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# Neither Force nor Will, but Merely Judgement: Becoming a Supreme Court Justice

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> But it is the premise of our system that those judgments are made by the people, and not imposed by a governing caste that knows best.[i]

One of the greatest achievements of our Founding Fathers was establishing in and through the Constitution, a Republic of democratic self-governance. This ensures that the government is one by and for the people. While old, the Constitution was ions ahead of its time when it was written. Freedom exists in our democratic self-governance and in the very fact that the United States is a Constitutional Republic. Supporting and defending the Constitution is the way to protect and uphold freedom—preserving the government's duty to protect, not control its people. This job of supporting and defending the Constitution is one taken up by the justices of the Supreme Court of the United States. It is in this job that those who serve are able to keep the Republic alive. This is why a career in the legal field—as an attorney, as a judge; and with high aspiration, as a Supreme Court justice is not only a service to our country, but imperative.

Becoming a Supreme Court Justice is no easy feat. It requires not only intensive academic rigor that comes with a large financial burden, but also a lifetime dedication to our country through a long and exemplary career as a jurist. In what follows, I aim to outline the steps to obtain a career as a Supreme Court justice and the challenges that an individual may face pursuing this career path. Then, I will provide responses to these challenges that can be considered potential solutions. More precisely, I intend to do three things. In part I, I will outline the necessary steps to achieve a career in the High Court of the United States. Then, in Part II, I move to the problems or challenges and implications of such in pursuing a career, not only as an attorney, but in pursuing a career in the highest courts of the United States. In particular, there are two critical issues facing those pursuing a legal career, especially in the current climate of the United States: (1) the debate regarding originalism versus living constitutionalists; and (2) issues

of convictions of faith in law. Finally, in the same section, I will employ solutions to these issues, with some overlap in responses for these issues.

## Part I. Steps to Becoming a Supreme Court Justice

Becoming a Supreme Court Justice is a taxing and long process, one that is of course, not guaranteed, as the Constitution grants lifetime appointment to justices. It is important to discuss, in as much detail possible, the steps to achieving nomination and confirmation to the highest court of our Land.

### Should I Go to Law School?

Attending law school is a large financial burden and after three years most students are in nearly $200,000 worth of debt. For this reason, it is important to ask yourself whether or not law school is right for you. Lawyers are often times depicted in TV and movies as being in court and questioning witnesses. This is not accurate, since lawyers spend little time in the court room—lawyers spend most of their time reading, researching, and writing legal documents. Because of this, the best thing to do is intern or work for a law firm or within the legal field to gain critical insight into the daily work life of a practicing attorney, though not the only option. If this is not available, talk to a practicing attorney who is able to give you some idea of what life will be like outside of law school. As an undergraduate, your major does not matter so much, however, many students believe that attending law school and becoming a lawyer will guarantee a high salary. Earning potential will depend on the state in which you choose to practice, as well as the type of law you are practicing. It is important to note, however, that the national average salary for first-year attorneys, without giving an exact job, is between $40,000 and $70,000 (National Association for Law Placement, 2020). These numbers can be higher or lower depending on whether or not an individual works in the public sector or private firms. The point here is that

most first-year attorneys are earning modest salaries, but according to the ABA Journal, law school graduates typically earn $1 million more than college graduates (Weiss, 2013). What this means is that law school is very much a long-term investment.

As discussed, law school tuition is incredibly expensive. The *U.S. News and World Report* states that those students who attend law schools ranked in the top 10 law schools,[ii] pay more than $60,000 on average, per year. This cost does not include living expenses (Kowarski, 2020). That being said, there is both merit-based and need-based aid. Merit-based scholarships are granted to those who have strong academic credentials, which do not have to be repaid. Need-based aid, however, is in the form of federally subsidized loans, which do need to be repaid. Thus, it is pretty obvious that many students leave law school with a substantial amount of debt.

So, the question left to ask yourself after knowing this information is: should I go to law school? If the answer is yes, let's move on to a discussion about getting into law school.

**Getting into Law School**

First, it is important to understand how law school admissions work. Before you can attend law school, you must earn an undergraduate degree from an accredited college or university. The Law School Admission Council (LSAC) facilitates the admission process (Law School Admission Council, 2020). This is done in two ways. The first is through the administration of the Law School Admission Test, or the LSAT. The next is through law school application processing through the Credential Assembly Service (CAS). You will need to create an account at LSAC.org, where you can upload transcripts, letters of recommendation, register for the LSAT and CAS, as well as apply to the participating law schools. This is similar to the Common Application, however, there is an element of recruitment that the Common Application lacks.

Law schools can access your profile to send emails, waive application fees, as well as provide more information based on the interests you may have listed on an application.

