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AN ANALYSIS OF THE CONTEMPORARY THEORIES OF CONSTITUTIONAL INTERPRETATION AND THE INTRODUCTION OF A LEGAL TRANSFORMATIONAL APPROACH

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AN ANALYSIS OF THE CONTEMPORARY THEORIES OF CONSTITUTIONAL INTERPRETATION AND THE INTRODUCTION OF A LEGAL TRANSFORMATIONAL APPROACH

A Master Thesis

Submitted to the Faculty

of

American Public University

by

Vincent DiMaggio

In Partial Fulfillment of the Requirements for the Degree

of

Master of Arts

November 2016

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Charles Town, WV
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ABSTRACT OF THE THESIS

AN ANALYSIS OF THE CONTEMPORARY THEORIES OF CONSTITUTIONAL
INTERPRETATION AND THE INTRODUCTION OF A LEGAL TRANSFORMATIONAL
APPROACH

by

Vincent DiMaggio

American Public University System, October 16, 2016

Charles Town, WV

Professor Karen Morrissette, Thesis Professor

Since the ratification of the United States Constitution and its first ten amendments, known as the Bill of Rights, a myriad of opinions and interpretive theories have developed as to how to interpret and apply the meaning of their provisions. Originalism, Pragmatism, and Natural Law Theory are the predominant contemporary constitutional interpretive methods. Each of these contemporary theories was defined and cases using these interpretive approaches were analyzed for consistency with each theory’s principal foundations. This research discovered functional problems with each theory’s methodology for interpreting constitutional provisions and arriving at consistent judicial results. The conclusion reached was that the shortcomings of the three contemporary interpretive theories to constitutional interpretation would continue to deliver jurisprudential decisions that are significantly inconsistent with each theory’s underlying core principles, and that a new interpretative theory based on a legal transformational approach
would be superior at minimizing the inconsistencies inherent in the traditional interpretive approaches.
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CHAPTER 1 – INTRODUCTION AND BACKGROUND

Introduction

American statesman and delegate to the Constitutional Convention, Elbridge Gerry called constitutional interpretation, “dangerous, or unnatural.”¹ He believed the text alone was sufficient in ascertaining the meaning of the Constitution. Despite Gerry’s significant contributions to the drafting and debating of the new Constitution, his panacean view is hopelessly naïve. As contemporary legal scholar Erwin Chermerinsky wrote, “The Constitution inevitably must be interpreted.”² How exactly one should interpret the Constitution has been the subject of a debate that has been ongoing for nearly 230 years.

James Madison’s view on constitutional interpretation was clear. Madison held strong beliefs that the federal government created under the Constitution was one of limited and enumerated powers.³ During the debate on whether to charter the First Bank of the United States, which Madison opposed because the Constitution did not explicitly give the federal government powers to charter a bank, Madison made clear that using the Necessary and Proper Clause to justify unenumerated authority of the federal government would eventually result in unlimited federal powers.⁴ As will be demonstrated in this paper, viewing Madison’s comments through the lens of history, he was proven correct.

Conversely, Alexander Hamilton disagreed with Madison’s textual focus on the Constitution. Hamilton felt that constitutional provisions should be interpreted broadly, sufficient

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⁴ Id.
to provide the federal government with the powers necessary to administer the nation.\(^5\) The fact that the Constitution did indeed require interpretation was made clear in *Federalist 78*, when Hamilton wrote, “A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”\(^6\) Hamilton went on to write that the courts shall “liquidate” any law passed by Congress that contradicts the Constitution and “fix their meaning and operation.”\(^7\)

The variance in constitutional interpretive philosophies between the Madisonian textualist view and the Hamiltonian broad based view continues to this day in various forms. Today, there are numerous constitutional interpretive theories. Each has one overriding common characteristic: they seek to give meaning to the Constitution. The concept of constitutional interpretive theory is so critical to our view of the law and individual rights that contemporary legal luminaries such as Robert Bork, Antonin Scalia, Richard Posner, Ronald Dworkin, Stephen Breyer, and the aforementioned Erwin Chermerinsky, have spent substantial portions of their careers elucidating a particular interpretive approach. Each of the various theories asserts its own criteria for how interpretation should be based, and thus creates substantially divergent thoughts about the meaning of constitutional provisions and consequently, individual rights.

