



THE COMPATIBILITY OF ORIGINAL MEANING AND CONSTITUTIONAL EVOLUTION: AN ANALYSIS OF LIVING ORIGINALISM

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Abstract: *This paper has been undertaken to understand the doctrinal concept of Living Originalism developed by Professor Jack Balkin, an attempt to reconcile the two theories of constitutional interpretation i.e. Originalism and Living Constitutionalism. The enduring conflict between Originalism (fidelity to fixed historical meaning) and Living Constitutionalism (adaptation to evolving societal norms) poses the most significant theoretical challenge to judicial legitimacy in modern constitutional republics. This approach is uniquely suited to the challenges of the modern era, providing a principled method for Constitutional Redemption—upholding the document's highest ideals while addressing technological and social advances (e.g., the Indian Supreme Court's Puttaswamy judgment on the Right to Privacy). An examining of its implementation in the judiciaries of the United States and India has been done. The analysis contrasts Living Constitutionalism's central appeal—its ability to ensure the Constitution's adaptability and contemporary relevance—with its primary critique: the potential for unconstrained judicial discretion and the erosion of democratic legitimacy. The paper explores landmark judgments in both jurisdictions, demonstrating how courts utilize this approach to expand fundamental rights in alignment with evolving societal standards (e.g., US cases like Obergefell v Hodges and Indian judgments expanding Article 21).*

Keyword- Originalism, Living Constitutionalism, Living Originalism.

1. INTRODUCTION

There exist two major theories for interpretation of constitutional provisions, i.e. originalism and living constitutionalism. Both the approaches, as widely believed, are contradictory to each other. (Solum 2019) Advocates of originalism argue that true meaning and purport of constitution are already settled and there is hardly anything which can be added to them. They believe that the founding fathers are solely instrumental in carving out a supreme document out of multifarious theories and doctrines, which is known as 'constitution'. They require it to act as a rigid bedrock for all statutory provisions. Whereas in Living constitutionalism, it is argued that the Constitution is a dynamic document that should be interpreted considering contemporary values and circumstances. It emphasizes the need for the Constitution to adapt to the evolving needs of society.

Living originalism, as propounded by Prof. Jack Balkin, is an idea to fill the existing theoretical gap between originalism and living constitutionalism. (Balkin 2012) It puts-forth that originalism is not in fact opposed to living constitutionalism. He argued that these two seemingly opposing approaches are not mutually exclusive. Instead, they can be integrated into a coherent theory of constitutional interpretation.

Balkin emphasized the importance of understanding the original meaning and principles of the Constitution. He argued that these should guide interpretation, but they should not be rigidly applied. He acknowledged that the meaning of words and concepts can change over time. Therefore, constitutional interpretation should be flexible

enough to adapt to these changes. Balkin differentiated between the original meaning of the text and its practical application in contemporary circumstances. He argued that while the original meaning should be respected, its application may require interpretation and adaptation. He emphasized the importance of considering the Constitution's overall structure and the values it embodies. This allows for a more nuanced and flexible approach to interpretation.

By providing this framework, Balkin offered a more sophisticated and nuanced understanding of constitutional interpretation. He demonstrated that it is possible to be both originalist and flexible, adhering to the Constitution's original meaning while recognizing the need for adaptation to changing circumstances

1.1 NEED AND SCOPE OF THE STUDY

The need and scope of this study are rooted in the imperative to resolve the inherent tension between constitutional stability and societal evolution in contemporary democracies. The study is necessary to address the fundamental challenge of legitimacy and applicability when interpreting ancient constitutional texts in the 21st century. It assesses whether judicial bodies, like the Supreme Courts of the US and India, have overstepped their bounds through Living Constitutionalism, thereby necessitating the search for a more constrained theory like Living Originalism to justify constitutional evolution while maintaining judicial fidelity to the text. It evaluates the frameworks required to apply broad, abstract constitutional principles (e.g., Liberty, Equality) to modern phenomena unforeseen by the framers, such as digital privacy, artificial intelligence, and complex issues of gender autonomy.

