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REDUCING THE RISE OF POLARIZATION IN THE COURT THROUGH THE BRIDGING OF DOCTRINES: AN ANALYTICAL APPROACH TO CONSTITUTIONAL INTERPRETATION THROUGH QUASI-ORIGINALISM

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Abstract

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By Naji Algaal

This thesis aims to deconstruct the conventional methods of constitutional interpretation—liberal and conservative—with respect to Originalism and Living Constitutionalism to illustrate the parallels and differences within both frameworks' origins and processes.

It is through this philosophical juxtaposition that I will develop an alternative interpretive method. The resources I will be using include the Federalist Papers and cases from the Marshall Court, the Warren Court, Rehnquist Court, and Roberts Court.

I will also be citing interviews and discussions from constitutional scholars and Supreme Court Justices—specifically Justices John Roberts and Elena Kegan—to substantiate my claims and proposed methodology for interpretation. This research seeks to challenge the traditional understandings of constitutional interpretation by offering a fresh perspective that incorporates historical and contemporary proponents of law.

By critically analyzing the existing methods and their limitations, the study aims to provide an interpretive framework that balances the needs and values of American society with the "original public meaning" of the laws—preventing the polarization and politicization of the Supreme Court that grants justices legislative powers.

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Table of Contents

Introduction....2

The Case for Originalism....5

Originalism: Principles of Interpretation....10

The Case for Living Constitutionalism....12

Living Constitutionalism: Dworkin's Principles of Interpretation....15

Living Constitutionalism: Breyer's Principles of Interpretation....27

Originalism v. Living Constitutionalism (Case by Case): Applying Principles....30

1. Roe v. Wade: The Case Facts & Question(s)....31

2. Roe v. Wade: The Majority Opinion....33

3. Roe v. Wade: Rehnquist's Dissent....37

4. Roe v. Wade: Synthesizing the Court's Analysis....41

The Rise in Polarization in the Court....43

Constructing the Middle Ground: Quasi-Originalism....48

1. Justice Roberts's Case for Quasi-Originalism....49

2. Justice Kagan's Case for Quasi-Originalism....51

Conclusion....55

Bibliography....58

Introduction

This paper focuses on the judicial branch and its power to interpret the constitutionality of the law. But why the judicial branch? Unlike the other two branches, the framers of the Constitution spent little time outlining the Supreme Court's role within the American government. It was not until Chief Justice John Marshall, in the landmark case of *Marbury v. Madison* (1803), that the Supreme Court granted for themselves the power to interpret the constitutionality of the laws.[1] It is fascinating to think that the mere ability to interpret the laws, what we all today understand to be the Court's primary role in American society, was first questioned and addressed 14 years after the Constitution first became operational. *Marbury's* decision would forever change the judicial branch's role within government and society, paving the way for what would come to be two distinct Constitutional interpretations–Originalism and Living Constitutionalism. The origins of originalism and living constitutionalism reflect the ongoing debate on how to understand best and apply the Constitution in an ever-changing world. Originalism as an interpretive methodology holds that "the constitutional text ought to be given the original public meaning that it would have had at the time that it became law."[2] On the other hand, living constitutionalists view the Constitution as "one that evolves, changes over time, and adapts to new circumstances, without being formally amended."[3]

While both interpretative frameworks continue to shape legal discourse, influencing judicial decisions and the broader understanding of the nation's foundational legal principles, the

[1] "Marbury v. Madison." Oyez. https://www.oyez.org/cases/1789-1850/5us137.
[2] Calabresi, Steven G. "On Originalism in Constitutional Interpretation." On Originalism in Constitutional Interpretation. https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation.
[3] David A. Strauss, "The Living Constitution," University of Chicago Law School, September 27, 2010, https://www.law.uchicago.edu/news/living-constitution.

Supreme Court–and the American public–has never reached a point of polarization and politicization as it is today. A Pew Research poll found that over 54% of Americans in 2023 have an unfavorable view of the Court, while only 17% of Americans expressed the same sentiment in 1987.[4] This rise in polarization and politicization of the Court is, in essence, the issue underlying the proposed arguments in this paper because if said issue remains unaddressed, the Court's ability to engage and participate within the American political system as the arbiter of laws becomes threatened, impacting the system as a whole. To address this issue, we must try to pinpoint its origins.

The cause(s) of the rise in polarization in the Court is twofold: the justices themselves and the fundamental misunderstanding of the Constitution's purpose. The first cause is the Court itself handling matters of constitutional interpretation in a black-and-white manner, meaning a justice should only use either originalism or living constitutionalism. Take a look at today's Court and the politicization of the judicial nomination process. Elected officials on both sides promise their constituents they will nominate a "good" originalist judge who will protect life or a "good" liberal judge who will fight for women's reproductive rights. With the conservative justices outnumbering their liberal counterparts 6-3, many try to predict the outcomes of most cases that go before the Court. In the past, justices were not afraid to act as consensus builders to reduce biases as a way to establish a balance of power. Former Justices Anthony Kennedy and John Paul Stevens were nominated by conservative presidents, yet Kennedy ruled moderately while Stevens became a whole-heart liberal. Chief Justice John Roberts has been known to rule moderately at times to help balance the Court. Other Justices could care less about an imbalance

[4] Katy Lin and Carroll Doherty, "Favorable Views of Supreme Court Fall to Historic Low," Pew Research Center, July 21, 2023, https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/.

of power in terms of ideologies and such an outlook naturally creates division, which reduces the Court's long-standing tradition of consensus building, dangerously mimics the legislative and executive branches' two-party status quo, and fails to account for the gray-area within law. The second cause of the Court's rise in polarization and politicization stems from the American public's crucial misunderstanding of the Constitution's primary purpose: establishing and maintaining the structure of government as outlined in the separation of powers doctrine. In other words, many people view the Constitution as nothing more than a list of laws but fail to recognize that before said laws, the Constitution dictates a complex system of government needed to create, enforce, and interpret these laws. This is essential to understanding the role of the Supreme Court and reducing polarization as both Democrats and Republicans misuse the Court for political reasons, expanding the Court's role beyond its constitutional purpose of adjudication, and unknowingly infringing upon the rights of all members in society.

Thus, this paper aims to address the two causes of the rise in polarization and politicization in the Supreme Court by deconstructing the conventional methods of constitutional interpretation—originalism and living constitutionalism—to illustrate the parallels and differences within both frameworks' origins and processes. It is through this philosophical juxtaposition that I will develop and propose an alternative interpretive methodology, Quasi-Originalism, that challenges the traditional understandings of constitutional interpretation by offering a fresh perspective that incorporates historical and contemporary proponents of law and balances evolving societal needs with the "original public meaning" of the laws in order to reduce the polarization and politicization of the Supreme Court. Quasi-Originalism encourages the Court's justices to view the gray-area within the law, allowing for consensus building and the

balancing of power within the Court itself when addressing complex legal questions while also reaffirming the Court's constitutional role within the American political system so as not to be abused or misused by the legislature or executive.

First, I will make the case for both originalism and living constitutionalism as interpretive methodologies, exploring their fundamental principles and mechanics of interpretation by some of each method's most popular legal scholars. Then, we will examine originalism and living constitutionalism in relation to polarization by applying their critical principles to *Roe v. Wade (1973)*. This exercise goes beyond a simple case summary, as it would allow one to place oneself in the mind of the justices examining *Roe*, thus thoroughly employing and deconstructing originalism and living constitutionalism. Using *Roe's* analysis as context, we will explore the issue of polarization and politicization more deeply–looking for how its causes threaten the Supreme Court's role within the separation of powers doctrine. I will argue that this polarization stems from the Court's lack of consensus-building and compromise, leading to binary interpretative methods at the extremes and the people's fundamental misunderstanding of the Constitution's structure and purpose–demonstrated by the politicization of the judicial nomination process. Ultimately, it is through the introduction of Quasi-Originalism, an alternative interpretive approach, that this paper seeks to offer a resolution that acknowledges the Constitution's historical context while addressing contemporary societal needs under the guidelines of consensus-building and compromise to restore the judiciary's impartiality and reduce the polarization and politicization of the Court.

The Case for Originalism

Originalism as an interpretative methodology traces its roots to the late 20th century and gained prominence as a reaction against what some perceived as judicial activism during the Warren Court (1953-1969). Judicial activism can be defined as "the practice of judges making rulings based on their policy views rather than their honest interpretation of the current law… exceed[ing] the proper exercise of judicial authority."[5] The modern originalist movement is influenced by conservative legal scholars such as Robert Bork and the late Supreme Court Justice Antonin Scalia. Bork and Scalia's writings contributed significantly to the development of originalist jurisprudence, asserting that justices should interpret the laws according to their original meaning at the time of their adoption. Originalists contend that the Framers' intent and the text's original public meaning are paramount in understanding and applying constitutional provisions. Here, the function of "public" in this context refers to the words used by Congress–a public domain–as opposed to disputed non-public words, which one can think of as colloquial or more everyday language. Thus, the originalist approach often relies on historical documents, such as the Federalist Papers and the constitutional convention debates, to better understand original intent. Thus, Scalia's opposition to judicial activism is evident in his dissent in *Obergefell v. Hodges* (2015), a landmark case that prohibited the discrimination of same-sex couple marriages. He writes, "This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' 'reasoned judgment.' A

[5] "Judicial Activism," Legal Information Institute, accessed March 14, 2024, https://www.law.cornell.edu/wex/judicial_activism#:~:text=Primary%20tabs,interpretation%20of%20the%20current%20law.

system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[6] Here, Scalia accuses liberal justices of acting beyond their legal capacity within the Court by what he considers enacting legislation, and thus, directly interfering with the core structure of government and the separation of powers outlined in the Constitution. Scalia views his liberal counterparts as fundamentally violating the core tenets of the Constitution because allowing policy questions concerning the Constitution to be "resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[7]

Now for a thorough breakdown of originalism and its key components, Scalia and legal scholar Bryan A. Garner, in their text, *Reading Law: The Interpretation of Legal Texts*, provide a comprehensive guide to principles of legal interpretation, emphasizing the importance and demonstrating the application of textualism and originalism in legal texts. The authors waste no time in outlining the basic process of adjudication, writing, "The text's author, not the interpreter, gets to choose how the language will be understood and applied. The court's job is to carry out the legislative project, not to change it in conformity with the judge's view of sound policy."[8] Here, the "text's author" refers to the legislature or the body of people creating the law, and thus, Scalia and Garner reserve the right of defining the law to said authors. The latter part of the quote pertaining to the Court's job to "carry out the legislative project"; however, to "carry out" is not clear at face value. Some might argue that "carry out" coincides with enforcement, which

[6] Obergefell v. Hodges, 576 U.S. 644 (2015)
[7] Obergefell (2015)
[8] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2012), 18.

interferes with the executive's role, or if the legislature defines the law's meaning and purpose, why is there a need for a judicial branch to begin with? The authors clarify the Court's role, stating, "the more the interpretive process strays outside a law's text, the greater the interpreter's discretion…but the real problem lies in a transfer of authority from elected officials to those with life tenure. The legislature acts first, the executive branch second, and the judiciary third. If the final decision-maker exercises significant discretion, then it rather than the legislature (or the executive) is the real author of policy."[9] Scalia and Garner note the boundaries for the Court to "carry out" the law as the interpretive process should not stray beyond a law's text. When interpreters rely more on sources outside the enacted text, their discretion–political power–increases. Scalia and Garner oppose this increase in discretionary power for the Court because unlike the legislature and executive, justices are granted life-tenure. Thus, a judiciary with unelected life-tenured judges with a pattern of expanding their interpretive discretion is by nature undemocratic as it undermines the roles of the legislative–ergo, the American voter–and executive branches that are meant to act in balance with one another. So, what is interpretation?