Three predominant schools of thought exist today on constitutional interpretation: originalism, the modern-day equivalent to Madisonian interpretive theory; pragmatism, the contemporary term for the Hamiltonian interpretive view; and natural law theory.\(^8\) As will be

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\(^6\) *The Federalist No. 78* (Alexander Hamilton).
\(^7\) Id.
shown herein, while each theory on its face has substantial merit, all of them have the inherent weakness of failing to produce interpretive decisions consistent with their ideological foundation. Without the ability to deliver judicial decisions on critical constitutional questions consistent with their philosophical underpinnings each theory fails as a viable long term interpretive methodology.

It is therefore necessary to adopt a new approach to constitutional interpretation. Contended herein is the argument that the world of constitutional interpretive theory requires an approach that does not attempt to divine ancient word meanings, or seek to produce decisions that place a subjective view of societal benefit over the legal provision being litigated. The Constitution has endured over the last two centuries because of its adaptability to an ever-changing, transforming society.

The United States began as an agrarian nation before transforming itself into an urban industrial powerhouse in the late 1800’s. The twentieth century saw further transformation with an expansion of rights across the societal spectrum, first with women receiving the right to vote, then later the Civil Rights Act of 1964, which sought to protect individual rights for all classes of citizens. Now, as we progress through the first quarter of the twenty-first century, our society has transformed once again with digital and computer technology playing an ever-increasing role in everyday life – something wholly unimaginable to the Framers of the Constitution. Therefore, this research paper seeks to demonstrate that any viable approach to constitutional interpretation must, at a minimum, acknowledge society’s continuous state of evolutionary flux.

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After analyzing the shortcomings of the current theories of constitutional interpretation, this work will introduce the interpretive theory of “legal transformationalism.” Legal transformationalism seeks to blend the contemporary meaning of the language of the Constitution with the widely accepted expectations that society has for what comprises individual rights. Far from being a simplified hybridized version of existing interpretive philosophies, legal transformationalism is distinguished from other interpretive methodologies by combining the transformational nature of society with a contemporary reading of constitutional terminology, resulting in an apolitical, consistent approach to extracting the modern day meaning of constitutional provisions.

Background

What is “due process?” What is meant by “equal protection of the laws?” What does it mean to “bear arms?” The only way to answer these questions, and others, is to interpret their meanings in the context of the constitutional provision being litigated. For example, jurists who advocate for an “originalist” approach to constitutional interpretation would argue that the phrase “equal protection of the laws” applies only to issues pertaining to equality among whites and African-Americans – because that was the original intent of that provision of the Fourteenth Amendment.\(^\text{11}\) An originalist would not use the Equal Protection Clause to strike down a state’s income inequality law, for example.\(^\text{12}\) Instead, an originalist would simply argue the Constitution should be amended if additional rights are to be enumerated.\(^\text{13}\) Herein lies the problem with the originalist interpretive philosophy. First, while Article V of the Constitution clearly delineates

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\(^{12}\) Id.

\(^{13}\) See generally, Turner *infra*. 

the process for amendment, the process itself was made deliberately difficult. James Madison argued that if amending the Constitution were made too easy, the document would merely be a temporary law. Secondly, if our understanding of the Fourteenth Amendment is frozen in time at a point where “equal protection of the laws” sought only the equal protection among races, there would be nothing to safeguard the rights of the citizenry from laws sanctioning inequality in other areas – such as gender inequality or income inequality – as society transformed their acceptability and understanding of these areas. Thus, originalism has fundamental shortcomings as a constitutional interpretive theory.

