

# Originalism

## 1 The living constitution

Justice Holmes: “When we are dealing with words that are also 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 light of our whole experience and not merely of what was said a hundred years ago.”<sup>1</sup>

Justice Brennan: “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”<sup>2</sup>

## 2 *Stare decisis* or precedent

Probably the greatest contrast between [Justice Clarence] Thomas and his colleagues was that he fundamentally did not believe in *stare decisis*, the law of precedent. If a decision was wrong, Thomas thought it should be overturned, however long the case may have been on the books. As he wrote once, “When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” At an appearance ... in 2005, Scalia was asked to compare his own judicial philosophy with that of Thomas. “I am an originalist,” Scalia said, “but I am not a nut.”<sup>3</sup>

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<sup>1</sup> Oliver Wendell Holmes, *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>2</sup> William Brennan, quoted in Jeffrey Toobin, *The Nine* (Doubleday, 2007), 15.

<sup>3</sup> Toobin, *The Nine*, 102–103.

### 3 Chief Justice Rehnquist on the living constitution

In my reading and travels I have sensed a second connotation of the phrase “living Constitution,” however, one quite different from what I have described as the Holmes version, but which certainly has gained acceptance among some parts of the legal profession. Embodied in its most naked form, it recently came to my attention in some language from a brief that had been filed in a United States District Court on behalf of state prisoners asserting that the conditions of their confinement offended the United States Constitution. The brief urged:

We are asking a great deal of the Court because other branches of government have abdicated their responsibility ... Prisoners are like other ‘discrete and insular’ minorities for whom the Court must spread its protective umbrella because no other branch of government will do so. ... This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.

Here we have a living Constitution with a vengeance. Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message. Under this brief writer’s version of the living Constitution, nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so. These same judges, responsible to no constituency whatever, are nonetheless acclaimed as “the voice and conscience of contemporary society.”<sup>4</sup>

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<sup>4</sup> William H. Rehnquist, “The Notion of a Living Constitution,” *Texas Law Review* 54 (1976): 694.

#### 4 Brown v. Board of Education

##### The Due Process and Equal Protection clauses of the 14th Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

##### Brown v. Board of Education

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>5</sup>

##### Scalia on Brown v. Board of Education

JUSTICE SCALIA: ... I'm curious, when - when did - when did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? Sometimes - some time after Baker, where we said it didn't even raise a substantial Federal question? When - when - when did the law become this?

MR. OLSON: When - may I answer this in the form of a rhetorical question? When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools.

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<sup>5</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

JUSTICE SCALIA: It's an easy question, I think, for that one. At – at the time that the Equal Protection Clause was adopted. That's absolutely true. But don't give me a question to my question. (Laughter.)<sup>6</sup>

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<sup>6</sup> Transcript of oral arguments on March 26, 2013 in *Hollingsworth v. Perry*, pp. 38-9.  
[http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-144a.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf)