DOWNLOAD PDF A LIVING CONSTITUTION

Chapter 1 : Living Constitution Law and Legal Definition | USLegal, Inc.

In United States constitutional interpretation, the living Constitution (or loose constructionism) is the claim that the Constitution has a dynamic meaning or that it has the properties of an animate being in the sense that it changes.

The law, lawyers, and the court. As the most recent " Justice Sunday " extravaganza illustrates, the majority of the nation seems now to be of the firm belief that there is only one way to view the U. To hear Tom DeLay and his cronies tell it, the only alternative to the interpretive theory of "Originalism" or "strict construction" is to have judges swinging like monkeys from the constitutional chandeliers, making up whatever they want, whenever they want. That is what prevents judges from ruling now this way, now thatâ€"thumbs up or thumbs downâ€"as their personal preferences dictate. In a very thoughtful essay published last week in the American Prospect, Adele M. Stanargues , "Liberals have done virtually nothing to explain the Constitution to regular people in terms they understand. Advertisement A Nexis search for the words "living Constitution" turns up literally dozens of stories by conservatives bashing the premise into a hopeless pulp. And I wonder why. Is it because the words "living Constitution," like the words "feminist" or "liberal," have become wholly appropriated by the Rush Limbaughs of the world? Or is it something deeperâ€"a sense on the part of serious liberal thinkers that Roe v. Wade, with its kabbalistic talk of constitutional penumbras and emanations, really is indefensible? Is it, as I have argued before, that we are all secretly afraid that Scalia is right? That a living Constitution is nothing more than a bunch of monkeys on chandeliers? Calls for minimalism or pragmatism or incrementalism are now in vogue for progressives. That has all the taste of penumbras and emanations, but only half the calories. So, I turn to you, dear readers, smart thinkers, and posters of great wisdom in the Fray, to ask simply: Is the living Constitution dead? What is left in its place? Is there room for a Brennan-esque defense anymore? Or am I correct in guessing that Scalia is right this time? Send replies to livingcons hotmail. The best of your answers will be coming soon to a Jurisprudence near you.

Chapter 2 : The Founders on a Living Constitution | What Would The Founders Think?

A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended. On the one hand, the answer has to be yes: there's no realistic alternative to a living Constitution.

Many countries have constitutions. But our Constitution is the oldest written national constitution in existence. Because it has passed the test of time, many countries have used it as a model for their constitutions. Strife Between States From to , the government of the U. Each state had its own government and could make its own laws. Each could coin its own money and arm its own soldiers. The states competed with one another for business and trade. They were like 13 separate nations rather than one. The new nation was divided. Working Towards Unity How could the new nation be strengthened enough to protect its independence? State delegates asked that question when they gathered in Philadelphia in One way was to rewrite the Articles of Confederation and make the new nation stronger by strengthening the central government. Instead, those who gathered decided to create a new governing document. But they still disagreed about how the new document would be written. One disagreement was about the number of Representatives each state would send to Congress. Delegates from states with large populations wanted more representation because they paid more taxes. Delegates from small states feared their states would be overpowered by a central government and dominated by the larger states. Finally, a compromise was reached. Congress would consist of two houses. Each state would send two lawmakers to the Senate. To give the Congress national authority, the Constitution gave Congress many new powers. Among them were the power to collect taxes, print all money, declare war, and draft soldiers. To provide a check on this power, the delegates decided to set up three nearly equal branches of government. The Legislative branch would consist of Congress and make the laws. The President and Vice President would compose the Executive branch and enforce the laws. The Judicial branch would consist of the federal courts and the U. Supreme Court and would interpret Constitutional laws. Adapted from Scholastic News.

Chapter 3 : Originalism - Wikipedia

Living Constitution This is a concept used in interpreting the Constitution of U.S. It is based on the notion that Constitution of the United States has relevant meaning beyond the original text and is an evolving and dynamic document that changes over time.

