

# TEXTUALISM AND THE LIVING CONSTITUTION

ELIOT T. TRACZ

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## I. INTRODUCTION

The concept of the Constitution as a living entity has proven to be a point of contention between scholars and jurists. But what is a living constitution? Professor David Strauss has defined the concept of a “living constitution” as a constitution “that evolves, changes over time, and adapts to new circumstances, without being formally amended.”<sup>1</sup> Professor Strauss’s definition of the living constitution has an inherently appealing quality: it views the living constitution as a product of common law.<sup>2</sup> Strauss maintains that this common law system, in which precedent and tradition are built over time, protects fundamental principles against the vagaries of public opinion.<sup>3</sup>

We see this definition vindicated as new Supreme Court decisions are issued, building upon past precedents. At the same time, we see new decisions expanding the rights of citizens beyond the text of the Constitution. Some of those cases have a decidedly progressive bent: *Brown v. Board of Education*,<sup>4</sup> *Loving v. Virginia*,<sup>5</sup> *Lawrence v. Texas*.<sup>6</sup> But progressive and liberal decisions are not alone in expanding

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1. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010).

2. *Id.* at 3.

3. *Id.*

4. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. *See Loving v. Virginia*, 388 U.S. 1 (1967).

6. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

rights; “self-defense” does not appear in the text of the Constitution, yet Conservative justices have found it to exist.<sup>7</sup> Bearing that in mind, there is an argument to be made that—in practice rather than in theory—the concept of a living constitution has no explicit political orientation.

The central argument of this article is that the text of the Constitution itself supports the idea that the Constitution is a living document. Through the use of broad general language, as well as specific forward looking provisions, the framers of the Constitution built a document capable of growth via multiple avenues. Unlike Professor Strauss, this article includes the process for amending the Constitution because amendments, though rare, change the life and meaning of the Constitution. To that end, this article would define a living constitution as one “that evolves, changes over time, and adapts to new circumstances.”

Section II addresses the argument that the Constitution is a living document.<sup>8</sup> It begins by discussing the theoretical underpinning of Living Constitutionalism.<sup>9</sup> This includes discussion of what forces may cause changes in constitution doctrine, both procedural and substantive.<sup>10</sup> Next it addresses two countervailing arguments against the idea of a living constitution: originalism and charges of judicial activism.<sup>11</sup>

Section III discusses Textualism as a means of Constitutional interpretation.<sup>12</sup> First it begins with a discussion of what Textualism is, and how it developed.<sup>13</sup> Next it looks at the tools that textualists use in analyzing a statute or Constitutional provision.<sup>14</sup> Finally, it addresses some criticisms of Textualism as tool of interpretation.<sup>15</sup>

Section IV examines textual support for the idea of a living constitution.<sup>16</sup> It begins by discussing the inclusion of a provision for amending the text of the Constitution and argues that this is proof that the Constitution was intended to change.<sup>17</sup>

## II. THE LIVING CONSTITUTION

### A. What Is the Living Constitution?

#### i. Theoretical Basis for Living Constitutionalism

At the most basic level, the theory of a living constitution involves that idea that a constitution adapts in response to changes in a nation’s circumstances over

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7. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. See *infra* Section II.

9. See *infra* Section II.

10. See *infra* Section II.

11. See *infra* Section II.

12. See *infra* Section III.

13. See *infra* Section III.

14. See *infra* Section III.

15. See *infra* Section III.

16. See *infra* Section IV.

17. See *infra* Section IV.

time.<sup>18</sup> Justice Oliver Wendell Holmes, Jr., writing for the majority in *Missouri v. Holland*, stated that “[W]hen 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.”<sup>19</sup> This does not, however, suggest a change in the substance of the Constitution, but rather in the understanding or meaning of its words.<sup>20</sup>

One approach to living constitutionalism has been rooted in evolutionary theory.<sup>21</sup> This theory rests on the idea that, at the most basic level, constitutions are organisms. It is not unusual for constitutions to be described in organic terms by commentators such as lawyers, judges and political scientists.<sup>22</sup> In that vein, scholars have claimed that the United States Constitution in terms that suggest that it is alive, including that it has been “nurtured,”<sup>23</sup> and it has the ability to “grow” with society.<sup>24</sup>

Constitutions change through acts of artificial selection.<sup>25</sup> Although “artificial selection” is an unfamiliar phrase for many people, it is a concept familiar to most; artificial selection entails humans acting as the agent responsible for deciding which traits are selected to continue on.<sup>26</sup> In everyday life, artificial selection has resulted in such a diverse set of traits as “the extreme brachycephalic head of the bulldog, thoroughbred horses bred for speed, and tomatoes for size and shape.”<sup>27</sup> Similarly to how humans have selected which traits to carry on in various organisms, so too do individuals select an interpretation of the Constitution which leads to their desired result.<sup>28</sup>

## ii. Reasons Why a Constitution’s Meaning Changes

Assuming that constitutions are living documents and therefore subject to change, there must be an underlying reason for those changes. I suggest two possible catalysts for such change: (1) efficiency, and (2) social change. These two

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18. Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1320 (2008).

19. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

20. Eliot T. Tracz, *Doctrinal Evolution and the Living Constitution*, 42 U. DAYTON L. REV. 257, 259 (2017).

21. *Id.*; see also Dodson, *supra* note 18, at 1323.

22. See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56–57 (1908) (“Government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life.”); *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Justice Holmes writing that the provisions of the Constitution are “organic, living institutions.”).

23. Thurgood Marshall, *The Constitution: A Living Document*, 30 HOW. L. J. 915, 919 (1987).

24. WILSON, *supra* note 22, at 22.

25. See CHARLES DARWIN, *THE ORIGIN OF SPECIES* 7–43 (1859).

26. *Id.*

27. Tracz, *supra* note 20, at 260.

28. *Id.*

catalysts account for changes both procedural (e.g. the creation of rules) and substantive (e.g. the identification of rights).

a. Efficiency

The argument that the meaning of constitutional provisions, or laws in general, change to promote efficiency, is rooted in economic theory. One supporter of this position, economist Paul Rubin, has written that litigation drives the law towards economically efficient outcomes through the process of litigation.<sup>29</sup> These economically efficient changes are largely procedural in nature.

While the United States Constitution provides a strong framework upon which our system of law is built, it says very little about procedure. For example, the Constitution provides equal protection of the law but does not say how that should be achieved.<sup>30</sup> As a result, the courts have developed a tiered scrutiny system in which cases are reviewed under strict scrutiny,<sup>31</sup> intermediate scrutiny<sup>32</sup>, or rational basis review.<sup>33</sup>

b. Social Change

The second factor driving change in a living constitution is the reality of evolving societal beliefs. Unlike the goal of efficiency, which largely leads to procedural change, evolving societal norms generate substantive change in the meaning of the Constitution. This is most readily visible when it comes to protecting rights.

One particular example of societal norms changing substantive meaning begins with the U.S. Supreme Court's egregious decision in *Bowers v. Hardwick*.<sup>34</sup> In *Hardwick*, the Court upheld a Georgia sodomy law which was being applied to consensual sexual acts between two men.<sup>35</sup> First, the Court found that prior precedent had not construed the Constitution to "confer a right of privacy that extends to homosexual sodomy."<sup>36</sup> Second, the Court found that there is no

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29. Paul Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55 (1977).

30. U.S. CONST. amend. XIV.

31. *See, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

32. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *Lehr v. Robertson*, 463 U.S. 248 (1983).

33. *See, e.g.*, *Penell v. City of San Jose*, 485 U.S. 1 (1988); *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

34. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

35. *Id.*

36. *Id.* at 190. In reaching this conclusion, the Court discounted a number of important cases touching on the right to privacy including: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), dealing with child rearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion.

“fundamental right to homosexuals to engage in acts of consensual sodomy.”<sup>37</sup> Strangely, the majority justified this position by citing the extensive history of discrimination against the LGBTQ community.<sup>38</sup>

Seventeen years later, the Supreme Court reversed in *Lawrence v. Texas*.<sup>39</sup> *Lawrence* dealt with the validity of a Texas statute which made it a crime for two members of the same sex to engage in types of intimate sexual acts.<sup>40</sup> The Texas statute provided that “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”<sup>41</sup>

In finding in favor of *Lawrence*, the Court overruled *Bowers*.<sup>42</sup> In doing so, the majority addressed several cases which followed *Bowers* and undermined its holding.<sup>43</sup> First, the Court discussed *Planned Parenthood v. Casey*, which affirmed constitution protection to “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>44</sup> While discussing *Casey*, Justice Kennedy quoted one passage which he felt captured the respect the Constitution requires for the autonomy of individuals:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>45</sup>

As a result, the majority found that people in same-sex relationships may seek that same autonomy as individuals in opposite-sex relationships.<sup>46</sup>

What *Bowers* and *Lawrence* demonstrate is that over a period of years, changes in social views can lead to substantive changes in the meaning of constitutional provisions and doctrines. These cases are not alone in demonstrating shifting changes in substantive constitutional doctrine, but they do provide a good snapshot of doctrinal change.

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37. *Bowers*, 478 U.S. at 192.

38. *Id.* at 192–94.

39. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

40. *Id.* at 562.

41. *Id.* at 563.

42. *Id.* at 578.

43. *Id.* at 573–74.

44. *Lawrence*, 539 U.S. at 574 (discussing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (*overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022))).

45. *Id.* at 574.