**The LSAT**

The LSAT is integral in the law school admission process. The purpose of the exam is to test necessary skills that lend to success in the first year of law school. These skills include: reading comprehension (specifically the ability to read for reasoning structure, or identify arguments), reasoning skills, and writing. Normally, the LSAT is five sections: two Logical Reasoning sections, one Analytical Reasoning or Logic Games section, one Reading Comprehension section, and one experimental section which does not count toward your score, but can be any of the three sections, and you will not know it is experimental. Your score is on a scale of 120-180. There is also a writing section, which does not in any way contribute to your score. Like the SAT, the LSAT is a proctored exam, administered electronically. The LSAT writing is done remotely, and can be completed up to eight days prior to taking the exam (Law School Admission Council, 2020). It is important to note, however, that due to the current pandemic, the LSAT has been administered remotely through a proctoring software. This version of the test is called the LSAT-Flex. The LSAT-Flex is only three sections: one Logical Reasoning section, one Logic Games section, and one Reading Comprehension section. This also includes an un-scored writing section.

The LSAT is an accepted test by all law schools accredited by the American Bar Association (Law School Admission Council, 2020).[iii] Each school has a median LSAT score. Numbers matter in law school—and most law schools want to maintain their median LSAT scores for ranking purposes. What this means as a hopeful law student is that it is best to apply to a school with their median LSAT score or better. This is not to say, however, that a rejection is

imminent if you score lower. I will discuss what will strengthen your application if this is the case later on.

**Studying for the LSAT.** There are three main ways to prepare for taking the LSAT: (1) take a prepared class (online or in person); (2) hiring a private tutor; and (3) purchasing materials for self-study. You should choose which study option best suits your individual needs as all have pros and cons. It is also important to note that a combination of different types of study is often beneficial (Fracchia, 2017).

***LSAT courses***. There are many LSAT preparation courses available. This form of studying is beneficial because such courses offer a comprehensive overview of the LSAT and necessary skills to build or improve a score. Like many courses, there is structure and important due dates, which holds learners accountable and provides a focused structure. The pace cannot be adjusted if you are struggling or confused or speed up if you are advanced in a certain area. One of the biggest drawbacks for students is the price of these courses as they tend to be on the expensive side. They can cost anywhere from $800 to $1,200, on average (Smith, 2014).

***Private tutors.*** Unlike courses, a private tutor is able to tailor lessons to individual needs. Private tutors, however, can be generally expensive, especially if wanting to meet on a regular basis. Also, tutors may only be available at a limited capacity and without reviews depending on the location of a given individual (Fracchia, 2017).

***Self-study.*** The most common way students study for the LSAT is through self-study. LSAC has compiled practice tests into test books known as TestPrep books. These are inexpensive, but will not provide you with tips and tricks to figuring out how to efficiently and accurately take the test. This is not constraining though because there are other strategy guides.

Most recommended are Mike Kim's "LSAT Trainer" and PowerScore's "LSAT Bible Trilogy," which are three separate strategy books for each section (Fracchia, 2017).

**Choosing Law Schools**

With an LSAT score, or at least an idea of a potential score, you can begin to narrow down a list of law schools that you want to apply to. Since the admissions process is very competitive, applying to a wide range of law schools is imperative. It is recommended that you apply to at least 15 law schools. This can be expensive, so some students apply to less than this. Like undergraduate college applications, the range of law schools chosen should include reach schools, target schools, and safety schools.

Each applicant should consider three major factors when choosing law schools: (1) geographical factors; (2) financial factors; and (3) career goals (Fracchia, 2017).

**Geographical factors.** The average law school applicant is not freshly graduated with their Bachelor's degree. The average age for first year law students is 25 (American Bar Association, 2019). What this means is that most applying to law school are looking to start families and careers upon completion. For this applicant, geographic location might be a constraint. What this means is that when choosing to apply to law schools, determine which geographic location is most appealing. It is still worthwhile to consider schools outside of these geographic constraints, as if a large scholarship is awarded from one of these schools, it can be used to negotiate better scholarships at a school within your geographical preference (Fracchia, 2017).

**Financial factors.** As stated, law school is very much a financial burden. Thus, if an individual is worried about the price tag, it is important to apply to a wide range of schools in numerous geographical locations. Scholarship negotiation for this applicant is necessary.

**Career goals.** What this means is selecting law schools which have a high turnout rate in your area of interest: i.e., judicial clerkships, big law (corporate, large law firms), and other positions.

**Completing Applications**

Mentioned in brief, the LSAC'S Credential Assembly Service (CAS) is responsible for compiling all application documents to forward them to the law schools you are choosing. Each application requires letters of recommendation, a resumé, and personal statement. Letters of recommendation are like those from teachers when applying to college for the first time in high school. You should choose those who might be willing to write your letters of recommendation. Then, once you have confirmed who, it is important to provide a long enough timeline to get the letter written. This will only make for stronger letters. These letters should be done at least one month in advance of sending in applications, since the LSAC can take a few weeks to process these letters (Fracchia, 2017). Your resumé should be up to date and it should include your degrees, academic awards, and any work experience. Finally, your personal statement is your chance to directly speak to the admission committees. This allows you the opportunity to give the law school a peek at who you are and how you came to be applying to law school.

