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With this thought, we hereby present to you

REVISITING ORIGINALISM: CONSTITUTIONAL FIDELITY IN AN EVOLVING LEGAL LANDSCAPE

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ABSTRACT

Originalism is a fundamental theory of constitutional interpretation that argues for interpreting the Constitution based on its meaning at the time of its drafting and ratification. This approach asserts that constitutional provisions should be understood in accordance with the intentions of the framers or the public meaning of the text when it was first adopted. Originalism stands in contrast to the Living Constitution theory, which advocates for adapting constitutional interpretation to evolving societal values, norms, and circumstances. This paper explores the evolution of Originalism from its early focus on Original Intent, where the framers' specific intentions were paramount, to Original Meaning and Public Meaning Originalism, which emphasize how constitutional language was understood by the general public at the time of its adoption. The shift from Original Intent to these newer variants reflects an effort to address criticisms of subjectivity and ambiguity inherent in determining the framers' exact intentions. Public Meaning Originalism, often referred to as "New Originalism," provides a more objective framework by focusing on the language's historical usage rather than the framers' subjective expectations. Furthermore, the paper examines recent modifications to Originalism, such as Living Originalism, which seeks to reconcile the theory with modern societal needs while maintaining fidelity to the original text. Despite these adaptations, the debate between Originalism and the Living Constitution approach continues to shape legal discourse, particularly in the United States. This study concludes that while Originalism remains a cornerstone of constitutional interpretation, its evolving nature allows it to engage with the dynamic realities of modern society.

Keywords: *Originalism, Constitutional Interpretation, Original Meaning, Public Meaning, Living Constitution*

I. INTRODUCTION

The debate over constitutional interpretation has long been one of the most contentious issues in legal theory, particularly in the United States. Central to this debate are two contrasting approaches: Originalism and the Living Constitution theory. Originalism, as a legal theory, asserts that the Constitution should be interpreted in line with its original meaning at the time of its drafting and ratification. This approach is premised on the belief that the meaning of the Constitution remains fixed, and judges should apply its provisions as they were understood by the framers and the public when it was adopted. Originalism seeks to preserve the stability and predictability of the legal system by preventing judges from altering the meaning of the Constitution based on contemporary values or societal changes.¹

On the other hand, the Living Constitution theory promotes the idea that the Constitution is a dynamic document, designed to adapt to evolving societal norms and conditions. Proponents of this view argue that constitutional interpretation should reflect current realities, allowing the judiciary to apply its principles to modern issues that could not have been anticipated by the framers. This approach emphasizes the flexibility of constitutional provisions, seeing the document as a living entity that grows alongside society.²

Originalism, however, has undergone significant evolution. Initially rooted in the concept of Original Intent, which sought to determine the subjective intentions of the framers, it has since expanded to include more objective approaches such as Original Meaning and Public Meaning Originalism. These later developments focus on understanding the Constitution through the lens of how its language was perceived at the time of adoption by the general public, rather than merely relying on the framers' intent.³

This paper explores the origins and evolution of Originalism, analyzing its various strands and their impact on legal interpretation. It also contrasts Originalism with the Living Constitution theory, examining the ongoing debate between historical fidelity and adaptability in constitutional law.

¹ Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, *Vanderbilt Journal of Transnational Law*, Vol 44:1239, available at: <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Varol-pdf.pdf> (last visited on March 2024)

² *Ibid.*

³ *Originalist Theory of Interpretation: A Comparative Analysis between India and the US* available at: <https://www.lawctopus.com/academike/originalist-theory-of-interpretation-a-comparative-analysis-between-india-and-the-us/> (last visited on March 2024)

II. DIFFERENT VARIANTS OF ORIGINALISM

- 1. ORIGINAL INTENT:** According to original purpose originalism, understanding the precise intentions of the Constitution's architects should serve as a guide for interpreting the document. Supporters of this strategy contend that correct interpretation of the text depends on knowing what the original drafters meant it to signify. To determine the framers' original intention behind specific sections, this may entail looking through historical records from the Constitutional Convention, such as letters, debates, and notes.⁴
- 2. ORIGINAL MEANING:** Original Meaning originalism places emphasis on how important it is to comprehend the meanings of the words and phrases in the Constitution as the broader public would have understood them at the time of their enactment. This approach's proponents contend that interpreting the Constitution in accordance with its original linguistic context leads to a more accurate comprehension of its contents. To ascertain the general understanding of the language employed, this entails consulting dictionaries, legal treatises, and other sources that were available during the time the Constitution was drafted.⁵
- 3. PUBLIC MEANING ORIGINALISM:** Public Interpretation Originalism adopts a more comprehensive viewpoint, taking into account the text's original public meaning. It asserts that the best way to read the Constitution is to consider what a reasonable person would have understood its words and phrases to mean when they were first adopted. Supporters of this strategy contend that by considering views held by the public at large in addition to the framers' own, it more accurately reflects the general understanding of the language used in the Constitution. This approach frequently entails examining historical background, prior legal decisions, and prevailing cultural norms to clarify how the general public interprets certain constitutional clauses.⁶