46. *Id.*

## B. Counter Views

## i. Dead, Dead, Dead!

Some of the loudest objections to the concept of a living constitution come from those who adhere to an originalist view of constitutional and statutory exegesis. Professor Eric Segall has defined an originalist as someone who accepts the following three tenants: (1) the Constitution's meaning was fixed at the time of its ratification; (2) a judge should give that fixed meaning a primary role in interpreting the Constitution; and (3) modern concerns and consequences should not outweigh "discoverable original meaning".<sup>47</sup> Naturally, this puts originalism at odds with the concept of a living constitution whose meaning changes as time passes.

While giving a lecture at the University of Cincinnati, Justice Scalia described the majority opinion by Chief Justice Taft in *Myers v. United States*<sup>48</sup> as a prime example of originalism.<sup>49</sup> In particular, Justice Scalia praised Taft's use of the text of the U.S. Constitution, writing:

It is a prime example of what, in current scholarly discourse, is known as the "originalist" approach to constitutional interpretation. The objective of the Chief Justice's lengthy opinion was to establish the meaning of the Constitution, in 1789, regarding the presidential removal power. He sought to do so by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of the President's removal power (particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention), the background understanding of what "executive power" consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the federal Constitution was adopted.<sup>50</sup>

Justice Scalia regarded this the proper exegetical method for dealing with the Constitution, but claimed that he would go even farther, including "placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day."<sup>51</sup>

Originalism is, however, a fundamentally flawed system of analysis. Judge Easterbrook has noted that the use of legislative history involves the assumption

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47. ERIC J. SEGALL, ORIGINALISM AS FAITH 8 (2018)

48. *Myers v. U.S.*, 272 U.S. 52 (1926).

49. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851-52 (1989) (citing *Myers v. U.S.*, 272 U.S. 52 (1926)).

50. *Id.* at 852.

51. *Id.* at 856-57.

that the intent of Congress matters.<sup>52</sup> If intent matters, Easterbrook argued, then the written text reflects imperfectly what the true law is.<sup>53</sup> In other words, the law exists in the minds of the legislators who enacted it, not on the paper containing the statute.<sup>54</sup> If this is true, then it is troubling as it replaces the text of the law, democratically agreed upon by legislators after compromise and then signed into law by the President, with the “intent” of a few legislators, many of whom may not have read the bill itself or the committee reports prepared before the votes.

A second problem with originalism is that it sometimes leads to the very judicial activism that it purports to oppose. By claiming to be searching for the “intent” of a law, a court may undertake a number of steps which broaden its power to act outside the literal text of the statute.<sup>55</sup> Judge Easterbrook has described how courts may use this process to shield judicial activism behind the mask of originalism. First, a court has discretion as to whether statutory language is ambiguous; if the court decides that it is, then the court’s decision is no longer controlled by either the language or the subjective intent of the drafters.<sup>56</sup>

Second, when the court attempts to discern which question it would hypothetically ask the framers of a statute or the constitution, the court may decide which question to ask.<sup>57</sup> By way of example Judge Easterbrook refers to *California Federal Savings and Loan Ass’n v. Guerra*,<sup>58</sup> a case dealing with a statute which required that pregnant women be treated the same as other employees for all employment related purposes. The issue before the Court was whether employers who favored female workers over male workers by only giving extended leave of absence to women were complying with the law.<sup>59</sup> The *Guerra* Court chose to frame the hypothetical question it chose to ask as “would you object if women got a little more?”<sup>60</sup> The outcome would surely be different had the question been phrased “Should the words ‘treated the same as’ be construed to grant preferential treatment.”<sup>61</sup> It is easy to see how framing the question can lead to wrong outcomes.<sup>62</sup>

Third, the court may select who is asked the question.<sup>63</sup> It is much easier to find the desirable answer if only those who championed the courts favored

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52. Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL’Y 59, 60 (1988).

53. *Id.* at 60.

54. *Id.* at 60–61.

55. *Id.* at 62.

56. *Id.*

57. *Id.*

58. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

59. Easterbrook, *supra* note 52, at 61.

60. *Id.* at 62.

61. *Id.* at 62–63.

62. *Id.* at 63.

63. *Id.*

interpretation are asked.<sup>64</sup> While this approach may be useful to a court that already has some idea in what direction it desires to go, it is hardly accurate as it allows the court to ignore those who opposed a congress or those members who voted for the measure without having had a meaningful impact and instead favor those with whom the court most identifies.<sup>65</sup>

Finally, we are back to the issue of whether the intentions of congress are “the law.”<sup>66</sup> As stated earlier, this method of constitutional exegesis is not much more than an end run around the legislative process and the final product created by our elected law makers.<sup>67</sup> Ironically, the use of originalism in constitutional interpretation can lead to substantive changes to constitutional doctrine by redefining the meaning of constitutional provisions<sup>68</sup>: the hallmark of a living constitution.

## ii. Living Constitution as the Basis for Judicial Activism

One traditional objection to the idea of a living constitution is that it is nothing more than a front for judicial activism.<sup>69</sup> But what exactly is “judicial activism” and how does it relate to the idea of a living constitution? The answers to these questions require some digging, and while this is not the place for an extended review of the concept of judicial activism,<sup>70</sup> there is some value in taking a deeper look.