It is important to note that most law schools also provide an opportunity to write an addendum. What this is, is a way to explain the reason for a grade or to discuss why your LSAT score is not indicative of your capabilities to succeed in law school. This part is not required and is only optional (Law School Admission Council, 2020). The addendum is especially important if your LSAT score is lower than the school's median. It will only serve to strengthen your application and give insight into your work ethic and determination. As stated, law schools hope

to maintain their median GPA's and LSAT scores because of national rankings. If your GPA or LSAT falls below this number, providing an addendum can amplify your chances of acceptance.

**Going to Law School**

This section will be brief, as I want to mention just the most critical aspects while in law school that create or destroy opportunities for becoming a Supreme Court Justice.

Your grades during your first year of law school are the most important. Unlike grades during your time in undergrad, each class is graded on a curve, and there are ranks handed out at the end of each semester based on GPA. Being graded on a curve means that each exam a professor marks will be compared, then ranked against one another. To make this clearer here is an example: Let's say that there are five students in a seminar. They all take an exam. All are average, and let's say have a high score of 80. The professor would then compare each of those exams, and whoever has the best will be marked higher in comparison to another exam, which includes less detail, or some other error. This determines the standard for the exam, rather than a rubric. What this means is that only so many students will get As. There is a pre-determined number based on the curve (Western, 2019). In law school, your grades are often solely based on a final exam, not participation, or a midterm.

That being said, your grades and class rank make all the difference. Often times, your grades can be a determining factor for whether or not you are offered a job. This means that if you have a grade that may be lower, you ought to have an explanation as to why and what you have learned coming out of it.[iv] Overall, the main point of this is to emphasize how hard you have to work in law school and how consistent preparation pays off.

Next, I want to note that networking matters. You have to build yourself as a future attorney. Represent yourself well on social media. Introduce yourself to people and attend

networking events. Get to know your professors. All of these strategies can only build on pre-existing opportunities. Thus, it is obvious that not only do your grades matter, but who you know also matters.

## Becoming an Attorney

There are several requirements in order to become a legal, practicing attorney in whatever state you wish to be[v]. It is clear through the information already provided that becoming a lawyer takes at minimum seven years of study (though if an individual so chooses, they can attend graduate school or take gap years). In order to become a lawyer, each state has separate requirements, but for the purpose of this paper, I will only discuss what each state has in common, and what are often considered the minimum requirements for licensure to practice law in any state. There are two major requirements for almost all jurisdictions:[vi] the Multistate Professional Responsibility Examination and what is known as the Bar Exam. As a side, it is important to note that the bar examiners also require a character and fitness application, where they look into your background and determine whether you are ethically credible to serve in a public profession. This will also require a fee payment, with this amount varying based on which state you are pursing Bar admittance (American Bar Association, 2020).

### Multistate Professional Responsibility Examination

The Multistate Professional Responsibility Examination, or the MPRE, is one exam that is required for an individual to be admitted to the Bar in the state they wish to practice law. This is the ethics portion of the Bar exam (Kaplan, 2020). This test is a 60-question multiple-choice exam that is two hours long. It is only administered three times a year. Like every test (aside from law school finals) there is a $125 dollar registration fee. Preparing for this part of the Bar is much less daunting than the LSAT or the Bar itself. There are free MPRE preparation courses

offered by many online services (Kaplan, 2020) and most law schools have a Professional Responsibility course that is offered that covers material on the MPRE.

Each question on the MPRE provides a hypothetical or a fact pattern and a question, followed by four answer choices. These questions commonly ask questions like: Was the attorney's conduct proper? Or, is the attorney subject to disciplinary action? All answer choices will begin with a yes or a no, with an explanation following. The MPRE is designed as a way to measure a candidates' understanding and knowledge of standards applying to the conduct of lawyers (National Conference of Bar Examiners, 2020).

Most law students will take this exam in August heading into their final year of law school. The passing score is established by the jurisdiction in which you are taking this exam (National Conference of Bar Examiners, 2020).

**Bar Exam**

The Bar Exam is the exam that all prospective lawyers take. This is a licensing exam—and upon passing, an individual is "admitted to the bar" of that state. Again, requirements and rules will differ based on the individual state (U.S. Bureau of Labor Statistics, 2020).

As emphasized, each state's Bar Exam will vary in regard to format. The exam may include the following. First, the Multistate Bar Examination (MBE) is included, which is a six hour, 200-question multiple choice exam covering specific areas of law.[vii] Then, another section that may be included is the Multistate Essay Examination (MEE), which is a three hour, six-question essay examination on a variety of subjects. The Multistate Performance Test (MPT) is another section that may be included, which is two skills questions, that take 90 minutes each. Here, the test taker will receive a case file and complete the written assignment. This is considered a test of your lawyering skills within the constraint of time (American Bar Association, 2020).

