

JOURNAL OF INDIAN LAW AND SOCIETY

Volume XIII (1)

Monsoon

EDITORIAL NOTE

INTERPRETATION OF THE CONSTITUTION: UNDERSTANDING LIVING CONSTITUTIONALISM THROUGH FRAMEWORK ORIGINALISM

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I. INTRODUCTION

Living constitutionalism, as famously propounded by Justice William Brennan, involves the interpretation of the statutes taking into account the current understanding of the society at large.¹ Originalists, on the other hand, believe in restricting themselves to the strict textual interpretation of the constitution as per the intention of the drafters of the constitution.² Originalists consider the constitution as a complete document in and of itself. They firmly believe that it does not require any adaption or changes outside of Article V of the United States constitution.³ Living constitutionalists treat the constitution as an “organism” capable of growing and adapting,⁴ while originalists consider the constitution as a “machine” that only requires to be operated.⁵ The respective conceptions of the American constitution have led to many spirited debates, and it has

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¹ Lawrence B Solum, ‘Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate’ (2018) 2 Nw UL Rev 113.

² *Id.*

³ Jamal Greene, ‘Selling Originalism’ (2008) Geo LJ 97.

⁴ Solum, (n 1).

⁵ William Baude, ‘Is Originalism Our Law’ (2015) Colum L Rev 115.

attained the status as one of the great constitutional debates of our modern times, including the debate between originalism and living constitutionalism.⁶ Living constitutionalists refuse to adhere to the “original” constitution due to three primary reasons. *Firstly*, they believe that such a constitution only encapsulates the concerns and ideas of the people who lived during that period. *Secondly*, they believe that the founding fathers could not foresee every scenario that the country would face, and as a result, the “original” constitution could not be a complete code. *Thirdly*, they believe that the founding fathers themselves drafted the constitution in a manner vague enough so that the future generations could interpret the constitution to suit the needs of their particular time.⁷ To substantiate the points mentioned above, living constitutionalists often bring up the New Deal & the Reconstruction era examples.⁸ Justice Black initially conceived originalism as a reaction (rather than as an independent theory) to the broadening influence of the living constitutionalism doctrine,⁹ or rather the expansive interpretation brought about by living constitutionalism. Originalists found the lack of popular sovereignty in living constitutionalism as its fundamental problem.¹⁰

Both ideologies have produced stalwarts who have given the respective theories prestige, recognition and acceptance. Living constitutionalism was championed and brought to the mainstream by Justice William Brennan,¹¹ while originalism was championed by none other than Antonin Scalia.¹² Although these concepts are primarily resorted to in the United States, it has found some acceptance or discussion in different countries throughout the world. India is no different in this regard. Certain prominent Indian Supreme Court judgments such as the *NJAC* case,¹³ and the *Navej Singh Johar* case¹⁴ have resorted to relying on the original intention or intention of the constituent assembly, at least to a certain extent.

There is a tendency to view both these theories as antithetical to each other and such beliefs are what the paper wishes to address. In its untainted form, the paper will strive to demonstrate that there is an intrinsic connection between living constitutionalism and originalism. In furtherance of this goal, the author will rely on the theory of *bedrock or framework originalism*. The author will go as far as to say that the connection between the two theories is like day and night.

⁶ Solum, (n 1).

⁷ J Harvie Wilkinson, *Cosmic Constitutional Theory* (2012).

⁸ Herman. A Belz, ‘A Living Constitution or Fundamental Law?: American Constitutionalism’ in (eds) *Historical Perspective* (Rowman & Littlefield 1998).

⁹ Robert M Howard & Jeffrey A Segal, ‘An Original Look At Originalism’ (2002) *Law & Soc’y Rev* 36.

¹⁰ Hugo Black, *A Constitutional Faith* (1968).

¹¹ Edward V Heck, ‘Justice Brennan and the Heyday of Warren Court Liberalism Supreme Court History Project: The Warren Court 1962-1969’ (1980) 3 *Santa Clara Law Review* 20.

¹² Adam Liptak, ‘Antonin Scalia Justice of the Supreme Court Dies at 79’ *The New York Times* <<https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>> accessed 30 March 2020.

¹³ *Supreme Court Advocates-on-Record Assn v Union of India* (2016) 5 SCC 1.

¹⁴ *Navej Singh Johar v Union of India* (2018) 10 SCC 1.

While neither can exist at the same time, however, as long as one exists, the other will follow. These points, as mentioned above in the paragraph, form the *primary theme* of the paper.

Part II of the paper will contain the necessary research information and Part III of the paper will strive to give the fundamentals of framework originalism and how that is distinct from originalism in its traditional sense. Part IV of the paper will examine the role of living constitutionalism as a theory of construction, within the framework originalist theory while Part V of the paper will examine the role of the Courts in framework originalism and in the last , Part VI will deal with concluding remarks.

