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Judicial Authority in the United States

In American political thought and dialogue, there remains an ongoing debate over the role and authority of a Supreme Court Justice in the federal judiciary. In 1997, former Supreme Court Justice Antonin Scalia published an essay defending one position, the originalist argument, whereas Justice Stephen Breyer is a modern spokesperson of the contending position for an evolving or “living” U.S. Constitution, which utilizes an approach of “active liberty.” Justice Scalia and other originalists prefer to rely strictly on the dictates of the Constitution as applied to cases brought before the Supreme Court and choose to refrain from exerting judicial authority over political matters, while, on the other hand, Justice Breyer acknowledges the significance of Constitutional language but deviates from the former as needed, weighing a multitude of factors applicable to the matter before rendering a formal decision. As we seek to align judicial interpretation with the textual intention of the Constitution’s framers, it is abundantly apparent that the essence of these diverging opinions contains Federalist and Anti-Federalist sentiments that framed the debate regarding the Constitution’s ratification. Following careful consideration of the main themes in the Constitution, this examination here will assess the merits and detriments of each argument regarding judiciary responsibility. More specifically, this study will explore the themes of strong national government, separation of powers, and individual liberties as they fit into the scope of the originalist and living interpretations.

While Justice Scalia and other originalists assert that judicial rulings should depend most heavily on the original intent of the Constitution’s text, they are careful to distinguish this methodology from any reliance on the objective of the framers who drafted the language,¹

¹ Scalia, Antonin. A Matter of Interpretation. Princeton, New Jersey. Princeton University Press. 1997. Page 17.

emphasizing the value of the language itself over the intent of its writers. Originalist David Forte, Professor of Law at Cleveland State University, cites Chief Justice John Marshall's insistence "that the framers of the constitution contemplated that instrument (the Constitution), as a rule of the government courts, as well as of the legislature."² He further reasons that if judges take an oath to support the Constitution, then there can be no greater metric used in deciding current court cases. However, in outlining the foundations of an originalist position, originalists themselves don't offer any guidance on *how* a justice should separate the purpose of the Constitution's text from the goal of its authors. Quite contrary, a practical application of the text would require a firm grasp the intentions of its drafters. The first-hand notes that capture the internal debates of the Constitutional Convention and the subsequent arguments captured in the Federalist and Anti-Federalist papers are key to understanding how constitutional language can be applied during the adjudication process.

Beginning first with some very basic understandings of the U.S. Constitution, we recognize that it is the shortest governing document in the world and the oldest among leading countries. These facts alone lend practical merit to the tendency to view the Constitution as document that must grow with the times in order to stay relevant and beneficial for each generation. We should then note that the Constitution's ratification in 1787 was met with fierce opposition, as many considered it to be a drastic and unnecessary retreat from the Articles of Confederation. Those who opposed the new governing document would come to be known as the Anti-Federalists, and their greatest concern was the Constitution's prescription for a large and powerful national government, one they feared would infringe upon the basic tenets of their democratic institutions and encroach upon state liberties and individual rights. While the Articles

² Meese, Edwin III. Spalding, Matthew. Forte, David F. The Heritage Guide to the Constitution. Washington, DC. Regnery Publishing, Inc. 2005. Pages 13-17

of Confederation were aimed at protecting state and individual liberties, the Constitution represented the framers' belief in a strong and unifying central government. As such, the Federalist and Anti-Federalist papers, a series of essays published in the press and frequently cited by originalist proponents, provide key insight into the intentions of the founding fathers. Echoing Anti-Federalist passions, the originalist position asks the Supreme Court to return a case back to the state of origin if the justices are unable trace the specifics of the matter back to a Constitutional prescription or remedy. If the Constitution is silent with regards to the particulars of the case, then the federal judiciary has no authority to rule on the matter. Such a case becomes a political matter and should be left to the deliberation of the people through their local representatives and by means of the legislative process.³ At odds with this Anti-Federalist/originalist commonality, the Federalists emphasized the value of a Constitution that established a strong federal government as the best solution for managing a multitude of states with varying passions, ideals, and priorities, and, in the process, illuminated a contradiction in the originalist argument: while it emphasizes the intent of constitutional text, it misses the overarching purpose of a constitution designed to mitigate factions within, and between, states. In pursuing the dictate that states should resolve political matters, originalists simultaneously give factions the autonomy they need to flourish and disrupt the sovereignty of the nation.