Like law school, the Bar Exam can be very costly. First, registration for this exam can cost up to $1,500. A preparation course (students often use Barbri or Themis) can cost up to $4-5 thousand dollars. However, not all students cover these costs as some may receive a scholarship or their hiring firm will pay. Another nuance here is that many will recommend that when taking the bar, it is best to stay in a hotel for the days you are taking the Bar as it will help maintain focus, which can also be an expensive feat for most. However, it is critical to know this information before you enter your third year of law school so you can begin saving ahead of time. This makes the financial burden easier.

Upon passing the Bar, there will be a swearing in ceremony, where you will officially be admitted to the Bar in whichever state.

**Becoming a Supreme Court Justice**

I will begin this discussion with background about the Supreme Court and how this was established in and through the Constitution of the United States. The Supreme Court of the United States was established in Article III of the Constitution, stating "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[viii] Here, it is clear that while the Constitution establishes the Supreme Court, Congress is permitted to decide how it ought to be organized. The Judiciary Act of 1789 created the Supreme Court with only six justices and established the lower federal courts (United States Courts, 2020). Today, there are eight Associate Justices and one Chief Justice, for a total of nine. Typically, a seat on the Supreme Court means these justices serve for life. Each justice is appointed by the President and confirmed by the Senate.

The Constitution also establishes the jurisdiction, or the legal ability to preside over certain cases, of the Supreme Court.[ix] The High Court (another name for the Supreme Court) has

*original jurisdiction* in particular cases, such as suits between two or more states or against public officials. The Court has *appellate jurisdiction* on almost any case that involves issues of federal law or constitutionality (United States Courts, 2020). The most important take away, however, from this brief introduction to the Supreme Court is the role. The role of those who serve on our Supreme Court is to interpret law and defend our Constitution. In no way, shape, or form should judges impose their own policy preferences. This is essential as it upholds super precedent of judicial review in *Marbury v. Madison*.[x]

Now, moving into a discussion regarding placement on the Supreme Court, it is important to note that the Constitution does not outline any requirements for Supreme Court Justices—this means that one does not even have to attend law school (although all modern Justices have been trained in the law) (Supreme Court of the United States, 2020). What this means is that while today, most justices who sit on the bench are lawyers and have had judicial experience.[xi] Thus, it seems as if having a successful legal and judicial career will make becoming a Supreme Court Justice more feasible.

Most justices have attended Harvard or Yale, which are top 2 law schools; with our most current confirmed Justice attending a top 30 law school, Notre Dame (Supreme Court of the United States, 2020). In this section, it is important to note that each justice has graduated top of their class and have had commendable legal careers. Each justice, as stated, is appointed by the President and confirmed by the Senate. So, the most important take away here is that in order to become a Supreme Court Justice, stand out performance in both law school and your legal career are imperative if one is to be noticed and considered by a sitting President for a vacancy on the Supreme Court.

**Nomination and Confirmation Process**

The Constitution of the United States states that the President "shall nominate, and by and with the advice and Consent of the Senate, shall appoint…Judges of the Supreme Court…"[xii] Before the President announces a nomination, there is usually a consultation with sitting senators. After this nominee is announced, this nomination is sent to the Senate Judiciary Committee to begin confirmation hearings. There are currently 22 members of the Judiciary Committee, 12 majority and 10 minority. This makeup of the Committee is based on the current majority party of the Senate (Senate Committee on the Judiciary, 2020). These hearings can take up to a month to prepare—though this is not always necessary or the case (Georgetown Law Supreme Court Nominations Research Guide, 2020). During these hearings, Senators will question the nominee in respect to their qualifications, judgments, and legal philosophy. Witnesses for both sides, affirmative and negative will also present their views. Then, the Committee will hold a vote to move the nomination to the Senate floor for debate. This is where the process is contentious. The Senate rules used to allow filibustering, which meant an unlimited debate that could only be ended through a cloture vote, where 60 senators had to vote to confirm the nominee. This rule changed in 2017, under Senate vote, to lower the required number of votes to a simple majority (51 Yeas) (Georgetown Law Supreme Court Nominations Research Guide, 2020). If there is a tie in the votes, or a 50-50 split, the Vice President it to break the tie in a deciding vote. If voted in the Senate to confirm, that individual will be sworn in as an Associate Justice under Oath to the Constitution—swearing to support and defend the Constitution of the United States.[xiii]

## Part II. Potential Challenges Faced When Becoming a Supreme Court Justice and Solutions

I want to preface this section by saying often times these challenges are faced by individuals who are politically more conservative. In our evolving society, especially today, it is far more difficult being more conservative on the political spectrum than it is to be more liberal. So, it is important to take into consideration that political affiliation may matter depending on Senate majority control and the party of the nominating president. By this I mean, if being nominated by a Democratic president, one may face challenges from Republican senators; and if nominated by a Republican president, one may face challenges from Democratic senators.