II. UNDERSTANDING ORIGINALISM AS A THEORY

This part seeks to provide an understanding of the various facets of originalism. The main branches of originalism including skyscraper originalism and framework originalism would be discussed. These discussions are necessary in providing a basic understanding that is necessary for the rest of the paper.

A. FOUNDATIONS OF ORIGINALISM

Originalism itself as a theory is vastly misunderstood. That is mainly because people fail to understand that there are different brands of originalism propagated by different schools of thought.¹⁵ There is a tendency to equate one brand of originalism to the entire theory of originalism, and this leads to discord and lack of understanding. The more popular brand of originalism that is often equated to the entire theory of originalism is *Skyscraper Originalism*.¹⁶ Being ‘popular’ simply alludes to the fact that more people know of the underlying theory of skyscraper originalism, even though they may not know it by this particular name. The other brand of originalism is *Bedrock Originalism*.¹⁷ At this juncture, it is necessary to try and elucidate what exactly these theories constitute.

B. SKYSCRAPER ORIGINALISM

This theory views the constitution as drafted by the founding fathers, as a text that is complete and perfect in every manner.¹⁸ As a result of this belief, the legislature, while enacting laws, is required to stay within the rigid boundaries set by the constitution. There is no element of constitutional construction as the boundaries of the constitution as per this theory are rigid, and these boundaries

¹⁵ Jack M Balkin, ‘Framework Originalism and The Living Constitution’ (2009) Nw UL Rev 103 (2009).

¹⁶ Cesar A Lopez Morales, ‘Jack Balkin’s Reclamation of Constitutional Fidelity: A Theory of Abstract Originalism for We the People’ (2014) REV JUR UPR 83.

¹⁷ Balkin, (n 16); TK Sueng, *Intuition and Construction: The Foundation of Normative Theory* (1993).

¹⁸ Lawrence B Solum, ‘Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption’ (2012) 91 Texas Law Review 147.

can only be changed by another rigid process, Article V of the American constitution.¹⁹ In addition to curtailing the legislative powers, skyscraper originalism will have the effect of diluting the power of judicial review. In this paradigm, the exercise of judicial review is proper only when the judiciary enforces the “original” meaning of the constitution. A valid question that may arise at this point is , what is the actual definition of the “original meaning”.²⁰ Fidelity to the “original meaning” of the constitution can be interpreted in many ways.²¹ Here, the author will endeavour to define the more important ones. *First*, original meaning entails that interpretation pays heed to the original meaning of the word at the time of the drafting of the constitution. *Second*, original meaning entails that a particular clause should be enacted the way the founders would have applied the clause. It is essential to understand that adherence to the semantic meaning of the words does not equate to adherence to the original expected application by the founders.²²

The theory of skyscraper originalism requires adherence to the original expected application rather than the original meaning of the word.²³ Unfortunately, skyscraper originalism prescribes this because, in actuality, there is some merit to taking into account the original meaning of the word at the time of the drafting of the constitution. To illustrate, consider Article IV of the American constitution. It talks about the federal power of the union to protect the states in cases of domestic violence. The meaning at the time of the drafting of the constitution almost certainly referred to instances of internal disturbance in a particular state, and it would be quite absurd to interpret domestic violence as violence that happens in a family. It is essential to recognise that the meaning of particular words may change as time progresses and it may not always be in the best interest for the words of the constitution to keep updating in the same manner.²⁴

Even prominent proponents of originalism, such as Justice Antonin Scalia, advocate for skyscraper originalism (though he does not call it by this name).²⁵ However, on careful analysis of actual application, it can be seen that even Scalia does not always follow this notion.²⁶ While it is unfortunate that people do keep advocating for this theory, it is crucial to understand that it has much less practical application.²⁷

¹⁹ *ibid.*

²⁰ Lawrence B Solum, ‘Semantic Originalism’, Illinois Public Law Research Paper (2008).

²¹ Scholars have suggested that the original meaning itself may be interpreted in almost five ways. Discussion of all the different ways is outside the scope of the paper. For a more detailed discussion, *see* Lawrence B Solum, ‘Semantic Originalism’, Illinois Public Law Research Paper (2008).

²² Jack M Balkin, ‘Abortion and Original Meaning’, Const Comment 24 (2007).

²³ *ibid.*

²⁴ Lawrence Rosenthal, ‘Originalism in Practice’ (2012) Ind LJ 87.

²⁵ George Kannar, ‘The Constitutional Catechism of Antonin Scalia’ (1990) 6 The Yale Law Journal 99.

²⁶ For a more detailed discussion on this point, *see* Part IV B of this paper.

²⁷ Jack M Balkin, Constitutional Redemption (2011).

C. FRAMEWORK ORIGINALISM

Framework Originalism, on the other hand, is more a theory of constitutional construction rather than an interpretive theory.²⁸ Framework originalism is built on the premise that drafters of the constitution could not have envisaged every possible scenario that may happen to the country at large. The drafters themselves believed and acted on these ideas while drafting the constitution.