“Judicial activism” is, in the words of Judge Frank Easterbrook, a notoriously slippery term.<sup>71</sup> It is common for both liberals and conservatives to level charges of “judicial activism” against opponents whose rulings they find unappealing.<sup>72</sup> Before “judicial activism” became the preferred term in the twentieth century, there was debate about the concept of “judicial legislation,” which is to say, judges creating positive law.<sup>73</sup> The idea of judicial legislation is an old concept which has been the subject of much discussion. “Where Blackstone favored judicial legislation as the

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64. *Id.*

65. Easterbrook, *supra* note 52, at 63.

66. *Id.* at 64.

67. *Id.* at 65.

68. *See, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

69. *See* 5 TEX. F. ON C.L. & C.R. 217, 218 (2000).

70. For a very good examination and history of the concept of judicial activism *see* Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 1441 (2004).

71. Frank Easterbrook, *Do Liberals And Conservatives Differ In Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

72. When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. This means that they want liberal Justices to follow yesterday’s holdings rather than engage in independent analysis, which might lead to a different conclusion. When conservatives are ascendant on the Court, liberals praise restraint--by which they mean following all those activist liberal decisions from the previous cycle!--and denounce “conservative judicial activism.”

*Id.*

73. Kmiec, *supra* note 70, at 1444.



strongest characteristic of the common law, Bentham regarded this as an usurpation of the legislative function and a charade or ‘miserable sophistry.’<sup>74</sup> This difference of opinion ought to sound familiar to anyone acquainted with the concept of judicial activism.

The term “judicial activism” did not first appear until 1947, when historian Arthur Schlesinger, Jr. used the term to describe informal alliance between Justices Black, Douglas, Murphy, and Rutledge as opposed to that of Justices Frankfurter, Jackson, and Burton whom he described as “Champions of Self Restraint.”<sup>75</sup> Even in its first usage, the idea of judicial activism is cast as the antithesis of judicial restraint.

Judicial activism is difficult to define. One fairly broad definition describes judicial activism as “any occasion where a court intervenes and strikes down a piece of duly enacted legislation.”<sup>76</sup> Alternatively stated, judicial activism is “the practice by judges of disallowing policy choices by other government officials or institutions that the Constitution does not clearly prohibit.”<sup>77</sup>

A second definition of judicial activism is “judicial legislation.”<sup>78</sup> This is a politically charged definition which accuses judges of actively seeking to make law rather than interpret it.<sup>79</sup> Some refer to the famous line from *Marbury v. Madison*, “It is emphatically the province and duty of the Judicial Department to say what the law is,”<sup>80</sup> in order to justify the allegation of judicial activism.<sup>81</sup> Others, such as Justice Powell in his dissent in the school desegregation case *Columbus Board of Education v. Penick*, have gone farther by pointing out that the courts are “the branch least competent to provide long range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education.”<sup>82</sup>

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74. Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 907 n.108 (1999) (quoting Richard A. Cosgrove, *SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART* 56–57 (1996)).

75. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 202, 208.

76. Gregory Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 143 (2002).

77. Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J. L. & PUB. POL'Y 293, 296 (1996); see also Easterbrook, *supra* note 71, at 1403–04 (“I have the gall to offer yet another definition of activism. It is a definition reflecting my view—which I will state but not here attempt to justify—that unless the application of the Constitution or statute is so clear that it has the traditional qualities of law rather than political or moral philosophy, a judge should let democracy prevail. This means implementing Acts of Congress and decisions of the Executive Branch rather than defeating them.”).

78. Kmiec, *supra* note 70, at 1471.

79. *Id.* at 1471–73.

80. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

81. Kmiec, *supra* note 70, at 1465.

82. *Columbus Bd. Educ. v. Penick*, 443 U.S. 449, 488 (1979) (Powell, J., dissenting).

While there are other extant definitions of judicial activism, Keenan Kmiec lists several more in his history of the term “judicial activism”,<sup>83</sup> these two definitions supply the definitions most relevant to this article. With these definitions in mind, it is time to consider another question: how does judicial activism relate to the concept of a living constitution?

The late Chief Justice Rehnquist, in a speech delivered at the University of Texas Law School, articulated two possible views of the meaning of the term “living constitution.”<sup>84</sup> The first was consistent with the ideology expressed by Holmes in his *Missouri v. Holland*<sup>85</sup> opinion.<sup>86</sup> While praising the general language of many of the Constitution’s clauses and amendments, Rehnquist argued that general language could be applied to scenarios which the framers could not have conceived of or methods of transacting affairs which did not exist in their time.<sup>87</sup> This view is consistent with the thesis of this paper, that generalities in constitutional phrases have enabled the Constitution to evolve as the world has changed.

