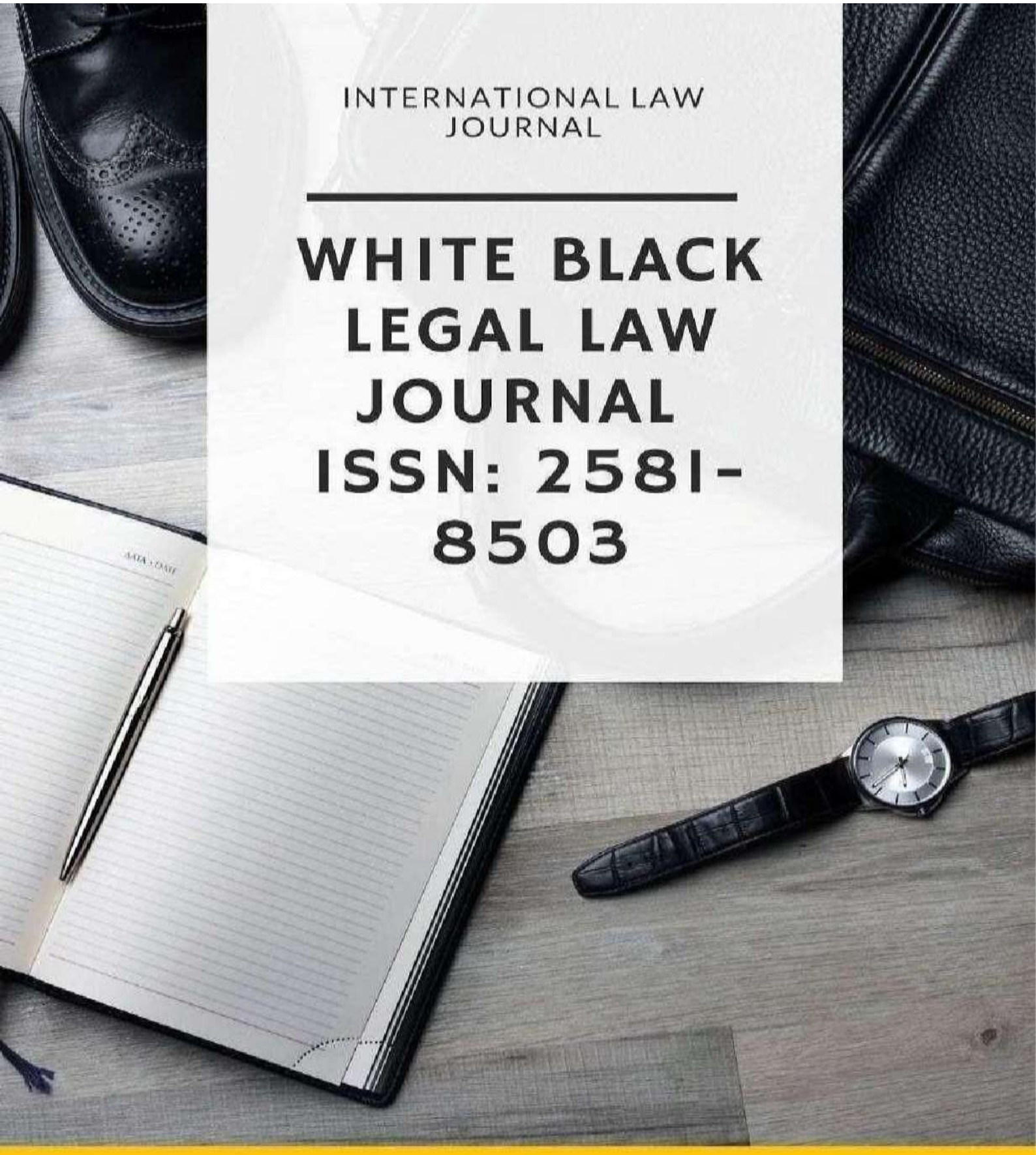

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# "HARMONY IN DISSONANCE: THE UNENDING DEBATE BETWEEN LEGAL TRADITION AND EVOLUTION"