Consequently, it would mean that the founders would draft the language of the constitution in such a manner that it remains abstract, especially with regards to the rights of the people at large. In other words, framework originalists believe that the constitution was drafted in a vague enough manner so that the future generations could work upon it and adapt the rights as per the needs of a particular generation.²⁹ Logic dictates that if the founders intended a skyscraper originalist model, then they would draft the language in such a manner that reflected such rigidity as the skyscraper model demands. Looking at the American constitution, it is clear that the drafters adopted the former method of abstract formulations than the latter.

Framework originalism envisages a basic formulation of structure and guidelines that are meant to regulate the entire institutional setup.³⁰ Since these are only basic formulations, it is expected that the future generations will build upon this framework and suit such construction based on the current needs of the generation. This setup is the reason why framework originalism is considered as a method of constitutional construction. This constitutional construction is brought about by participation of various institutions such as the government, the judiciary and even the people through the exercise of popular sovereignty.³¹

It is also essential to address the nature of this basic framework, particularly whether this basic structure is subject to change. The simple answer is no, though it is easy to envisage scenarios such as coup d'état that can completely change the functioning of a country and resultantly, this basic framework. The reason behind this presumed rigidity is that these principles are considered so fundamental to the functioning of the society and government that they must never be altered. These primary principles do not need to be set forth by the founding fathers alone, and not all the things put forth by the founding fathers are part of this basic framework.³² Principles can be added to this basic framework as the society progresses, and this addition can be carried out by Courts,³³ or even the

²⁸ Balkin, *Abortion and Original Meaning*, (n 23).

²⁹ Steven G Calabresi & Livia Fine, 'Two Cheers for Professor Balkin's Originalism' (2009) *Nw UL Rev* 103 .

³⁰ Lawrence B. Solum, 'Construction and Constraint: Discussion of Living Originalism' (2013) 1 *Jerusalem Review of Legal Studies* 7.

³¹ *ibid.*

³² Jack M Balkin, 'Nine Perspectives on Living Originalism' (2012) *U Ill L Rev* 14.

³³ Michael Sinclair, 'Precedent, Super-Precedent' (2006) *Geo Mason L Rev* 14.

executive,³⁴ by the process of constitutional construction. An example of addition to this basic framework could be the Civil Rights Act of 1964, the institution of terms limits for the President etc. The Courts could determine what constitutes this basic framework. Additionally, some scholars have even suggested that the executive can perform this role as well.³⁵

Formulation of this basic framework is not just restricted to American jurisprudence. The Indian Supreme Court has adopted something similar to this via the basic structure doctrine.³⁶ It is also important to note that India has entrenched the basic structure doctrine in its constitutional jurisprudence, while framework originalism merely remains as a theory among the scholarly community in America. The most fundamental difference between the two countries with regards to the basic structure is the fact that the basic framework in India was created, curated and is being protected by the judiciary. In contrast, in America framework, originalism is envisaged as a more constructive process between the different branches.

III. LIVING CONSTITUTIONALISM AS A FACET OF FRAMEWORK ORIGINALISM

This part of the paper will endeavour to demonstrate two things. *First*, that living constitutionalism is merely a process of constitutional construction and not a method of constitutional interpretation. *Second*, constitutional interpretation methodologies popularised by Justice Brennan and Justice Scalia³⁷ are both manifestations of the framework originalism through living constitutionalism.

A. LIVING CONSTITUTIONALISM AS A TOOL OF CONSTITUTIONAL CONSTRUCTION

As argued above, framework originalism sees living constitutionalism as a method by which the institutions, government and judiciary alike, can build upon the basic skeletal framework of governance that has been established.³⁸ Living constitutionalism even as a method of interpretation is a powerful tool.³⁹

³⁴ Bruce Ackerman, 'Oliver Wendell Holmes Lecture III: The Conversation between Generations?' (2007) 7 Harv Law Rev 120.

³⁵ For a more detailed discussion, see Part V of the paper.

³⁶ *Kesavananda Bharati v Union of India* (1973) 4 SCC 225.

³⁷ Justice Brennan termed it as living constitutionalism while Justice Scalia called it Originalism. Regardless of their names, it is the opinion of the author that these are both manifestations of their particular ideology, through the process of living constitutionalism. Semantically, these explanations might cause confusion particularly with regard to Justice Brennan. That would be solved if living constitutionalism is regarded as a tool of constitutional construction, which in turn gave space for the ideology of Brennan to flourish.

³⁸ George Thomas, 'Popular Constitutionalism: The New Living Constitutionalism' (2008) Constitutional Politics in a Conservative Era 44.

³⁹ David A Strauss, *The Living Constitution* (2010).