The first day was filled with opening statements from both the nominee and the Senators who will consider his confirmation. Feinstein seemingly used her opening statement to signal she will not be supporting Gorsuch and used the contrast in judicial philosophies as part of an explanation of why. We can use the statements of Feinstein to help illustrate the differences to better understand them. Understanding the difference in these two competing judicial philosophies helps us understand why one is preferable, and the other is dangerous. It should be noted that adherents to a living document philosophy do not actually believe the Constitution is a literal living organism â€" it is a metaphorical description, and to suggest otherwise would be a gross mischaracterization. This, of course, does not mean that a legal text written a couple of hundred years ago cannot apply to the cases and controversies that arise today. The main difference is living document-ists believe those changes should come from the judicial branch of government. Originalists, however, believe change must come via the more political branches the legislative and executive , and it should not be done by judges who are virtually unaccountable to the electorate. In our system of government, people are accountable for their actions under the law. If they violate the laws, they can lose their lives or their property; they can have their liberties restricted. Not knowing the law will lead to more incidence of violating the law, thus, more loss of liberty. For to know the law, one must know the meaning of the words of the legal texts as fully as possible. Under the living document doctrine, the meaning of the laws of the land cannot fully be known until after a judge hands down his interpretation, for who knows how a certain judge or panel of judges will react to the facts of a specific case? This is why originalism in all its forms is a superior judicial philosophy. The mischaracterization and demonization of Originalist philosophy So why is originalism maligned and rejected for a clearly inferior philosophy like living document-ism? For one thing, originalism is detrimental to the political goals of progressive leftists like Senator Feinstein. For example, Feinstein has advocated for certain gun-ownership restrictions by private individuals. Feinstein, and legislators like her, know this. That is where the philosophy of the Constitution as a living document truly comes in to its own. Yesterday, a law may have meant one thing. Today it means something different. With the American political system, it is relatively hard to advance a progressive political agenda through the normal political process. It is much easier for it to be implemented via the judicial branch and progressive judges who utilize a living document philosophy. Of course, an originalist philosophy is vastly superior to the living document doctrine. Ideological progressives who need the living document doctrine in order for their agenda to become law know this. Therefore, originalism must be discredited. How does Feinstein go about discrediting originalist philosophy? The same progressives generally discredit their opposition: Through mischaracterization and demonization. In essence, it means the judges and courts should evaluate our Constitutional rights and privileges as they were understood in Originalists believe the provisions should be interpreted based on how a reasonable person would have done so when the statute was passed. Of course, none of the Amendments were part of the Constitution in , so they could not be interpreted based on what they meant then â€" they did not exist! Feinstein clearly and possibly intentionally mischaracterizes how originalism operates. She then goes on to demonize originalism using some of the classic demonization methods progressives employ â€" saying her political opponents are bigots who want women and minorities to suffer. Furthermore, originalism is the best philosophy for protecting the equal rights of all Americans. Two of the most common are the living document doctrine and originalism. The living document doctrine is a dangerous one because it opens up to consequential legal statutes to be interpreted by judges who think they know best how to adapt the Constitution to our ever-changing world. Originalism, on the other hand, is accountable to the text of a statute. A reasonable person can interpret the laws and know his rights before he finds himself on trial and not after a judge explains to what degree the Constitution has evolved to fit the times. Originalism is much maligned, but the charges are

weak. Originalism does not mean a philosophy whereby the adherents want to return to a time where oppression was more rampant than it is today. In fact, originalism is the best philosophy to adhere to for those concerned about mistreatment and prejudice before the law.

Chapter 4 : What's a "living Constitution"?

The living Constitution is not what the framers intended, Ernest van den Haag is a Distinguished S cholar at The Heritage Foundation and John M. Olin Professor of Jurisprudence and Public Policy.