AUTHORED BY - IQRA ROZY

## ABSTRACT

This paper delves into the journey toward organic interpretations or scholarly controversy named living-constitutionalism from originalism with several definitions as a single approachled to a tapered aspect. Whether the interpretation is frozen or dynamic seeks an answer that paves two schools of thought. This paper seeks to explore the transition from a practice of "reading and understanding" legal texts to adopting a "dynamic interpretation" approach, particularly in contrast to constitutional obligations with the case of *A.K Gopalan v. State of Madras*[1] to underlying principles of organic interpretations mentioned in *Kesavnanda Bharti v. State of Kerala*[2]. The living Constitution of India is always not a case but a conundrum dueto its drawbacks highlighting concerns about judicial overreach, instability, and erosion of constitutional principles[3]. Critics contend that these drawbacks undermine the legitimacy and effectiveness of the judicial branch and call for a more restrained approach to constitutional interpretation.

U.S.A.'s recent tilt toward originalism transpired in the case of *Thomas E. Dobbs v. Jackson Women's Health Organisation (2022)*[4] suggests Strict Constructionism and India stands with the largest written constitution but does inherit the right way to interpret the constitution fromtime to time or the approach of originalism is way better. Through a comprehensive analysis of scholarly literature, judicial decisions, and contemporary discourse, this paper aims to provide insights into the unresolved challenges posed by the clash between originalism and organic interpretation and its implications for the future of jurisprudence and what way will be most appropriate to a deeper understanding of the complexities inherent in interpreting legal texts and navigating the tension between traditional or

[1] A.K Gopalan v. State of Madras, AIR 1950 SC 27
[2] Kesavnanda Bharti v. State of Kerala, Writ Petition (Civil) 135 of 1970
[3] Keith E. Whittington, ORIGINALISM: A CRITICAL INTRODUCTION, 82 Fordham Law Rev,375-408, (2013)
[4] Thomas E. Dobbs v. Jackson Women's Health Organisation, No. 19-1392, 597 U.S. 215 (2022)

living adaption in the demesne of law by investigating the potential questions to find a middle ground that respects both original intents and need for adaption by considering future implications and sophisticated social yet cutting-edge mindset of judiciary.


## KEYWORDS

Living constitution, judicial activism, judicial overreach, Interpretation, constructionism, constitutional obligation, Constitutional fidelity.


## INTRODUCTION

Originalism is a theory regarding the interpretation of legal texts, including constitutional provisions. Proponents of originalism contend that the meaning of the constitutional text shouldalign with its original public interpretation at the time of enactment. This original meaning is discerned from various sources such as dictionaries, grammar books, and other legal documents, as well as the contextual legal events and public discourse surrounding its creation.It is viewed as an objective legal construct akin to the reasonable person standard in tort law, evaluating actions based on their reasonableness from an ordinary person's perspective in each situation[5]. Importantly, originalism holds that the original meaning exists independently of the subjective intentions of the text's authors or their envisioned application.

In divergence, living constitutionalism presents an opposing theory of constitutional interpretation. Advocates of this approach argue that the meaning of constitutional text evolvesin tandem with societal attitudes, even absent formal amendments. Living constitutionalists believe that interpretations can shift in response to changing social norms. However, in the caseof the U.S.A. originalists maintain that provisions like the Fourteenth Amendment have a fixedmeaning that prohibits racial segregation, regardless of prevailing attitudes or court decisions.They argue that constitutional principles remain constant and that amendments are required toalter them[6]. Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors. Living constitutionalists contend that constitutional law canand should evolve in response to changing circumstances and

[5] 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 viewed 5th November 2013)

[6] National Constitution Center, On Originalism in Constitutional Interpretation, Steven G. Calabresi

values[7].

In India, the living constitution ideal has always been perceived. Pandit Jawaharlal Nehru in the Constituent Assembly connotes, "While we want this constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions.There should be certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people. Therefore, it has to be flexible."