Scalia and Garner address this question behind interpretation, writing, "Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules…and misuse of these rules by a crafty or willful judge then can be exposed as an abuse of power."[10] Through these rules, a judge can fulfill their role of carrying out the legislature's text. Among these rules include the life-tenured judge's need to employ restraint because "[t]enure is designed to insulate the judge from popular will, so that the judge will be more faithful to a text that may have been adopted by a political

[9] Scalia & Garner, 19
[10] Scalia & Garner, 19

coalition that is now out of favor."[11] It is vital to reaffirm Scalia and Garner's acknowledgment of interpretation being a "human enterprise" dealing with difficult questions that many cannot systematically or mathematically handle. Take, for instance, textualism, which is similar to originalism in the sense that the wording of the text binds textualists, but unlike originalists, textualists do not factor in the author's original intent, historical understanding, or purpose for the law. Textualists can argue for a liberal or conservative outcome. Scalia and Garner argue that textualists are bound to disagree, even in a hypothetical all-textualist court, because "[w]ords don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words. The older the text, the more distant that interpretive community from our own."[12] In other words, without a proper understanding of context vis-a-vis original intent, defining the law and determining the constitutionality of a law over time proves even more challenging.

Take, for instance, the Cruel and Unusual Punishments Clause of the Eighth Amendment, as the authors explain. What exactly constitutes cruel and unusual to a textualist who avoids considering original intent or historical understanding and only looks at the text for an answer? On the other hand, an originalist like Scalia can determine the definition of cruel and unusual by referring to resources like the original understanding of the Amendment's makers that do not force him to rule beyond the scope of the law. Despite the authors' confidence in originalism being the answer to the dilemma of interpretations, Scalia and Garner reaffirm the difficulty in interpreting laws, and thus, offer three options to use when original intent becomes too uncertain. They write, "[A] court must choose from among three options: (1) it can give that text a new

[11] Scalia & Garner, 19
[12] Scalia & Garner, 14

meaning; (2) it can attempt a historical reconstruction; or (3) it can declare that meaning has been lost, so that the living political community must choose."[13] The first option is in line with the Living Constitutionalism doctrine, in which justices rule via a pragmatist paradigm to discover meaning for a law.[14] The second option applies to cases with different historical understandings of the law that allow for ambiguity. Such as the *D.C. v. Heller (2009)* Second Amendment case where "all nine Justices tried to understand the original meaning of a text that concerned a form of organization (the 18th-century militia) alien to the modern interpretive community…"[15] The third and final option, and most preferable to originalists, is for the Court to admit their lack of understanding, leaving the matter for the legislature to fix. The third option demonstrates judicial restraint and removes the burden on originalists by not forcing them to decide every challenging case, which increases the democratic process by returning the matter to "a vote among elected representatives who can be thrown out if their choices prove to be unpopular."[16]

Originalism: Principles of Interpretation

Before indulging in the originalist application's mechanics or principles, Scalia and Garner begin with prefatory remarks on law. They argue that law or "legal instruments that are the subject of interpretation," whether it is the Constitution, ordinances, or statutes, are not put together or created mindlessly. Instead, they refer to such instruments as "intelligent expressions"

[13] Scalia & Garner, 21
[14] I define "pragmatism" as Justice Stephen Breyer's concept of "Active Liberty" which will be explained further in the paper, but as a brief definition, pragmatism here can be defined as an expansive view of interpretation that considers the text's purpose–concerning the Constitution's objectives in terms of democracy–and its practical application in terms of consequences in today's evolving society.
[15] Scalia & Garner, 21
[16] Scalia & Garner, 21

free from grammatical errors, contradictions, and redundancy that act as obstacles to understanding, thus allowing for soundness. With that in mind, Scalia and Garner outline several fundamental principles of interpretation with respect to originalism.

The first is the "Interpretation Principle" which holds that "[e]very application of a text to particular circumstances entails interpretation."[17] Here, the application of a law renders it interpreted, and even if a text is clearly understood, the understanding of said text is an implied interpretation. Scalia and Garner refer to interpretation and construction interchangeably, writing, "Interpretation or construction is 'the ascertainment of the thought or meaning of the author of, or of the parties to, a legal document, as expressed therein, according to the rules of language and subject to the rules of law…'"[18] Thus, when a judge makes an implicit interpretation it is their job to make that interpretation express. The authors demonstrate this process using Frederick Pollock's paradigm: first read the major premise, then find facts to determine the minor premise, and from that, one can reach a conclusion.[19]

The second fundamental principle is "Supremacy-of-Text" which holds that "the words of a governing text are of paramount concern, and what they convey, in their context is what the text means."[20] This principle further addresses the importance of being bound by the scope of the text in question. While the authors note that judges should refrain from operating outside the borders of the text, they emphasize the necessity of context because "words are given meaning by their context, and context includes the purpose of the text."[21] However, this context, in

[17] Scalia & Garner, 64
[18] Scalia & Garner, 64
[19] Scalia & Garner, 64
[20] Scalia & Garner, 66
[21] Scalia & Garner, 66

addition to purpose, intent, and meaning, remains within the scope of the law and can be defined accurately and concretely. One cannot simply add context to the text as a supplement. The philosophy behind the "Supremacy-of-Text" conveys a crucial ideal: "[T]he limitations of a text—what a text chooses not to do—are as much a part of its 'purpose' as its affirmative dispositions."[22] Here, the authors, in essence, accuse living constitutionalists of failing to "leave some matters uncovered" by using substantive due process to create meaning in their interpretations. Substantive due process as a constitutional concept is the idea that some rights are so great and innate–like the right to privacy–that their existence is implied within the Constitution.[23]

The Case for Living Constitutionalism

American legal scholar, Paul Freund, once said, "The Court should never be influenced by the weather of the day, but…by the climate of the era."[24] Using "climate," and "era" as metaphors to illustrate an unconventional–non-originalist–approach to interpreting law that accounts for broader societal needs and context beyond textual boundaries. Freund's quote, in essence, serves as an underlying representation of the living constitutionalist theory. In contrast

[22] Scalia & Garner, 67

[23] Additional key principles of originalism emphasize the importance of contextual and effective analysis through canons of construction, presumptions against ineffectiveness and for validity, and the adoption of ordinary and fixed-meaning canons–arguing for an interpretation of texts by balancing various interpretive principles, considering the purpose and effectiveness of laws, and adhering to the original meanings of words to maintain integrity and intention behind laws. (Scalia & Garner, 68)

[24] Marcia Coyle, "The Supreme Court and the 'Climate of the Era,'" National Constitution Center – constitutioncenter.org, June 29, 2020, https://constitutioncenter.org/blog/the-supreme-court-and-the-climate-of-the-era.

to originalism, living constitutionalism engages with constitutional questions in a manner that considers and responds to the evolving nature of society. This approach challenges the notion of a static and unchanging Constitution. Drawing inspiration from the legal realist movement–which held that judicial decisions are influenced by social, economic, and political factors, rather than purely legal reasoning–living constitutionalism became popular as a methodology during the Warren Court's era of civil liberties which paved the way for societal progression for disenfranchised communities. Living constitutionalism asserts that the Constitution is a living entity capable of adapting to the challenges and values of modern times. This interpretative method reflects a more liberal and context-sensitive understanding of constitutional principles by taking into consideration the historical wrongs that were present during the creation of these principles. Living constitutionalists, like originalists, view the Court's role is to be an interpreter of laws. While originalists stop there, living constitutionalists believe their role as legal arbiters is to act in the pursuit of justice–employing morality–by not ignoring the historical wrongs that underlie and govern the Constitution and, thus, viewing the law holistically.

American legal theorist and philosoher of law, Lawrence Solum, explores the origins of originalism and living constitutionalism from their legal function to their "assigned" titles. In his journal article, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, Solum explains how the term "Living Constitution" was used by Representative Hugh Legaré on the House Floor in 1837, stating, "'[T]he very first pilgrim that set his foot upon the rock of Plymouth, stepped forth a LIVING CONSTITUTION! armed at all points to defend

and to perpetuate the liberty to which he had devoted his whole being…'"[25] Here, Legaré refers to the Constitution as a living document for the purpose of defending and perpetuating liberty. In essence, defending and perpetuating liberty can be viewed as the purpose and function of the judiciary through their power of interpretation, and thus, here one can see the importance of morality and justice for living constitutionalists.

Unlike originalism, living constitutionalism can take slightly different forms as there is not an organized and universal method that is equipped by everyone that falls under the banner of a living constitutionalist. Solum addresses the issue of defining living constitutionalism and refers to Professor Adam Winkler's quote concerning the issue. Winkler states, "The pattern—critiquing originalism, insisting that the interpretation of the constitutional text evolve to meet changed conditions in society, and pursuing reform through litigation strategies that made evolution central to judicial reasoning—has come to define modern living constitutionalism."[26] There are two key takeaways from Professor Winkler's definition of living constitutionalism. The first is that living constitutionalism is inherently a direct critique of originalism, and thus, the originalist principles, in part, define living constitutionalism as the anti-originalist theory. In other words, originalism insists that the interpretation of the Constitution does not evolve to account for changing conditions in society, and thus, living constitutionalism does. While it may initially appear self-evident, this argument posits a fundamental incompatibility between originalism and living constitutionalism as interpretative frameworks. However, I will rigorously challenge this notion by advocating for a quasi-originalist approach–bridging the perceived gap and demonstrating a synergistic potential

[25] Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate," The Scholarly Commons, 2019, https://scholarship.law.georgetown.edu/facpub/2230/, 1255.
[26] Solum, 1259

between these two methodologies. The second key takeaway conveys the purpose of living constitutionalism–considering an evolving constitution–is for the pursuit of legal reformation. Here, Solum further emphasizes the role pursuing justice plays for living constitutionalists as a justification for their interpretative methodology.

Moreover, Solum breaks down two features of living constitutionalism that help with its official definition. The first is the positive feature, which holds that "[a] theory is a form of "living constitutionalism" only if it accepts the proposition that constitutional practice can and should change in response to changing circumstances and values."[27] The positive feature reflects the dynamic nature of living constitutionalism, where the interpretation and application of the constitution are not static but can adapt over time. The second is the negative feature: "A theory is a form of 'living constitutionalism' only if it rejects one of the two unifying ideas of originalism, the "Fixation Thesis" and the "Constraint Principle," and adopts an understanding of the nature of original meaning that is sufficiently thick to provide meaningful constraint."[28] Here, Solum suggests that the nature of original meaning should be thick in the form of underdeterminacy. Thickness in relation to "underdeterminacy" describes a balanced approach within living constitutionalism, contrasting with originalism's fixed meanings. Thickness refers to the degree of detail present in the understanding of a constitutional text's original meaning, allowing for some interpretive flexibility while ensuring there are still clear constraints to prevent arbitrary judicial decisions. Overall, Solum's positive feature embraces evolution while the negative feature rejects one (or both) of originalism's unifying ideas–judicial constraint–while adopting an understanding of the nature of original meaning that provides

[27] Solum, 1276
[28] Solum, 1276

meaningful constraint and allows for moderate or minimal flexibility in interpretation. Therefore, for the purpose of this paper, living constitutionalism can be defined as the combination of both features: viewing the constitution as a dynamic and evolving document that is capable of adapting to changing circumstances over time, and rejecting originilism's principles of fixation and constraint while adopting an understanding of the nature of original meaning that provides meaningful constraint and underdeterminacy. I will provide an account of the principles of living constitutionalism by turning to the writings of legal philosopher Ronald Dworkin and Justice Stephen Breyer.