The study's scope is two-fold, encompassing both theoretical analysis and comparative jurisprudence. Theoretical Scope: It involves the critical definition and assessment of three competing theories: Living Constitutionalism, Originalism, and the hybrid Living Originalism (focusing on the Interpretation/Construction distinction), including their inherent pros and cons. Comparative Jurisprudence Scope: It analyses how these interpretive theories are practically deployed in landmark judgments across the United States and India. This comparative approach highlights the universal relevance of the interpretive debate while noting the distinct cultural and political contexts in which these theories operate (e.g., the expansion of fundamental rights in India's Article 21 versus the US's Due Process and Equal Protection clauses).

1.2 OBJECTIVES OF THE PAPER

- To critically analyse the key tenets of Originalism, Living Constitutionalism.
- To understand the hybrid theory of Living Originalism
- To examine the judicial implementation of Living Originalism
- To evaluate the potential challenges associated with Living Originalism

1.3 RESEARCH METHODOLOGY

For the paper, Doctrinal method has been undertaken and primary resources like judgements of Supreme court of USA and India has been relied upon. Secondary resources like Articles, books have been employed wherever necessary.

2.THEORIES OF CONSTITUTIONAL INTERPRETATION

Constitutional interpretation is a dynamic and ever-evolving field of legal inquiry. As society changes and societal values evolves, the interpretation of fundamental legal document too needs to evolve in the same way. Broadly, there are two ways of interpreting the Constitutional provisions – Originalism and Living Constitutionalism.

2.1ORIGINALISM

Originalism is a constitutional interpretation theory that emphasizes the original meaning of the Constitution at the time it was drafted, framed, and ratified. This approach emphasizes that constitutional meaning does not change with evolving social values or new circumstances. Changes should come only through formal amendments, not judicial reinterpretation. It provides constraint and stability by fixing meaning to a specific historical point, it makes the law more stable, predictable, and objective, treating the Constitution as law.

2.2 LIVING CONSTITUTIONALISM

Living constitutionalism views the Constitution as a dynamic, evolving document that adapts to contemporary societal needs and values. It rejects the fixation and constraint principles, allowing interpretations to reflect modern circumstances, even if they diverge from the original meaning. This approach sees the Constitution as a “living thing,” capable of addressing issues unforeseen by the Framers, such as digital privacy or same-sex marriage. It is determined by combining factors of evolving societal values, pragmatism, and Constitution as a framework. Facilitates the progress of human rights and social justice by incorporating contemporary, evolved understandings of equality and liberty (e.g., recognizing rights the Framers did not intend or envision). It avoids ‘Rule by the dead hand’ by Prevents society from being governed by the social and moral prejudices of past era.

Below is the table summarising the key difference between Originalism and Living Constitutionalism

Feature	Originalism	Living Constitutionalism
Perspective of the Constitution	Static and fixed document	Dynamic and evolving document
Source of the meaning	Framer’s intent	Evolving societal values and norms, changing socio-economic conditions
Role of Judge	A discoverer of historical meaning	Guardian of modern rights
Mechanism for change	Formal amendment is the only legitimate means	Judicial interpretation
Goal of interpretation	To constraint Judicial power and uphold the democratic will of the people who enacted the law	To ensure Constitution remains relevant, effective for each successive generation
Example (Rulings)	A.K. Gopalan v State of Madras (strict interpretation of Article 21)	Vishaka Judgement (Sexual harassment at workplace)

3. LIVING ORIGINALISM

Living Originalism is a modern theory of constitutional interpretation, primarily developed by legal scholar Jack Balkin, based on the idea that the original meaning of the constitutional text is fixed but its application or construction must evolve over time to remain relevant to a changing society. Living Originalism views the Constitution as a framework designed to be incomplete in its details, allowing future generations to “build out” or *construct* its meaning in practice through laws, doctrines, and judicial interpretations. The theory emphasizes fidelity to the original, abstract meaning or principles of the text, but allows for evolution in its moral and social application. Balkin emphasizes that constitutional interpretation is not solely the domain of judges; it is an ongoing project involving citizens, politicians, and social movements. These movements play a critical role in shaping how the Constitution is “constructed” and applied over time, maintaining its democratic legitimacy.