Columnist, author, and theologian Constitution Is Clearly a Living Document The Constitution must be a living document if it is to represent those living today. The flaw in its inception would be its original intent excluded so many people. This is generally understood that the Constitution should be interpreted as the framers intended. Such interpretations are allegedly based on a fundamentalist reading of the Constitution along with other key documents of the period, such as the Federalist Papers. The originalist perspective in theory is designed to counter what many offer as activist judges legislating from the bench. This is a focus-group-tested canard designed to obfuscate reality by relying on the mythical deity of the framers of the Constitution. There is no doubting the collective greatness of the framers; they were able to craft a document that surpassed their idealistic imagination. Charles Pinckney was a great American statesman who played a key role in ratifying the Constitution; he also reportedly owned slaves. Does the originalist perspective suggest that we embrace in totality what Pinckney intended? Though I would not consider myself on an intellectual par with James Madison, I would say that I have a better understanding of what "We the people of the United States in order to form a more perfect union" looks like in the 21st century than he does. Since the Constitution was ratified in , the ongoing struggle in America has been to redefine the "we" to better reflect those who comprise the nation. In some cases that monumental responsibility has been left to the courts. Should we consider the gains for women and minorities, allowing them to also drink from the wells of democracy, the work of activist judges legislating from the bench because this was not what the Founding Fathers originally intended? Supporters of Proposition 8 felt former federal Judge Vaughn Walker had subverted their will. Walker ruled the controversial initiative that banned gay marriage was unconstitutional. The majority albeit small felt their will prohibiting same-gender marriage trumped other considerations. If that were true, why have a Constitution? Moreover, their reliance on the Constitution focuses more on the 10th Amendment, which states: The framers of the Constitution punted on the most pressing issue of their day -- slavery. The result nearly tore the country asunder. But after the Civil War, the nation survived, spawning the 13th, 14th and 15th Amendments to the Constitution. Support for constitutional principles could have one opposing an outcome they back. Nor do we believe that the Constitution should be confined to the world view of a group of men whose last survivor died years ago. Originalists argue, rightfully so, same-sex marriage is not found in the Constitution, while ignoring the due process and equal protection that appears prominently. The Constitution must be a living document if it is to represent those living today. With all we know, why would anyone advocate that we revert to that? Byron Williams is an Oakland pastor and syndicated columnist. He is the author of the forthcoming book: The Year of Hope and Hostility. E-mail him at byron byronspeaks.

Chapter 5 : Living Constitution - Wikipedia

The Founders on a Living Constitution by James D. Best The Founders believed that the Constitution was a legally binding agreement between Americans and their government.

Background[edit] During the progressive era, many initiatives were promoted and fought for, but were prevented from coming to full fruition in either legislative bodies or judicial proceedings. One case in particular, Pollock v. Brandeis , and Woodrow Wilson. Living political constitutions must be Darwinian in structure and in practice. Society is a living organism and must obey the laws of life, not of mechanics; it must develop. All that progressives ask or desire is permission - in an era when "development," "evolution," is the scientific word - to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine. In an letter to Samuel Kercheval , excerpted on Panel 4 of the Jefferson Memorial , he wrote But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. The most common association is with judicial pragmatism. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether [U. We must consider what this country has become in deciding what that amendment has reserved. According to the pragmatist view, the Constitution should be seen as evolving over time as a matter of social necessity. Looking solely to original meaning, when the original intent was largely to permit many practices universally condemned today, is under this view cause to reject pure originalism out of hand. This general view has been expressed by Judge Richard Posner: A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law [as the Connecticut law banning contraceptives] would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution. Under this view, for example, constitutional requirements of "equal rights" should be read with regard to current standards of equality, and not those of decades or centuries ago, because the alternative would be unacceptable. Original intent In addition to pragmatist arguments, most proponents of the living Constitution argue that the Constitution was deliberately written to be broad and flexible to accommodate social or technological change over time. Edmund Randolph , in his Draft Sketch of Constitution , wrote this: To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events: To use simple and precise language, and general propositions, according to the example of the constitutions of the several states. James Madison , principal author of the U. Constitution and often called the "Father of the Constitution," said this in argument for original intent and against changing the Constitution by evolving language: I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that is not the guide in expounding it, there may be no security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be

sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense. Some living Constitutionists seek to reconcile themselves with the originalist view; e. This was seen in the Supreme Court case of Trop v. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. From its inception, one of the most controversial aspects of the living Constitutional framework has been its association with broad interpretations of the equal protection and due process clauses of the 5th and 14th Amendments. Not only is it currently seen as unacceptable to suggest that married women or descendants of slaves are not entitled to liberty or equal protection with regard to coverture laws, slavery laws and their legacy as they were not expressly seen as free from such by all ratifiers at the time of the Constitutional ratification, but neither do advocates of the living Constitution believe that the framers intended, or certainly demanded, that their 18th century practices be regarded as the permanent standard for these ideals. Liberty in , it is argued, was never thought to be the same as liberty in or , but rather was seen as a principle transcending the recognized rights of that day and age. Giving them a fixed and static meaning in the name of "originalism," thus, is said to violate the very theory it purports to uphold. Disregard of Constitutional language[edit] The idea of a Living Constitution was often characterized by Justice Scalia and others as inherently disregarding Constitutional language, suggesting that one should not simply read and apply the constitutional text. Jack Balkin argues that this is not the intended meaning of the term, however, which suggests rather that the Constitution be read contemporaneously, rather than historically. A proper application, then, involves some reconciliation between these various devices, not a simple disregard for one or another. Indeed, Living Constitutionalists often suggest that it is the true originalist philosophy, while originalists generally agree that phrases such as "just compensation" should be applied differently than years ago. It has been suggested that the true difference between these judicial philosophies does not regard "meaning" at all, but rather, the correct application of Constitutional principles. It may be what it always has always been: The important change then might be in what is recognized as liberty today, that was not fully recognized two centuries ago. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall. Living Constitutionalists tend to advocate a broad application in accordance with current views, while originalists tend to seek an application consistent with views at the time of ratification. Critics of the Living Constitution assert that it is more open to judicial manipulation, while proponents argue that theoretical flexibility in either view provides adherents extensive leeway in what decision to reach in a particular case. By its nature, the "living Constitution" is not held to be a specific theory of construction, but a vision of a Constitution whose boundaries are dynamic, congruent with the needs of society as it changes. This method also has its critics; in the description of Chief Justice William Rehnquist , it "has about it a teasing imprecision that makes it a coat of many colors. Opponents of the doctrine tend to use the term as an epithet synonymous with judicial activism itself a hotly debated phrase. However, just as some conservative theorists have embraced the term Constitution in Exile which similarly gained popularity through use by liberal critics , and textualism was a term which once had pejorative connotations before its widespread acceptance as a badge of honor, some liberal theorists have embraced the image of a living document as appealing. Please help improve this article by adding citations to reliable sources. Unsourced material may be challenged and removed. February Learn how and when to remove this template message Two of the arguments in support of the concept of a "living Constitution" is the concept that the Constitution itself is silent on the matter of constitutional interpretation. Proponents of the living Constitution assert that the Constitutional framers, most of whom were trained lawyers and legal theorists, were certainly aware of these debates; they also would have known the confusion that not providing a clear interpretive method would cause. Had the framers meant for future generations to interpret the Constitution in a specific manner, they could have indicated such within the Constitution itself. Relating to the pragmatic argument, it is further argued that if judges were denied the opportunity to reflect on