Living Constitutionalism: Dworkin's Principles of Interpretation

American legal scholar Ronald Dworkin examines living constitutionalism as an interpretive theory in his works *Law's Empire* and *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*. To be clear, Dworkin is not a self-ascribed living constitutionalist, and thus, I recognize that his position in the literature is highly contested. Some view Dworkin as a middle ground between originalism and living constitutionalism, similar to how Dworkin bridges the gap between Natural Law theory and Legal Positivism vis-a-vis "law as integrity".[29] While acknowledging this opinion, I argue that Dworkin's methodology for constitutional interpretation falls under the banner of living constitutionalism as he shares similar beliefs to that of actual living constitutionalists like Justices Ruth Bader Ginsburg and Stephen Breyer. This is evident in

[29] See Pg. 26 for a more thorough explanation of Dworkin's "Law as Integrity".

Dorkin's philosophy for adjudication where he portrays a judge's process for interpreting law as an author finishing the end of a written novel–forward looking.[30]

As a legal theorist, Dworkin argues for a moral reading of law that does more than just discovering the meaning of law, but in some cases, creates–develops–meaning for the purpose of furthering the adjudicative process. In *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, Dworkin begins by criticizing the late Conservative Senator, Robert Dole, who claimed that justices should be "free from the constraint of a moral interpretation of the Constitution" for the sake of "keeping faith with [what] the document means."[31] As a conservative, Dole displays his support for originalist judges and expresses his opposition to those who fall under the living constitutionalist banner by employing a moral reading of the Constitution. In opposing Dole's perspective, Dworkin attempts to expose what he refers to as this paradox "that the people Dole had in mind as the good judges were the ones for whom fidelity to the Constitution actually accounts for little. And those whom he would count as the bad judges are…the true heroes of fidelity."[32] Here, Dworkin emphasizes the term "fidelity" which will prove fruitful in understanding his arguments for living constitutionalism–and not just because fidelity is in the title. Merriam-Webster defines fidelity as the quality or state of being faithful or loyal.[33] Given this definition of fidelity, Dworkin accuses Dole's vision of judicial interpretation–strict constructionism or originalism–as least loyal to the Constitution compared to living constitutionalists. If this seems like a bold and ironic claim, that is because it is. A

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[30] Dworkin, Ronald M. "Integrity in Law." *Law's Empire*, Harvard University Press, Cambridge, MA, 1990, 225.
[31] Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," V65 I4, Fordham Law Review, 1997, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3328&context=flr, 1249.
[32] Dworkin, 1249
[33] "Fidelity Definition & Meaning," Merriam-Webster, accessed March 14, 2024, https://www.merriam-webster.com/dictionary/fidelity#:~:text=Legal%20Definition-,fidelity,a%20spouse's%20reasonable%20sexual%20desires.

question that immediately comes to mind is how can originalists–those who aim to stay within the textual and contextual boundaries vis-a-vis original intent of the Constitution–be less loyal or faithful to the Constitution than their liberal counterparts?

Fidelity to the Constitution generally implies a commitment to interpreting and applying it in a manner that is true to its underlying principles and values. But Dworkin creates a distinction between "fidelity to the Constitution's text and fidelity to past constitutional practice, including past judicial decisions interpreting and applying the Constitution."[34] One can think of fidelity to the Constitution's text as the idea of constraining a Judge's interpretation to the boundaries of the text, but with a twist–the use of constitutional integrity. To better understand how Dworkin's two types of constitutional fidelities work and what he means by Constitutional Integrity, he illustrates a simplified breakdown of constitutional interpretation. He writes, "Proper constitutional interpretation takes both text and past practice as its object: Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution, an interpretation that both unifies these distinct sources…and directs future adjudication."[35] Here, Dworkin holds both constitutional fidelities–text and past practice–necessary for a proper constitutional interpretation. In doing so, Dworkin demonstrates that the act of interpreting requires a judge to look beyond the literal confines of the text and into the realms of history and tradition, allowing the judge to view "the Constitution as a whole" for the sake of future adjudication. Directing future adjudication is an essential purpose of living constitutionalism and the purpose of the

[34] Dworkin, 1249
[35] Dworkin, 1249-1250

judiciary's role as an arbiter of the law. Where does constitutional integrity come into play? Dworkin's perspective is unique in that having a judge employ a holistic approach to interpretation–looking into the past, present, and future of the law–allows judges to seek constitutional integrity, which he deems to be necessary because "fidelity to the Constitution's text does not exhaust constitutional interpretation…"[36] Without constitutional integrity, interpretations–no matter the fidelity to the text–can be incomplete or improper, as "on some occasions overall constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation of the constitutional text…"[37]

To clarify, Dworkin is not suggesting that living constitutionalists turn away from the text for a holistic approach; he views "textual interpretation'… (as) an essential part of any broader program of constitutional interpretation, because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument."[38] Dworkin's use of "ingredient" as a metaphor to describe textual interpretation's overall role in interpreting a case further demonstrates a non-traditional and holistic reading of the Constitution that relies on multiple sources. Living constitutionalism, according to Dworkin, employs textual fidelity. He writes, "[i]ndeed, textual fidelity argues so strongly in favor of a broad judicial responsibility to hold legislation to direct moral standards…"[39] Dworkin's emphasis on the judiciary's use of moral standards stems from the need to hold the legislature accountable, and thus, a way in which the judiciary acts as a check and balance upon the legislature. This is interesting because the separation of powers doctrine's purpose is to establish

[36] Dworkin, 1250
[37] Dworkin, 1250
[38] Dworkin, 1250
[39] Dworkin, 1249

and maintain a system of checks and balances. While originalists practice judicial restraint to not hinder the separation of powers doctrine, living constitutionalists like Dworkin argue that expanding the Court's interpretive discretion by viewing the Constitution as a whole can help further the purpose behind the separation of powers doctrine, and thus, living constitutionalists account for fidelity to the Constitution more than their originalist counterparts.

To better justify his claims for fidelity to the Constitution's text, Dworkin exposes the level of sophistication embedded within the Constitution itself, which his conservative counterparts dismiss. He writes, "But, of course, identifying a canonical series of letters and spaces is only the beginning of interpretation. For there remains the problem of what any particular portion of that series means."[40] He provides examples to demonstrate this sophistication in terms of meaning. For instance, the Constitution mentions that an American citizen must be at least 35 years old to run for president, but does this mean 35 years in terms of chronological age or mental and emotional maturity? Dworkin continues by referencing the long-debated meaning of "cruel and unusual" punishments in the Eighth Amendment. What precisely constitutes "cruel and unusual"? Why does the Constitution–its framers–not specify punishments that are "cruel and unusual" for future generations to come? Could it have been purposeful to account for societal changes or did they think that there would be no dispute in how people understood what the words meant at the time? According to Dworkin, these are the questions that inevitably force judges to look beyond the text for answers, and originalists are no

[40] Dworkin, 1251

different despite their stated intentions.[41] Thus, how should one go about interpreting the Constitution from a living constitutionalist perspective and according to Dworkin?

One would begin with a method of interpretation he calls "constructive interpretation".[42] Which is to begin by "asking what–on the best evidence available--the authors of the text in question intended to say…It does not mean peeking inside the skulls of people dead for centuries. It means trying to make the best sense we can of an historical event…"[43] Beginning with "constructive interpretation" answers the first question Dworkin raises concerning the Constitution's minimum age requirement of 35 years for President. The best evidence available reasonably shows that the framers' meant literal age, and not some metaphorical reference for maturity, which one cannot measure objectively. Here, Originliast would agree with Dworkin. However, constructive interpretation alone is not sufficient to address the second question regarding the meaning of "cruel and unusual" in the Eighth Amendment because the word "cruel" does not infer a question of policy or simple procedure like the first question. Instead, the words "cruel and unusual" imply an inherent judgment or moral reading which forces an interpreter into two possible categories of understanding: abstract or outdated. Abstract refers to the use of a moral and pragmatist reading of the Constitution and outdated is similar to that of the originalist–text bounding–framework. Dworkin writes, "If the correct interpretation is the abstract one, then judges attempting to keep faith with the text today must sometimes ask themselves whether punishments the Framers would not themselves have considered cruel…nevertheless are cruel…If the correct interpretation is the dated one…these questions would be out of place…because the only questions a dated understanding would pose is the

[41] Dworkin, 1251
[42] Dworkin, 1252
[43] Dworkin, 1252

question of what the Framers or their audience thought."[44] He poses an interesting point with respect to the use of a dated understanding of the Constitution: how can judges employ a dated understanding of the Constitution to address a question or an issue pertaining to the modern world?

Take for instance the case of *Kyllo v. United States* (2001), where federal agents without a warrant used thermal imaging devices to scan the outside of Danny Kyllo's house and found that he was growing marijuana, which is prohibited under federal law.[45] The Supreme Court had to decide whether the federal agents' use of technological devices violated Kyllo's rights against "unlawful searches and seizures" under the Fourth Amendment. The federal agents argued that their use of high technology did not constitute a search and seizure, as this would have been no different than if a police officer was walking by Kyllo's car with no intention to search but saw marijuana through the window in plain sight. The Court, on the other hand, sided with Kyllo, ruling the federal agents' actions as unconstitutional. In fact, Justice Scalia wrote in his majority opinion, "To withdraw protection of [the minimal expectation of privacy that exists] would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment…obtaining by sense-enhancing technology any information regarding the interior of the home that could not have otherwise been obtained without physical intrusion . . . constitutes a search."[46] Scalia's use of Originalism in this case is criticized by fellow pragmatist Justice John Paul Stevens, who in his dissent, questioned the conservative majority's conclusion as a temporary departure from Originalism. Justice Stevens writes, "...[the Court] has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is

[44] Dworkin, 1253
[45] "Kyllo v. United States." Oyez. June 11, 2001. https://www.oyez.org/cases/2000/99-8508.
[46] Kyllo v. United States, 533 U.S. 27 (2001)

actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints."[47] Here, Justice Stevens criticizes the conservative justices for employing judicial activism by enacting forward-looking tactics to limit the federal government's actions under the Fourth Amendment. Stevens believes that Scalia and his fellow conservative justices failed to use Originalism in this case because its very nature would force the justices to leave the question underlying *Kyllo* for the legislature to address because the original public meaning of the "search and seizures" clause of the Fourth Amendment could not have possibly taken to account the use of modern high-grade police technology. Now, you might be thinking: where am I going with this and how does this relate to Dworkin?