However, living constitutionalism as a theory of constitutional construction is even more powerful. As mentioned above, the drafters, while framing the constitution, vaguely drafted most clauses.⁴⁰ Living constitutionalism (as a method of constitutional construction) provides an effective way by which these vague enunciations in the constitution can be adapted according to the needs of the generation.⁴¹ A tool of constitutional construction is particularly important in the American context because the amendment process under Article V tends to be too rigid.⁴² That is not to say that the amendment process is disadvantageous. The rigid amendment process results in a certain amount of resistance to change,⁴³ that living constitutionalism simply cannot provide. The process of constitutional construction (via living constitutionalism) can be reversed or modified by a subsequent generation. That takes us to the next point that the paper wishes to address.

Living constitutionalism in its traditional understanding has always been linked to a liberal school of thought, a way to read and interpret the constitution, keeping in mind the dynamic needs of the community.⁴⁴ The paper contends that living constitutionalism has been misunderstood for two main reasons. *First*, as mentioned earlier living constitutionalism has been reduced to a theory of interpretation and *second*, Justice Brennan conflated living constitutionalism with another ideology of his, that is his use of human dignity in constitutional rights interpretation.⁴⁵ Due to this conflation, living constitutionalism got reduced to a liberal way of interpretation of the constitution,⁴⁶ severely undermining the role it plays. Living constitutionalism (as a tool of interpretation) was employed by Brennan, and the other liberal-minded judges of the Warren Court and this resulted in one of the most progressive eras in the history of the Supreme Court,⁴⁷ and established Justice Brennan as a champion of liberal thought.⁴⁸ This progressive era provoked a reaction from the other side of the political spectrum, and this resulted in the popularisation of the originalist school of thought by Justice Scalia, as is popularly known.

The paper contends that the ideologies of both Justice Brennan and Justice Scalia are the products of living constitutionalism. Living constitutionalism allowed Brennan to build upon the skeletal framework and bring in his ideology of interpretation of rights in terms of human dignity to the forefront. The same process of living constitutionalism brought the conservative ideologies of Justice

⁴⁰ Jack N Rakove, *Original Meanings: Politics & Ideas in the Making of the Constitution* (1996).

⁴¹ William Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 S Tex L Rev 433.

⁴² Richard Albert, 'American Exceptionalism in Constitutional Amendment' (2016) Ark L Rev 69 .
⁴³ *ibid*.

⁴⁴ William J Brennan Jr, 'Remarks of William J. Brennan Jr.' (1988) Vt L Rev 13 .

⁴⁵ Deborah A Roy, 'Justice William J Brennan, Jr, James Wilson, and the Pursuit of Equality and Liberty' (2013) 61 Clev St L Rev 665.

⁴⁶ Ethan J Leib, 'The Perpetual Anxiety of Living Constitutionalism' (2007) 24 Const Comment.

⁴⁷ Heck, (n 11).

⁴⁸ Seth Stern, Justice Brennan (2010).

Scalia to the forefront in the guise of originalism. The entire purpose of this preceding paragraph was merely to demonstrate that living constitutionalism cannot be linked to any particular ideology with respect to interpreting the constitution, neither liberal nor conservative.

B. ORIGINALISM FROM THE PERSPECTIVE OF LIVING CONSTITUTIONALISM AS A TOOL OF CONSTITUTIONAL CONSTRUCTION

Although Justice Scalia (and others like him) has been an outspoken supporter of originalism,⁴⁹ specifically skyscraper originalism, in actual practice it can be demonstrated that originalists have significantly deviated from the original intended application in certain significant cases. This is not to say that originalists do not rely on the original intended application of the drafters at all, but the irregularities are enough to show that it is more of an ideology (to be a specific a conservative ideology) than anything else.

Justice Scalia has explicitly had certain trysts in this regard. The trump card often resorted to by living constitutionalists (in the traditional sense) to keep the originalist thought in check, is the acceptance of the New Deal policies by originalists.⁵⁰ New Deal era statutes & policies certainly did not have a place in the initial constitution, yet the originalists refuse to take active efforts to condemn or overturn this. In fact, on numerous occasions, originalists have even upheld these New Deal policies.⁵¹ Justice Scalia worked around this problem by making it known that in specific scenarios his fidelity to the original intended application of the constitution would wither when such original intended application was too out of touch with the contemporary realities or precedents.⁵² Justice Scalia has even gone to the extent of describing himself as a “faint-hearted originalist”.⁵³ Justice Scalia later went on to admit that the doctrine was mainly employed to contain the aggressive assault on the nineteenth-century precedents by the living constitutionalists,⁵⁴ pointing towards the fact that originalism was indeed a reaction to living constitutionalists as mentioned earlier in the paper.

Towards the latter half of his judicial career, Justice Scalia revealed that his approach towards originalism had taken more of a pragmatic turn. Justice Scalia, as much as he hated the first amendment expansions,⁵⁵ went on to state that even though such expansions were not as per the originalist view, they had attained a

⁴⁹ Kannar, (n 25).