## LEGACY OF LAW: FROM FOUNDING PRECEPTS TO MODERNLEGAL INTERPRETATION

Living constitutionalism was not always the case but evolved from time to time and originalismdid not always fail to meet the expectations, this is the propound that meets the intent of framers, yet the journey is far more satisfying as both the interpretational aspect aims to provideand protect the rights of the citizens. Hence, originalism as words suggest leads to direct and literal interpretations of the text and interpretation of the Constitution based on the subjective intentions of its drafters, this approach faced challenges due to the broad terms used in the Constitution and the difficulty in determining a single representative intent among the framers[8].The theory of Original Intent found prominence from the 1960s to the mid-1980s; however, itwas realized that framers' intent and the undesirability of being bound by historical intentions in a modern society are ambiguous[9]. Yet, Originalism evolved towards the original public meaning approach, which interprets the Constitution based on how its words would have beenunderstood by a reasonable person at the time of enactment[10]. This shift, known as "Originalism2.0" or "New Originalism," addressed some of the subjective issues of the original intent approach but blurred the line between Originalism and Living Constitutionalism[11].

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[7] Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Northwestern University Law Review, 1243 (2019).

[8] Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599 (2004).

[9] Kenneth R. Thomas, Selected Theories of Constitutional Interpretation, available at HYPERLINK "http://www.fas.org/sgp/crs/misc/R41637.pdf")

[10] Richard S. Kay, Original Intention And Public Meaning In Constitutional Interpretation, Northwestern University Law Review 103:703 (2009) available at http://www.law.northwestern.edu/lawreview/v103/n2/703/lr103n2kay.pdf

[11] Originalist Theory of Interpretation: A Comparative Analysis between India and the US, By Aditi, WBNUJS, Akademike,

The evolution of originalism has made interpreting the Constitution less subjective, but it's nowharder to distinguish it from living constitutionalism. This newer form of originalism doesn't always rely on the framers' intentions but instead looks at how a reasonable person at the timewould have understood it. However, this approach can lead to different interpretations[12]. Considering today's social and language context complicates interpreting the Constitution, balancing old and new understandings. While living constitutionalism lacks a clear guiding principle, recent changes suggest originalism isn't always coherent either. Some originalists even adapt the Constitution's rules for today, blurring the lines further. [13]This shift has led to the term "originalism for non-originalists." Additionally, the concept of living originalism suggests that originalism and non-originalism can work together, potentially making their differences less clear yet this distinction is significantly an accomplishment to lead the pathways towards living constitutionalism.

## ORIGINALISM VERSUS LIVING CONSTITUTIONALISM IN INDIAAND THE USA - A COMPARATIVE INQUIRY

"Living originalism" is a great compromise between originalism and its antithesis, living constitutionalism. The most famous criticism of originalism thinking was done by David Strauss who stated that the greatest problem of originalism was that it was unable to solve thefamous Jeffersonian problem that "the earth belongs to the living and not the dead[14]", Strauss believes, it is the original sin in interpretive theory. Living originalism tries to solve this problem through a moral reading of the Constitution. It is argued time and again that wheneverthe text of the Constitution is unclear in its meaning, the original intent of the framers must be given priority, but does that mean that the prevailing circumstances are completely ignored? This question divides the pathways and becomes the propound to interpret the theory in the world- The USA style and The Indian style.

"The theory has not provided the clarity some of its early proponents had hoped it would"- Harry Litman. This statement shows the tilt towards living constitutionalism by the younger proponents because it deals with constitutional interpretation, priority must always be given tothe original intent

[12] Richard S. Kay, Original Intention And Public Meaning In Constitutional Interpretation, Northwestern University Law Review 103:703 (2009) available at http://www.law.northwestern.edu/lawreview/v103/n2/703/lr103n2kay.pdf

[13] Justice D.M. Dharmadhikari, Principle Of Constitutional Interpretation: Some Reflections, (2004) 4 SCC (Jour) 1, available at http://www.ebc-india.com/lawyer/articles/2004v4a1.htm

[14] David Strauss, The Living Constitution (1st Edn., University of Chicago Press, 2010) 4

of the people responsible for enacting these constitutional provisions. Yet USA in the recent Supreme Court decision in *Thomas E. Dobbs v. Jackson Women's Health Organisation*[15] suggests a leaning towards originalism. The Court overturned two important past rulings on abortion rights, saying the Constitution does not guarantee a right to abortion. The majority opinion, written by Justice Samuel Alito, argued that any right protected by the Constitution must have deep roots in American history. They criticized the previous *Roe v. Wade*[16] decision, saying it did not have strong reasoning and only caused more disagreement. On the other hand, the minority opinion disagreed strongly. They worried that the majority's decision could affect many other rights, like privacy and access to contraception, which the Court had recognized before. The minority pointed out that the framers of the Constitution didnot see women as equals and did not give them full rights[17]. They were upset about the potential impact on women's rights and citizenship.