Remember Dworkin's bold claim where he refers to strict constructionists or originalists as least loyal to the Constitution when compared to living constitutionalists. There, I asked how can originalists–those who aim to stay within the textual and contextual boundaries vis-a-vis original intent of the Constitution–be less loyal or faithful to the Constitution than their liberal counterparts? Justice Stevens' criticism of the conservative justices majority opinion in *Kyllo v. United States* (2001) demonstrates Dworkin's point on fidelity to the Constitution, and thus, serves as a segway into Dworkin's argument for why "[i]f we are trying to make best sense of the Framers speaking as they did in the context in which they spoke, we should conclude that they intended to lay down abstract not dated commands and prohibitions."[48] Dworkin criticizes Originalism for beginning with the assumption that the framers intended for their original

[47] Kyllo, (2001)
[48] Dworkin, 1253

meaning of the words to remain unchanged because said framers in the Constitution employed abstract principles "not coded references to their own opinions…"[49] In doing so, Dworkin legitimizes living constitutionalism as an interpretive methodology necessary to address difficult cases dealing with contemporary issues that Originalism fails to address. Dworkin writes, "It is a fallacy to infer, from the fact that the semantic intentions of historical statesmen inevitably fix what the document they made says, that keeping faith with what they said means enforcing the document as they hoped or expected or assumed it would be enforced."[50] Living constitutionalism takes the additional step beyond semantic intentions, and thus, keeping faith with the constitution–fidelity–and employing legal integrity. To better understand the mechanics behind living constitutionalism, Dworkin proposes three core principles as possible reasons to "trump" fidelity before objecting to them as well, because without these three principles, there would be no fidelity to the Constitution. Likewise, remaining faithful to these three principles strengthens one's fidelity to the Constitution.

The first principle, according to Dworkin, is justice. Living constitutionalists view justice as a core tenet to the judiciary's role as an arbiter of the laws. Unlike originalists, living constitutionalists cannot ignore the impact of their rulings on difficult cases concerning social issues for the sake of remaining "loyal" to the Constitution's text. Dworkin writes, "For the supposed problem we have identified is not that fidelity requires judges to uphold laws they think immoral. It is close to the opposite: that since the Constitution contains abstract moral principles, fidelity gives judges too much leeway to condemn laws that seem unjust to them though they have been endorsed by a properly elected legislature."[51] Take for instance the 14th

[49] Dworkin, 1253
[50] Dworkin, 1255
[51] Dworkin, 1263

Amendment's equal protection clause, which holds that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…nor deny to any person within its jurisdiction the equal protection of the laws."[52] This misuse of constitutional fidelity by the Court is evident throughout the judiciary's history. A properly elected legislature, after the end of The Civil War passed the 13th, 14th, and 15th Amendments which prohibited slavery, established equal protections, and ensured the fundamental right to vote, respectively. How can it then be that 30 years after the 14th Amendment's ratification, the Supreme Court defines "equal protection of the laws" to mean separate but equal in *Plessy v. Fergurson* (1896)?[53] Plessy's decision acted unfaithfully with the 14th Amendment's meaning and purpose for the sake of maintaining political peace with the southern Jim Crow states. Thus, it is essential, as was in *Brown v. Board* (1954) for the Warren Court, for justices to account for justice as a core principle in their interpretations to right the Court's previous wrongs, and thus, remaining faithful to the Constitution.[54]

Dworkin's second core principle that comes before fidelity with respect to constitutional interpretation is democracy itself. He distinguishes democracy into two types: the "majoritarian" and self-governance. The majoritarian is the traditional view of democracy in that "all issues of principle must be decided by majority vote…"[55] We will revisit majoritarian democracy later as this is where Dworkin and Scalia fundamentally differ with respect to the basis of the Constitution and American exceptionalism. Dworkin emphasizes the latter form of democracy, which "means self-government by all of the people acting together, as members of a cooperative

[52] "14th Amendment to the U.S. Constitution: Civil Rights (1868)," National Archives & Records Administration, https://www.archives.gov/milestone-documents/14th-amendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.
[53] "Plessy v. Ferguson." Oyez, https://www.oyez.org/cases/1850-1900/163us537.
[54] "Brown v. Board of Education of Topeka (1)." Oyez. https://www.oyez.org/cases/1940-1955/347us483.
[55] Dworkin, 1263

joint venture, with equal standing."[56] Here, the author emphasizes equal membership as a necessary condition for this cooperative self-governance, which is essentially the way in which majority rule becomes truly democratic. But even equal membership consists of "certain prior conditions" that must be "met and sustained" for a proper Democracy. The first references the First Amendment "all citizens are given an opportunity to play an equal part in political life…an equal voice both in formal…and in informal moral exchanges."[57] The second condition holds that people, as individuals, are entitled to an "equal stake in the government," which references the Equal Protection Clause of the 14th Amendment. Dworkin goes on to reference "the First Amendment's guarantee of religious freedom, and also the due process clause" as both necessary conditions for a true democracy. Dworkin explains the importance of these conditions for the self-governance, cooperative joint venture, form of democracy with respect to majority rule when he writes, "majority rule isn't even legitimate, let alone democratic, unless these conditions are at least substantially met."[58]

The final core principle–setting aside fidelity–paves the way for understanding Living constitutionalism as interpretative methodology: legal pragmatism. Dworkin defines legal pragmatism as an interpretive methodology that "argues that judicial decisions should be small, careful, experimental ones."[59] Components of legal pragmatism–not necessarily how Dworkin defines it–falls under the banner of living constitutionalism, specifically as a liberal methodology that examines the practical use of arbitration, allowing for a holistic reading of law that pushes the Court in tandem with societal progression. This type of legal pragmatism is one that employs

[56] Dworkin, 1263-1264
[57] Dworkin, 1264
[58] Dworkin, 1264
[59] Dworkin, 1265

multiple sources, in addition to the text, to arrive at the best interpretation for the question at hand. Dworkin demonstrates the purpose behind pragmatism's holistic approach when he writes, "Up to a point, that pragmatist voice…reminds us that it is well to be as informed as possible, and to have an eye to consequences, when doing or deciding anything."[60] With that said, legal pragmatism allows a living constitutionalist to address straight-forward questions like that of policy or tax codes. However, when it comes to rather difficult questions that are non-calculative, pertaining to civil liberties and injustice, legal pragmatism by itself is not sufficient for a living constitutionalist to address.

It is for this reason that Dworkin objects to the use of pragmatism in his text, *Law's Empire*, noting how pragmatism fails to ensure any form of stability and legal protections, and thus, in dismissing important past-processes like precedent, pragmatism, "holds that people are never entitled to anything but the judicial decision that is…best for the community as a whole..."[61] Instead, Dworkin proposes a reading of law he calls "law as integrity". Dworkin's law as integrity "denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism," and thus, he argues for the incorporation of both mechanisms for interpreting "contemporary legal practice…as an unfolding political narrative."[62] Moreover, Dworkin's law as integrity, as a framework for interpreting law, includes both an adjudicative principle and creativity. The adjudicative principle emphasizes justice and due process while creativity encourages a reading of law that consists of a moral and politically-considerate narrative. Dworkin uses the adjudication principle to demonstrate law as integrity's effectiveness in balancing between

[60] Dworkin, 1266
[61] Dworkin, Ronald M. "Integrity in Law." *Law's Empire*, Harvard University Press, Cambridge, MA, 1990, 147.
[62] Dworkin, *Law's Empire*, 225

conventionalism and pragmatism to address difficult cases by using legal precedent and strict conventions while expanding rights and duties beyond the explicit boundaries of the law. In doing so, law as integrity maintains a strong commitment to moral principles and the legal system as a whole.[63] Dworkin's law as integrity consists of two key principles that illustrate the balance between conventionalism and pragmatism a judge employs when interpreting law: fit and justification. The former holds that the interpretation must fit the text to ensure consistency with the written law. The latter principle compels an interpretation to justify the text by highlighting the societal and legal impact on the present or future. Therefore, the intertwine of creative interpretation and integrity from this fit and justification process allows a judge to create law in terms of meaning, and thus, presenting a moral and political narrative. Dworkin's use of law as integrity, specifically, his philosophical framework for juxtaposing and balancing two extremes will prove fruitful later when addressing quasi-originalism purpose and function.

Living Constitutionalism: Breyer's Principles of Interpretation

While Dworkin's philosophy of law provides an insightful background for understanding the principles underlying living constitutionalism, former Supreme Court Justice Stephen Breyer breaks down the components of pragmatism most influential to living constitutionalism–in terms of interpretation–in his text, *Active Liberty: Interpreting our Democratic Constitution*. The first key principle Breyer outlines that is crucial to any living constitutionalist philosophy is that textual interpretation is "driven by purposes".[64] One can imagine living constitutionalism as a

[63] Dworkin, *Law's Empire*, 225
[64] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, "The Tanner Lectures on Human Values." Delivered at Harvard University Nov. 17-19, 2004, https://tannerlectures.utah.edu/_resources/documents/a-to-z/b/Breyer_2006.pdf, 10.

conversation a judge has with themself to "'honestly say what was the underlying purpose expressed' in the statute…"[65] Breyer further paints this illustration of interpretation when he writes, "The judge, whether applying statute or Constitution, should 'reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.'"[66] By discovering the purposes behind a law, one can understand the law's objective while maintaining an attitude of judicial restraint which allows for one to "embrace [progressive] decisions without essentially abandoning the traditional attitude."[67] In discovering the purpose of the Constitution, Breyer references James Madison's Federalist Number 39, which describes the Constitution as "'a charter of power…granted by liberty,' not (as in Europe) 'a charter of liberty…granted by power."[68] Thus, it becomes clear that the Constitution's primary objective is to further "active liberty," and living constitutionalism serves as manifestation of "the Constitution's structural complexity as responding to certain practical needs, for delegation, for nondestructive…public policies, and for protection of basic individual freedoms."[69]

Breyer demonstrates the mechanics behind living constitutionalism through the use of the free speech clause in the First Amendment, writing, "one cannot (or at least I cannot) find an easy answer to this basic constitutional question in language, in history, or in tradition. The First Amendment's language says that Congress shall not abridge "the freedom of speech".[70] Some might be surprised to hear Breyer's issue with the free speech clause due to the general and basic understanding of the First Amendment, but the question, nonetheless, must be raised because the

[65] Breyer, 10
[66] Breyer, 10
[67] Breyer, 12
[68] Breyer, 20
[69] Breyer, 21
[70] Breyer, 26

framers' did not tell us what "the freedom of speech" means. The Court, in accordance with precedent cases, has defined "speech" to include more than just its strict or literal sense–in terms of oral or written speech.[71] Take for instance, *Citizens United v. Federal Election Commission* (2010), where the Court held that corporations are people, and thus, are entitled to First Amendment protections in terms of campaign funding with no limitations. Breyer addresses the question of campaign funding and freedom of speech, revealing another mechanism living constitutionalists use for interpretation. To answer whether campaign contribution limits abridge "the freedom of speech," Breyer first turns to the "Constitution's general democratic objectives."[72] He states, "It is to understand the Amendment as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process…To focus upon that First Amendment's relation to the Constitution's democratic objective is helpful because the campaign laws seek to further a similar objective."[73] Thus, the purpose behind campaign contribution limits is to prevent corporations or select individuals from using their wealth to influence politicians, and thus, "seek[ing] to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process….and encouraging greater public participation."[74]

One can summarize Breyer's principles of interpretation for living constitutionalism as the following: democracy, balance, context, and intent. The first principle is explained earlier as

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[71] The Court determined in *Tinker v. Des Moines* (1969) that public school students wearing armbands as a symbol to protest the Vietnam War is protected valid speech. In *Texas v. Johnson* (1987), the Court held that burning an American flag is also a protected form of speech.