The second meaning of “living constitution” which Justice Rehnquist divined, was a perceived method of extreme judicial activism. Drawing on a brief from an unknown case, filed in an unnamed United States District Court, Rehnquist shared a brief passage which he used to illustrate his concerns:

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.<sup>88</sup>

This language appeared to Rehnquist to be an explicit request for non-elected members of the judiciary to rule on social problems for no reason other than that the other branches of government had either failed or refused to do so.<sup>89</sup>

Rehnquist’s objections to this version of the idea of a living constitution stem from the fact that he equates “living constitution” with both of the definitions of

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83. See Kmiec, *supra* note 70.

84. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694–95 (1976).

85. *Missouri v. Holland*, 252 U.S. 416 (1920).

86. [W]hen we are dealing with words that also are 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.

*Id.* at 433.

87. Rehnquist, *supra* note 84, at 694.

88. *Id.* at 695.

89. *Id.*

“judicial activism” discussed above.<sup>90</sup> Not content to simply object to this association, Rehnquist sought to lay blame for some of the Supreme Court’s most reviled decisions, namely *Dred Scott v. Sanford*<sup>91</sup> and *Lochner v. New York*,<sup>92</sup> at the feet of proponents of a “living constitution.”<sup>93</sup> To Rehnquist’s mind, a living constitution was no more than an unelected judiciary supplanting the elected law makers, resulting in bad jurisprudence, and altogether “genuinely corrosive of the fundamental values of our democratic society.”<sup>94</sup>

### III. TEXTUALISM

#### A. Textualism in Theory

At various points in our legal history, different theories of legal interpretation have dominated the judiciary and academia. Legislative intent, or the idea that courts should consider the intent of the legislative body who enacted a law, has an extensive history of application in the United States.<sup>95</sup> The idea of relying on legislative intent entered American jurisprudence through the case of *Holy Trinity Church v. United States*,<sup>96</sup> a case involving a church in New York City which violated a state statute by contracting with an English citizen to come to the United States and serve as its rector.<sup>97</sup>

Legislative intent places a strong emphasis on the actions of Congress, which opens it to strong criticisms.<sup>98</sup> I have addressed these criticisms elsewhere,<sup>99</sup> but they can be summarized succinctly by Judge Frank Easterbrook, who wrote that “because legislatures comprise many members, they do not have ‘intents’ or

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90. At least three serious difficulties flaw the brief writer’s version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer’s version ignores the Supreme Court’s disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer’s version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.

*Id.* at 699.

91. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

92. *Lochner v. New York*, 198 U.S. 45 (1905).

93. Rehnquist, *supra* note 84, at 700–03. Rehnquist does admit that the term “living constitution” was not yet extant, but blames the idea it represents as responsible for these decisions. *Id.* at 700.

94. *Id.* at 706.

95. See Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 353, 355 (2021).

96. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

97. *Id.* at 457–58.

98. See Tracz, *supra* note 95, at 359–60.

99. *Id.*

designs,' hidden yet discoverable."<sup>100</sup> Easterbrook has also argued that searching for intent allows a party to assign intent to the drafters of legislation for the interpreters own purposes.<sup>101</sup> This in turn is what led Justice Scalia to claim that "*Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking."<sup>102</sup>

While legislative intent appears to apply most readily to interpreting laws passed by Congress, it has also been applied in arguments concerning the interpretation of the Constitution. One example concerns the extension of the Fourteenth Amendment outside of the context in which it was passed.<sup>103</sup> The argument states that the drafters did not intend to "encode a general antidiscrimination principle."<sup>104</sup>

Textualism serves as a rejection of legislative intent, holding as its foundation that belief that, "the text of the law is the law."<sup>105</sup> At the same time, it attempts to create a system of interpretation which leads to "predicable results emanating from democratically created statutes."<sup>106</sup> While attempting to adhere closely to the text of the statute or constitutional provision in question, textualism should not be confused for literalism.<sup>107</sup> Instead, it should be interpreted as a method-flawed, like any other-of interpreting the law, which seeks to address only the language passed by the legislature and signed into law by the relevant executive.

## B. Textualism in Practice

### i. Textualists

Textualists, or those who apply textualism, do so to varying degrees. Linda Jellum has identified several forms of textualists: "soft plain meaning", moderate, and strict.<sup>108</sup> Soft plain meaning textualists are more willing to consider legislative history in certain cases, without necessarily finding ambiguity.<sup>109</sup>

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100. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

101. Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992) ("[T]he concept of 'an' intent for a person is fictive and for an institution hilarious. A hunt for this snipe liberates the interpreter, who can attribute to the drafters whatever 'intent' serves purposes derived by other means.").

102. ANTONIN SCALIA, A MATTER OF INTEREST OF INTERPRETATION: FEDERAL COURTS AND THE LAW 21 (Amy Gutman et al. eds., 1997).