changes to modern society in interpreting the scope of Constitutional rights, the resulting Constitution either would not reflect current mores and values, or would necessitate a constant amendment process to reflect our changing society. Another defense of the Living Constitution is based in viewing the Constitution not merely as law, but as a source of foundational concepts for the governing of society. Of course, laws must be fixed and clear so that people can understand and abide by them on a daily basis. But if the Constitution is more than a set of laws, if it provides guiding concepts which themselves will in turn provide the foundations for laws, then the costs and benefits of such an entirely fixed meaning are very different. The reason for this is simple: Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth. The term presumes the premise of "that which is written is insufficient in light of what has transpired since". This more moderate concept is generally not the target of those who are against the "Living Constitution". The concept considered perverse by constructionalists is "making the law say what you think it should say, rather than submitting to what it does say". Economist Thomas Sowell argues in his book Knowledge and Decisions that since the original designers of the Constitution provided for the process of changing it , they never intended for their original words to change meaning. Sowell also points out cases where arguments are made that the original framers never considered certain issues, when clear record of them doing so exists. Please help improve it by rewriting it in an encyclopedic style. October Learn how and when to remove this template message Another argument against the concept of a "living Constitution" ironically, is similar to the argument for it; the fact that the Constitution itself is silent on the matter of constitutional interpretation. The doctrine of the "living Constitution" relies on the concept that the original framers either could not come to a consensus about how to interpret, or they never intended any fixed method of interpretation. This would then allow future generations the freedom to reexamine for themselves how to interpret the Constitution. This view does not take into account why the original constitution does not allow for judicial interpretation in any form. The concept for a "living constitution" therefore relies on an argument regarding the writing of the constitution that had no validity when the constitution was written. The views of constitutional law scholar Laurence Tribe are often described by conservative critics such as Robert Bork as being characteristic of the "living Constitution paradigm" they condemn. Tribe rejects both the term and the description Such a construction appears to define "living Constitution" doctrine as being an ends dictate the means anti-law philosophy. Some liberal constitutional scholars have since implied a similar charge of intellectual dishonesty regarding originalists, noting that they virtually never reach outcomes with which they disagree. Many academic political scientists believe that justices and appeals judges are willing to alter their outcomes to attain philosophical majorities on certain questions. A Living Document," in which he argued that the Constitution must be interpreted in light of the moral, political, and cultural climate of the age of interpretation. References to "the living Constitution" are relatively rare among legal academics and judges, who generally prefer to use language that is specific and less rhetorical. It is also worth noting that there is disagreement among opponents of "the living Constitution" about whether the idea is the same as, implied by, or assumed by judicial activism, which has a similar ambiguity of meaning and is also used primarily as an epithet. Justice Clarence Thomas has routinely castigated "living Constitution" doctrine. In one particularly strongly worded attack, he noted that: Let me put it this way; there are really only two ways to interpret the Constitution â€” try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial. The Constitution is over years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that; the Constitution is not a living organism; it is a legal document. You think the death penalty is a good idea? Under the formalist understanding of the Constitution, but not under the Living Constitution understanding, you can persuade your fellow citizens to adopt it. You want a right to abortion? Persuade your fellow citizens and enact it. This section needs additional citations for verification.

Chapter 6 : Living Constitution - Ballotpedia

ow would you write an interpretive history of the U.S. Constitution? Not a story of the framing and how the founders' political theories have survived (or not) the test of time, or a chronological exegesis of Supreme Court cases, or even a critique of American constitutionalism from a particular theoretical perspective.

