

# TWO COMPETING THEORIES

**What is the role of a constitution? Should it remain frozen in time, reflecting the original intent of its framers, or should it evolve with society's changes?**

This question lies at the heart of one of the most heated debates in American constitutional law: Originalism versus Living Constitutionalism. These theories represent different approaches to interpreting the Constitution of the United States, reflecting contrasting views on the balance between legal stability and societal progress. Let's dive into each theory, one at a time, to explore their core principles and implications for the law, democracy, and the future of constitutional governance.

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## **Originalism: A Return to the Framers' Intent**

Imagine you are reading an ancient map written centuries ago. The map, however old, still leads you to the right places, provided you follow its instructions carefully. In the same way, Originalists believe the Constitution should be interpreted exactly as the framers intended when they wrote it.

### **What is Originalism?**

Originalism is the legal philosophy that interprets the Constitution according to the meaning it had when it was originally written in 1787. This theory emerged in response to what some saw as the growing tendency to interpret the Constitution in a way that bent it to modern circumstances. It was championed by figures like Justice Antonin Scalia, a long-time advocate for strict interpretation based on the text and original context.

According to Originalists, the Constitution is not a living document that can change with the times. Instead, it is a fixed framework designed to provide stability and predictability in the law. The guiding principle behind this theory is that the framers of the Constitution carefully debated and crafted the language, and their intent should not be easily dismissed. Originalists often ask, "What did the words mean when they were written?"

### Forms of Originalism:

1. **Original Intent:** This version of Originalism seeks to discover the subjective intentions of the framers. What were they thinking? What did they hope to achieve with specific clauses or articles?
2. **Original Public Meaning:** This focuses not on what the framers themselves intended, but on how the words of the Constitution were understood by the public at the time. This method relies on historical dictionaries, writings, and other texts to capture what the words meant to a reasonable person in the 18th century.

### Arguments in Favor of Originalism:

1. **Democratic Legitimacy:** Originalists argue that deviating from the original meaning undermines democracy because it allows judges to impose their personal views rather than adhering to the laws that were enacted by the people's representatives.
2. **Judicial Restraint:** Originalism advocates for judicial restraint, meaning that judges should avoid making policy decisions from the bench. They should instead interpret the law as it is written, leaving changes to the political branches—Congress and state legislatures.
3. **Stability and Predictability:** Originalism offers a clear, fixed point of reference that provides legal consistency. If judges interpret the Constitution based on their own views or modern sensibilities, the law could shift dramatically with each new judge, destabilizing the legal system.

### Criticisms of Originalism:

Critics of Originalism argue that the Constitution was written in an entirely different era, under circumstances that could not have anticipated the complexities of modern society. For example, the framers could not have foreseen the technological advancements or the social evolution that we have experienced. Thus, critics claim that strictly adhering to their intent would result in a rigid and outdated legal framework, incapable of addressing contemporary issues such as privacy in the digital age, same-sex marriage, or environmental protection.

Furthermore, finding the "original intent" is often a matter of interpretation itself, and critics argue that this can lead to subjective decisions masked as objective judgments about history.

### Famous Cases:

One of the most famous cases associated with Originalism is *District of Columbia v. Heller* (2008), where the Supreme Court, in a 5-4 decision, held that the Second Amendment guarantees an individual's right to bear arms, as it would have been understood at the time of its writing.

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## Living Constitution: Evolving with the Times

Imagine now that the map we talked about earlier has faded. New paths have opened, old roads have disappeared, and the terrain has changed. If we stick rigidly to the original map, we might get lost. This is where the theory of a Living Constitution steps in.

### What is the Living Constitution Theory?

The Living Constitution theory posits that the Constitution is not a static document, but a dynamic one that evolves alongside society. This theory allows for a more flexible interpretation that adapts to contemporary values, technological changes, and societal developments. Living Constitutionalists argue that a rigid interpretation would render the Constitution incapable of addressing modern issues like reproductive rights, healthcare, and climate change.

The principle behind this theory is that the framers could not have anticipated every possible future circumstance, and thus, their work should be viewed as laying out broad principles rather than specific rules. Justice William Brennan, a leading advocate for this theory, argued that the Constitution must be interpreted in the context of "current circumstances and needs."

### Arguments in Favor of the Living Constitution:

1. **Adaptability:** The world today is drastically different from the 18th century. Living Constitutionalists argue that the Constitution must adapt to new realities. For instance, the Fourth Amendment's protection against "unreasonable searches and seizures" needs to be reinterpreted in the age of smartphones and mass surveillance.
2. **Moral Progress:** Living Constitutionalists emphasize that the Constitution should reflect the evolving moral standards of society. Concepts like equality, liberty, and justice have expanded over time, and the Constitution should reflect that progress. For example, racial segregation was once legal under the Constitution, but evolving societal values led to the landmark decision in *Brown v. Board of Education* (1954), which declared segregation in public schools unconstitutional.
3. **Judicial Responsibility:** Living Constitutionalists argue that judges should play an active role in ensuring that the Constitution protects the rights and freedoms of all citizens, especially when political branches fail to address injustices. In cases like *Roe v. Wade* (1973), the Supreme Court expanded privacy rights to include a woman's right to choose an abortion, reflecting the changing societal views on privacy and reproductive rights.

### **Criticisms of the Living Constitution:**

Critics of the Living Constitution argue that it grants too much power to judges, effectively allowing them to rewrite the Constitution according to their personal beliefs or societal pressures. This, they argue, undermines the democratic process, as judges are unelected and unaccountable to the people.

Moreover, opponents claim that the flexibility of this theory risks creating legal instability, as interpretations of the Constitution could shift depending on the composition of the Court, rather than being anchored in any fixed meaning.

### **Famous Cases:**

One of the hallmark cases of Living Constitutionalism is *Obergefell v. Hodges* (2015), where the Supreme Court ruled that same-sex couples have a constitutional right to marry. This decision reflected an evolving understanding of equal protection under the law.

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### **Conclusion: Bridging Tradition and Progress**

The debate between Originalism and Living Constitutionalism reflects deeper questions about how society should balance respect for the past with the need for progress. Originalists emphasize stability and adherence to the democratic process, while Living Constitutionalists argue for a legal framework that can adapt to changing societal needs. Ultimately, the choice between these two theories shapes the future of law, governance, and individual rights in America. The question remains: should we follow the original map, or redraw it to fit the new landscape? The answer lies somewhere in between, a delicate balance between tradition and progress, stability and change.