⁵⁰ Stephen M Griffin, ‘Rebooting Originalism’ (2008) U Ill L Rev.

⁵¹ *Gonzales v Raich* 2005 SCC OnLine US SC 44 : 545 US 1 (2005).

⁵² Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

⁵³ Randy E Barnett, ‘Scalia’s Infidelity: A Critique of Faint-Hearted Originalism’ (2006) U Cin L Rev 75.

⁵⁴ Antonin Scalia, ‘Originalism: The Lesser Evil’ (1989) U Cinn L Rev 57 .

⁵⁵ Scalia, *Matter of Interpretation*, (n 52).

certain level of importance such that it could not be reversed.⁵⁶ He adopted this pragmatic view in the interest of maintaining overall stability in the constitution and the country.⁵⁷ While the modification of views is a welcome one, Justice Scalia offered no guidelines as to when his pragmatic approach and when his originalist view would be adopted.⁵⁸

Framework originalism can perhaps offer more insight in this regard. When Justice Scalia refers to certain non-originalist interpretations that must be upheld in the interest of stability, it is quite possible that he is referring to the skeletal framework that cannot be disturbed without considerable consequences.⁵⁹ Justice Scalia is implicitly pointing to the fact that certain interpretations can become so essential to the community that it cannot be disturbed at a later point. So, if we are going by the framework originalist view, the pragmatic Scalia will come to the forefront if the case involves the skeletal framework which cannot be disturbed and originalist Scalia would come to the forefront if the case merely involves a constitutional construction (via living constitutionalism).

Through this section, the paper hopes that it has demonstrated how originalism is also a manifestation of living constitutionalism and that originalism, as is popularly known, is merely a disguise for particular conservative views that have come to the forefront via living constitutionalism.

C. ROLE OF POPULAR SOVEREIGNTY IN FRAMEWORK ORIGINALISM

At the core of framework originalism lies the role of popular sovereignty. As mentioned earlier, both the judiciary and the governmental institutions have a fundamental role to play in framework originalism.⁶⁰

The primary institution affected by popular sovereignty is the government itself. Social and cultural changes in the understanding of the community at large can initiate the process of constitutional construction.⁶¹ Until a certain point, American constitutional history had an abundance of movement-party politics.⁶² Presidents elected out of such movements often play a huge role in the constitutional construction of the country.

The relationship between the judiciary and the executive in framework originalism is the same as it always has been. Each branch will keep the other in

⁵⁶ *ibid.*

⁵⁷ Christopher E Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Moment* (1993).

⁵⁸ Bruce Ackerman, 'Oliver Wendell Holmes Lecture I: Are we a Nation?' (2007) 7 Harv Law Rev 120.

⁵⁹ Consequences here being instability, as Justice Scalia rightly pointed out.

⁶⁰ Jack M Balkin, *Living Originalism* (2011).

⁶¹ Jack M Balkin & Sanford Levinson, 'The Canons of Constitutional Law' Harv Law Rev (1998).

⁶² Ackerman, (n 58).

check, and as a result, radical changes in policies would be difficult to achieve. For illustrative purposes, consider the New Deal era reforms. Franklin D. Roosevelt was borne out of a populist political movement and passed extensive legislation & policies in favour of the New Deal. These were considered radical at the time and as a result, a lot of these regulations and policies were struck down by the Supreme Court.⁶³ The Court, in this case, was essentially slowing the process of change down (radical change to be more specific) by acting as a check on the executive power of the Presidency. Such inertia often exists between the government and the Court, especially if the appointees to the Supreme Court and the government are on different sides of the political spectrum. However, this is not to say that radical change is not at all possible, just that it requires sustained political support over a considerable period. Even in the New Deal era, the Supreme Court started paying heed to President Roosevelt only after he threatened to “pack the court” with members more favourable to the New Deal.⁶⁴ This threat was only effective because the executive is heavily involved in the nomination process of a Supreme Court judge. However, only in rare cases do the President challenge the authority of the Supreme Court for interpretation of constitutional matters like President Roosevelt did.⁶⁵ This is mostly because sustained support in the form of popular sovereignty would enable the executive to eventually “convert” the members of the Supreme Court to be more favourable to the policies of the executive, through the nomination powers of the office of the President.⁶⁶

In the theory of framework originalism, the role of the Court is to act as a check on the powers of the executive and prevent radical changes in policies by the executive. Judges in the Supreme Court nominated by a different party would mostly continue to hold to their beliefs and would restrict any radical changes in policies.⁶⁷ However, popular sovereignty does hold supreme in the constitutional setup. Sustained support of the public would enable the office of the President to eventually nominate candidates to the Supreme Court who are more favourable to the office of the President, and such candidates would be in turn more in tune with the demands of popular sovereignty at that particular point in time.⁶⁸ This is not to say the judicial office is not an independent one, but rather that the judiciary would always reflect the belief of popular sovereignty to a certain extent. The office of the President and the Judiciary may often be at loggerheads,

⁶³ Jeff Shesol, *Supreme Power: Franklin Roosevelt Vs. the Supreme Court* (2011).