This section needs additional citations for verification. Please help improve this article by adding citations to reliable sources. Unsourced material may be challenged and removed. April Learn how and when to remove this template message Bret Boyce described the origins of the term originalist as follows: The term "originalism" has been most commonly used since the middle s and was apparently coined by Paul Brest in The Misconceived Quest for the Original Understanding. Scalia differentiated the two by pointing out that, unlike an originalist, a strict constructionist would not acknowledge that he uses a cane means he walks with a cane because, strictly speaking, this is not what he uses a cane means. In many cases, the meaning might be so specific that no discretion is permissible, but in many cases, it is still before the Judge to say what a reasonable interpretation might be. A judge could, therefore, be both an originalist and a strict constructionistâ€”but he is not one by virtue of being the other. Forms[edit] Originalism is actually a family of related views. But that line was largely abandoned in the early s; as "new originalism" emerged; most adherents subscribed to "original meaning" originalism, though there are some intentionalists within new originalism. One problem with this approach is identifying the relevant "lawmaker" whose intent is sought. For instance, the authors of the U. Constitution could be the particular Founding Fathers that drafted it, such as those on the Committee of Detail. Or, since the Constitution purports to originate from the People, one could look to the various state ratifying conventions. The intentionalist methodology involves studying the writings of its authors, or the records of the Philadelphia Convention , or debates in the state legislatures, for clues as to their intent. There are two kinds of intent analysis, reflecting two meanings of the word intent. The first, a rule of common law construction during the Founding Era, is functional intent. The second is motivational intent. To understand the difference, one can use the metaphor of an architect who designs a Gothic church with flying buttresses. The functional intent of flying buttresses is to prevent the weight of the roof from spreading the walls and causing a collapse of the building, which can be inferred from examining the design as a whole. The motivational intent might be to create work for his brother-in-law who is a flying buttress subcontractor. Using original intent analysis of the first kind, we can discern that the language of Article III of the U. Constitution was to delegate to Congress the power to allocate original and appellate jurisdictions, and not to remove some jurisdiction, involving a constitutional question, from all courts. That would suggest that the decision was wrong in Ex Parte McCardle. For example, most of the Founders did not leave detailed discussions of what their intent was in , and while a few did, there is no reason to think that they should be dispositive of what the rest thought. Moreover, the discussions of the drafters may have been recorded; however they were not available to the ratifiers in each state. The theory of original intent was challenged in a string of law review articles in the s. This is dubbed original meaning. Original meaning Justice Oliver Wendell Holmes argued that interpreting what was meant by someone who wrote a law was not trying to "get into his mind" because the issue was "not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. The most robust and widely cited form of originalism, original meaning, emphasizes how the text would have been understood by a reasonable person in the historical period during which the constitution was proposed, ratified, and first implemented. For example, economist Thomas Sowell [19] notes that phrases like "due process" and "freedom of the press" had a long established meaning in English law, even before they were put into the Constitution of the United States. Justice Scalia, one of the most forceful modern advocates for originalism, defined himself as belonging to the latter category: The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. I take the words as they were promulgated to the people of

the United States, and what is the fairly understood meaning of those words. Perhaps the clearest example illustrating the importance of the difference between original intent and original meaning is the Twenty-seventh Amendment. The Twenty-seventh Amendment was proposed as part of the Bill of Rights in , but failed to be ratified by the required number of states for two centuries, eventually being ratified in An original intent inquiry might ask what the framers understood the amendment to mean when it was written, though some would argue that it was the intent of the latter-day ratifiers that is important. An original-meaning inquiry would ask what the plain, public meaning of the text was in when it was eventually ratified. This type of originalism contrasts with expectations originalism, which adheres to how the statutes functioned at the times of their passages, without any expectation that they would function in any other particular ways. Dworkin and the semantic-originalists assert, however, that if advances in moral philosophy presuming that such advances are possible reveal that the death penalty is in fact "cruel and unusual", then the original meaning of the Eighth Amendment implies that the death penalty is unconstitutional. All the same, Justice Scalia purported to follow semantic originalism, although he conceded that Dworkin does not believe Scalia was true to that calling. Framework Originalism, or Living Originalism, is a blend of primarily two constitutional interpretive methods: Balkin holds that there is no inherent contradiction between these two, aforementioned, interpretive approachesâ€”when properly understood. Framework Originalists view the Constitution as an "initial framework for governance that sets politics in motion. This process is achieved, primarily, through building political institutions, passing legislation, and creating precedents both judicial and non-judicial. The authority of the judiciary and of the political branches to engage in constitutional construction comes from their "joint responsiveness to public opinion" over long stretches of time, while operating within the basic framework of the original meaning. Balkin claims that through mechanisms of social influence, both judges and the political branches inevitably come to reflect and respond to changing social mores, norms, customs and public opinions. According to Framework originalism, interpreters should adhere to the original meaning of the Constitution, but are not necessarily required to follow the original expected application although they may use it to create doctrines and decide cases. For example, states should extend the equal protection of the laws to all peoples, in cases where it would not originally or normally be applied to. Contemporary interpreters are not bound by how people in would have applied these words and meanings to issues such as racial segregation or sexual discrimination, largely due to the fact the fourteenth amendment is concerned with such issues as well as the fact that the fourteenth amendment was not proposed or ratified by the founders. When the Constitution uses or applies principles or standards, like "equal protection" or "unreasonable searches and seizures," further construction is usually required, by either the judiciary, the executive or legislative branch. Therefore, Balkin claims, pure, unadulterated originalism is not sufficient to decide a wide range of cases or controversies. Judges, he posits, will have to "engage in considerable constitutional construction as well as the elaboration and application of previous constructions. Constraint itself does not just come from doctrine or canons, it also comes from institutional, political, and cultural sources. These constraints ensure that judges act as impartial arbiters of the law and to try to behave in a principled manner, as it applies to decision making. Rappaport described the methodology associated with the "original meaning" form of originalism as follows: Interpreters at the time would have examined various factors, including text, purpose, structure, and history. The modern interpreter should read the language in accord with the meaning it would have had in the late s. Permissible meanings from that time include the ordinary meanings as well as more technical legal meanings words may have had. Purpose, structure, and history provide evidence for determining which meaning of the language the authors would have intended. One common and permissible way to discern the purpose is to look to the evident or obvious purpose of a provision. Yet, purpose arguments can be dangerous, because it is easy for interpreters to focus on one purpose to the exclusion of other possible purposes without any strong arguments for doing so. History can also reveal their practices, which when widely accepted would be evidence of their values. The decision to enact one constitutional clause may reveal the values of the Framers and thereby help us understand the purposes underlying a second constitutional clause. Of course, early interpreters may also have had political and other incentives to misconstrue the document that should be considered. June Philosophical