103. See RANDY BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 342 (2021).

104. *Id.*

105. Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes By Robert A. Katzmann* New York, N.Y.: Oxford University Press 2014 PP. XI, 171. \$24.95, 129 HARV. L. REV. 2118 (2016).

106. Tracz, *supra* note 95, at 361.

107. *Id.*

108. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 28–29 (2d ed. 2013).

109. *Id.* at 28.

Moderate textualists rely heavily on the plain meaning canon of construction.<sup>110</sup> This canon holds that where the “meaning of the text is plain, or clear, from the text, interpretation is complete.”<sup>111</sup> As a result, turning to other sources is only done when absolutely necessary.<sup>112</sup>

Strict textualists require that a text be ambiguous before they will consider turning to another source for help with interpretation.<sup>113</sup> Even then, strict textualists eschew legislative history.<sup>114</sup> The reason for this is that many strict textualists, such as the late Justice Scalia, refuse to consider any material not subject to the process of bicameralism (passage through both houses of congress) and presentment (signature by the President).<sup>115</sup>

## ii. Applications

During the Chief Justiceship of John Roberts, textualism has grown as a tool of interpretation. Lower courts have consistently looked to the text of statutes, policies, and ordinances to determine whether the law at issue is discriminatory. *Grimm v. Gloucester County School Board*,<sup>116</sup> a recent opinion from the Fourth Circuit, is a good example.

In *Grimm*, the plaintiff— a transgender student— challenged a school policy which stated that:

It shall be the practice of the GCPS [Gloucester County Public Schools] to provide male and female restroom and locker facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative private facility.<sup>117</sup>

The Fourth Circuit found that the policy discriminated against Grimm on the basis of sex because the School Board could not exclude Grimm from the boy’s bathroom without referencing his “biological gender”.<sup>118</sup> In so referencing “biological gender” the School Board’s policy fit within Title IX’s prohibition against discrimination on the basis of sex.<sup>119</sup>

*Grimm* is merely one circuit court’s opinion applying textualism. In *Bostock v. Clayton County*, Justice Gorsuch applied a textualist approach to determine that

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110. *Id.*

111. *Id.*

112. *Id.* at 28–29.

113. JELLUM, *supra* note 108, at 29.

114. *Id.* at 30.

115. *Id.*

116. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

117. *Id.* at 599.

118. *Id.* at 608.

119. *Id.* at 616–17.

discrimination against homosexual and transgender individuals was discrimination on the “basis of sex” under Title VII.<sup>120</sup> So prevalent is the use of textualism that even Justice Elena Kagan has famously declared that “We are all textualists now.”<sup>121</sup>

Much like legislative intent, textualism may seem more readily employable in the context of statutory interpretation rather constitutional interpretation. It has, however, feature prominently in certain cases. One example is the dissent of Justice Hugo Black in *Griswold v. Connecticut*.<sup>122</sup> In disputing the existence of a right to privacy, Black wrote that:

I get nowhere in this case by talk about a constitutional ‘right of privacy’ as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision.<sup>123</sup>

While Justice Black would have used textualism to deny the expansion of rights in *Griswold*, he would employ a textualist approach in numerous other matters of constitutional interpretation as well.<sup>124</sup>

#### IV. TEXTUAL SUPPORT FOR A LIVING CONSTITUTION

##### A. The Amendments Process

The first evidence piece of textual evidence that the Constitution is a living document comes from the text of Article V. This article states that:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses

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120. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

121. Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015) <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

122. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

123. *Id.* at 509–510 (Black, J., dissenting).

124. For a more descriptive analysis of Justice Black’s textualism see Michael Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 Bos. U. L. REV. 24, 25 (1994).

in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.<sup>125</sup>

The mere existence of Article V demonstrates that the Constitution was intended to be changeable, with multiple avenues available.

The plain language of Article V defines two routes for amending the Constitution. First, Congress may, with the support of two thirds of each house, propose amendments.<sup>126</sup> Second, a convention may be called if the legislatures of two-thirds of the states call for a convention.<sup>127</sup> Even then, any amendment must be ratified by the legislature of three fourths of the states before it can take effect.<sup>128</sup>

This process is difficult, and intentionally so. Erwin Chemerinsky has written that a “constitution represents an attempt by a society to limit itself to protect the values it most cherishes.”<sup>129</sup> If this is true, then it follows that the ability to amend the Constitution is an acknowledgement that society’s values change and those values may warrant protection. The amendments process has altered the substantive meaning of the Constitution 27 times. When the Bill of Rights is removed, the remaining 17 amendments illustrate a constitution which is clearly a living document.