With varied degrees of emphasis on the framers' intentions against the public's comprehension at the time of the document's adoption, each of these variations offers a unique viewpoint on how to interpret the Constitution. These divergent perspectives influence the development of

⁴ John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory Of Interpretation And The Case Against Construction*, North-western University Law Review (2009) available at http://www.law.northwestern.edu/LAWREVIEW/v103/n2/751/LR103n2McGinnis&Rappaport_OriginalMethods.pdf

⁵ *Ibid.*

⁶ *Ibid.*

constitutional law and its implementation in contemporary society by contributing to the continuous discussions in legal research and judicial interpretation about the best way to read the Constitution in specific modern settings.

The idea of a "Living Constitution," which maintains that the Constitution is a dynamic text that should be read in light of current circumstances and societal norms, is frequently used to contrast originalism. Originalism has shaped discussions on how to interpret the Constitution, especially in the US, where certain conservative academics and jurists have given it more traction. It is not without detractors, though, who contend that it can be unduly strict and ignore changes in society and changing standards.⁷

III. ORIGINALISM AND LIVING CONSTITUTION

Originalism and the Living Constitution theory represent two contrasting approaches to interpreting the Constitution.

ORIGINALISM:

As was previously said, originalism places a strong emphasis on reading the Constitution in accordance with the original meaning or intent of its provisions at the time of their adoption. It considers the framers' intentions or the prevailing linguistic understanding of the text at the time of writing. Originalists contend that in order to preserve stability, predictability, and faithfulness to the document's original meaning, the Constitution should be interpreted in line with its original intention. They frequently support moderation in judicial interpretation, arguing that formal amendment procedures should be used to update the Constitution rather than judicial activism.⁸

LIVING CONSTITUTION:

On the other hand, the Living Constitution theory maintains that the Constitution is a living instrument that must be read in the context of the values, customs, and circumstances of the modern world. This point of view's proponents contend that the Constitution's tenets should change over time to take into account evolving social, political, and technical realities.

Proponents of the Living Constitution thesis frequently assert that the framers meant for the

⁷ *Supra* note 4.

⁸ Kenneth R. Thomas, Selected Theories of Constitutional Interpretation, available at <http://www.fas.org/sgp/crs/misc/R41637.pdf> (last visited on 15th March 2024)

Constitution to be adaptable and able to deal with unanticipated difficulties. They contend that justice, equality, and development are advanced when the Constitution is interpreted in a way that is congruent with contemporary ideals and changing social norms.

The Living Constitution idea stresses the Constitution's flexibility to modern situations, whereas originalism favors adherence to the document's original meaning. These two methods have influenced conversations on topics ranging from individual rights to governmental powers, and they have shaped interpretations of constitutional law and current disputes in legal academia and judicial decision-making. The conflict between originalism and the Living Constitution is a reflection of larger philosophical differences regarding the nature of constitutional interpretation and the judiciary's influence on the development of constitutional law.⁹

IV. ORIGINALIST THEORY OF CONSTITUTIONAL INTERPRETATION: EVOLUTION

Even if originalism differs greatly from the idea of change, the theory has seen significant development in the last several years. At first, the originalists tried to understand the Constitution by figuring out what the arbitrary goals and expectations of those who drafted it were. The Original Intent idea gained popularity between the 1960s and the mid-1980s, but for a variety of reasons, it quickly lost its luster.¹⁰

CHALLENGES OF ORIGINAL INTENT

It was quickly realized that the framers' use of broad, general terms made it difficult to apply the original intent standard because it was impossible to assume that they would have foreseen every scenario that might justify the application of a given constitutional provision. Furthermore, it was believed that it would be challenging to determine the framers' singular representative intent regarding a certain constitutional clause. There is typically a great deal of political compromise among many different parties during the preparation of a constitution. Therefore, combining their disparate goals presented a methodological challenge. Second, even

⁹ *Supra note 8.*

¹⁰ Constitutional Interpretation and a Theory of Evolutionary Originalism available at; https://journals.sagepub.com/doi/abs/10.22145/flr.27.3.1?journalCode=flra#:~:text=OF%20EVOLUTIONARY%20ORIGINALISM,-Jeremy%20Kirk*&text=A%20Constitution%20cannot%20be%20applied,or%20uncertainty%20to%20be%20resolved%3F (last visited on March 2024)

when the framers' intention was ascertained in some way, it was frequently discovered to be vague in character. Furthermore, historical evidence revealed that even the framers did not intend for their intent to become a tool for future generations to interpret the constitution. Furthermore, the critics saw the unfavorable effects that could arise from "being ruled by the dead hand of the past" in a contemporary, changing society.¹¹