### The Debate of Constitutional Interpretation

There are two schools of thought surrounding interpretation of the Constitution: originalism and living constitutionalism. Originalist judges in the "Written Constitution" of the United States of America, which values a fixed meaning of the law that is the Constitution. What this means in plain terms is that while the meaning of the Constitution remains fixed under this school of constitutional interpretation; new applications under this meaning will come about through new societal and technological developments (Gorsuch, 2019). This is in stark contrast with the so-called "Living Constitution," an ideology that holds that those who apply the Constitution must revise and adapt the meaning of it to meet particular political and social aims, without the formal amendment processes (Strauss, 2010).

There is case law and various arguments that address the tension between the originalist and the living constitutionalist. In particular, the argument regarding subjectivity and objectivity in adherence to the Rule of Law, arguing that without the originalist interpretation of the

Constitution in deciding cases of jurisdiction, the Supreme Court has overreached in its role and rights, giving room for subjective morality[xiv] to play a role in judicial engagement.

**Originalism vs. The Living Constitution**

**The great debate.** Raging for over 200 years, the great debate regarding schools of constitutional interpretation started in 1798 in *Calder v. Bull*.[xv] Justices Chase and Iredell disagreed regarding a fundamental question within the Court: should judges impose their own subjective interpretation of natural justice in the review of laws or should there be an application of the fixed principles of the Constitution? Justice Chase argued that judges have the right to subjectively interpret natural justice. On the other hand, Justice Iredell argued that judges do not have this right and are only able to determine the validity of the law by judging whether it is within the scope of power delegated to legislature through the Constitution. This is a clear argument of the living constitutionalist against the originalist. This debate has reared its head again, most recently in *Obergefell v. Hodges,*[xvi] which claimed that "[h]istory and tradition guide and discipline" constitutional interpretation and went even further to state that the Constitution must be adapted when there is new insight into the meaning of liberty. Chief Justice Roberts dissented, stating that this conception of the role of the Court as a deliverer of social progress is not the conception of the Framers of the judiciary branch.

Proponents of originalism believe that if the Constitution is to evolve to match the needs of the people, this change is to be sought through the amendment process granted in Article V.[xvii] The Court is not an elected body and thus should not make law for the people. In contrast, however, those who are living constitutionalists argue that the formal process of amending the Constitution is far too burdensome as a means of keeping the Constitution up to date. In saying that this process outlined in Article V makes amending the Constitution difficult, means that the

Supreme Court is required to make amendments to the Constitution through judicial engagement (Chemerinsky, 2015). It is a clear problem to allow the Supreme Court such amendment power as nowhere in Article III (where the Courts were established), does the Constitution grant the Court this power. This power belongs to the people.

**Justice Antonin Scalia's Originalism.** The Written Constitution, ratified by "We the People" is the supreme Law of the Land as explicitly stated in Article VI.[xviii] This principle was the foundation that allowed Chief Justice Marshall to grant the Court the power of judicial review in *Marbury v. Madison*.[xix] It follows that the Written Constitution governs not only the judiciary, but Congress and the President as well. The Constitution is the foundation of legitimacy in judicial rulings, legislative, and executive acts.

Justice Scalia, a renowned originalist justice appointed by President Ronald Reagan, summarized his understanding of originalism as: "The Constitution is a written instrument. As such its meaning does not alter. That which it means when adopted it means now" (Scalia & Garner, 2012).[xx] This does not mean that applications are fixed, rather, it means that the original *meaning* of the written words stay fixed, but new applications can arise. For example, the Punishments Clause of the Eighth Amendment referred to, at the very least, methods of execution that were designed with the intent to inflict pain. This will never change. But this meaning is not only encompassing those forms of torture that were known at the time of the Framing. It will also apply to the efforts to cause a slow and painful death by lasers (Gorsuch, 2019). Justice Scalia's foundational approach in originalist interpretation relies on the meaning of the text, not the subjective intentions of those who drafted the Constitution. In his majority opinion in *District of Columbia v. Heller*,[xxi] Justice Scalia's version of originalism was written into law. Using the original meaning of the Second Amendment, it created an "individual right to

keep and bear arms."[xxii] This was a 5-4 opinion. Justice Scalia's legacy on the school of originalist interpretation of the Constitution is important, and allows justices today to continue in the defense of originalism.

To put forward an argument in favor of originalism, Justice Scalia recognized the choice to be made between the original meaning of the Constitution and the Living Constitution. He likened this decision as searching for the lesser of two evils, and made an analogy to choosing between two librarians. Would you want one who speaks too softly or one who speaks too loudly (Scalia, 1989).[xxiii] Originalism does take a great deal of hard work and serious research, and while this might be considered a downfall to the critics, to proponents it is obvious that this is something lawyers and judges are very much capable of. On the other hand, a major downfall of living constitutionalism is that completely finds its foundations in subjective moral and philosophical preference (Scalia, 2012). This is inherently incompatible with the rule of law—as the Constitution is to be the objective standard that legitimizes judicial review. Justice Scalia argued in his dissent against the majority in *Obergefell v. Hodges,* that the majority violated the rule of law in favor of the rule of man in complete disregard of the original meaning of the Constitution.[xxiv] In other words, a reliance on subjective moral preference becomes the rule of man, something that is utterly incompatible with the objectivity of the Constitution. It is critical to note that those who are in favor of living constitutionalism have no response to this critique.