This disagreement shows how different justices see the Constitution differently and highlightsthe importance of future generations correcting any mistakes made by the Court the decision of the Court has been severely criticized by many people on the liberal wing and has been usedas a tool to point out the flaws in rigid originalist thinking and how such an interpretation couldlead to absurd constitutional conclusions[18]. Another form of criticism that is leveled against this decision is that this decision while considering the historical reasons behind this right, hasconveniently misconstrued the historical context of the provision. This is the reason why originalism is seen as a controversial tool even in America because many scholars believe that,like every other interpretative tool, originalism also has certain preconceived notions, but unlike other schools of thought, it does not acknowledge the existence of such preconceived biases[19].

The approach of a living originalist places importance not only on understanding the original intentions of the framers but also on remaining true to the ongoing experiment of the Constitution. This approach could potentially succeed in India because, unlike in the United States, the intentions

[15] (2022) SCC online US SC 9: 597 US
[16] (1973) SCCOnline US SC 20: 35 L Ed 2d 147: 410 US 113 (1973)
[17] Quoted by H.R. Khanna, J. (dissenting) in ADM, Jabalpur v. Shivakanta Shukla, (1976) 2 SCC 521, Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court by Alan Barth, 1974 Edn. Pp. 3-6.
[18] Steve Emmert, Are We All Originalists Now? (American Bar Association, 18-2-2020) accessed on 2-12-2020. https://www.scconline.com/blog/post/2022/02/04/living-originalism-and-moral-interpretation/
[19] James E. Fleming, Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution, (2014) 92 BUL Rev 1171, 1178, accessed on 2-12-2020

of the Indian framers are well-documented and subject to debate[20]. In simpler terms, the moral foundation of the Indian Constitution is less uncertain compared to that of the American Constitution. One of the key elements of living originalism is its emphasis on the moral reading of a constitution[21]. The Indian Constitution has an undeniable moral characteristic as well which has been explored by the courts in several judgments. Moral reading of the Constitution is not a new phenomenon. Many philosophers, including Ronald Dworkin himself, have examined the moral arguments of Indian jurisprudence.

In S.R. Bommai v. Union of India[22], the moral question of Indian secularism was considered. Here the Court has expanded on the basic structure doctrine of Kesavnanda Bharati[23] to include"secularism" as part of the basic structure of the Constitution. This, according to many, reflects the moral characteristic of constitutionalism which has allowed for such an interpretation in the first place. As pointed out by Dworkin, this interpretation of the Constitution was more in line with the morality with which the Constitution was drafted, rather than the bare text of theConstitution. Prof. Baxi whilst analysing Dworkin, has pointed out that "An Indian reader of Dworkin is never able to understand why governance of certain provisions of the Constitutionought to be consigned to the realm of constitutional detail and not that of principle[24]."

Many modern countries of the world, apart from India, have adopted the livingconstitutionalism theory of interpretation of the supreme law of the land. The Canadian Supreme Court described the Constitution as a "living tree" and held that the frozen concept reasoning runs contrary to the fundamental principles of the Canadian constitutional interpretation[25]. The European Court of Human Rights interprets the Convention on Human Rights as a "living instrument which must be interpreted in the light of the present-day conditions[26]." Hence, it would not be inapt to conclude by quoting Brandeis, J. that "it is moreimportant that the applicable rule of law be settled than that it be settled right."