Approaching the Constitution as a living document meant to serve the evolving needs of its people, Justice Breyer advocates for “active liberty” and rejects confining originalist logic. With active liberty, justices must consider the current social and political climate and adjudicate according to the present needs and ambitions of the people. This is an approach which

³ Scalia, Antonin. A Matter of Interpretation. Princeton, New Jersey. Princeton University Press. 1997. Page 10.

contemplates the themes of the Constitution while acknowledging the antiquity of its text. As such, active liberty is a balance between textual reliance and the judge's modern discernment of the Constitution.

Active liberty influenced two notable Supreme Court cases in the 20th century: *Roe v. Wade* in 1973, and *Obergefell et al. v. Hodges* in 2015. *Roe v. Wade* emerged from the state of Texas and brought the matter of a woman's right to abortion before the United States Supreme Court. Upon review, the Supreme Court found "unduly restrictive state regulation of abortion" to be unconstitutional. The majority opinion issued by Justice Harry A. Blackmun held that the criminalization of abortion in the state of Texas was a violation of a woman's constitutional right to privacy.⁴ The argument was grounded in the language of the Constitution's Fourteenth Amendment,⁵ which declares that no state shall "deprive any person of life, liberty, or property, without due process of law."⁶ As originalists would point out, this line of argument is arguably weak and unstable, as the text itself does not explicitly address abortion in its broad treatment of human rights. By Justice Scalia's logic, if the Constitution fails to address the specific topic of abortion, the matter becomes one of political substance, thus removing it from the scope of federal adjudication. At odds with the judiciary majority's employment of active liberty, an originalist would have recognized the Constitution's silence on the issue of abortion, deferring the matter to the authority of the state and further differentiating the matter as one of legislative rather than judicial responsibility. Similar to *Roe v. Wade*, originalists and proponents of a living constitution employed the same logic in their analysis of *Obergefell et al. v. Hodges*, which

⁴ "Roe v. Wade Law Case." *Encyclopedia Britannica*, 2019 Encyclopedia Britannica, Inc., <https://www.britannica.com/event/Roe-v-Wade>.

⁵ "Roe v. Wade Law Case." *Encyclopedia Britannica*, 2019 Encyclopedia Britannica, Inc., <https://www.britannica.com/event/Roe-v-Wade>.

⁶ "Roe v. Wade Law Case." *Encyclopedia Britannica*, 2019 Encyclopedia Britannica, Inc., <https://www.britannica.com/event/Roe-v-Wade>.

challenged the state's authority to discriminate on same-sex marriages. As they did in the case on abortion, the Supreme Court ruled in favor of same-sex marriage, finding state exclusions on same-sex marriage unconstitutional under the due process and equal protection clauses also found in the Fourteenth Amendment.⁷ Again in opposition, the originalists found that the Constitution's provisions for "due process" and "equal protection" were too vague to serve as proper guidance for judgment, declaring that the matter should instead be addressed by political and legislative means.

With regards to both these cases, the defense for or against the rulings bear a strong resemblance to Federalist and Anti-Federalist sentiments from the 18th century. The Bill of Rights was amended into the Constitution, in part to address Anti-Federalist concerns that a strong federal government would abuse its supremacy and eventually interfere with the peoples' essential freedoms. The Bill of Rights included a series of "*negative*" rights that would serve to protect said freedoms,⁸ removing them from the reach of government.⁹ While Justice Scalia argues that judicial rulings made outside of a textualist framework detract from the liberties of the people, Justice Breyer insists that approaching the Constitution as an evolving document serves to preserve individual liberty, much like "*negative*" clauses found in the Bill of Rights. As examined above, active liberty restores the autonomy of individual choice via *Roe* and *Obergefell*. In both cases, the Supreme Court majority refused to send the matters back to a state that would enable the limitations of freedom and succumb to an oppressive populous vote. Their

⁷ "Obergefell v. Hodges Law Case." *Encyclopedia Britannica*, 2019 Encyclopedia Britannica, Inc., <https://www.britannica.com/event/Obergefell-v-Hodges>.

⁸ "Positive and Negative Liberty." *Stanford Encyclopedia of Philosophy*, The Metaphysics Research Lab, 27 Feb 2003, revised 2 Aug 2016, <https://plato.stanford.edu/entries/liberty-positive-negative/>.