SHIFT TO ORIGINAL PUBLIC MEANING

The originalists' focus progressively switched to the original public meaning approach as a method of constitutional interpretation when the objections of the original intent approach gained traction. The original public meaning method reads the Constitution's text in accordance with how a knowledgeable and reasonable speaker of the language would have understood it during the historical era in which it was established. As a result, rather than the founders subjective original intentions or expectations, it is based on the objective meaning as determined by a reasonable observer. This method has been referred to by numerous academics as "Originalism 2.0" or "New Originalism."

IMPLICATIONS OF NEW ORIGINALISM

The shift to this new interpretation of originalism has been advantageous in many respects; among other things, it has helped address the issue of subjectivity that beset the original intention theory. But it also makes it harder to distinguish between Living Constitutionalism and Originalism. The new originalism separates itself from the legitimizing power of the act of constitution formation as it no longer draws its interpretation from the framers. Second, this theory's central figure—the reasonable man—may allow for several reasonable readings of various constitutional clauses. This is implied by the fact that a variety of descriptions of the hypothetical reasonable guy are offered in the literature on public meaning originalism. Furthermore, it is frequently necessary to take into account the social and linguistic backdrop of the society while interpreting the constitution. Therefore, it is expected of the modern interpretation to try to read the provisions in light of both their original social and linguistic context and their current context, or in a way that finds a workable middle ground between the two.

There is "no agreement, and no chance of agreement, upon what is to be the guiding principle

¹¹ *Supra note 10.*

of the evolution" of constitutional meaning, according to Justice Scalia, who calls this a "glaring defect of Living Constitutionalism." Nevertheless, considering current events, the coherence and uniformity argument is not indisputable in favor of originalism. Because of these effects of the new approach, the original meaning doctrine has been referred to as "Originalism for non-originalists".¹²

RECENT MODIFICATIONS AND LIVING ORIGINALISM

The theoretical and practical differences between originalism and non-originalism have been further undermined by more recent revisions to originalism. It has also been suggested that a number of well-known originalists participate in constitutional interpretation, which is the alteration of laws to make them applicable in contemporary situations even when original meaning does not require it. Another development in this area that can serve to further solidify the divisions between originalists and non-originalists is the emergence of the idea of Living Originalism, which contends that originalism and non-originalism are complimentary rather than antagonistic viewpoints.¹³

V. ORIGINALISM IN THE UNITED STATES AND INDIA: DIVERGING WAYS

EVOLUTION OF ORIGINALISM IN THE UNITED STATES

The philosophy of Constitutional Interpretation known as originalism has taken different routes in the US and India, each country's own historical, cultural, and legal environments. Despite a considerable change over time, originalism has remained a popular approach in the United States. Justice Antonin Scalia of the US Supreme Court has been an outspoken supporter of originalism, saying that it is superior to other approaches. Scalia argues that historical research into the original meaning of the Constitution is crucial because it gives judges' decision-making a more solid and respectable basis.

Finding out the framers' intentions and comprehension of the Constitution at the time of its drafting was the main goal of originalism in the past. But this strategy has changed to include

¹² Constitutional Interpretation and a Theory of Evolutionary Originalism available at: https://journals.sagepub.com/doi/abs/10.22145/flr.27.3.1?journalCode=fra#:~:text=OF%20EVOLUTIONARY%20ORIGINALISM,-Jeremy%20Kirk*&text=A%20Constitution%20cannot%20be%20applied,or%20uncertainty%20to%20be%20resolved%3F (last visited on March 2024)

¹³ *Ibid.*

more general ideas, including the text's initial public interpretation. This change has made it possible for originalism to be faithful to the original meaning of the Constitution while also adapting to shifting societal norms and conditions.¹⁴

Originalism has faced several obstacles and detractors as it has developed in the US. Opponents contend that originalism is intrinsically retrograde and ignores the advancement of society and shifting moral standards. Furthermore, interpreting a document based solely on historical sources might provide challenges because it can be challenging to determine the exact objectives of the book's framers or the original public interpretation.

Despite these difficulties, originalism is nevertheless widely accepted in American legal circles because its proponents contend that it offers a morally sound and coherent approach to constitutional interpretation.