When Balkin spoke about “living originalism” he presented it as a great compromise between originalism and its antithesis, the living constitutionalism. (Balkin, Living Originalism 2011) 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 the famous Jeffersonians problem that “the earth belongs to the living and not the dead”, (Strauss 2010) This Strauss believes, is the original sin in this interpretive theory. Living originalism tries to solve this problem through a moral reading of the Constitution. It is argued time and again that whenever the 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? Here the idea of “living originalism” as understood by Balkin, can be based on what is known as the “faith and redemption” theory, where Balkin acknowledges that the Constitution in its present form is imperfect and it is necessary to interpret it in such a way as to redeem our faith in its message and aspiration. In other words, the intent of the framers cannot, and should not, be seen in isolation to the aspirations and the object with which the Constitution was bestowed upon a nation.

3.1. JUDICIAL ACCEPTANCE OF LIVING ORIGINALISM

3.1.1 UNITED STATE OF AMERICA

USA has a more nuanced approach, with a tension between originalist and living constitutionalist approach. As living Originalism is a doctrinal framework, not a judicial doctrine explicitly cited by the U.S. Supreme Court. However, in few landmarks cases where broad and constitutional clauses have been the focus, the judgements have

aligned with the living originalism interpretation i.e. upholding a fixed, original principle (interpretation) while allowing its application (construction) to evolve with modern society. In the case of *Roper v Simmons* (2005) (United States Reports 2005), focused on whether executing an individual for a crime committed before the age of 18 violated the Eighth Amendment's prohibition on "cruel and unusual punishments." The court barred the execution of death penalty for juvenile offenders. The Court's reasoning was an exercise in Living Originalism because it was originalist in its fidelity to the text of the Eighth Amendment which establishes the fixed principle against cruel and unjust punishment, used the "evolving standards of decency" and modern science to define what is "cruel and unusual" for juveniles today. Hence, The Court effectively constructed the fixed Eighth Amendment principle by applying it to the modern understanding of juvenile psychology. It concluded that executing a juvenile is a disproportionate and therefore "cruel and unusual" punishment under current standards of decency, even if it was not considered so in the past.

The landmark U.S. Supreme Court case *Obergefell v. Hodges* (2015) (*obergefell v hodges* 2015), which legalized same-sex marriage nationwide, provides a powerful illustration of reasoning aligned with Living Originalism, particularly in its use of abstract constitutional principles to justify an evolving application. While the majority opinion did not cite "Living Originalism", its structure perfectly embodies the theory's core mechanism: upholding a fixed, foundational principle (Liberty and Equality) while demanding an evolving, modern construction of that principle. The Court found the right to same-sex marriage rooted in the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The Court's decision rejected the historical, traditional application of these clauses (which limited marriage to one man and one woman) by arguing that modern understanding requires a new, progressive construction of the fixed principles. The Court stated that the nature of liberty requires that new understandings of personal autonomy and dignity be applied. Justice Kennedy famously wrote that the generations invoking the Constitution "do not seek to destroy the institution [of marriage] but to live in it." This means they are honouring the fixed institution of marriage (the concept) but are changing the *construction* of who is included in the right to that institution based on modern notions of dignity. The Court recognized that excluding same-sex couples from marriage stigmatized them and denied them a right of equal dignity. This application affirmed the fixed principle of equality but constructed it in a way that corrected past moral failings, which is a key goal of progressive Living Originalism (or "Constitutional Redemption," as Balkin terms it).