⁹ MacDonald, Dwight. "Isaiah Berlin's 'Two Concepts of Liberty.'" *The American Conservative*, The American Conservative 2019, 7 June 2013, <https://www.theamericanconservative.com/repository/isaiah-berlins-two-concepts-of-liberty/>.

decision to do so protected essential personal freedoms, even if at the expense of state authority and majoritarian democracy.

As judicial authority issued a ruling in *Roe* and *Obergefell* that would protect the freedoms of people in the United States, the court's decision also points towards a caution against state abuse of power. Just as federal authority runs the risk of evolving into tyranny, the popular vote also contains the threat of "soft despotism," a name which Alexis De Tocqueville assigns to the dangers of a tyranny of the majority in his 1830 survey of Democracy in America.¹⁰ Federalist arguments further support the framers' insistence upon a democracy regulated by representation, as opposed to a direct democracy, as a means of controlling against an unjust tyrannical majority. While democratic representation was essential, Federalists presumed that the public at large would lack the political wherewithal and intellectual capacity to make decisions in the best interest of the nation. Political representatives and government leaders were expected to be formally educated and experienced experts best equipped to lead the country and protect the general will of the people. This mission layers on to Justice Breyer's philosophy in application to the cases cited above. Generally speaking, citizens opposing same-sex marriage base their stance on personal conviction and individual interest rather than on the principles of the matter in its entirety. When individuals use their personal preferences and prejudices as their only metric in determining how they will vote, they place their own specialized ambitions above the liberties of their neighbor. Without a strong central government to balance the scales, we cannot protect minority groups from becoming the majority's

¹⁰ De Tocqueville, Alexis, translated by Gerald E. Bevan. Democracy in America and Two Essays on America. New York, New York. Penguin Group. 2003

oppressed victims. Justice Breyer's remedy would be an application of negative rights: drawing a line between government and personal freedoms. The Supreme Court ruling on same-sex marriages removes a majoritarian determination that would otherwise limit personal choice. As Justice Breyer notes, "without delegation to the experts, an inexpert public, possessing the will, would lack the way,"¹¹ suggesting, alongside the founders, that the public benefits from the guidance of political leaders when it comes to managing and maintaining its liberties. Under the guidance of a practiced and professional group, the decisions that impact American democracy can be adequately navigated by discerning and distinguishing the will of an impartial public from the mal-intent of a people that chose to dictate their own emotionally-charged personal perspectives at the detriment of society at large. If using judicial authority to negate the outcome of popular vote can be just as anti-constitutional as condoning tyranny of the majority, then it stands to reason that the risks should be weighed and measured according to the merits of each case. The Supreme Court's ruling in *Obergefell* may have diminished the power of a peoples' vote, but only at the noble cost of protecting and preserving individual liberty.

Nonetheless, we cannot be confident that aligning a judicial ruling with a negative Bill of Rights consistently produces an innocuous or overall beneficial outcome. To Scalia's point, American democracy suffers when the democratic vote is superseded by a judicial ruling.¹² Prior to the ruling in *Obergefell*, the popular majority in thirteen states had defended marriage exclusively as an institution between one man and one woman. By means of a forced judicial mandate, the Supreme Court's ruling in *Obergefell* undermined the popular vote and skirted the legislative avenues otherwise required to alter the marital law in those thirteen states. To further

¹¹ Breyer, Stephen. Active Liberty: Interpreting Our Democratic Constitution. New York. Random House, Inc. 2005. Pages 102-103

¹² Scalia, Antonin. A Matter of Interpretation. Princeton, New Jersey. Princeton University Press. 1997. Pages 41-42.

remove the democratic process from the judicial ruling, U.S. Supreme Court justices are appointed by presidential nomination rather than voted into position by the public. This point can be claimed as an inherent contradiction to Justice Breyer’s claim that judiciaries serve the “public will.”¹³ If Supreme Court justices are not ushered into office by the people of the United States, but instead selected by the executive branch before being reviewed and approved by the legislative branch, this process distances the public from influencing judicial rulings that become federal laws. It also means that the U.S. Supreme Court is not directly beholden to any constituency.

But before we discredit the ability of a judge to serve the public will based on the process of nomination, we must first recognize the inherent shortcomings of any democracy. Concerns that a nominated judge will not adequately serve the interests of the people if their appointment is not based on the vote of the people are best addressed by the overarching value of the checks and balances built into American democracy. The founders were careful to consider each distinct branch of government’s allotment of power. Certainly, the will of every individual cannot always be represented, nor is the public majority always of sound mind and purpose – these absolutes do not exist, thus validating the need for leadership and government. Perfection is unattainable in this regard, and the aim of government is replaced by the imperative to lead the nation forward in a balance of values that best serve the people and the country as a whole.