SHIFTS IN CONSTITUTIONAL INTERPRETATION IN INDIA

India, on the other hand, has approached constitutional interpretation in a different way. Although there were hints of originalism in previous Indian Supreme Court rulings, the general trend now favors a living Constitution approach. Indian courts initially supported a narrow reading of the Constitution, taking their cues from discussions held during the Constituent Assembly. Nevertheless, later decisions have strayed from rigorous fidelity to the original objective, acknowledging the necessity for interpretation in the modern application setting.¹⁵ Enacted in 1950, the Indian Constitution addressed a wide range of intricate social, cultural, and political challenges that the recently independent country was confronting. Because of this, interpretation had to be more adaptable in order to consider changing society norms and values. The practical realities of a fast-evolving society have softened the originalist ideals that nevertheless shape Indian Jurisprudence.

Notwithstanding these different approaches, constitutional interpretation issues remain a source of contention in both the US and India's dynamic and changing legal systems. In the interpretation of foundational legal documents, the ongoing debate between originalism and

¹⁴ Originalist Theory of Interpretation: A Comparative Analysis between India and the US available at: <https://www.lawctopus.com/academike/originalist-theory-of-interpretation-a-comparative-analysis-between-india-and-the-us/> (last visited on March 2024)

¹⁵ *Ibid.*

living constitutionalism demonstrates the intricate interaction between tradition and development, stability and change.¹⁶

VI. INTERSECTING LINES: REEVALUATION OF CONSTITUTIONAL INTERPRETATION

The fast-paced social, cultural, and technological developments of contemporary society have had a profound impact on how constitutional interpretation has developed. The growth of Indian constitutional jurisprudence is exemplified by the emergence of the living constitution theory, which mirrors a global trend towards flexible and adaptive legal structures. But even with its universal applicability, the antiquated theory of originalism still has supporters in nations like Turkey and the United States, where it is still a fundamental component of constitutional interpretation.¹⁷

Rigid amendment procedures' inability to adapt to changing legal issues has resulted in an increasing global criticism of stringent Originalism. Rather, a more nuanced and context-sensitive approach to constitutional interpretation is becoming increasingly apparent. The traditional division between originalism and living constitutionalism is being challenged by new ideas that offer complementary forms of interpretation, calling for a more dynamic and integrative understanding of constitutional principles.

It is crucial to acknowledge that various constitutional provisions can call for different approaches to analysis in this reevaluation of constitutional interpretation. A one-size-fits-all strategy runs the risk of oversimplifying the intricate interactions between political, social, and cultural elements that influence how laws are interpreted. Scholars and jurists can better negotiate the intricacies of constitutional interpretation in a world that is becoming more varied and interconnected by adopting a more pluralistic and interdisciplinary approach.

Furthermore, it's critical to recognize that interpretation is a dynamic, ever-evolving process rather than a static or mechanical one. Originalism's once-unquestionable authority has diminished as academics and professionals struggle with the complexity of modern legal

¹⁶ *Supra note 14.*

¹⁷ Editorial , Chintan Chandrachud “ The four phases of Constitutional Interpretation , *The Hindu*, January 27, 2020 available at: <https://www.thehindu.com/opinion/lead/the-four-phases-of-constitutional-interpretation/article30653706.ece> (last visited on March 14, 2024)

concerns. Although originalism was fundamental in forming early theories of constitutional interpretation, its shortcomings have grown more noticeable in light of contemporary legal issues.¹⁸

In the end, reevaluating constitutional interpretation is about broadening and improving our understanding of the law in response to shifting society values and needs rather than doing away with long-standing precepts. We can make sure that constitutional interpretation is current and sensitive to the many demands and goals of society by adopting a more inclusive and multifaceted approach.¹⁹

VII. CONCLUSION

In summary, originalism's shift from an intent-focused interpretation to a more comprehensive analysis of public meaning is a substantial development in constitutional theory. Although there were issues with subjectivity and practical application with original purpose, the move towards public meaning provides a more objective approach based on linguistic study and historical context. But this shift has made it more difficult to distinguish between originalism and living constitutionalism, which has sparked discussions about the legitimacy of judges and the appropriate function of the judiciary. Current revisions and discussions in originalist circles, including the rise of Living Originalism, highlight the theory's continuous conflicts and complexities. Originalism continues to be a pillar of constitutional interpretation in spite of these difficulties, offering a framework for comprehending the words and ideas of the document. Its ongoing development shows a dedication to upholding the integrity of the constitution while adjusting to the changing demands of society. Looking ahead, it seems certain that future legal debates and judicial rulings will be shaped by originalism's continuing effect on constitutional law.

¹⁸ Originalist Theory of Interpretation: A Comparative Analysis between India and the US available at: <https://www.lawctopus.com/academike/originalist-theory-of-interpretation-a-comparative-analysis-between-india-and-the-us/> (last visited on March 2024)

¹⁹ *Ibid.*