underpinnings[edit] Originalism, in all its various forms, is predicated on a specific view of what the Constitution is, a view articulated by Chief Justice John Marshall in Marbury v. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? Originalism assumes that Marbury is correct: Originalism further assumes that the need for such a written charter was derived from the perception, on the part of the Framers, of the abuses of power under the unwritten British Constitution , under which the Constitution was essentially whatever Parliament decided it should be. As one author stated, "If the constitution can mean anything, then the constitution is reduced to meaninglessness. Evans , Scalia wrote: Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected. This statement summarizes the role for the court envisioned by originalists, that is, that the Court parses what the general law and constitution says of a particular case or controversy , and when questions arise as to the meaning of a given constitutional provision, that provision should be given the meaning it was understood to mean when ratified. Is there a right to abortion? The federal Constitution says nothing on these subjects, which are therefore left to be governed by state law. However, this power was itself balanced with the requirement that the Court could only invalidate legislation if it was unconstitutional. Originalists argue that the modern court no longer follows this requirement. They argue thatâ€”since U. This latter approach is frequently termed "the Living constitution "; Scalia inveighed that "the worst thing about the living constitution is that it will destroy the constitution". Dulles and of reference to the opinions of courts in foreign countries excepting treaties to which the United States is a signatory, per Article II, Section 2, Clause 2 of the United States Constitution in Constitutional interpretation. In an originalist interpretation, if the meaning of the Constitution is static, then any ex post facto information such as the opinions of the American people, American judges, or the judiciaries of any foreign country is inherently valueless for interpretation of the meaning of the Constitution, and should not form any part of constitutional jurisprudence. The Constitution is thus fixed and has procedures defining how it can be changed. The exception to the use of foreign law is the English common law , which originalists regard as setting the philosophical stage for the US Constitution and the American common and civil law. Pros and cons[edit] Arguments for and against Originalism should be read in conjunction with alternative views and rebuttals, presented in footnotes. Arguments favoring originalism[edit] This section needs additional citations for verification. The Living Constitution approach would thus only be valuable in the absence of an amendment process. Originalism deters judges from unfettered discretion to inject their personal values into constitutional interpretation. Before one can reject originalism, one must find another criterion for determining the meaning of a provision, lest the "opinion of this Court [rest] so obviously upon nothing however the personal views of its members". If a constitution as interpreted can truly be changed at the decree of a judge, then "[t]he Constitutionâ€¦ is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please," said Thomas Jefferson. Sometimes the Ninth Amendment is cited as an example by originalism critics to attack originalism. Self-described originalists have been at least as willing as judges of other schools to give the Ninth Amendment no substantive meaning or to treat it as surplusage duplicative of the Tenth Amendment. Bork described it as a Rorshach blot and claimed that the courts had no power to identify or protect the rights supposedly protected by it. However, this is a criticism of specific originalistsâ€”and a criticism that they are insufficiently originalistâ€”not a criticism of originalism.