⁶⁴ Judge Glock, The Lost History of FDR's Court-Packing Scandal, Politico (24 February 2019) <<https://www.politico.com/magazine/story/2019/02/24/the-lost-history-of-fdrs-court-packing-scandal-225201>> accessed 31 March 2020.

⁶⁵ Shesol, (n 63).

⁶⁶ Randall R Rader, 'The Independence of the Judiciary: A Critical Aspect of the Confirmation Process' (1998) Ky LJ 77.

⁶⁷ William G Ross, 'The Supreme Court Appointment Process: A Search for a Synthesis' (1993) Alb L Rev 57.

⁶⁸ Balkin, *Framework Originalism and the Living Constitution*, (n 15).

but Presidents rarely take to a public showdown with the judiciary. Instead, they engage with the judiciary in the method described in this paragraph.

Even the Supreme Court rarely takes radical steps that are not in tune with the demands of popular sovereignty as a whole. This is so because for a person to become a judge in the Supreme Court first, he has to be nominated by the President and then the person has to be confirmed by the Senate.⁶⁹ A person would only be nominated by the President if there is a certain intersection of beliefs and if that is there, then it implies that such a person nominated is in tune with the “short term” popular sovereignty.⁷⁰ A Judge also requires the endorsement of sustained popular sovereignty, and this is where the role of the Senate comes in. The appointment of a person to the Supreme Court is contingent on the confirmation by the Senate.⁷¹ Senators are elected for a term of six years, and 1/3rd of the seats go up for election every two years.⁷² So a confirmation by the Senate means that the nominee has the support of popular sovereignty spread out over a more extended period.⁷³ However, this is different from the notion of sustained popular sovereignty, which requires the support of the public to a particular ideology for a more substantial period. An example of this would be if a Republican candidate won after George Bush Jr and stayed in power through 2012.⁷⁴

Even critical Supreme Court decisions such as *Brown v. Board of Education* aligned with the widespread belief in the country as a whole then.⁷⁵ A significant majority of states had already ended the segregation in the public schooling system,⁷⁶ and the role of the Supreme Court in *Brown* was to make the resilient Southern States comply with the dominant belief. More recently, even when the Supreme Court decriminalised homosexuality,⁷⁷ it was also after there was a widespread political consensus in different states to decriminalise homosexuality.⁷⁸

⁶⁹ United States Courts, ‘Nomination Process’, <<https://www.uscourts.gov/educational-resources/educational-activities/nomination-process>> accessed 1 April 2020.

⁷⁰ Donald E Lively, ‘The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities’ (1985) S Cal L Rev 59.

⁷¹ United States Courts, (n 69).

⁷² United States Senate, Elections, <<https://www.senate.gov/reference/Index/Elections.htm>> accessed 1 April 2020).

⁷³ Lively, (n 70).

⁷⁴ Ackerman, *Oliver Wendell Holmes Lecture III*, (n 34).

⁷⁵ *Brown v Board of Education of Topeka* 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 US 483 (1954).

⁷⁶ Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004).

⁷⁷ *Lawrence v Texas* 2003 SCC OnLine US SC 73 : 539 US 558 (2003).

⁷⁸ Joseph Daniel Ura, ‘The Supreme Court and Issue Attention: The Case of Homosexuality’ (1999) 4 Political Communication 26; William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (1999).

D. MAJORITARIAN NATURE OF THE AMERICAN CONSTITUTION

It is also important to note that this system of framework originalism will not work in countries where popular sovereignty plays no part in the nomination of judges to the higher judiciary. An example of this would be the country of India, where the judges themselves appoint the judges to the higher courts.⁷⁹ While the American system of constitutional construction revolves around majoritarianism, there are fair arguments as to why this system cannot work in a non-homogenous country like India. India has a vast majority of political minorities that may never come into the mainstream and be able to shape policy and improve conditions. An independent judiciary, which is not bound by majoritarianism, would be in a better shape to alleviate concerns of such political minorities⁸⁰. The issue of whether majoritarianism is the right approach can lead back to the seminal Hart-Fuller debate.⁸¹ Would it be right for the judges to take into account the inner morality of law while deciding on the constitutionality of a particular statute, regardless of the fact that a constitutionally elected President has signed it? Brennan certainly believed so,⁸² and considered the judiciary as a higher office that should not be tainted by aspects of majoritarianism. Unfortunately for Brennan, in the American system, sustained popular sovereignty would eventually displace Brennan's power to resist.

