Brown v. Board of Education or Griswold v. Connecticut.

Whichever non-originalist theory you consider, it will share certain advantages over originalist theory. For example, using a results-oriented approach judges are able to avert crises that might evolve from an inflexible interpretation of an outdated or unfair constitutional provision.94 The Article V amendment process is too cumbersome and time-consuming to be effective in a crisis.

Another advantage is that non-originalism allows our Constitution to evolve as our understanding of such matter as the rights of minorities, women, etc. becomes more sophisticated or enlightened.95

CONCLUSION

Judicial interpretation is comprised of both theory and practice. The most important requirement for a theory of judicial interpretation is that it best preserves the values and principles embodied in the great document itself. In addition, it must be able to allow adjustment to meet the needs and values of current society. Thirdly, it must enhance the rule of law by upholding public respect for the judiciary.

Each generation faces its own unique challenges, technologies, and social values. It often must be able to react to these changes as they occur. Amending the Constitution through the

93 Theories, supra.
94 Id.
95 Id.
Article V process is time-consuming and cumbersome, and it is highly suspect whether we could have had such concepts as integration in schools or one-man, one-vote through the process.

To ensure that all citizens, men and women, white, black, Hispanic or Asian is never deprived of life, liberty or property without due process of the law, and that each is guaranteed that their privileges and immunities will not be infringed, and each receives the equal protection of the law,\textsuperscript{96} we grant to our judges the authority to review Acts of Congress and legislation passed by state legislature to determine their constitutionality.

The framers of the Constitution recognized that legislatures, because they bow to the will of the majority, would occasionally pass laws that infringe on the liberties or rights of minorities. One need only look to the Jim Crow laws of the early twentieth century to see an example of laws relegating a minority to second-class status. Alexander Hamilton realized the when, writing as Publius, he wrote,

\begin{quote}
Limitations of this kind [on the legislature] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.\textsuperscript{97}
\end{quote}

The process of doing away with Jim Crow laws of the South did not begin with legislatures, it was put into motion, in 1938, by a Supreme Court that recognized that the values on which they

\textsuperscript{96} U. S.. Const., Amend. XIV, Sec. 1
\textsuperscript{97} Federalist, supra at note 9, at 350.
were based violated the constitutional rights of blacks.\textsuperscript{98} The Congress did not act on civil rights until nearly thirty year later when it passed the Civil Rights Act of 1964. Without judicial review, and without living constitutionalism, Jim Crow would have continued until then.

The debate between living constitutionalists and originalists over the proper method of interpreting those ambiguous provisions of the Constitution is likely to continue for some time. Already a massive amount of time and paper has been exhausted in defending one or the other and there is no end in sight. However, that being said, if we assume that the purposes of an interpretive theory are those set down at the beginning of this conclusion, then the living constitution theory is preferable.

Flexible living constitutionalism more effectively “promotes the general welfare” than a static originalism because it can recognize what is required, in the current time, to insure such welfare and can adapt constitutional provisions to provide it.

Living constitutionalism can more effectively adjust to changes in society and society’s values because it allows judges to take into account the consequences of their decision. Robert Steven Calabresi argues that originalism can keep pace with changes in society if we read the text with sufficient generality.\textsuperscript{99} For example, if we read the purpose of the Fourteenth Amendment to be racial equality in a general sense, rather than, as the framers and ratifiers of that amendment intended, as more specifically to insure equality between citizens \textit{under the}

\textsuperscript{98} See, for example, Gaines \textit{v. Canada}, 305 U. S. 337 (1938) requiring Missouri to provide an equal but separate law school for blacks, or admit them to the University of Missouri law school. See also, Smith \textit{v. Allwright}, 321 U.S. 649 (1944) outlawing the South’s practice of “white primaries.” See also, Morgan \textit{v. Virginia}, 328 U.S. 373 (1946) outlawing discrimination in interstate commerce. See also, Brown \textit{v. Board of Education}, 347 U.S. 483 (1954) outlawing racial segregation in schools and that “separate but equal” was inherently unequal.

\textsuperscript{99} Originalism, supra at 32.
law. However, this call for varying levels of generality flies in the face of the originalist complaint against living constitutionalism that it gives judges too much flexibility to impose their own values and prejudices when interpreting the Constitution. If a judge has the flexibility to determine the level of generality to attach to a constitutional provision, he can make it mean whatever he wants it to mean based on his own values and prejudices.

Finally, living constitutionalism enhances public respect for the Court. At no time in the Court’s history was its standing higher than it was just prior to the decision in Bush v. Gore, when its originalist majority authored a blatantly political decision that had, despite their argument to the contrary, no connection whatever to the Constitution. To use the “due process” and “equal protection” clauses to overrule a state supreme court ruling on a matter of state law was the type of judicial usurpation of which originalist normally accuse living constitutionalist. Originalists often say that their philosophy insures a more democratic process – “preserving democracy in those areas where the framers intended democratic government.”

What could be less democratic than five justices interfering in a matter that was the province of the state, and overruling the votes of millions of Americans? Justice Scalia, to this day, refuses to justify the decision, simply saying, “get over it!”

The originalist Supreme Court of Chief Justice Roberts went further to undermine the public standing of the Court in 2008, when it turned one hundred years of precedent on its head.

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100 See quotation from Plessy v. Ferguson on pages 23–24. (emphasis added).
101 Strauss, supra at note 4, at 100.
103 Originalism, supra at 17 (quoting Robert Bork’s Speech at the University of San Diego Law School (1985)).
in the again blatantly political ruling in *Citizens United v. FEC*.\(^{105}\) As Justice Stevens noted in his scathing dissent, the Congress, from the time it passed the Tillman Act in 1907, has consistently placed limitations on campaign spending by corporations. He went on to say that “[t]he Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).”\(^{106}\) The originalist majority in *Citizens United* flies in the face of the originalist claim that the Congress is the appropriate place to make and change law, not the Supreme Court. It further gives lie to Professor Lino Graglia’s question; does originalism always provide the answer? His answer “yes – and the answer is almost always “no” – the challenged law is not unconstitutional!”\(^{107}\) Justice Stevens prophesied, “[t]he Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.”\(^{108}\)

Living constitutionalists have no problem being consistent in their philosophy. While they may disagree on whether common law or pragmatism should determine interpretation, they all agree that the Constitution is flexible enough to adjust through interpretation. As you can see from the rulings in *Bush* and *Citizens United*, the same is not true of originalists. As noted previously, Justice Scalia once noted, “I am an originalist, I am not a nut.”\(^{109}\) As David Strauss

\(^{105}\) 130 S. Ct. 876 (2010).

\(^{106}\) Id. at 930. (Stevens, J. dissenting in part, concurring in part).

\(^{107}\) Graglia, *supra* at note 45, at 87.

\(^{108}\) 130 S. Ct. at 931 (Stevens, J. dissenting in part, concurring in part).

\(^{109}\) See page 13.
observes, there is something wrong with a legal philosophy that requires you to be either inconsistent (faint-hearted, if you will) or a nut!\textsuperscript{110}

\textsuperscript{110} Strauss, \textit{supra} at 38.