Based on the preceding information, it becomes clear that there is a simple issue here: there is either adherence to the rule of law or the living interpretation of the Constitution, but not both. Judicial review does not give the Court the right to re-write or amend the Constitution. Instead, it gives the power to apply the Constitution as written. The Constitution is by we the people, not by unelected justices in the highest Court in our Land.

**Justice William Brennan's Living Constitutionalism.** Justice William Brennan is a well-known proponent of living constitutionalism—making him a critic of originalist interpretation of the Constitution. Critics of originalism focus on two primary arguments. First, they argue that originalism produces inflexibility. Then, in this, they argue that this inflexibility lends to originalism being incompatible with desirable case outcomes. For example, Justice Brennen would argue that being an originalist means that the Constitution does not protect abortion rights, same-sex-marriage, or racial equality (Brennan, 1990).

**The problem.** It is clear here, through the debate of how justices ought to interpret the Constitution, that there is no uniform answer to which way is right or wrong. However, what is obvious, is the issue that may arise in seeking to be confirmed as a Supreme Court justice. This is often a partisan debate and I do not believe there will ever be reconciliation between these two schools of interpretation. Since this is a partisan debate, a jurist who comes before the Senate Judiciary Committee during confirmation hearings who is an originalist will face criticism from Democrat senators. If the jurist is a proponent of living constitutionalism, they will face backlash from Republican senators. This is ultimately a challenge a hopeful justice might face.

## The Solution: Defense of Originalism

The solution I propose is to adopt originalism. This is because it is not inherently incompatible to be politically liberal and an originalist. I argue that since it is not the job of the Court to make law, but simply interpret it, means there is no room in the decision-making process for personal policy preferences. Thus, I will provide a defense of originalism and demonstrate the critical importance of originalism in supporting and defending our Constitution and integrity of the Republic it establishes.

In the preceding section, I briefly discussed how critics of originalism, like Justice Brennan focus their critique on two central arguments: (1) originalism produces inflexibility; and (2) originalism leads to outcomes that are undesirable.

I will begin by discussing the first argument against originalism—that it does not allow for flexibility. As stated, the Constitution, though the *meaning* remains fixed, through it, is a flexible and long-standing system of democratic self-governance. Change comes through the voice of the people and it is not the job of the Court and its justices to determine law and norms of the whole body of people, especially when they are not elected. In fact, it actually appears that the subjective moral commitments of those who believe in a Living Constitution, actually limits the flexibility of the Constitution. By this, I mean that the Constitution outlines the power of the three branches, as well as the people. In instituting subjective philosophical principles, the Constitution is disregarded in favor of norms that the justices believe out to be a right as granted through the Constitution. It is true, then, that the ideology behind having a Living Constitution is consequentialist;[xxv] and the emphasis on the difficulty of the amendment process means that the Court's role under living constitutionalism is to act to propose and ratify revisions to the Constitution (Pozen, 2016). This is problematic because the Constitution belongs to the people, and allows for flexible application based on new advances within modern society. Allowing the Court to propose and ratify constitutional amendments deteriorates by the people and for the people.

Looking at the next argument, it is very much related to the consequentialist philosophy of the living constitutionalist: that under an originalist interpretation, there can be no desirable results (read as: results that do not satisfy personal political, moral, and sociological commitments). Those who are non-originalists believe that cases such as *Brown v. Board of*

*Education*,[xxvi] striking down segregation in schools, or *Loving v. Virginia*, [xxvii] striking down the laws prohibiting interracial marriage, are not justifiable through originalism. The opposite is true. Originalism supports racial equality in both cases. Further than this though, is that with originalism undesirable consequences like that in *Plessy v. Ferguson*[xxviii] can be avoided. The original meaning of the Fourteenth Amendment would strike down any state action that involves discrimination or racial segregation, be it regarding public transportation, public schools, or marriage. These types of laws would plainly violate the original meaning of the Fourteenth Amendment (McConnell, 1995).

What these arguments against originalism demonstrate is why proponents of a Living Constitution are attracted to this form of interpretation; it allows them to constitutionalize subjective moral and policy preferences (Strauss, 2010). This alone is enough reason to reject this school of interpretation; it is a threat to the Constitution and the Republic established through it.

**To the Republic.** Justice Scalia his dissent in *Lawrence v. Texas*[xxix] said, "But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best." In other words, if an issue is not expressly written in our Constitution, the Court should make no decision and allow states to put these issues up for a vote by the people. The very idea of a Living Constitution is a clear and present danger to the democratic self-governance of the states.[xxx] Living constitutionalism allows for the power to shift from the people to the Court, which is safeguarded by our Constitution. In adopting an originalist interpretation of the Constitution, it safeguards the Republic—the Constitution *is* the supreme Law of the Land—and thus every judgment and law ought to be pursuant to it. There are no

mixed messages and the intent of the Framers does not matter. The Constitution says what it says, and there is no room for subjectivity in the interpretation of law.