As Justice Breyer and other constitutional evolutionists assert, there are larger and overarching “consequences” to consider in the federal adjudication process. If left to political discourse, it is reasonable to assume that, in most cases, popular opinion would mirror the

¹³ Breyer, Stephen. Active Liberty: Interpreting Our Democratic Constitution. New York. Random House, Inc. 2005. Page 101.

decision rendered by the state's highest court. If the aim is a unified nation, as the founders intended, there is a tipping point at which a divergence of opinion becomes detrimental to a country's well-being, as we will see in an upcoming example. Prior to their respective Supreme Court rulings, 20 states permitted abortion and 37 states had legalized same-sex marriage. Setting aside the temporary condition of a pregnancy, we can assume that individuals affected by these matters, such as Jane Roe (the fictitious name of the female plaintiff used to protect her identity in *Roe v. Wade*), are influenced by a state mandate, one way or another. If sufficiently impassioned and economically empowered, those individuals would relocate to states and regions that more closely align with their political views and values. However, physical relocation prompted by political positions ultimately withdraws people into silos. An inevitable segregation would manifest based on political ideologies as states witness an exodus and/or influx of populations with specified views. Considering current demographics in the United States, this is already a prevalent characteristic of our geographical spread. A strongly conservative and traditional state such as Texas is geographically clustered with other states of similar political convictions (Oklahoma, Arkansas, Louisiana, Mississippi, Kansas, and Alabama). Similarly, modern and progressive values are concentrated in the West and Northeast regions of the country.¹⁴ Not only do like-minded people tend to huddle in their respective groups, but they also tend to breed similar thoughts by way of social influence. Ideological segregation occurs as people congregate geographically.

The harsh history of the United States makes these consequences quite tangible. Consider the Civil War, preceded by the succession of Southern states as the final manifestation of escalating differences in political opinions. Though the Civil War began in 1861, the fear of

¹⁴ "Swing, Bellwether, and Red and Blue States." *Population Reference Bureau*, 2019 Population Reference Bureau, 27 October 2008, <https://www.prb.org/electiondemographics/>.

succession is notably present in James Madison's observations in 1781 when slavery and apprehensions of a divided country prompted a number of clauses in the Constitution. The debates of the Constitutional Convention were not only saturated by tensions between pro-slave states and abolitionist states, but also by Shays Rebellion, the uprising of small farmers who responded to crippling debts and rising taxes by taking up arms in 1786. In fact, state leaders were so shaken by Shays Rebellion that it became the primary motivation to organize the Constitutional Convention, where the founders came together to shape a central government that could mitigate and control any future faction, especially where the threat displayed imminent signs of tyranny by the masses or disruption of the union. Those at the convention feared an uneducated and unintelligent populous as a threat to the country, and advocated for a strong central government that would provide democracy the elements it needed to stay intact:

In every community where industry is encouraged, there will be a division of it into the few and the many. Hence, separate interests will arise. There will be debtors and creditors, etc. Give all the power to the many, they will oppress the few. [The voice of the people has been said to be the voice of God, and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first [or upper] class a distinct, permanent share in the government. They will check the unsteadiness of the second [or lower classes], and as they cannot receive any advantage by change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed to pursue the public good? Nothing but a permanent body can check the imprudence of democracy].¹⁵

The founders sought to create "a permanent body" to "check the imprudence of democracy," and their drafting of the Constitution awarded no other political office with more permanency than that of a federal judge seated in the Supreme Court. Returning judicial matters to the authority of the state and its routine legislative process prolongs a political disagreement until it is forced to fester and impede the cohesion of a unified alliance between states. An originalist stance at the federal level not only runs the risk of tolerating disagreements amongst states, but also

¹⁵ Larson, Edward J. Winship, Michael P. Madison, James. The Constitutional Convention. New York. Random House, Inc. 2005. Page 50.

promoting factions and preparing the country for civil war. Approaching the Constitution as a living document, however, prioritizes the sanctity of the union and assists in advancing less populated and rural parts of the country to keep pace with the dense urban populous; filling in for the disadvantage of physical distances and its resulting political polarization. In the absence of active liberty, how long would it take for such divisive matters to reach the level of the federal legislation required to unite the country under one uniform decision?