However, in a system like India where judges have ensured insulation from the public sovereignty, judges are accorded vast independence and would be able to make decisions that may go against what the public at large may feel, hence, judges are free to take into account an inner morality of law.⁸³ For illustrative purposes, let us say a Nazi form of government was elected into power. With sustained support in America, with say three or four presidential terms, the Nazi government would be able to reconstruct and pack the Court with judges that would look kindly to the office of the President. The judicial setup in India prevents such actions, and nothing short of great constitutional tragedy or an assumption of power by force is likely to be effective. This is not to say that the system in India is the ideal one. Like every system, that is also rife with flaws.⁸⁴ Which approach is more ideal is a much bigger question, and that remains outside the scope of the paper, although the majoritarian dominance does incite some

⁷⁹ Economic & Political Weekly, 'Collegium System in the Indian Judiciary Needs to be Reformed for Greater Transparency and Accountability', <<https://www.epw.in/engage/article/collegium-system-indian-judiciary-needs-be>> accessed 1 April 2020.

⁸⁰ Matthew EK Hall & Joseph Daniel Ura, 'Judicial Majoritarianism' (2015) 3 The Journal of Politics 77.

⁸¹ HJM Boukema, 'The Hart-Fuller Debate' (1983) *Rechtstheorie* 14.

⁸² William J Brennan Jr, *Remarks of William J. Brennan Jr.*, (n 44).

⁸³ This is not to say that this system is perfect, in fact it would be quite right to say that there are certain fundamental problems with it.

⁸⁴ Economic & Political Weekly, (n 79); Arghya Sengupta & Ritwika Sharma, Appointment of Judges to the Supreme Court of India (2018).

exciting discussions. The next section of the paper will analyse the role of the courts in the context of framework originalism.

IV. ROLE OF THE COURTS IN FRAMEWORK ORIGINALISM

So far discussions about the role of the judiciary in framework originalism have been about its ability to restrict radical policy changes in a short period. Though this is a vital function, there is another function that the judiciary must also be given credit for. That is the creation of a class of cases called super-precedents.⁸⁵ Though there is a considerable debate on this topic, particularly on how these are formed, the paper contends that super-precedents are formed when certain constitutional constructions by the Court become part of the constitutional canon and when they also stand the test of time and become durable. Super-precedents form part of the basic skeletal framework in the framework originalist doctrine and hence, the importance of the Court in this regard is immeasurable.⁸⁶

A. CONSTITUTIONAL CANON

A particular construction can become part of the constitutional canon if the decision is of such nature that it signifies an essential character or attribute to the society at large. The case or the attributes thereof become so vital to the society to the extent that constant discussions and re-affirmations keep cropping up and a wide variety of people are aware and engage with the ideas in such constructions.⁸⁷ Certain cases, on the other hand, can also attain the status of “anti-canon” because the ideas represented by the case are so antithetical to contemporary society that it is brought up to signify an undesirable period or a rejected position.⁸⁸ A prime example of the constitutional canon would be the seminal *Brown v. Board of Education*, while an example of an anti-canon could be *Plessy v. Ferguson*⁸⁹ or even *Dred Scott v. Sandford*.⁹⁰ Essentially, it is important that for a case to be part of the constitutional canon, it must have some cultural or political significance to the community at large. It is important to understand that just because a case becomes part of the constitutional canon does not mean that it will stand the test of time. A case that is a part of the constitutional canon at this moment can later become part of the anti-canon in the future.⁹¹ A constitutional canon does not need to get universal acceptance. Some cases that are part of the canon can inspire debates that may rage on in the community for decades.

⁸⁵ Michael J Gerhardt, ‘Super Precedent’, *Minn L Rev* 90 (2006).

⁸⁶ The nature and the importance of this skeletal framework has been already discussed in the paper. Kindly refer to Part III C for the same.

⁸⁷ Balkin & Levinson, (n 61).

⁸⁸ Richard A Primus, ‘Canon, Anti-Canon, and Judicial Dissent’ (1998) *Duke LJ* 48.

⁸⁹ *Plessy v Ferguson* 1896 SCC OnLine US SC 164 : 41 L Ed 256 : 163 US 537 (1896).

⁹⁰ *Dred Scott v Sandford*, 15 L Ed 691 : 60 US 393 (1857).

⁹¹ Primus, (n 88); Jack M Balkin & Sanford V. Levinson, *Legal Canons* (2000).

A prime example of this is the case *Roe v Wade*.⁹² Though it was decided back in 1973, the case to this day sparks passionate debates about its correctness in the community at large. Even Presidential candidates are often required to state their position concerning the case, and it is no secret that there have been attempts to overrule *Roe v Wade* and such attempts continue even in this modern age.⁹³ This point assumes much significance considering the fact that a leaked Supreme Court draft decision indicates that *Roe v Wade* would be overturned.⁹⁴ However, this point will not be discussed any further, considering the fact that it is a leaked opinion, and no formal ruling on this point has been given.