The pragmatist school of constitutional interpretation also has significant deficiencies. As will be discussed in detail, pragmatists view adherence to the literal constitutional language as a constraint against decisions that would deliver a superior outcome for society as a whole. To eliminate this liability, pragmatist jurists divided the concept of constitutional “due process” by delineating the “procedural” element of the right from a “substantive” element of the right. It is clear from the use of the term “due process” in the Fifth and Fourteenth Amendments that the language is referring to certain procedures that the government must follow before depriving an individual of “life, liberty, or property.” Indeed, even Alexander Hamilton, who like the pragmatists, favored a broad interpretation of constitutional language, felt that “due process” meant only procedural safeguards were mandated. The concept of “substantive due process” is

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14 U.S. Const. art. IV.
17 See Desautels-Stein infra p.583.
19 U.S. Const. amend. V and amend. XIV §1.
more mercurial. Essentially, the substantive due process doctrine holds that there exist certain fundamental rights not specifically listed in the Constitution, but incorporated in the term “liberty” that are protected from government infringement (without a compelling government interest).  
21 The concept itself is anathema to the originalist interpretive school.  
22 However, the pragmatists see the concept as their ability to positively impact society without the necessity of being tethered to specific constitutional terms or provisions.  
23 The practical impact of this approach has led to the opening of the proverbial “flood gates” to the discovery of a plethora of unenumerated rights now considered so fundamental – despite significant disagreements across the public spectrum – that the government’s ability to regulate or prohibit these rights is substantially curtailed. The loss of emphasis on the Constitution’s language and its replacement with the attempt to realize a perceived societal benefit has led the pragmatist approach to deliver inconsistent judicial outcomes and a dispensing of precedent which make the method inadequate.  
24

The natural law method of constitutional interpretation draws its inspiration from Lockean thought which holds that individuals are endowed by their Creator with rights that are beyond the reach of the government to deny or regulate.  
25 While the natural law school of thought closely parallels the pragmatic viewpoint, there are distinctions. For example, where pragmatists are motivated, in part, in achieving some societal benefit from their decisions, natural law theorists place their emphasis on the notion that certain rights transcend man-made

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22 Kenneth R. Thomas, Selected Theories of Constitutional Interpretation, 3 (2011).
23 See Cantu, infra pp. 70-71.
24 Id. at 71.
rules or benefits.\textsuperscript{26} While \textit{Griswold v. Connecticut}\textsuperscript{27} is often cited as a pragmatist decision, it is more appropriately seen as a decision rooted in the natural law philosophy.\textsuperscript{28} This observation was shared by Justice Hugo Black in dissent.\textsuperscript{29} As will be shown herein, \textit{Griswold} held, \textit{inter alia}, that many basic and fundamental human rights “emanate” as “penumbras” from the concept of “liberty.” The natural law theory sees the individual’s rights as supreme to those of society as a whole.\textsuperscript{30} The Constitution, in many places, protects individual rights, but in the context of a societal group. Interpretation of the Constitution is not based on the primacy of the individual, but rather on how the text’s provisions can be interpreted and applied consistently to protect all individuals within the larger society.\textsuperscript{31} It is for this reason that natural law fails as a compelling, or even adequate, constitutional interpretive method.