Justice Scalia asserts that this approach conflicts with the U.S. Constitution's separation of federal governing powers. The framers created a strong national government, but as a formerly colonized nation subjected to the British Monarchy prior to the American Revolution, they were wary of power concentrated into the hands of the few. Their solution was to balance federal authority with three branches of government: the legislative, executive and judicial. It is by this logic that Justice Scalia made the claim that the judicial branch oversteps a separation of powers any time it makes a ruling on a political matter that is not specifically addressed by the text of the Constitution. Consider his critique of the majority opinion issued in *Obergefell*:

No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect. That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions..." One would think that sentence would continue: "... and therefore they provided for a means by which the People could amend the Constitution," or perhaps "... and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." The "we," needless to say, is the nine of us.¹⁶

Scalia's disappointment in the *Obergefell* outcome is rooted in his frustration of the judiciary's attempt "to create 'liberties' that the Constitution and its Amendment neglect to mention."

Justices are *not* to take on the role of a sovereign body ruling over "320 million Americans coast

¹⁶ *Obergefell v. Hodges*. No. 14–556. Supreme Ct. of the US. 26 June 2015. https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf. 30 March 2019.

to coast.”¹⁷ As he would assert, the only appropriate way to handle a political matter that makes its way to the Supreme Court would be to revisit the issue by way of constitutional amendment or legislative process.

Unfortunately, Justice Scalia’s position in *Obergefell* is inconsistent with his opinion of the decision in *Oliver Brown v. Board of Education of Topeka, Kansas*, whereby the Supreme Court barred racial segregation in public schools. In *Brown*, Justice Scalia finds that "equal protection of the law" found in the Fourteenth Amendment combines with the Thirteenth Amendment to conclude “laws treating people differently because of their race are invalid.” This analysis parallels Justice Harlan’s dissent in the case of *Plessy v. Hon. John H. Ferguson*, which sought to overturn a statute in Louisiana that required non-white railway passengers to travel in an equal, but separated or divided coach train.¹⁸ In reviewing both *Brown* and *Plessy*, Scalia takes the stance that the equal protection clause carries more merit than it does in the *Obergefell* case. Scalia is willing to extend the equal protection clause to racial discrimination, but he attacks the same use of the same clause when it is applied to marriage discrimination, when in fact neither right is explicitly captured in the clause itself. This comparison likens the originalist’s approach to the active liberty approach. While originalists pride their logic on its principle of consistency, here we find it to be inconsistent as the opinion shifts depending on the political matter at hand. The stable metric offered by an originalist approach is defeated in the Fourteenth Amendment’s liberal application to *Brown* and *Plessy*, and active liberty is justified by the imperative to remove a discriminatory practice.

¹⁷ *Obergefell v. Hodges*. No. 14–556. Supreme Ct. of the US. 26 December 2015. https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf. 30 March 2019.

¹⁸ Turner, Ronald. “A Critique of Justice Antonin Scalia’s Originalist Defense of *Brown v. Board of Education*.” *UCLA Law Review*, 2019. <https://www.uclalawreview.org/a-critique-of-justice-antonin-scalia’s-originalist-defense-of-brown-v-board-of-education/>. 30 March 2019.

Revisiting the emphasis that active liberty places on consequences, *Brown* helps to further illustrate how an evolving interpretation of the Constitution can bring about a long overdue and much-needed change in society:

To be sure, a court focused on consequences may decide a case in a way that radically changes the law. But this is not always a bad thing. For example, after the late-nineteenth-century court decided *Plessy v. Ferguson*, the case which permitted racial segregation that was, in principle, “separate but equal,” it became apparent that segregation did not mean equality but meant disrespect for members of a minority race and led to a segregated society that was totally unequal, a consequence directly contrary to the purpose and demands of the Fourteenth Amendment. The court, in *Brown v. Board of Education*, overruled *Plessy*, and the law changed in a way that profoundly affected the lives of many.¹⁹

Despite Justice Scalia’s interpretation of these two cases, Justice Brown’s majority opinion in *Plessy v. Ferguson* sought justification in the vague text of the Constitution, manipulating an overbroad citation to further his own opinion on a political matter. In his analysis, Justice Brown relies on the precedent set by the *Slaughterhouse* cases of 1873. In *Slaughterhouse*, the court resolved that while the Fourteenth Amendment required states to offer equal rights to Black Americans it did not automatically bestow equal privileges upon all American citizens.²⁰ The Fourteenth Amendment neither discussed race nor addressed the rights of Blacks. Instead, the majority opinion in *Plessy* found that the Amendment only *established* Black citizenship and defined what it meant to be a citizen of the United States and of each respective state.²¹ Herein lies the fallibility of an originalist interpretation. The failure to apply active liberty to the of *Plessy* case 1896 consequently condoned and exacerbated Jim Crow laws until the matter would be revisited and reversed by the *Brown* decision in 1954. However, by that time, racial segregation laws were so broadly enforced and deeply embedded in U.S. Southern society that the ruling would only be the beginning of a long and painful struggle for Black civil rights.