[20] Parliament of India: Digital Library, The Constituent Assembly Debates, Vol. 2, accessed on 6-12-2020. It is to be noted that the American Constitutional Convention (1787) took place behind closed doors and was not open to the public.
[21] David Strauss, The Living Constitution (1st Edn. University of Chicago Press, 2010) 4.
[22] AIR 1994 SC 1918
[23] (1973) 4SCC 225
[24] Upendra Baxi, A Known but Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence (2003) I.CON 557-589, Oxford University Press, accessed on 12-12-2020
[25] Reference re Same-Sex Marriage, 2004 SCC OnLine Can SC 80
[26] Tyrer v. United Kingdom, (1978) 2 EHRR 1.

# METAMORPHOSIS: ORIGINALISM'S EVOLUTION INTO ORGANIC INTERPRETATION IN INDIA

India relies on the Privy Council decision as a British way of interpretation to be upheld with originalism but this strict adherence is no longer able to address the complexities faced by society's aftermath of constitution framing. Originalists argue with US Supreme Court JusticeAntonin Scalia maintains that "*originalism, while not being perfect, still beats all other alternative methods of constitutional interpretation*." He does not deny the fact that the Constitution now finds application in new phenomena and contexts, but he opines that the historical inquiry of its original meaning is still essential.[27] The original intent of the phrase "procedure established by law" instead of "due process of law" (as used in the US Constitution)is specifically to prevent social justice legislation from being bogged down by Part III challengein the courts, as the same created a lot of problems for the US Government in during the early20th century and the new deal[28]. This sort of textualist approach to the Constitution was also taken up in several early constitutional judgments by the Supreme Court, and whilst this approach has been criticized by later Supreme Court judgments and legal scholars, there was acoherent judicial philosophy behind it. The prime example of this can be seen in the *State of Rajasthan v. Union of India*[29], where the Court permitted only a limited intervention of the courts when there was an exercise of Article 356(1) by the Union Government. In this case, aswell the Court went for a more textualist approach and adopted judicial restraint and the case of *A.K. Gopalan v. State of Madras*[30], one of the earliest cases decided by the Supreme Court, Article 21 of the Constitution was held to not require Indian courts to apply a due process of law standard. The Court relied on the rejection, by the framers of the Constitution, of the "dueprocess" clause (which appeared in the original draft). Mukherjee, J., in a concurring judgment,concluded that in Article 21, the word "law" has been used in the sense of state-made law andnot as an equivalent of law in the abstract or general sense embodying the principles of naturaljustice. while originalism is not explicitly articulated as a judicial philosophy, there have beeninstances where strict adherence to the original intent or literal interpretation of constitutional provisions has been challenged or deemed inadequate in addressing contemporary issues. Onesuch example is the interpretation of Article 21 of the Indian

[27] University of Virginia, School of Law, Scalia Defends Originalism as Best Methodology for Judging Law, April 20, 2010, available at www.law.virginia.edu/html/news/2010_spr/scalia.htm
[28] Chintan Chandrachud, Constitutional Interpretation, in P.B. Mehta and Madhav Khosla (eds.), Oxford Handbook of the Indian Constitution (Oxford University Press, 2016).
[29] (1973) 4 SCC 225
[30] AIR 1950 SC 27

Constitution, which guarantees the right to life and personal liberty.

In the case of *Maneka Gandhi v. Union of India*[31], the Supreme Court of India expanded the scope of Article 21 beyond its literal interpretation. Maneka Gandhi's passport was impounded by the government under Section 10(3)(c) of the Passport Act, 1967, without providing her with an opportunity to be heard. The government's action was based on its interpretation of thelaw, which allowed for such impoundment in the interest of the public. However, the SupremeCourt, led by Chief Justice Y.V. Chandrachud, held that the right to life and personal liberty under Article 21 is not confined to mere animal existence but includes a broad array of rights that make life meaningful and worth living. The Court emphasized that the procedure established by law must be fair, just, and reasonable and that it cannot be arbitrary, oppressive,or unjust.

In reaching this decision, the Court departed from a literal interpretation of Article 21 and embraced a more expansive and progressive understanding of fundamental rights. This interpretation has had far-reaching implications for the protection of individual liberties in India and has been cited in numerous subsequent cases to uphold rights related to due process, privacy, and dignity[32].