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According to them, a living Constitution is first of all a protean constitution - one whose meaning is not fixed, but variable. In this respect, it is similar to the Constitution as understood by the "judicial power" school.

The first was the influence of Darwinism and pragmatism on traditional consitutional theory, and in particular their challenge to a more traditional, and conservative emphasis on remaining faithful to original intent and designs. The second development was the rising constituency for political reform in the early twentieth century after industrialization began putting pressure on eighteenth-century institutional arrangements. The idea of the living Constitution should be seen in light of a relatively straightforward feature of our constitutional system: The Framers believed that the Constitution embodied principles of a republican form of government that had withstood the test of time. Thus, despite warnings from thomas jefferson against imposing on future generations the "dead hand of the past," the supporters of the Constitution felt it was acceptable to entrench these arrangements in a constitutional system that was perpetual and marked by a difficult, formal amending process. It is sometimes claimed that the idea of the living Constitution received its first clear expression in mcculloch v. As Justice joseph story explained in his Commentaries on the Constitution of the United States , while the "means" by which the government pursues its enumerated powers "must be subject to perpetual modification" it is equally important "not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever. Rather, they were challenging the inherited principle that the Constitution is to have a "permanent construction," arguing instead that judges should update their interpretations to make them more consistent with current assumptions and more serviceable to current problems. On the Supreme Court the theory of the living Constitution found expression in two related but distinct judicial traditions. The first is associated with Justice oliver wendell holmes, jr. As he put it in missouri v. As he put it in his dissenting opinion in lochner v. The second tradition associated with the new theory of the living Constitution can be traced to Justice louis d. Brandies often agreed with Holmes about the advantages of deferring to experimental legislation, but unlike Holmes he also believed that a commitment to a living Constitution meant that judges had an obligation to update constitutional protections to enable them to address contemporary threats to liberty. When the Court ruled in olmstead v. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This battle intensified after President franklin d. This political development led increasing numbers of scholars sympathetic to the New Deal to speak out more strongly in favor of the living Constitution. Of this group none was more vocal or prolific than edward s. The Holmes version of constitutional adaptation through judicial deference was given voice by the former progressive, Justice felix frankfurter. It is a fairly straight line from this position to the attempts of alexander m. Whether either version of the living Constitution can be reconciled with the original understanding of our constitutional system has been a central locus for debate among postâ€”New Deal constitutional theorists. Still, if it be true that the alternative to this move is the kind of activist originalism practiced by preâ€”New Deal conservatives, then we may come to see the theory of the living Constitution as an understandableâ€”but still controversialâ€”response to the pressures for political change within a difficult-to-amend constitutional system. Howard Gillman see also: Bibliography Corwin, Edward S. The Judiciary, edited with an introduction by Richard Loss.

Chapter 8 : On Constitutional Interpretation: Originalism v. A Living Constitution?

A Living Constitution Posted on March 21, by James Herrold This week begins the confirmation hearings for Judge Neil Gorsuch, President Trump's nominee to fill the vacant seat on the Supreme Court.

Chapter 9 : Originalism vs. A Living Constitution â€“ The Project

A "living" Constitution, notes constitutional attorney John Whitehead, means the Constitution is "up for grabs," and it becomes whatever the justices decide, not the people through their elected representatives.