[72] Breyer, 26

[73] Here, Breyer illustrates a mechanical cycle present in the living constitutionalist theory that begins and ends with discovering the essence of the law in question, and making sure that its purposes are in line with the Constitution's objectives. In doing so, Breyer's living constitutionalist methodology as applied "maintain[s] the integrity of the political process…help[ing] to further the kind of open public political discussion that the First Amendment seeks to sustain, both as an end and as a means of achieving a workable democracy." Breyer 26-27

[74] Breyer, 27

the promotion of democracy in terms of understanding the purpose behind a law and ensuring that said purpose is in line with the Constitution's objectives. The second principle allows a living constitutionalist to be mindful of their biases so that the Court does not abuse its power by ruling beyond its discretion. Take the free speech example Breyer gives, a judge must find the balance between making sure Congress does not infringe the right to free speech by limiting campaign funding, while understanding that campaign funding regulations prevent large corporations from flooding money into politics, and thus, limiting the right of the American people to participate in the democratic system as a whole. The third principle in the living constitutionalist interpretive methodology emphasizes the consideration of context when looking at the law. By "context," Breyer refers to both the historical application of the law and the modern values of today's society. Living constitutionalism asserts that "[t]o maintain pre-existing protection, we must look for new legal bottles to hold our old wine."[75] Here, Breyer exposes the issue that arises when the understanding and application of pre-existing laws collide with evolving technology and values that cannot be ignored for the sake of maintaining the progression of democracy. The fourth principle takes into account legislative intent which helps answer the question: what is the essence or purpose of this law? Why did the legislature create the 14th and 15th Amendments after abolishing slavery? Maybe it was to ensure the equal protection of African Americans for the sake of guaranteeing equal protection and the right to participation in the democratic process. That could explain why the North maintained their military presence in the South during the reconstruction era.

Breyer's interpretation of the Constitution exemplifies living constitutionalism as a nuanced art that transcends the boundaries of inquiry established by originalism. When a living

[75] Breyer, 40

constitutionalist looks for the meaning of a particular amendment, clause, or even word, they are not simply asking for the semantic meaning. They look for the essence, spirit, goal, and purpose behind the text in question. They take into account the practical application of the law in terms of historical wrongs–stepping in to balance a misuse of power by state or federal legislatures. They set standards, limits, and tests to account for a progressing society with evolving issues, and all while ensuring that the purpose behind the law remains in sequence with the Constitution's objectives in order to remain faithful to the Constitution–Dworkin's fidelity.

Originalism v. Living Constitutionalism (Case by Case): Applying Principles

Now that the mechanics governing originalism and living constitutionalism have been identified, one can view these key themes in practice, using past Supreme Court cases as case studies. For this exercise, let's examine a landmark case that has contributed to much controversy and political polarization, *Roe v. Wade* (1973). Although Roe was recently overturned by the Court in *Dobbs v. Jackson Women's Health Organization* (2022), it nevertheless served as precedent, and arguably super-precedent, for dozens of civil liberty cases, playing a pivotal role in American legal theory, and solidifying the stage for living constitutionalists for over 50 years.

1. Roe v. Wade: The Case Facts & Question(s)

In 1970, just after the end of the Warren Court, Texas resident, Jane Roe, sued Dallas County's district attorney, Henry Wade, challenging the Texas legislation at the time which prohibited abortion except under dire circumstances that must be determined by a physician to

preserve a woman's life. Roe argued that the Texas statutes were too vague, and thus, violated her constitutional right to personal privacy, "protected under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[76] Wade, on the other hand, argued that Texas reserves the right to restrict abortions under the 10th Amendment.[77] Given Roe's petition, the Court had the opportunity to address the following question: Does the Constitution recognize a woman's right to terminate her pregnancy by abortion? Before continuing with Roe's analysis, one must understand a crucial point with the question raised in the case, which directly demonstrates Roe's influence to living constitutionalism and addresses the two factors contributing to the rise of polarization in the Court–the justices themselves and the public's misunderstanding of the Constitution's purpose. Some make the mistake of reducing Roe v. Wade to a case that just deals with abortion rights, which is understandable when one only focuses on the question at a surface level. In reality, the Court spends the vast majority of its time exploring the underlying questions encompassing Roe's petition. Before the justices in Roe can provide an answer for the question about abortion, they must address additional questions that can lead to the best path(s) for a conclusion.[78] The first of which, is privacy a constitutional right? Now before determining if privacy is a constitutional right, the judges must ask what are the types of rights that are present in the Constitution? To which two roadblocks appear. Can one be entitled to a constitutional right that is not explicitly written in the Constitution? If it is the case that there exists a constitutional right that is not explicitly written, how would this impact state law under the 10th Amendment?

[76] "Roe v. Wade." Oyez. Jan 22, 1973, https://www.oyez.org/cases/1971/70-18.
[77] Roe v. Wade, 410 U.S. 113 (1973)
[78] Think of this process as a puzzle in which justices ask many questions to decipher and define what the law or laws means in addition to their application in the case.

These questions in Roe can be addressed through both an originalist and living constitutionalist framework. From an originalist and a living constitutionalist perspective, the answer to whether one can be entitled to a constitutional right that is not explicitly written in the Constitution is yes. Both would point to the 9th Amendment for evidence, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[79] While originalists and living constitutionalists agree to the existence of rights not explicitly written in the Constitution, this does not make the task of addressing Roe any less difficult. Just as Breyer questions the basic meaning of "speech" in the first amendment, I ask what exactly does the Ninth Amendment's use of "certain rights", "shall not be construed", and "the people" mean?[80] The Ninth Amendment is clear that only particular enumerated rights "shall not be construed to deny or disparage others [unenumerated rights] retained by the people". Thus, both originalists and living constitutionalists agree that some enumerated rights are so fundamental that they would trump any unenumerated right–with an exception that will be addressed later.

The question of privacy being a constitutional right can be framed into two distinct questions: Can the American people seek a right to privacy from the Constitution? Does the Constitution guarantee a right to privacy? The former question renders an affirmative answer for both originalists and living constitutionalists as the right to privacy would be understood as an unenumerated right under the Ninth Amendment. The latter question renders a disagreement on both the political implication and the meaning of the word "guarantee". In terms of political

[79] "Constitutional Amendments – Amendment 9 – 'Enumerated Rights of the People,'" Ronald Reagan, accessed March 14, 2024, https://www.reaganlibrary.gov/constitutional-amendments-amendment-9-enumerated-rights-people.
[80] To define enumeration, enumerated rights are rights that are explicitly written in the Constitution, and these are also referred to as fundamental rights because they are held at the highest standard of protection by the Court.

implication, the latter question would make the right to privacy a federal law that no state can outlaw. In terms of meaning, an originalist would argue that a right that is guaranteed by the Constitution is a fundamental–explicitly–written right, and thus, since the word "privacy" is not written anywhere in the Constitution it fails to meet this criteria. Here, there is a clear use of strict constructionism by remaining within the literal boundaries of the constitutional text. Under the originalist framework, Roe's case ends here, but the living constitutionalists ask a new question–one that is deemed unnecessary by their originalist counterparts. Is there another type of a right that exists beyond enumerated and unenumerated rights?[81]

2. Roe v. Wade: The Majority Opinion

Since such a question would require one to move beyond the confines of the Constitution's text, it follows that the answer would lie beyond said confines.[82] Earlier, Breyer maintained that it is not that living constitutionalists rule independently of the text, rather, in cases involving difficult questions, living constitutionalists expand their discretion from the constitutional text to thinking about constitutional purpose.[83] Thus, in Roe, this intellectual shift in questioning within the interpretative process–by asking if there is another type of right that exists beyond the enumerated and unenumerated–is the act of addressing the Constitution's purpose as it relates to privacy. By focusing on the purpose or spirit of the law, the living constitutionalists in Roe can address the question most relevant to the case, which allows them to address the issue of abortion directly. What is the purpose of the First, Fourth, Fifth, Ninth, and

[81] A right that, in essence, is so fundamental that it need not be written while rendering the same standard of protection of an enumerated right. Perhaps these are the types of rights that Jefferson would call "unalienable".
[82] Take note of the literal use of the word "text" when mentioning confines as this will prove fruitful when understanding the living constitutionalists' ruling in Roe.
[83] See page 29.

Fourteenth Amendments as it relates to privacy? To which the majority opinion author, Justice Blackmun, writes, "In a line of decisions [as early as 1891]...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution….the Court [has] found at least the roots of that right in the First Amendment…in the Fourth and Fifth Amendments…in the penumbras of the Bill of Rights…in the Ninth Amendment…or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment…These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'...are included in this guarantee of personal privacy."[84]

Here, the majority derive the fundamental right to an abortion by deriving the constitutional right to privacy. They did so by tracing the development right to privacy through a series of past decisions, which indicate–while not explicitly stating–privacy's existence in some of the fundamental clauses of the Bill of Rights and the 14th Amendment. Moreover, by defining privacy as a fundamental right in the Constitution, the question regarding states rights is addressed because no state law can trump federal law under the principles of federalism. It is important to mention that the Court, in addressing Texas' right to regulate in the interest of health and safety, argued that "because of the now-established medical fact…that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health"

[84]Roe, 1973

(Blackmun Justia).[85] Thus, Roe's decision made it so that abortion could not be outlawed on the federal level while limiting state regulation to abortions after the first trimester.

Another key takeaway from the majority's interpretive process in Roe is their use of substantive due process to justify the right to privacy in the Constitution.[86] The purpose of substantive due process is to protect unenumerated fundamental rights–despite being implied–under the due process clause of the 5th and 14th Amendments. Although substantive due process was not established in Roe, Justice Potter Stewart can be credited with his use of the legal concept in his concurrence for Roe that popularized the substantive due process principle, becoming a solidified principle within the living constitutionalist doctrine. He writes, "The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights."[87] Stewart then references Justice John Harlan's[88] definition of "liberty" in relation to the 14th Amendment's "Due Process Clause" to justify substantive due process: "'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution…It is a rational continuum which…includes a freedom from all substantial arbitrary impositions and purposeless

[85] Roe, 1973
[86] Substantive due process as a legal concept is defined earlier in this paper (Pg. 6) as "the idea that some rights are so great and innate–like the right to privacy–that their existence is implied within the Constitution."
[87] Roe, 1973
[88] Harlan's explanation of substantive due process highlights two key points. It first serves as a way to prevent the government's abuse of power–"substantial arbitrary impositions and purposeless restraints"--by securing the people's protection of their innate, unwritten rights. Second, Harlan–and Stewart–reemphasize the notion that some rights are so sacred that even when they are non-explicit, "their abridgement" requires a high level of "scrutiny" on the government's part.

restraints…recogniz[ing]...that certain interests require particularly careful scrutiny[89] of the state needs asserted to justify their abridgment.”””[90]

In Roe, Justice Stewart applies the framework for substantive due process and scrutiny to the right to privacy. He cites a precedent case, *Eisenstadt v. Baird* (1972), in which the Court held that “‘the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’”[91] Stewart draws a parallel from the ruling in Eisenstadt to Roe, writing, “the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment…The question then becomes whether the state interests advanced to justify this abridgment can survive the ‘particularly careful scrutiny’ that the Fourteenth Amendment here requires.”[92] The Texas state law in question refers to interests for maintaining the health and safety of pregnant women and the unborn child. Stewart argues that while Texas’ state interests are legitimate concerns, they are not enough to “constitutionally support the broad abridgment of personal liberty worked by the existing Texas law.”[93]