B. DURABILITY – STANDING THE TEST OF TIME

Certain constructions become durable when the community at large accepts the ideas behind the decision and convert it to actual practice. A prime example of this is the case of *New York v Sullivan*.⁹⁵ The case expanded the scope of the first amendment and shaped the entire jurisprudence on free speech for generations to come. If construction is termed as durable, it does not mean that such construction is never subject to change.⁹⁶ Durable constructions often embed themselves into legal practice and over time, people use these durable constructions to build upon them or modify them to suit the needs of the future generations. It is essential that there must be a widespread acceptance of the holding of the case, and the core principles of the decision must have stood the test of time.⁹⁷ Another example of this would be the landmark *Texas v Johnson*.⁹⁸ Durable construction must penetrate the normative fabric of society and establish itself as a fundamental part. Constant re-affirmations by the Supreme Court of a previous position is also an indicator of the durability of the case.⁹⁹

There can be instances where construction or case can be part of the constitutional canon, but due to the lack of concurrence in its general acceptance, does not become a durable construction. An illustration of this is the famous *Roe v Wade* case. The case has been subject to much controversy in the general public, and certain States in the south continue to train their assault on this canonical

⁹² *Roe v Wade* 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973).

⁹³ Scott Lemieux, 'Supreme Court's New Abortion Case Shows that Roe v Wade's End will Come Slowly. But It'll Come' <<https://www.nbcnews.com/think/opinion/supreme-court-s-new-abortion-case-shows-ro-v-wade-ncna1063361>> accessed 1 April 2020; Robert Barnes, 'States Racing to Overturn Roe v. Wade look to a Supreme Court that Prefers Gradual Change' <https://www.washingtonpost.com/politics/courts_law/a-race-to-overturn-ro-v-wade-looks-to-a-supreme-court-that-prefers-gradual-change/2019/05/15/7296749e-7713-11e9-b7ae-390de4259661_story.html> accessed 1 April 2020.

⁹⁴ <<https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>>.

⁹⁵ *New York Times Co v L.B. Sullivan* 1964 SCC OnLine US SC 43 : 11 L Ed 2d 686 : 376 US 254 (1964).

⁹⁶ Jack M Balkin, 'The New Originalism and the Uses of History' (2013) Fordham L Rev 82.

⁹⁷ Bruce Ackerman, *Oliver Wendell Holmes Lecture III*, (n 34).

⁹⁸ *Texas v Johnson*, 1989 SCC OnLine US SC 129 : 105 L Ed 2d 342 : 491 US 397 (1989).

⁹⁹ Gerhardt, (n 85).

case. The converse of this is also possible, i.e., a case can be durable but not be part of the constitutional canon. There can be a considerable amount of cases that are part of the legal fabric but because they do not hold a political or cultural significance, they do not become part of the constitutional canon.¹⁰⁰

The existence of super-precedents has already found mention in certain federal courts.¹⁰¹ Supreme Court Chief Justice John Roberts was even asked during his confirmation hearing whether he believed in super-precedents to which he hinted that it does indeed exist, but he refused to cite examples. The transformation of certain statutes to the status of “super-statutes” have already been debated in certain academic circles,¹⁰² but they remain outside the scope of the paper.¹⁰³

V. CONCLUSION

The paper is merely an attempt to give a fresh perspective to the age-old debate of Living constitutionalism versus originalism. The paper has strived to demonstrate that both these theories in its traditional understanding, is merely a manifestation of framework originalism. The same process by which Justice Brennan was able to introduce his theories of human dignity into rights interpretation is the same process by which Justice Scalia shared his conservative views under the guise of originalism. The inherent similarity in the formative process of both the theories is the reason why the author initially stated in the paper that the relationship between both the theories is like day and night. As the rotation of the earth causes both day and night, the process of framework originalism (via living constitutionalism) creates both the theories of Justice Brennan and Justice Scalia. It is important to understand that framework originalism is merely an attempt to explain how the constitutional process is carried currently rather than redefining any existing method of interpretation. This paper is only meant to spark thought and inspire discussions. To properly flesh out the theory, much work is left, and this will only ensue only if a proper dialogue is established. The work on this project has changed the entire perspective of the author. The change in perspective is very apparent if one reads the initial hypothesis and then the rest of the paper. As framework originalism inspired the author, the author hopes that at least one reader gets similarly inspired by this paper.

¹⁰⁰ Balkin, *Framework Originalism and the Living Constitution*, (n 15).

¹⁰¹ *Richmond Medical Centre for Women v James Gilmore* 219 F 3d 376 (2000).

¹⁰² William N Eskridge & John Ferejohn, ‘Super-Statutes’, *Duke LJ* 50 (2001).

¹⁰³ Another interesting discussion in the scholarly circle, is whether certain important statutes can attain the position of a constitutional amendment and thus form a part of the constitutional canon. This is certainly an interesting claim but a discussion around this topic remains outside the scope of the paper. See for reference, Bruce Ackerman, ‘The Living Constitution’, *Harv L Rev* 120 (2006).