Professor Chemerinsky has identified three major categories for the amendments which followed the Bill of Rights.<sup>130</sup> First, Chemerinsky identifies those amendments which overturned existing Supreme Court Precedent.<sup>131</sup> The Eleventh Amendment was adopted to overturn *Chisolm v. Georgia*,<sup>132</sup> and protect the states from suits by citizens of different states or foreign countries. The first section of the Fourteenth Amendment overturned *Dred Scott v. Sandford*,<sup>133</sup> and made clear that all persons born or naturalized in the U.S.- including slaves- are citizens. The Sixteenth Amendment permitted Congress to enact a personal income tax by overturning *Pollock v. Farmers’ Loan & Trust Co.*<sup>134</sup> Finally, the Twenty-Sixth Amendment provided universal suffrage to anyone over age eighteen, overturning *Oregon v. Mitchell*<sup>135</sup> in the process.

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125. U.S. CONST. art. V.

126. *Id.*

127. *Id.*

128. *Id.*

129. ERWIN CHEMEKINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 7 (4th ed. 2011).

130. *Id.* at 12-15.

131. *Id.* at 12.

132. *Chisolm v. Georgia*, 2 U.S. 419 (1793).

133. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

134. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

135. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

The second class of amendments identified by Chemerinsky were enacted to fix problems in the Constitution.<sup>136</sup> One example is the Twelfth Amendment, which changed the process by which the Vice-President is selected and the procedure by which the House of Representatives chooses a president if no candidate receives a majority of votes in the electoral college.<sup>137</sup> The Twentieth Amendment address the death of a president-elect, articulates that the terms of members of Congress begin January 3, and sets the inauguration date for the President and Vice-President as January 20.<sup>138</sup> The Twenty-Fifth Amendment address what happens when the President becomes disabled,<sup>139</sup> the process for removing a President,<sup>140</sup> and the procedure for choosing a new Vice-President if there is a vacancy.<sup>141</sup> Finally, the Twenty-Seventh Amendment prohibited Congress from giving itself a raise during its current term.<sup>142</sup>

The third group of amendments reflect changes in our social consciousness.<sup>143</sup> The Thirteenth Amendment ended slavery and involuntary servitude except in specific circumstances.<sup>144</sup> The Fourteenth Amendment protected the rights of the newly freed slaves and prohibited the states from denying equal protection of the laws, and life, liberty, or property without due process of law.<sup>145</sup> The Fifteenth Amendment prohibited denying the right to vote on the basis of race or previous condition of servitude.<sup>146</sup> Other amendments in this category include Prohibition<sup>147</sup> and its repeal,<sup>148</sup> and women's suffrage.<sup>149</sup>

The common thread amongst these amendments is that each addressed a need significant enough to garner the support necessary to survive the difficult amendment process. Each brought significant, substantive change to the Constitution. This capacity for the Constitution to change supports the idea that it is a living document, capable of experiencing change in meantime. The ability to amend constitutional text is only one form of change, but it is by no means alone. There remains another textual means for the living constitution to continue to grow and evolve as our society changes.

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136. CHEMERINSKY, *supra* note 129, at 13.  
137. U.S. CONST. amend. XII.  
138. U.S. CONST. amend XX.  
139. U.S. CONST. amend. XXV, § 1.  
140. *Id.* § 4.  
141. *Id.* § 2.  
142. U.S. CONST. amend. XXVII.  
143. CHEMERINSKY, *supra* note 129, at 13–14.  
144. U.S. CONST. amend. XIII, § 1.  
145. U.S. CONST. amend. XIV, § 1.  
146. U.S. CONST. amend. XV, § 1.  
147. U.S. CONST. amend. XVIII, § 1.  
148. U.S. CONST. amend. XXI.  
149. U.S. CONST. amend. XIX.



### B. The Ninth Amendment

The second piece of textual evidence supporting the existence of a living constitution is the text of the Ninth Amendment. This amendment, part of the Bill of Rights, is brief and states in its entirety that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>150</sup> Despite its brevity, it remains largely undeveloped by the Supreme Court.

So how would a textualist reading interpret the Ninth Amendment? First, rather obviously, there would be an acknowledgement that there are enumerated rights within the Constitution.<sup>151</sup> Next, the text of the Ninth Amendment makes clear the fact that certain rights are enumerated cannot be used as a basis to deny the existence of other rights. It is a central canon of construction that “the word ‘shall’ usually connotes a requirement.”<sup>152</sup> This means that “shall not” requires that a court cannot interpret the enumeration of certain rights to mean that others either do not exist or are less significant.<sup>153</sup>

Thus, a plain reading of the Ninth Amendment’s text reveals two important, related points, both of which tend to support the idea of a living constitution. First, the amendment does not protect any specific rights. Instead, it makes clear that there are other rights beyond those enumerated in the text of the Constitution.<sup>154</sup> Second, the plain language of the text makes clear that the fact that certain rights are not enumerated in the Constitution does not make those rights less important.<sup>155</sup>

This view of the Ninth Amendment is not universal. Some, like Professor Akhil Reed Amar, have dismissed the Ninth Amendment - along with the Tenth Amendment- as a “popular sovereignty amendment.”<sup>156</sup> Professor Amar argues that the Ninth and Tenth Amendments are connected to the Preamble by use of the phrase “the people”.<sup>157</sup> In fact, he tells us that the “most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of

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150. U.S. CONST. amend. IX.