There is one objective standard that ought to be the leading "member" of the Court, the standard that a justice swears their oath to the Constitution. Without originalism, the protections granted to the people in and through our Constitution would be no more. The Constitution creates and ensures the scope of government and the structure of government we see today. Judicial power only extends so far, and the living constitutionalist's disregard of the Constitution allows the scope of government and the courts to be far broader. Originalism matters.

**Convictions of Faith in Law**

The debate raging over the relationship between church and state has been steadfast since our founding. The No Religious Test Clause,[xxxi] addresses this relationship by stating:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; *but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States* [emphasis added].[xxxii]

This is of course interpreted differently by those who hold different constitutional philosophies. It is in this that the argument to be made has a direct relation to the defense of originalism in the previous section. The Constitution mandates, as well as the limited case law,[xxxiii] that there can be no oath of denial or affirmation of a particular religious sacrament to hold office. This religious test, be it explicit or implicit is a direct violation of the Constitution and merely questioning the ability of an individual to hold office because of subjective perceptions of one's religion is at face value a violation.

**Constitutionality of Religious Tests: An Originalist View**

An individual of faith is no more or less qualified to serve a public position. Since there is no room for subjectivity in judicial interpretation, an individual's faith has no bearing on their ability to do their job. It might be important to note that identity politics will not be of value for the argument I am about to make. I say this because often times, a person of Christian faith is assumed to be a politically conservative originalist. However, I have shown it is not incompatible to be an originalist and politically liberal. It follows then, that a person of any faith can be anywhere on the political spectrum and it would be far outside of the scope of this paper to make an argument regarding religious incompatibilities with certain political orientations.

In what follows, I will make an analysis of the No Religious Test Clause assuming originalism. Then, I will highlight the debates that have arose since its ratification and modern-day implications in our Circuit courts and Supreme Court. Then I will employ what I believe is a reasonable solution shall an individual face a religious test during a confirmation hearing.

**Historical importance.** At its drafting and ratification, the No Religious Test Clause did not receive much attention. Despite this, it was still controversial because some, namely Antifederalists, at the Founding believed it was a problem to allow Catholics or non-Christians to hold office (McConnell, 1990). Federalists, however, defended the clause. The most prominent defender, was delegate Oliver Ellsworth. He later became the third Chief Justice of the United States Supreme Court. Ellsworth argued that a religious test of any kind offers no security—rendering it useless and counterproductive. So long as men are wise, virtuous and of upright character (Ellsworth, 1787). Thus, religious tests would only exclude such men from office, while those who are of no religious affiliation would not find ill in taking any religious Oath to further their selfish ends.

While the intent of the Founders upon ratification was to safeguard against religious oaths or affirmations, the meaning instead revolves around principles nondiscrimination and a prohibition of religious qualifications for public office.

**Issues of discrimination of religious convictions.** While the No Religious Test Clause is constitutional protection against religious oaths or affirmations, those who are of steadfast faith still face scrutiny and discrimination. For example, in 2017, Amy Coney Barrett was criticized for her faith and whether this hindered her ability to exercise judicial discretion and interpretation. During her confirmation hearings to the 7th Circuit Court of Appeals, Sen. Dianne Feinstein, D-Calif., said, “The dogma lives loudly within you and that’s a concern” (Shaw, 2019). Amy Coney Barrett went on to be confirmed as an Associate Justice to the Supreme Court this year, and still faced criticism and judgement about her ability to rule fairly because of her religious convictions.

I want to emphasize that this debate predominantly rears its head during discussions of whether abortion is a constitutional right. I will not argue one way or another, however, since I am strongly advocating for originalism, it seems clear where I would stand. It is critical here since abortion is fundamentally against the tenets and teachings of most religions. Though, as I have already emphasized, there is no place for subjective moral or political commitments in judicial interpretation. Thus, it follows, that regardless of one’s background in faith, no such test would render any utility.

## The Problem

Here is the problem simply stated; religion poses a threat for those who wish to impose personal policy preferences instead of abiding by the objective and highest Law of the Land: the Constitution. Those who face scrutiny because of their faith have had a gross constitutional

injustice done to them. This problem directly relates to the debate of constitutional interpretation. I do not like to generalize, however, here's why: most proponents of a Living Constitution believe personal policy preferences matter when interpreting the Constitution. What this means it that religion would pose a threat to the role of justices according to this philosophy. Most proponents of originalism do not believe that faith would threaten judicial discretion and interpretation. This is because the role of the Court is merely judicial interpretation instead of a governing caste that wishes to amend the Constitution without adhering to the legitimate constitutional process.[xxxiv]

It is clear then that perhaps those committed to not only originalism, but their faith may be subject to intense backlash in confirmation hearings. The problem is simply the issue of the role faith may play in judicial proceedings and as I have emphasized, there is no place for this in the Highest Court of our land.