With each of the three principal contemporary methods of constitutional interpretation having fatal flaws, it becomes obvious that an alternative interpretive theory is necessary. Legal transformationalism is the theory proposed herein by this student that recognizes the transformational nature of society. The theory operates in support of the inescapable fact evidenced over time that society’s feelings about acceptable societal norms changes and consequently society’s expectation as to what constitutes their rights also changes. However, it would be both irresponsible and defeat the purpose of this scholarly work to put forth a new constitutional interpretive theory that merely provides for constitutional rights based on the whims of social opinion. As will be shown, legal transformationalism anchors itself squarely in

\textsuperscript{26} Id.  
\textsuperscript{27} 381 U.S. 479 (1965).  
\textsuperscript{29} 381 U.S. at 507 (J. Black, dissenting).  
\textsuperscript{30} Brian Tierney, \textit{Rethinking Rights: Historical, Political, and Theological Perspectives}, 3 Ave Maria L. Rev. 23, 28 (2005).  
\textsuperscript{31} See Arnold supra at 275.
the text of the Constitution, with the common sense recognition that the meaning of words changes over two centuries. The legal transformational approach holds that the idea of a “dead Constitution” should itself be relegated to the trash bin of failed theories, and that precedent should act as a barometer of society to gauge current thought.
CHAPTER 2 – ORIGINALISM: ADVOCATES FOR A “DEAD CONSTITUTION”

Definition of Originalism

The oft-quoted and esteemed jurist of the first half of the twentieth century, Learned Hand, wrote, “There is no surer way to misread any document than to read it literally.” Despite this somewhat cautionary admonition, this is precisely what the constitutional interpretive theory of “originalism” advocates.

Originalism is a formalist theory of constitutional interpretation. In general, the formalist school of thought emphasizes the “literal, plain meaning of the words.” Formalists argue that attempting to determine the purpose of a certain provision, beyond the provision’s plain meaning, will ultimately yield inconsistent results. There are dozens of definitions of originalism, but perhaps the most straightforward was put forth by Erwin Chermerinsky in a 2013 law review article where he states, “Originalists believe that the meaning of a constitutional provision is fixed at the time of its adoption and is changeable only by constitutional amendment.”

Modern day originalism takes its inspiration from the writings and speeches of James Madison, who believed that the federal government’s power extended only as far as what was

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32 Giuseppe v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).
34 Id. at 185.
35 Id.
36 Chermerinsky, supra at 935.
specifically enumerated in the Constitution. Madison said, “Should Congress attempt to extend to it any power not enumerated, it would not be warranted by the clause.”

Beyond the textbook definition, another way to view originalism is that it represents a philosophical perspective whereby laws passed by a democratically elected legislature are seen to have more legitimacy than “new” rights discovered by a handful of judges. In this context, the Constitution serves as not only the higher law (above the legislative lawmaking process), but also in the capacity as gatekeeper to ensure that the legislature does not encroach on the specific enumerated rights afforded the people. It is for this reason that originalists are adamant that “new” rights can only occur through the constitutional amendment process and that the language of certain constitutional provisions can, by virtue of omission, permit some government actions that modern society may find no longer tenable, e.g., segregation.

Advocates of the Theory

The two most well-known advocates of the originalist philosophy are the late Justice Antonin Scalia and the late judge Robert Bork. Bork has been called the “intellectual godfather” of originalism for initially setting out the philosophical foundation of the movement in a 1971 article in the *Indiana Law Review*. Numerous scholarly articles cite both Scalia and Bork as the high priests of the movement, but perhaps no article summarizes their religious-like devotion to originalism better than the one by professors Thomas Colby and Peter Smith, entitled

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38 Id. at 266
40 Id. at 1632.
41 Calabresi, supra at 14.
Living Originalism. Consistent with other scholars, Colby and Smith point out that Scalia and Bork believe originalism to be consistent in all respects with the purpose of a constitution in a democracy in that it prevents laws from acknowledging values and rights that the adopting society found to be undesirable. Bork himself went much further when he wrote that any other constitutional interpretive philosophy besides originalism “must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us.”