The Maneka Gandhi case exemplifies how a strict adherence to originalism, or a narrow interpretation of constitutional provisions may fail to address the complexities of modern society and the evolving understanding of fundamental rights. Notably, it took 28 years for thejudiciary in India to often adopt a dynamic and purposive approach to constitutional interpretation, considering contemporary realities and societal values in its decisions.

But Originalism is not a complete failure or explicitly rejected but there are instances where strict adherence to originalism leads to ambiguous skirmish. In *K.S. Puttaswamy and Anr. vs. Union of India*[33], Right to Privacy was established as a fundamental right under Article 21 eventhough it is not mentioned in the Constitution but to update our understanding of the Constitution with societal norms. Hence, we cannot stick to the original intent of framers at thetime of constitution-making and we have to modernize the aspects which lead to amendmentsin our constitution. But this does not signify that

[31] (1978) 1 SCC 248
[32] Originalism v. Living Constitutionalism: The Debate Goes on… by Somesh Jain, Published on September 13, 2022, By Bhumika India.
[33] ((2017) 10 SCC 1), (Puttaswamy I).

Organic interpretation is flawless and only concerned with the best and appropriate understanding of the Constitution. One potential drawback of living constitutionalism is the risk of judicial activism as interpretations by the judges reflect their beliefs and ideologies or social trends rather than sticking to the original intent which marks it as an approach of the Realistic School.

The most appropriate and recent evidence of the flaw of organic interpretation is the Abrogationof Article 370 because the Supreme Court denied involvement too much and held it as a political issue instead of looking at the heart of the matter and the people of Jammu and Kashmir yet loses the end and call it a failure of living constitutionalism in India[34].

Hence, Singh, Kamlesh & Mishra, and Aman in their Research analysis concluded that The Constitution of India, known as the longest-written constitution globally, isn't considered 'complete' because it leaves out some things, overlooks others, or leaves them undecided and how important these gaps in the Constitution with changing dynamics looks at what happens when the Constitution doesn't say something, showing examples where courts have filled in these gaps by making decisions that shape how the Constitution works, like with the Doctrineof Basic Structure, and talks about the arguments made by scholars about these gaps and how some people criticize those who interpret them too much and confirmed that there's still a lot we don't know about what the Constitution doesn't say, and that could affect how things go inthe future[35].

## CONCLUSION

The switch from the interpretation of the Constitution as its original meaning to understandingmodern societal norms marks an unending debate in legal thinking yet both reflect flaws and qualities to ensure values in the society.

The author would like to submit that the idea of neither organic interpretation nor originalismis cult-appropriate but living constitutionalism allows the courts to play an active role in fillingthe gaps of the constitutional reach in constitutional texts, illustrating instances where courts have played a role in

[34] Government of India. (2019). Resolution revoking the special status of Jammu and Kashmir. Gazette of India, Extraordinary, Part II, Section 1. Retrieved from [https://egazette.gov.in/WriteReadData/2023/247847.pdf]

[35] Singh, Kamlesh & Mishra, Aman. (20 23). CONSTITUTIONAL SILENCE: A COMPLETE ANALYSIS OF THE LIVING TREE. Indian Journal Of Applied Research. 13. 1-3.

shaping constitutional culture by telling certain voids while deliberately leaving room for future determination, exemplified by the Doctrine of Basic Structure[36] and ensure justice and equity in the society. Conversely, Originalism can limit judicial overreach and provide a more restrained approach. Hence, the answer to this conundrum is not to strictlystrict with the creator's intent and not allow courts to interpret the constitution with all their intent which leads to the making of laws instead of interpreting. The solution can be found between them which concludes that it is high time for India to think about living Originalism and moral interpretation of the constitution. Constitutional Morality is not a natural sentiment.It has to be cultivated. We must realize that our people have yet to learn it. Democracy in Indiais only a top-dressing on Indian soil which is essentially undemocratic[37] and this moral constitutionality demands to be upheld.



[36] Singh, Kamlesh & Mishra, Aman. (2023). CONSTITUTIONAL SILENCE: A COMPLETE ANALYSIS OF THE LIVING TREE. Indian Journal Of Applied Research. 13. 1-3.

[37] By B.R Ambedkar, Writing and Speeches of Dr. Baba Saheb Ambedkar, Volume No. 13 Page No. 61