**The Solution: Apologetics**

I offer a simple solution in conjunction with adopting originalism: be an apologist. Your faith has no bearing on your ability to support and defend the Constitution of the United States. The only objective rule of which you ought to allow a guide in the Court is the Constitution. Defend your faith and emphasize that interpretation of a statute, an Amendment, a Clause is derived from the very *word* of the Constitution, not any Bible or other religious document. Tests of religious faith are of little utility, as they bear little importance to your ability to perform your role as outlined in the Constitution.

Any religious test undermines accomplishment and prevents upstanding people from wishing to hold public office. Defend your faith and lead with integrity. Your job is to support and defend the Constitution through judicial interpretation, nothing more and nothing less.

## Conclusion

Being a Supreme Court justice is one of the highest honors a jurist can receive. It is imperative that there are justices who will uphold our Constitution and ensure the continuation of our Republic through limiting the scope of government and the scope of judicial power. Getting to the Supreme Court is not for the faint of heart as it takes fierce determination, hard work, and integrity. The challenges our country faces can ultimately come down to one Supreme Court ruling and because of this originalism is necessary and being an apologist for it matters even more. Faith has no place in the Court and should never be a factor for determining someone's ability to do a job, and to do it well. The Supreme Court and how we come to understand its role of supporting and defending the Constitution through fair and impartial judgement maintains the very core of what makes America great.

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Brown v. Board of Education, 347 U.S. 483 (1954)

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

Plessy v. Ferguson, 163 U.S. 537 (1986)

Lawrence v. Texas, 536 U.S. 588 (2003)

**Notes**

[i] Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting)
[ii] Law schools in the top 10 include (not in order): Harvard, Yale, Stanford, Columbia, University of Chicago, NYU, UVA, UPenn, Northwestern, and UC Berkeley.
[iii] Some law schools have been beginning to accept Graduate Record Examinations test, or the GRE. This is still limited to select law schools, so the LSAC recommends all hopeful law students take the LSAT. Harvard is one such university.
[iv] Though first year law students are more grade conscious, most law schools do not allow them to work. Despite this, first year grades will be used to increase competition for summer associate positions, among other jobs.
[v] Perhaps, it is important to note that an individual can be a practicing lawyer so long as they work under an attorney who has passed the bar. A lawyer working under an attorney is a graduated law student who has already taken the bar, but has not received a score.
[vi] Exceptions include Wisconsin and Puerto Rico. See The National Conference of Bar Examiners for more information regarding MPRE jurisdiction.
[vii] These areas include: constitutional law, criminal law and procedure, federal civil procedure, contracts, torts, evidence, and property. See the American Bar Association for a more detailed examination of the information in this section of the Bar.
[viii] U.S. CONST. art III (explaining the formation of the Courts).
[ix] U.S. CONST. art III, sec 2 (establishing the jurisdiction of the SCOTUS).
[x] 5 U.S. (1 Cranch) 137, 177-78 (1803). The Court made clear that the Constitution is a body of law for judges to interpret.
[xi] With notable exception being sitting Justice, Elena Kagan
[xii] U.S. CONST. art II, sec 2, cl. 2 (explaining the role of the Senate during certain Presidential duties to maintain checks and balances).
[xiii] Title 28—Judiciary and Judicial Procedure §453. Oaths of justices and judges; in conjunction with 5 U.S. Code §3331—Oath of Office. Most justices are required to affirm both oaths.
[xiv] Subjective morality is the concept of individual approaches to moral issues (or issues of policy and law in this case).
[xv] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)
[xvi] Obergefell v. Hodges, 135 U.S. 2584 (2015)
[xvii] U.S. CONST. art V (explaining how the Constitution is to be amended).
[xviii] U.S. CONST. art VI, cl. 2
[xix] *See* Marbury v. Madison, *supra* note 10
[xx] Quoting South Carolina v. United States, 199 U.S. 437, 448 (1905).
[xxi] 544 U.S. 570 (2008).
[xxii] *Id.* At 595
[xxiii] Although not perfect, it makes more sense to choose the librarian that speaks too softly.
[xxiv] *Obergefell*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting)
[xxv] Consequentialist ethics or moral philosophy is when an action (or in this instance, the outcome of a case) is right or wrong based on the consequences of that decision. This is contrasted with the deontological ethics of the originalist who derive decisions based on whether it is right or wrong under a series of rules (or in this instance, the Constitution).
[xxvi] 347 U.S. 483, 495 (1954)

[xxvii] 388 U.S. 1, 12 (1967)
[xxviii] 163 U.S. 537 (1896)
[xxix] 539 U.S. 558 (2003)
[xxx] *Obergefell*, 135 S. Ct at 2626-27 (Scalia, J., dissenting)
[xxxi] U.S. CONST. art VI, cl. 3
[xxxii] *Id.*
[xxxiii] Torasco v. Watkins, 367 U.S. 488 (1961) (Supreme Court unanimously held that requiring an oath to affirm or deny "the existence of God" to hold public office is a violation of the First and Fourteenth Amendments).
[xxxiv] *See* Scalia dissent *supra* note 1.