3. Roe v. Wade: Rehnquist’s Dissent

[89] “Scrutiny” can be defined as a test for constitutionality that the Court uses particularly in due process cases to determine whether a violation of a fundamental right is justified given the violating party’s interests. Discrimination cases upon the basis of race, for instance, are classified under strict scrutiny, and thus, it is extremely unlikely that any party interests would outweigh the right to equal treatment under the laws on the basis of race.
[90] Roe, 1973
[91] Roe, 1973
[92] Roe, 1973
[93] Roe, 1973

In contrast to the majority opinion, conservative Justice, William Rehnquist delivered the dissent, arguing against Roe for a number of reasons. The first issue Rehnquist presents is that of a technical or procedural issue with the Court's handling of Roe's petition, which is that she lacks standing because she was not pregnant in the first trimester–lack of impact–at the time of the case. Standing can be defined as the "capacity of a party to bring suit in court."[94] In other words, the majority's decision to completely prevent any state's ability to outlaw or heavily regulate abortion relied on Roe's capacity to sue at a time when the Texas statute did not actively impact Roe. Such a decision by the Court to violate the principles of federalism did not follow the Court's process from "previous decisions [which] indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others."[95] Rehnquist calls out the majority for ignoring the facts of the case, which mentions nothing about a first-trimester pregnancy and instead states that Roe was only pregnant at the time of her lawsuit. Thus, Rehnquist refers to Roe as a "hypothetical lawsuit" since "the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[96]

Rehnquist moves on to present his second argument, which operates under the assumption that even if Roe had standing, the majority's use of substantive due process to justify the right to privacy as one that is fundamental and constitutional is flawed in its application to

[94] "Standing," Legal Information Institute, accessed March 14, 2024, https://www.law.cornell.edu/wex/standing#:~:text=Standing%2C%20or%20locus%20standi%2C%20is,to%20bring%20suit%20in%20court.
[95] Roe, 1973
[96] Roe, 1973

the Texas statute. To better understand Rehnquist's second argument, we can break down his main points. The first of which is that he does not view the right of "privacy" as a relevant factor within the case itself. Since Texas statute would prohibit a physician from performing an abortion on their patient, "[a] transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word…"[97] In other words, while the majority spent time thinking about questions pertaining to unenumerated rights and substantive due process, they neglected to define the very meaning of privacy that would prove relevant to the case in terms of abortions. He continues in dismantling the majority's use of "privacy" when he writes, "Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy."[98] In an attempt to find common ground in terms of using a consistent meaning for "privacy", Rehnquist concedes that should the Court interpret privacy as an aspect of personal liberty safeguarded by the Fourteenth Amendment—a viewpoint substantiated by precedent—he would agree with Justice Stewart's assertion that the concept of "liberty" under the 14th Amendment's due process clause extends beyond the explicit rights outlined in the Constitution (Rehnquist).[99]

However, where Rhenquist's opinion differs from the majority is "that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law," and thus, demonstrating a stricter understanding for what constitutes a personal and unexplicit right. More importantly, he does not view the right of privacy as a fundamental guarantee that supersedes state law. He narrows the majority's scope for the right of privacy to the 14th

[97] Roe, 1973
[98] Roe, 1973
[99] Roe, 1973

Amendment's due process clause by employing a different test than Justice Stewart's "careful scrutiny" when determining whether the Texas' state interests are enough to justify their limitations of abortion in the statute. For Rehnquist, "the test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective."[100] By lowering the test standard from "careful scrutiny" to "rational relation," Rehnquist argues that the Texas statute demonstrates a "rational relation" to their State's interests for health and safety, arguing that just as a state would not be able to absolutely outlaw abortion, the Court had no authority to declare any limitation on abortion during the first trimester as unconstitutional.[101] He criticizes the majority point for their misuse of the standard of test that is applicable to the case at hand. The majority is using the "compelling state interests" test to justify their use of the "careful scrutiny" standard, which is, as mentioned earlier, a higher standard for states to follow. The issue here is that the majority's approach disregards the historical context of the 14th Amendment, and thus, causing what Rehnquist views as a problematic shift in legal reasoning. He notes that while the "compelling state interest" test is associated with the "Equal Protection Clause" of the 14th Amendment, the majority has applied it to a case involving the "Due Process Clause" of that same amendment.[102] The use of the same test standard for two different clauses that apply to different philosophical and legal questions of law within the same amendment leads to greater confusion.

By adopting the "compelling state interest" standard in Roe, Rehnquist argues the Court would inevitably involve itself in evaluating legislative policies in a way that exceeds the

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[100] Roe, 1973

[101] Rehnquist concedes that if the Texas statute had prohibited abortion without exception–including situations where the birth of a child would come at the expense of the mother's life–then that, according to Rehnquist, "would lack a rational relation to a valid state objective under the test" (Oyez).

[102] Roe, 1973

judiciary's role, and thus, increase the risk of violating the separations of power doctrine.[103] Specifically, Rehnquist criticizes the majority's subdivision of pregnancy into three terms and its delineation of permissible state restrictions for each term. He argues that this approach of the "Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify..and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one."[104] For Rehnquist, the majority's lack of discretion in using the 'compelling state interests' standard to determine whether Texas' state interests are enough to justify the abortion statute's abridgement of personal liberty demonstrates how they acted beyond their juridical roles as arbiters of the law. Roe's conclusion is one that could not have been reached with an exclusively judicial judgment, rather it amounted to judicial legislation rather than a faithful interpretation of the 14th Amendment's intent.

The majority's claim of a universal fundamental right of "privacy" compels the Court and other relevant institutions to adopt a controversial stance, demonstrating a misreading of American history with respect to abortion laws. Rehnquist writes, "The fact that a majority of the States reflecting…the majority sentiment…have had restrictions on abortions for at least a century is a strong indication…that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'...when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe."[105] For the

[103] Rehnquist draws parallels between Roe and earlier cases like Lochner v. New York (1905), where substantive due process standards were used to evaluate economic and social legislation.
[104] Roe, 1973
[105] Roe, 1973

majority to assert the fundamental right of "privacy," in Roe, they inadvertently had to discover "within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment" since "there were at least 36 laws enacted by state or territorial legislatures limiting abortion" by the time of the Amendment's adoption.[106] The point that Rehnquist raises here demonstrates his use of the originalist principle of intent to prove that there "was no question concerning the validity of [the Texas statute] or of any other state statutes when the Fourteenth Amendment was adopted," and thus, he concludes that the only reasonable verdict "from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to [abortion]."[107] By striking down the Texas legislation "in toto" while conceding that state limitations to abortions are permissible only after first trimester pregnancies, the majority violates a past practice of the judiciary in which "a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply 'struck down' but is, instead, declared unconstitutional as applied to the fact situation before the Court."[108]

4. Roe v. Wade: Synthesizing the Court's Analysis

This analysis on Roe was an attempt to break down or decipher the guiding principles outlining the case law, facts, question, and outcomes. The majority in Roe utilizes an inherent system of questioning that reflects the living constitutionalist principle of discovering the purpose or spirit of the law and ensuring its alignment with the Constitution's purpose and objective for promoting democracy. From this process of discovering the law's purpose, one

[106] Roe, 1973
[107] Roe, 1973
[108] Roe, 1973

discovers the law's meaning, after which the justices engage in the process of adjudication to determine the proper legal remedy for the issue. This process in Roe reflects the living constitutionalist principles of "context" and "balance," which is demonstrated by the majority's expansive references in the case. For "context" on abortion, the majority cited scientific literature and medical journals, and on "privacy" the Court referenced 9th and 14th Amendment cases as precedent for dealing with personal liberties, substantive due process, and the legal frameworks for tests and standards. This extensive research allows the majority to maintain the principle of "balance" when reaching a conclusion to the issue at hand. In Roe, the majority must balance the Texas' state interests of health and protection, represented by state statute, with the people's personal right of privacy, and thus, states can place regulations on abortion only, and only, after the first trimester of a pregnancy.

With that said, Rehnquist's dissent in Roe, seems to shine the light on a fundamental–and continuous–tension within the Court: the balance between explicit textualism[109] and broader principles, or more accurately, conceptions of personal liberty. Rehnquist employs originalist principles throughout his dissent. The first argument he presents in his dissent deals with an issue of legal procedure concerning the plaintiff's standing, and from that, the Court's discretion, or lack-thereof, to examine the case. He employs the "Interpretation Principle," or rather, criticizes the majority for not using the principle to make their implicit interpretations of the word "privacy" express, which is why Rehnquist notes three different interpretations the majority might have meant for "privacy" in the beginning of his dissent. Another originalist principle

[109] Note, that by "textualism", I am not referring to the interpretive methodology, rather, how much weight justices give to words that are explicitly written in comparison to non-explicit concepts when determining the constitutionality of a law.

Rehnquist uses in his dissent is “Supremacy-of-Text,” and this is evident when he notes the majority’s improper application of the “compelling state interests” standard to the 14th Amendment's due process clause. By applying a legal standard to the wrong clause to justify the fundamental constitutionality of an unexplicit right, the majority is adding to a law–specifically, the due process clause–something that was never there. Rehnquist emphasizes “‘the limitations of a text–what a text chooses not to do–are as much a part of its ‘purpose’ as its affirmative dispositions.”[110] Further, Rehnquist employs a principle of sound construction when assessing context. Take for instance, his use of historical references to both the 14th Amendment's adoption and state laws concerning abortion, to demonstrate that if the adopters of the 14th Amendment meant what the majority claims concerning abortion, the historical evidence would have demonstrated this given that the first abortion law predates the 14th Amendment by over 50 years.[111] Overall, with respect to interpretive principles for both originalism and living constitutionalism in Roe, the majority’s opinion illustrates the living constitutionalists theme of judicial activism, while the dissent calls for restraint by highlighting the potential consequences of the decision such as expanding the Court’s judiciary role.