151. *Id.*

152. *Kingdomware Techs., Inc. v. U.S.*, 579 U.S. 162, 171 (2016) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)) (recognizing that “shall” is “mandatory” and “normally creates an obligation impervious to judicial discretion”).

153. This reading is contrary to another well-known canon of construction, *expressio unius est exclusio alterius*, which stands for the proposition that the expression of one thing implies the exclusion of others. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–111 (2012).

154. U.S. CONST. amend. IX.

155. *Id.*

156. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND CONSTRUCTION* 119–120 (1998).

157. *Id.* at 120.

the Constitutional convention.<sup>158</sup> Professor Amar argues that there is a close triangular relationship between the Preamble, the Ninth Amendment, and the Tenth Amendment due to the use of the words “the People”- although he ultimately undermines this position by neither including nor explaining the exclusion of the Second Amendment which refers to the “right of the people” to keep and bear arms.<sup>159</sup> as well as their placement next to one another.<sup>160</sup>

A related argument offered by Professor Amar, is that the Ninth and Tenth Amendments integrate popular sovereignty with federalism.<sup>161</sup> In this reading of the Constitution, the Tenth Amendment limits the powers of Congress to those specific powers explicit or implicit in Article I.<sup>162</sup> The Ninth Amendment, in turn supports the Tenth Amendment by answering the question of “whether such express or implied power in fact exists.”<sup>163</sup> Professor Amar argues that the Ninth Amendment cautions readers “not to infer from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain.”<sup>164</sup>

Both arguments share a fatal flaw: they are interpretations wholly divorced from the plain language of the text of the Ninth Amendment. The text of the Ninth Amendment makes no such warning, it merely states that the fact that a right is not enumerated does not allow the government to “deny or disparage” that right.<sup>165</sup> The Tenth Amendment, on the other hand states that “The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.”<sup>166</sup> It is significant that the Ninth Amendment discusses rights, while the Tenth discuss powers. In order to reach Professor Amar’s position, one must assume first that the Framers chose to use rights and powers interchangeably in these two amendments alone, and second that the words “rights” and “powers” were not chosen specifically in order to achieve the purpose of each amendment.

Some have rejected the Ninth completely. Judge Robert Bork shared his views in this famous exchange:

Judge Bork: ... I think the ninth amendment therefore may be a direct counterpart to the 10th amendment. The 10th amendment says, in effect, that if the powers are not delegated to the United States, it is reserved to the States or to the people. And I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions. That is the best I can do with it.

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158. *Id.*

159. U.S. CONST. amend. II.

160. REED, *supra* note 156, at 121.

161. *Id.* at 123.

162. *Id.*

163. *Id.* at 124.

164. *Id.*

165. U.S. const. amend IX.

166. U.S. CONST. amend X.

Senator DeConcini: Yes. You feel that it only applies to their State constitutional rights.

Judge Bork: Senator, if anyone shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.

Senator DeConcini: I do not have any historical evidence. What I want to ask you is purely hypothetical, Judge. Do you think it is unconstitutional, in your judgment, for the Supreme Court to consider a right that is not enumerated in the Constitution?

Judge Bork: Well, no.

Senator DeConcini: -to be found under article IX?

Judge Bork: ... I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says, "Congress shall make no" and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.<sup>167</sup>

Bork's position is often described as being in line with Professor Amar's view that the Ninth and Tenth Amendments work in tandem.<sup>168</sup>

It is understandable why some would struggle with the significance of the Ninth Amendment. There are no rights enumerated in the Ninth Amendment, on this point most agree. But because it neither protects explicit rights nor explains how to ascertain what unenumerated rights exists, it is difficult to figure out how to deploy the Ninth Amendment. So what purpose does the Ninth Amendment serve?

Justice Goldberg, concurring in *Griswold v. Connecticut* made clear his position on the Ninth Amendment.

While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends

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167. See, e.g., Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219, 219–20 (2013).

168. *Id.* at 219.

strong support to the view that the 'liberty' protected by the Fifth And Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.<sup>169</sup>

Justice Goldberg's position is consistent with a textualist reading of the Ninth Amendment. As it stands, however, a Supreme Court majority has yet to seriously consider the role of the Ninth Amendment in identifying and protecting rights.

#### V. CONCLUSION

The discussion of whether the Constitution is a living document is far from settled, and it may well be that there will never be consensus. At the same time, the existence of Article V and the Ninth Amendment present strong evidence that there has always been an intent for the Constitution to grow beyond its original form. Judging from the plain language of the text, we can conclude that the Constitution and its coverage are intended to undergo growth, and that such growth need not be rejected for ideological reasons.

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169. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965).