¹⁹ Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. New York: Random House, Inc. 2005. Page 119

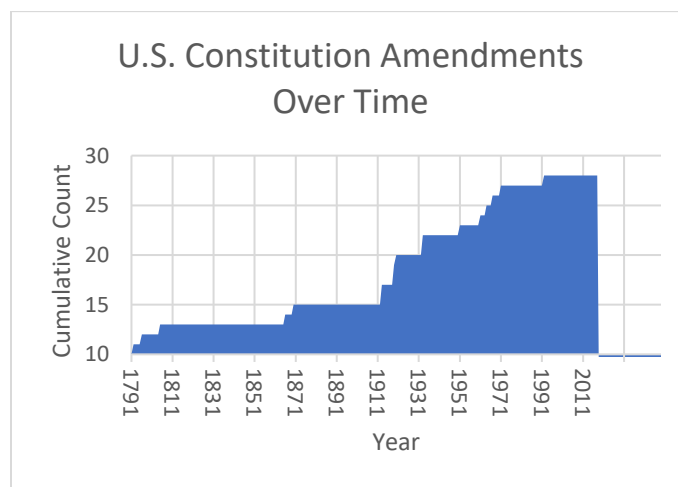
²⁰ “Supreme Court History: The First Hundred Years: Slaughterhouse Cases (1873).” *Thirteen, Media with Impact*, 2007 Educational Broadcasting Corporation, December 2006, https://www.thirteen.org/wnet/supremecourt/antebellum/landmark_slaughterhouse.html. 30 March 2019.

²¹ “*Plessy v. Ferguson*.” *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/163/537#writing-USSC_CR_0163_0537_ZO. 30 March 2019.

However delayed it may have been, active liberty served as the catalyst to the civil rights movement, whereas awaiting the abolishment of Jim Crow laws via the legislative process and Constitutional Amendment, as preferred by originalists, would have further delayed a long overdue and much needed political change. Justice Scalia's insistence upon treating political matters through these means, although contradicted by his opinion in *Brown*, is fallible for two reasons. If Constitutional Amendment is required to address every ambiguity of existing Constitutional language, there would be no end to the scrutiny of such language as the text would require ongoing clarification and continual amendment to keep up with evolving times and, consequently, evolving language. But this is only a secondary obstacle. The primary challenge is the two-thirds vote of approval needed by the legislative branch in both the U.S. House of Representative and the U.S. Senate. This is not an easy process to begin with, but it is further hampered by the rigidity of a two-party system that has dominated the U.S. political landscape.

The complication that a two-party system presents to the amendment process was not in the framers' purview at the time of the Constitutional Convention. In 1787, although there were Federalist and Anti-Federalist positions that resulted from the drafting of the Constitution, political parties did not formally exist, and political ideologies were not confined by pre-determined systems of thought, as the Republican and Democrat parties are today. Although other political parties exist in the U.S. today, Republicans and Democrats control the political scene, and the legislative branch is divided between the two. The insurmountable obstacle that threatens the Constitution's amendment process is the extreme polarization of these two parties that has deepened since the 1980s. As pointed out in an article by the Washington Post, prior to this polarization, even "if you knew which party an American voted for, you couldn't predict

very well whether the person held liberal or conservative views.”²² As Democrats began to typify themselves as more and more progressive, and as Republicans became increasingly conservative, each party has emerged less diverse in ideology.²³ Declining diversity within the parties compels politicians to confine themselves to strict ideologies, creating increasing difficulties, even impossibilities, in obtaining a two-thirds vote required to amend the Constitution under the rigidity of a two-party system. This development is better illustrated by a graphical representation of ratified amendments over time:



The concept of a living Constitution suggests that more amendments are needed to keep up with the evolving times, and the above graph mostly supports that claim. We see a plateau leading up to the Civil War, and post-Civil War when political tensions ran high, and then another plateau is displayed around 1980, which seemingly correlates with increased tensions and polarization among Democrats and Republicans. If the framers could have foreseen the emergence of a

²² Haidt, Jonathan and Abrams, Sam. “The top 10 reasons American politics are so broken.” *The Washington Post*, 1996-2019 The Washington Post, 7 January 2015, https://www.washingtonpost.com/news/wonk/wp/2015/01/07/the-top-10-reasons-american-politics-are-worse-than-ever/?noredirect=on&utm_term=.6cf29ce72f6d. 30 March 2019.