The Rise in Polarization in the Court

To return to an earlier point, Roe’s impact as a case left an unprecedented mark on the Court’s role within the society, underscoring the multifaceted nature of legal interpretation, and the Court’s dynamics that had led to an increase in polarization. Unlike many landmark cases

[110] Roe, 1973
[111] Roe, 1973

brought before the Court, Roe–and the question of abortion or reproductive rights–were far from settled. For decades, the legislative and executive branches used the issue of abortion as their talking points, reflecting the increasing divide among Americans. New York Times reporter, Peter Baker, depicts this division in his article, "*Battle Over Abortion Threatens to Deepen America's Divide,"* in which he illustrates the impact of the Court's reversal of Roe in 2022, writing, "Democrats and Republicans in Congress are further apart ideologically than at any point in the last half-century. The public's view of its presidents has grown more divided along partisan lines than at any time in the history of polling."[112] Despite striving for independence and nonpartisanship, the Court has faced political disputes, often influenced by Congress, particularly during the nomination process. Historically, judicial nominations were less controversial, because the focus was on a nominee's ability to perform the job rather than their judicial philosophy. The politicization of the Supreme Court nomination process can be traced back to President Ronald Regan's nomination of staunch originalist, Robert Bork. According to National Public Radio (NPR) writer, Nina Totenberg, Bork's strongly voiced conservative values and legal philosophies, from his opposition to civil rights legislation and reproductive rights cases, is what "prompted liberals and civil rights activists to launch an all-out campaign to defeat the nomination…Liberal groups followed up with mass mailings, lobbying, newspaper ads and a small buy of TV ads."[113] This unprecedented move "enraged many Republicans. Bork's name became a symbol of conservative grievance, and a new verb–to 'bork'--was born, defined in the Oxford English Dictionary as "to defame or vilify a person systematically."[114] Bork's nomination

[112] Peter Baker, "Battle over Abortion Threatens to Deepen America's Divide," The New York Times, May 7, 2022, https://www.nytimes.com/2022/05/06/us/politics/abortion-rights-supreme-court-roe-v-wade.html.
[113] Nina Totenberg, "Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever,'" It's All Politics, December 19, 2012, https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.
[114] Totenberg, 2012

ended with a 58 to 42 vote, the widest margin in Senate history for judicial confirmations, primarily along partisan lines. The aftermath of Bork's rejection had both immediate and long-lasting impacts. Immediately after, President Regan appointed two moderate justices, serving as swing votes which prevented an ideological power imbalance on the Court. However, this ceased to be the case after President Trump's appointment of Justice Amy Coney Barret (ACB), replacing Justice Ginsburg and giving conservatives a six to three majority.[115] This enraged Democrats because in 2016, Republican Senators blocked Obama's nomination of Judge Merrick Garland, arguing that no President should nominate a Supreme Court Justice with less than a year before the next presidential election.[116] Many cannot help but think back to Bork's nomination, viewing it as the catalyst to Congress' politicization of the judicial nomination process that led to Judge Garland's treatment in 2016, ACB's nomination in 2020, and *Roe v. Wade's* reversal in 2022. The first two examples demonstrate politicization caused by "the people", and Roe's reversal of that of the Court's justices.

Before directly addressing the Court's justices, a point of absolute clarity will prove fruitful in preventing any misunderstandings about my use of "political polarization" with respect to the Supreme Court. First, the two causes to the rise of polarization in the Court--as mentioned in detail in Chapter 1—illustrate two distinct images of polarization. The more expressive or outwardly harmful case of polarization is that of the second cause—the people

[115] ACB's nomination provoked controversy as her nomination and appointment occurred shortly after the death of the late Justice Ruth Bader Ginsburg, who, included as one of her last wishes that the next President ought to be the one to nominate her replacement. Ginsburg's wish is one that was echoed by Republican senators the last time a Justice died on the Court, who, ironically, was Justice Ginsburg's best friend and colleague, Scalia, in 2016 at the beginning of President Obama's final year in office.

[116] Only, to contradict themselves years later in the rushed confirmation of ACB's nomination by Republican senators with less than a few months before the 2020 Presidential Election.

themselves and a lack of proper understanding for the Constitution's purpose. This polarization begins from, and remains with, the people's fundamental misperception of the Court and its role within society. Think of this type of polarization as one in which its division and politics are reflected in terms of emotion, behavior, spectacle, and generalization. Thus, I argue that this form of polarization is not the one that is present in the Court. This polarization exists outside the Court and its control, as it manifests in people's false perception of the Court's work, which is shaped by others within society. The dangers of this polarization is not limited to the judiciary--Bork, Garland, Barret, Roe's reversal—it misleads people by encouraging them to seek legislative guidance from the Court instead of those tasked with the responsibility, and thus, ironically removing themselves from the democratic process by yielding their right of a choice to an unelected court of nine life-tenured individuals. I am in no way arguing that the Court lacks tension within but there is a significant distinction between liberal and conservative justices, and liberal and conservative members of Congress--one applies to a methodology of legal interpretation and the latter is a political outlook on life. The former requires more information in terms of legal knowledge while the latter at times is a spectacle. Thus, the best solution for this type of polarization by the people is to increase education about the Supreme Court's function and the Constitution in general by listening to the oral arguments and reading the legal opinions–in their entirety. A small paragraph from a news network summarizing a SCOTUS decision does not allow the people to understand the case in question. The world of academia is in no way an exception. A scholarly journal from a couple of political scientists developing an algorithm to "predict" the way in which the Court will rule reduces legal interpretation to mathematical equations and undermines the level of complexity demonstrated in the Court's legal opinions.

The first cause for the rise in polarization of the Court is the Court's justices. This type of polarization is one that is rooted in the personal mindset and judicial philosophy that influences a justice's interaction with one another. Note that this polarization is not one that is rooted in emotion or behavior. This is evident in Roe, as Justice Rehnquist begins his dissent by referring to the majority's decision as one that "commands [his] respect."[117] By personal mindset and judicial philosophy, this focuses less on the textual differences in legal interpretation, and more on the way in which justices interact with one another when dealing with a case. It makes sense that Justices are much more reserved in public than their legislative and executive counterparts given the content and function of their work. However, behind closed doors they share a common struggle, regardless of their legal methodology. As Breyer once said, "every judge has the same challenge in every case" which is "that the words 'life,' 'liberty' or 'property' do not explain themselves."[118] With only nine members, the Court's traditions with respect to the justices' interactions with one another are essential to solving complex cases, and in many respects, serves as a checks and balances within the Court itself, which demonstrates the importance of consensus-building and compromise. Thus, polarization in the Court exists in the extremes–the staunch originalists and living constitutionalists. Despite Scalia's case for Originalism, his adamant rejection of serving as a consensus-builder within the Court violated a long tradition of justices extending olive branches with one another, demonstrating a willingness to understand each other's perspectives.[119] This is not to blame Scalia as the originator of the Court's polarization, one can argue that originalists like Scalia refused to entertain

[117] Roe, 1973
[118] Andrea Seabrook, "Justices Get Candid about the Constitution," Law, October 9, 2011, https://www.npr.org/2011/10/09/141188564/a-matter-of-interpretation-justices-open-up#:~:text=For%20one%20thing%2C%20Breyer%20said,speech%2C'%22%20he%20said.
[119] "Judging Antonin Scalia: Professors Discuss the Legacy of the Supreme Court's Conservative Giant," Columbia Law School, accessed March 14, 2024, https://www.law.columbia.edu/news/archive/judging-antonin-scalia.

consensus-building because of the liberal justices' expansion of the Court's power. Nevertheless, consensus-building is crucial in reducing the polarization of the Court, which includes consequences that in turn harm the Court's reputation. Such consequences include the overturning of cases that have served as super precedents for years, and thus, having severe ramifications for the American people. The Court has overturned a limited number of cases since its inception, which is purposeful because to overturn a case would be to acknowledge a misreading of law and the Constitution, and thus, increasing confusion for the lower courts and those tasked with enforcing the law. The pressure and need for consensus-building and compromise is especially relevant today, as the American people cannot live under eras, or waves, of extreme liberalism and conservatism without damaging the Court's legitimacy, and thus, the separation of powers doctrine. Although the first cause of the rise of polarization in the Court is not as expressive as the second, its harm is no less dangerous, setting implications for many institutions on both a federal and state level. Ultimately, traditions like consensus-building and compromise are in many ways the principles underlying another method of constitutional interpretation that is not meant to be used exclusively but can help reduce the polarization in the Court. Recognizing the need for a harmonizing approach that draws on these traditional values of consensus-building and compromise, there emerges a distinct interpretative framework.

Constructing the Middle Ground: Quasi-Originalism

As an attempt to act as a middle-ground between originalism and living constitutionalism, Quasi-Originalism–which can also be referred to as lite textualism–emerges as a way to discover meaning behind a law so that a remedy to the harmed party can be awarded while enacting judicial restraint by remaining within the boundaries of the law. This approach may seem contradictory or even utopian but one must remember that originalists and living constitutionalists agree on the vast majority of cases the Court reviews. Only a handful of cases are decisive because those cases involve social and legal implications that often deal with civil liberties. Throughout this paper, originalism and living constitutionalism has been deconstructed and defined to demonstrate their unequivocal differences, but within this process of deconstruction and the applying these methodologies, one can see between them hints of similarities that are enough to substantiate consensus-building and compromise. In other words, is it possible to find some common ground when Scalia searches for a law's meaning and Breyer searches for a law's value or purpose?

To address the question above, it would be helpful to demonstrate quasi-originalism in action using a conservative and liberal justice–i.e., Justice Roberts and Justice Kagan, respectively. According to Margaret Talbot in her New Yorker article, "Is the Supreme Court's Fate in Elena Kagan's Hands?," both justices have demonstrated a nuanced understanding and application of legal principles that reflect elements of quasi-originalism.[120] For instance, Kagan is recognized as a justice who focuses on bridging ideological divides, emphasizing the Court's role in reflecting a coherent and unified voice, while increasing the diversity of thought within legal opinions when siding with the conservative majority. She argues for a judicial approach that

[120] Margaret Talbot, "Is the Supreme Court's Fate in Elena Kagan's Hands?," The New Yorker, November 11, 2019, https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands.

anchors the Constitution's text, while considering its application in a modern context, thereby embodying quasi-originalism. Similarly, Roberts has shown a commitment to maintaining the Court's legitimacy by seeking middle-ground decisions that respect the Constitution's original intent while acknowledging contemporary realities as a means of providing legal remedies to those harmed by said realities. These efforts by Kagan and Roberts reflect the quasi-originalist philosophy and demonstrated a balanced interpretation of the Constitution for the sake of compromise and reducing polarization.

1. Justice Roberts's Case for Quasi-Originalism

One case that demonstrates Roberts' use of quasi-originalism is *NFIB v. Sebelius (2012)*, which addressed the legality of federally mandating government sponsored healthcare—impacting the political and social life of everyday Americans. The justices in this case had to grapple with the constitutionality of the Affordable Care Act (ACA). The specific part of the law in question, the individual mandate, required Americans to obtain health insurance, and thus, issued a penalty payment to punish individuals and states that failed to obtain said insurance. The National Federation of Independent Business sued the federal government, arguing that "the individual mandate exceeded Congress' enumerated powers under the Commerce Clause…[and] the employer mandate impermissibly interfered with state sovereignty."[121]

In a 5-4 decision, led by Roberts, the Court upheld the mandate, viewing it as a legitimate exercise of Congress's taxing power under the Commerce Clause despite the ACA's

[121] "National Federation of Independent Business v. Sebelius." Oyez. https://www.oyez.org/cases/2011/11-393.

lack of the word “tax”. Roberts writes, “The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”[122] By reinterpreting the ACA's penalty as a tax, Roberts balances his originalist perspective by moving beyond the semantic confines of "penalty", and focused on the functional role of the mandate within Congress's taxing powers. Further, when he writes, “Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness,” Roberts illustrates a commitment to uphold the legislative intent and the broader constitutional powers of Congress under the Commerce Clause, and thus, his opinion underscored a quasi-originalist approach. In contrast, the dissenting justices, employing a stricter version of originalism, held the individual mandate unconstitutional “because Congress characterized the payment as a *penalty*” and “to instead characterize it as a tax would amount to rewriting the Act.”[123] The minority’s characterization of Roberts’ interpretation of the payment penalty as creating law or “rewriting the act" holds little weight since the power of Congress to administer and collect payments stem from the Commerce Clause, which unequivocally grants Congress the right to tax.[124] The dissent's failure to view the role of a payment penalty and a tax as being similar in function and the same in purpose demonstrates the dissents unwillingness to engage in consensus-building or compromise, and thus, neglecting the ACA’s purpose in addressing the healthcare crisis. The majority's opinion in NFIB would lead to over 50 million Americans losing their health insurance, which would wreak havoc upon the healthcare market. Rather Roberts’ view of the independent mandate’s intent shows that the law is not meant to punish Americans who already have health care–which is why Robert redefines the penalty as a