3.1.2 INDIA

India has arguably been more receptive to Living Originalism, with its courts often adopting to a dynamic and evolving approach to constitutional interpretation. This is evident in landmark cases where the judiciary has invoked the spirit of the Constitution to address contemporary challenges. The Supreme Court of India's decision in *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017), (*Justice K S Puttaswamy v Union of india* 2017) which recognized the fundamental right to privacy, perfectly illustrates the operational logic of Living Originalism, even though the Court used terms like "Transformative Constitutionalism" and the "Living Tree Doctrine." The *Puttaswamy* judgment bridged the gap between the original document and contemporary necessity by dividing its analysis into two parts, mirroring the Living Originalist split between fixed interpretation and evolving construction. The Court adhered to the fixed, foundational meaning of Article 21 (Protection of Life and Personal Liberty) and Part III of the Constitution generally. The Court then performed an act of constitutional construction by determining how the fixed principle of liberty must be applied to the modern era. The Court reasoned that in a modern technological state, the fixed right to "personal liberty" would be meaningless without a corresponding right to privacy and informational self-determination. The rise of digital data, communication technology, and state surveillance necessitates a new construction of liberty. In the case of *Navtej Singh Johar*, which decriminalized consensual same-sex relations by reading down Section 377 of the Indian Penal Code, the Court declared that the Constitution is a "transformative document" and its purpose is to correct the historical discrimination and prejudice embedded in colonial-era laws. The construction of equality and liberty was updated to reflect contemporary global and domestic understanding of sexual autonomy and equal citizenship. The judges upheld the foundational principles of the Constitution's preamble (Justice, Liberty, Equality) and Fundamental Rights, but constructed their application to reject a discriminatory past practice. It was a clear act of constitutional redemption, applying the fixed, egalitarian constitutional ideals to new moral realities.

4.ASSESSING THE LIVING ORIGINALISM THEORY

Living Originalism is a theoretical midpoint that asserts the original semantic meaning of the Constitution's abstract principles is fixed (Originalist component), but the application (or construction) of those principles must evolve with modern social, moral, and technological realities (Living component).

Pros	Cons(critique)
Provides a textual anchor for judicial evolution, making progressive rulings seem more legitimate than pure "living" theories.	Critics argue the distinction between fixed principle and evolving application is arbitrary, allowing judges to select high levels of abstraction to justify any desired outcome.
Ensures the Constitution remains relevant (e.g., addressing digital privacy) while preventing judges from simply inventing new principles outside the text.	Fails to provide genuine judicial constraint; it is seen as "Originalism in name only"—a rhetorical shield for Living Constitutionalism.
Facilitates Constitutional Redemption by applying the text's highest ideals (Equality, Dignity) to correct past moral and legal failures (e.g., segregation, discrimination).	Lacks clear determinacy; in the "construction zone," there is no objective guide for choosing the "correct" modern application over conflicting alternatives.

In the current era of rapid technological change (AI, surveillance) and heightened polarization, Living Originalism is uniquely beneficial because it offers a path for judicial correction of historical injustices (e.g., same-sex marriage, privacy) that can be traced back to the original, aspirational text (like the Dignity component of Liberty and Equality). Addresses technological gaps by using fixed principles (like anti-unreasonable search) to construct rules for modern contexts (like digital data), ensuring the document retains its status as the supreme law of a changing society.

5.CONCLUSION

The debate between these interpretive theories reflects a fundamental tension in constitutional law: the need for stability (Originalism) versus the demand for justice and contemporary relevance (Living Constitutionalism). Living Originalism emerges as a powerful attempt to reconcile this tension. By separating the unchanging abstract principle from its evolving construction, it offers a coherent justification for major judicial developments in both the US and India (like the recognition of privacy and LGBTQ+ rights). The continued success and coherence of this "midway" theory rest on the judiciary's ability to demonstrate that its evolving applications are truly constrained by, and logically flow from, the enduring principles laid down by the constitutional text.

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