²³ Haidt, Jonathan and Abrams, Sam. “The top 10 reasons American politics are so broken.” *The Washington Post*, 1996-2019 The Washington Post, 7 January 2015, https://www.washingtonpost.com/news/wonk/wp/2015/01/07/the-top-10-reasons-american-politics-are-worse-than-ever/?noredirect=on&utm_term=.6cf29ce72f6d. 30 March 2019.

divisive two-party system, would they have correspondingly drafted a drastically different process for amending the Constitution?

The rigidity of a two-party system may be a relevant consideration for active liberty: as it becomes increasingly difficult to amend the Constitution, it becomes increasingly necessary to adjudicate on political matters where the alternative legislative process may be inaccessible, especially when a failure or delay in the legislative process may lead to irreversible consequences. On the other hand, this justification for active liberty gives rise to Justice Scalia's concern regarding the checks and balances set forth in the Constitution to mitigate the abuse of power by any one branch of government. The 1856 case of *Dred Scott v. John F.A. Sandford* properly demonstrates the danger inherent in exercising active liberty, or enforcing the "will of the people" by way of judicial ruling. Prior to the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments granting citizenship to Blacks, Dred Scott petitioned his freedom before the courts, arguing that the time he and his owner resided in a free state entitled him to emancipation before returning to the slave state of Missouri. Scott argued that time spent in a free state entitled him to emancipation. His petition was brought before the Supreme Court, where it was denied pursuant to Article III of the Constitution, noting that slaves and descendants of slaves were not, and could not be, U.S. citizens, and therefore could not bring a case before the court. The ruling could have concluded on this note, but Justice Taney went one step further, using the Constitution's 5th Amendment, which addresses the right to property, to demonstrate that depriving a slave owner of his right to own a slave was an unconstitutional violation of his property rights. While it is popularly argued that Justice Taney exercised a judicial solution to a political problem in the matter of *Scott v. Sandford*, this case actually demonstrates how an originalist approach *and* active liberty can be dangerously utilized. Justice

Taney's citation of Article III of the Constitution validates his originalist perspective, but his further application of the Constitution's 5th Amendment extends beyond a textualist approach. For those who insist that the Constitution is a living document and active liberty is a necessary device by which to approach federal court cases, the *Dred Scott* case is an illustration of the dangers that come with obeying literal readings of the Constitution. Meanwhile, originalists can point to this case as one where Taney stepped outside of the scope of his judicial responsibility by issuing his ruling on a matter that he had already declared beyond his reach, by the dictates of the Constitution.

A conclusion of these findings suggests that those justices who fail to apply a sound and balanced approach to adjudication are prone to endanger democratic freedoms and securities. The *Dred Scott* decision inflamed public opinion and quickly became one of the issues that fueled the Civil War. While originalists claim that their approach to adjudication is structured to prevent loose interpretations of the Constitution, they cannot be certain that this tendency will protect the country from malicious rulings any more than an active liberty decision that presumes to prioritize the will of the people as it evolves over time. Regardless of how one might define the role of the judge, the constitution already grants them a powerful position that requires measured discretion. The *Dred Scott* case is one example of a gross abuse of judicial authority and a manipulation of Constitutional language aimed at privileging those of particular political and economic standing.