[122] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)
[123] NFIB, 2012
[124] NFIB, 2012

tax that is meant to be less of a burden–but to offer a remedy to those unable to afford private health insurance. Roberts' approach, therefore, not only preserved the ACA but also exemplified a judicial philosophy that respects the constitution's enduring principles while addressing the nation's contemporary challenges in a way that proves consistent by citing "precedent recogni[zing] Congress' large authority to set the Nation's course in the economic and social welfare realm."[125]

2. Justice Kagan's Case for Quasi-Originalism

In the case of Kagan, Columbia Law School's Rachel Rein's article "Justice Breyer's Principled Pragmatism and Kagan's New Living Constitutionalism and Lite Textualism" explores the way in which the Justice differs from her liberal peers–specifically Breyer.[126] Both are living constitutionalists but differ in their interpretive methodologies in terms of approach and purpose. While Breyer is open with his pragmatic use of living constitutionalism for interpreting all cases, Kagan employs a more rigid approach that, arguably, evolved over time on the Court. In terms of statutory cases, Kagan "sometimes defines herself as a textualist, other times as a 'textualist with caveats'...view[ing] legislative history with skepticism and avoids considering it as dispositive."[127] Kagan's view of legislative history is directly in line with staunch originalists like Scalia. Rein goes on to outline her interpretive methodology, writing, "Kagan claims that she answers constitutional questions by looking at the text of the Constitution and at the Constitution's history, structure, and precedents. She claims to consider the 'broad

[125] NFIB, 2012
[126] Rein, Rachel, Justice Breyer's Principled Pragmatism and Kagan's New Living Constitutionalism and Lite Textualism (2022). 4 Trento Student L. Rev. 17 (2022) (It.), SSRN: https://ssrn.com/abstract=4075321
[127] Rein, 6-7

sweep of history' instead of the Constitution's original public meaning."[128] Kagan's approach serves as a middle-ground between originalism and a more pragmatic version of living constitutionalism as understood by Breyer. To be clear, Kagan is unequivocally a living constitutionalist, but she also differentiates herself from her peers by employing originalist principles of restraint. Why does she do this? Similar to Roberts, "Kagan also takes into great consideration consensus on the Court, fostering compromise when she can, especially in hot-button social issues, to avoid the Court appearing politicized."[129] Here, a must raise a crucial point, Rein uses Kagan's use of consensus-building to argue that Kagan is more of a pragmatist than she claims to be, and thus, exposing a contradiction between the Justice's claim for judicial restraint and her "pragmatic" actions. This is evident when Rein writes, "while Kagan claims that any form of constitutional theory must impose constraints on judicial discretion, stressing that one must start with the text with both the Constitution and statutes, her focus on consensus-building brings her, ever so slightly, closer to Breyer's pragmatism."[130] I disagree with Rein's analysis of Kagan's approach as she fails to consider the distinction between methodological approach with respect to interpretation and the purpose behind consensus-building as a tradition. The act of consensus-building is not rooted in pragmatism, as demonstrated by Roberts' use of the tradition in NFIB. Rein further addresses Kagan's use of consensus-building as a methodology when she states, "Her compromise-focused strategy suggests the possibility that Kagan may choose in some cases to frame the law narrowly or broadly, because of her will to favor a practical outcome—one that advances or clarifies the law in a way that inspires public support or at least avoids sowing public distrust."[131] Again, Rein

[128] Rein, 7
[129] Rein, 7
[130] Rein, 8
[131] Rein, 8

does not take into account methodology and purpose. When Kagan joins the originalist majority on a case–adding a concurring opinion–her broad or narrow framing of the law is an act of issuing judicial restraint to minimize extremism within both interpretive methodologies, demonstrating the nuances behind Kagan's use of quasi-originalism. The purpose behind Kagan's consensus-building has little to do with inspiring "public support" or "public distrust," as to refer to public sentiment defeats the purpose of an independent judiciary consisting of unelected and life-tenured judges. Rather, Kagan looks to prevent distrust and minimize polarization within the Court itself for the sake of maintaining the Court's function and purpose under the Constitution, especially with respect to protecting crucial traditions like precedent.

Ramos v. Louisiana (2020) is a case that helps illustrate Kagan's use of quasi-originalism in terms of consensus-building and compromise.[132] In Ramos, the Court addresses the constitutionality of non-unanimous jury verdicts in criminal cases–dealing with the Sixth Amendment. The petitioner, Evangelisto Ramos, was convicted of second-degree murder in Louisiana by a 10-2 jury verdict. At the time, Louisiana was one of only two states that allows non-unanimous verdicts for criminal convictions. Ramos challenged his conviction, arguing that the non-unanimous jury verdict violated his Sixth Amendment right to a fair trial via an impartial jury, which requires a unanimous decision in federal criminal convictions. Thus the Court is tasked with deciding whether the Sixth Amendment's requirement for unanimous verdicts apply to state criminal trials as well. In a 6-3 decision, the Court ruled in favor of Ramos, overturning his conviction and expanding the Sixth Amendment's requirement of a unanimous jury for state criminal trials.[133]

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[132] "Ramos v. Louisiana." Oyez. https://www.oyez.org/cases/2019/18-5924.
[133] Ramos v. Louisiana, 590 U.S. ___ (2020)

With respect to Kagan's involvement in Ramos, the University of Cincinnati Law Review article, "The Long Game: Justice Kagan's Approach in Ramos v. Louisiana" explores the Justice's unique position as the lone-liberal dissenter. The author of the article, Associate Member Sam Berten, notes Kagan's dissent, "which at first could be confusing because Kagan's liberal colleagues largely agreed with the majority opinion…However, a more detailed analysis…shows that *Ramos* is the next in a line of key cases wherein Justice Kagan has solidified her position as a protector of precedent on the Court."[134] By solidifying "her position as a protector of precedent" Kagan's use of quasi-originalism allows her to maintain objectivity in her rulings while doing so in a way that looks to the future for adjudication. The reason for Kagan's dissent is because Ramos resolved a confusion raised in *Apodaca v. Oregon* (1972), which held that the "'Sixth Amendment does not require unanimous jury verdicts in *state* criminal convictions,'" and thus, only for federal criminal cases.[135] The majority in Ramos cleared the confusion by holding "that the Sixth Amendment requires a unanimous jury verdict to convict a defendant of a serious offense."[136]

For Kagan, while the Ramos' case deals with the Sixth Amendment's right to a unanimous jury on the surface level, the underlying core question has to do with the Court's respect for the tradition of precedent–similar to Roe in terms of question of abortion and privacy. Here, Kagan's use of quasi-originalism for consensus-building demonstrates that she "has likely positioned herself as a protector of precedent as part of a strategic, long-term approach to protect

[134] Sam Berten, "The Long Game: Justice Kagan's Approach in Ramos v. Louisiana," University of Cincinnati Law Review, May 26, 2020, https://uclawreview.org/2020/05/26/the-long-game-justice-kagans-approach-in-ramos-v-louisiana/.
[135] Berten, 2020
[136] Berten, 2020

Roe v. Wade. And precedent is what *Ramos* is truly about.'"[137] Berten demonstrates this point with evidence referencing Kagan's opinion in *Kimble v. Marvel Entertainment (2015)* and *Knick v. Township of Scott, Pennsylvania, et al (2019)*.[138] In Kimble, Kagan writes "[w]hat we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly," and in Knick she criticizes the decision for having "smashe[d] a hundred-plus years of legal rulings to smithereens," calling out her counterparts since the "conservative majority may be similarly dismissive of precedent in other areas."[139] Berten makes a crucial point, writing, "Justice Kagan's dissent in *Ramos* is likely a reiteration of Kagan's position as 'the Court's leading proponent of respect for precedent'..Since 'Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito Jr. and Elena Kagan — dissented [in *Ramos*], not necessarily because they thought the Constitution permits non-unanimous juries *but because they thought the 1972 case should not be so lightly overruled.*'"[140] This demonstrates the purpose and function of consensus-building, and by the same token, the use of quasi-originalism, as a necessary deterrent for polarization within the Court. By remaining objective in terms of respecting the core tradition of precedent, Kagan's compromise helps create a dynamic within the Court that can be reciprocated by her conservative counterparts in issues she deems important. This is not to say that such a method is perfect, but when compared to just originalism or living constitutionalism, quasi-originalism's function in terms of "extending a branch" to the other side allows for the potential of consensus-building, and thus, limits polarization within the Court itself.

[137] Berten, 2020
[138] Berten, 2020
[139] Berten, 2020
[140] Berten, 2020

Conclusion

This paper has endeavored to explore the solutions for addressing the rise in polarization and politicization within the Supreme Court vis-a-vis constitutional interpretive methodology, underscoring the salience of quasi-originalism, through the lens of Justices Roberts and Kagan, as a way to bridge the gap between the extremes of originalism and living constitutionalism. The importance of quasi-originalism lies in its capacity to foster an environment conducive to consensus-building and compromise, thereby contributing significantly to the maintenance of the Court's integrity and its perceived legitimacy by the people.

This paper has highlighted the divisive nature of landmark cases and the politicization of the judicial nomination process, underscoring the resultant polarization that threatens the judiciary's foundational principles. In this environment, quasi-originalism presents itself as a balanced interpretative strategy that emphasizes a grounded yet adaptable reading of the Constitution. This approach allows for a nuanced approach to contemporary issues within the framework of the Constitution's original intentions in terms of both text and purpose, thereby avoiding the extremes of rigidity and expansiveness that characterize originalism and living constitutionalism. This is evident in Kagan and Roberts exemplifying the quasi-originalist approach, demonstrating how a middle-ground methodology can lead to decisions that respect the Constitution's text and historical context while also acknowledging the realities of modern American society. Their decisions in landmark cases, such as NFIB and Ramos, reflect a judicial philosophy that prioritizes the Court's role in employing restraint through respecting precedent to address contemporary issues of national importance.

By bridging ideological divides and emphasizing the Court's collective voice, these Justices showcase the potential of quasi-originalism to reduce polarization through compromise and collaboration, enabling the Court to engage with the Constitution in a manner that is both respectful of its origins and responsive to current societal needs. This interpretive strategy acknowledges the complexities of legal interpretation in a pluralistic society and the necessity of maintaining the judiciary's credibility and authority in the eyes of the Court, the political system, and thus, the people. The issue of polarization is not limited to the Supreme Court as the lower courts look to the Court for guidance, the embrace of quasi-originalism across the ideological spectrum underscores the urgent need for a judiciary branch that seeks unity in diversity and prioritizes legitimacy and stability over pure ideological interests. As this paper has argued, quasi-originalism offers a viable path forward, one that respects the enduring principles of the Constitution while addressing the challenges of contemporary governance. It is a call for judicial approaches that are rooted in understanding, flexibility, and a profound commitment to the nation's highest legal and moral ideals. Through such commitment, the Supreme Court can continue to serve as a stabilizing force in American democracy and safeguarding the rule of law.

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