Now that we've stressed the founders' aim for constitutional control over factions and mitigation of the abuse of federal authority, we can focus our attention on the constitutional role of the judicial branch. Article III of the Constitution attempts to provide a description of the types of issues that shall fall within the scope of the Supreme Court:

The judicial Power of the United States shall be vested in one Supreme Court... The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...²⁴

The scope of judicial federal power is delineated to “Cases” and “Controversies,”²⁵ but this is a broad explanation of federal jurisdiction. At the Constitutional Convention, the framers hoped that the federal courts would hear “questions which may involve the national peace and harmony.”²⁶ Alexander Hamilton emphasizes this goal in his opening of Federalist Paper 80:

...the Judiciary authority of the Union ought to extend to these several descriptions of cases... to all those which involve the **PEACE of the CONFEDERACY**, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves.²⁷

Here, again, the framers have emphasized “PEACE” and “Union.” As Hamilton further elaborates that presiding over cases “between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union,” whereby “... the peace of the WHOLE ought not to be left at the disposal of a PART.”²⁸ This echoes the doctrine of the early Federalist papers (especially 1 through 10) on the concern that factions posed a threat to the security of the country. As part of a strong national framework, Hamilton’s comments here would support an aggressive adjudication wherever it could best serve the whole of the union, especially where the states might fail in complying with that imperative.

Notably absent from the Constitution, the Constitutional Convention, and the Federalist arguments, is a restrictive outline limiting the powers of the judicial branch.²⁹ There is only an implication of limitation as imposed by a separation of powers. The Constitution intends to

²⁴ *U.S. Constitution*. Art. III, Sec. 2.

²⁵ *U.S. Constitution*. Art. III, Sec. 2. <https://www.law.cornell.edu/constitution/articleiii>. 30 March 2019.

²⁶ Meese, Edwin III. Spalding, Matthew. Forte, David F. *The Heritage Guide to the Constitution*. Washington, DC. Regnery Publishing, Inc. 2005. Page 241

²⁷ Hamilton, Alexander. *The Federalist Papers* (Federalist #LXXX). New York, NY. Fall River Press. 2017. Page 363.

²⁸ Hamilton, Alexander. *The Federalist Papers* (Federalist #LXXX). New York, NY. Fall River Press. 2017. Page 364.

²⁹ Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. New York. Random House, Inc. 2005. Page 117.

empower federal justices with a moral responsibility to be “impartial between the different states and their citizens.” The framers had faith that a judicial branch “owing its official existence to the union, will never be likely to feel any bias auspicious to the principles on which it is founded.”³⁰

In considering the contentious views of Scalia and Breyer, respectively, the originalist versus the evolutionist, it is unrealistic to definitively assert that the framers valued Constitutional efficacy (reliance on textualism) over the preponderance of consequences required in order to mitigate faction and division. A more valid ponderance, perhaps, would be the prioritization of values: should separation of powers be placed *above* the general peace and preservation of the union? While the originalist approach is not without flaws, neither is the approach of active liberty, but the parallels between the former and Anti-Federalist sentiments reveal concerning contradictions in the originalist argument. At first glance, Justice Scalia and the originalist position may seem to be a didactic and secure approach to adjudication, but it finds itself at odds with the priorities that shaped and sculpted the Constitution into existence, namely the preservation of the union and the institution of a strong central government. As the originalist position elevates the text of the Constitution above all other considerations, it simultaneously insists on returning political matters back to the authority of the states, thereby negating the Constitution’s prescription for strong federal authority. Additionally, a system of checks and balances does not need to be singular in purpose. While it may mitigate against the abuse of power, it can also keep federal authority operational. By employing active liberty, the judicial branch can step in to accommodate for the short-comings of the legislative branch. We should also take into account that the authority of the judicial branch helps to mitigate any abuses

³⁰ Hamilton, Alexander. The Federalist Papers (Federalist #LXXX). New York, NY. Fall River Press. 2017. Page 365.

of power that may be overextended by the state, which is yet another balance of governing authority. Further, approaching the Constitution as a living document meant to serve the people is consistent with a judicial supremacy granted by the Constitution, and serves Federalist intentions for a strong central government and preservation of the union, while it has also, in recent years, functioned in the protection of individual liberties prioritized by Anti-Federalist ambitions. It is by this reasoning that a natural proclivity arises towards active liberty, aiming to protect the public will and the peace of the union whenever the people are ill equipped to do so on their own. Nonetheless, as the Supreme Court considers their ruling on any matter, it is important to view each case strategically and acknowledge the competing constraints of an originalist approach and imminent national consequences associated with the direction of their adjudication. The expertise of the judge should encompass a broad assessment of risks and responsibilities regarding matters of national interest, which also affect matters of state and individual interests. A “one-size-fits-all” metric cannot promise a successful outcome that balances consistency with necessity, and this is why textualism falls short independent of its comparison to any other approach. Such a complication is only resolved by placing highly educated, experienced, trustworthy and exemplary figures at the highest judicial office, empowering them to step in and aid society in its deficiencies as they strive to advance the nation.