In 1987, President Ronald Reagan nominated Bork for a seat on the United States Supreme Court. The nomination created a firestorm of controversy primarily because Bork’s views were seen as outside of the societal mainstream at the time. However, Bork’s views were very much in keeping with the originalist philosophy. For example, Bork took an exceedingly narrow view of the First Amendment, believing that it only protected speech that was clearly political in nature. Bork’s view on the Equal Protection Clause illustrates perfectly the Byzantine nature of the originalist philosophy, when he openly criticized the decisions in Oregon v. Mitchell, which outlawed the use of literacy tests as a requirement to vote, and Shelley v. Kraemer, which prevented the use of covenants restricting property ownership based on race. Bork’s nomination to the Supreme Court failed primarily because he espoused positions that offended modern societal sensibilities on these topics. Senator Edward Kennedy masterfully summarized the Bork philosophy in his “Bork’s America” statement on the floor of the United State Senate when he said,

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44 Id.
48 Pomerance, supra at 261.
“Robert Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.”

While Bork may have been the early standard bearer of originalism, Justice Antonin Scalia was the more prolific proponent of the philosophy given his twenty-nine year tenure on the United State Supreme Court. Scalia wrote hundreds of opinions, most in dissent, that support the originalist interpretive theory. This extensive body of judicial opinions however has also provided a well spring of inconsistencies.

Scalia’s brand of originalism advocates two possible paths for deciding critical legal issues: allowing democratically elected legislators to pass laws that either allow or disallow certain activities, so long as the Constitution does not speak directly and explicitly to the issue; or amend the Constitution. But more than simply holding firm to the original meaning of the statute or constitutional provision in question, Scalia saw himself as a “textualist” of which he wrote, “[W]e look for meaning in the governing [texts], ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’

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51 Justice Antonin Scalia, Address at the University of Minnesota, Stein Lecture Series (October 21, 2015).
extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”52

This type of rigidity can lead to nonsensical results. In a critique of Reading Law, Judge Richard Posner asks rhetorically, if a local ordinance says, “no person may bring a vehicle into a park,” does that apply to “an ambulance that enters the park to save a person’s life?” Posner concludes that in Scalia’s world, the answer is yes. “After all, an ambulance is a vehicle – any dictionary will tell you that.”53

Despite Scalia’s cult-like devotion to originalism, his judicial opinions belie the underlying shortcomings of the theory. For example, in a 2011 interview, Scalia argues that the Fourteenth Amendment does not protect women against gender discrimination.54 The only way to reach such an absurd conclusion is to assert that the word “person” in the Equal Protection Clause of the Fourteenth Amendment does not include women. Yet in his concurring opinion in Citizens United, he wrote that freedom of speech, “include[s] the freedom to speak in association with other individuals, including association in the corporate form.”55 So where Scalia concludes that women are not included in the definition of “persons” in the Fourteenth Amendment, he does conclude that corporations are equivalent to people in the First Amendment.

Cases Illustrating the Theory’s Shortcomings

Several cases also underscore the overall unviability of originalism. In Romer v. Evans the Supreme Court considered whether Amendment 2 to the Colorado Constitution, which

54 Calvin Massey, The Originalist, California Lawyer, January 2011.
prohibited recognition of homosexuals as a protected class, violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{56} In a 6-3 ruling the Court determined the Colorado amendment to be unconstitutional. In a sharply worded dissent however Justice Scalia wrote, “Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions.”\textsuperscript{57} Historically, the Fourteenth Amendment was drafted to give citizenship and equal protection to freed slaves.\textsuperscript{58} As an originalist, Scalia should go no further in interpreting the Fourteenth Amendment beyond that purpose. However, contrary to his own originalist philosophy, Scalia acknowledged during oral arguments for an affirmative action case before the Court in 2013, that the Fourteenth Amendment protected people of all races, despite the Amendment’s primary purpose during its drafting and ratification to protect blacks.\textsuperscript{59} Why then Scalia chose homosexuality as the bright line distinction between those who enjoy protections of the Fourteenth Amendment and those who do not is never explained in his opinion. However, it is clear that his stated opinion about the applicability of the Fourteenth Amendment already exceeded its “original intent.”

It is obvious to state that the racial make-up of an individual is something they are born with; that is, it is beyond their control. There is also recent significant scientific evidence to suggest that individuals are born with a particular sexual orientation.\textsuperscript{60} This begs the question that if sexual orientation is a natural component of what it is to be human, as race surely is, why

\textsuperscript{56} 517 U.S. 620 (1996).
\textsuperscript{57} Id. at 636.
\textsuperscript{58} Primary Documents in American History, 14\textsuperscript{th} Amendment to the U.S. Constitution, The Library of Congress, www.loc.gov/rr/program/bib/ourdocs/14thamendment.html#American (last visited on September 7, 2016).
\textsuperscript{59} Cheryl K. Chumley, Antonin Scalia: 14\textsuperscript{th} Amendment for all, not ‘only the blacks,’ The Washington Times, October 16, 2013.
\textsuperscript{60} A.R. Sanders, et al., Genome-wide scan demonstrates significant linkage for male sexual orientation, 45 Psychol. Med. 1379 (2015).
should the Equal Protection Clause not apply to homosexuals? This is an especially important question for an originalist, like Scalia, who has already interpreted the Clause beyond its originally intended meaning. His vehement dissent in Romer in refusing to ensure that homosexuals are not discriminated against because of a factor in their individual make up that is beyond their control (and often out of public view, where race is not) further illustrates the folly of originalism.

In District of Columbia v. Heller, Justice Scalia discovered an individual right to bear arms in the Second Amendment. To be sure, the Second Amendment is not a sterling example of proper English composition. The Amendment is structured in the object-subject-verb linguistic style which has contributed to its misinterpretation. The Amendment reads, “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” Instead of viewing the Amendment through the prism of the geopolitical historical context of a new, young nation threatened with invasion from both the north and south, and reliant almost exclusively on a citizen militia for its defense, as one would expect an originalist to do, Scalia instead spends over thirty pages analyzing the provision’s “prefactory” and “operative” clauses to find that the Amendment does not, in fact, apply to a “well regulated militia,” but instead applies to the individual citizen, regardless of that citizen’s participation in a militia. Combining an English lesson with dubious historical observations, Scalia twists and turns his own originalist philosophy into a pretzel logic that justifies his arrival at an individual right to bear arms, resulting in the overturning of the Washington, DC, ban on handguns.

62 U.S. Const. amend. II.
63 554 U.S. 572-582.
In the recently decided case, *Obergefell v. Hodges*, the Supreme Court considered whether same-sex marriage was a fundamental right under the Fourteenth Amendment. With Scalia writing in dissent, (and Alito, Roberts, and Thomas also dissenting) he focused his opinion on the historical aspects of who has traditionally been allowed to be married. However, Scalia’s focus is misplaced. The question in *Obergefell* was not who can participate in something, but what someone has a fundamental right to participate in – in this case, marriage.

Justices Kagan, Breyer, and Sotomayor are correct; the inviolate principle here is marriage itself – a social construct in existence for many millennia – that all have a fundamental right to participate in.

The best examples of why originalism is an indefensible constitutional interpretive theory are the two landmark cases that dealt with the “separate but equal” doctrine: *Plessy v. Ferguson* and *Brown v. Board of Education*. The “separate but equal” doctrine was established by *Plessy v. Ferguson* in which the Supreme Court found that providing separate railroad cars for blacks and whites was not violative of the Fourteenth Amendment’s Equal Protection Clause. Writing for the Court, Justice Henry Brown stated, “Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.” An originalist, such

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65 *Id.* (Scalia, J., dissenting).
66 *Id.* (Opinion of the Court).
68 163 U.S. 537 (1896).
70 163 U.S. 548-551.
71 *Id.* at 544.
as Scalia for instance, would have no issue with this finding as nothing in the Fourteenth Amendment explicitly prohibits states from enacting laws of this kind.  

The question then becomes, can an originalist seriously defend the *Brown* decision, which overturned *Plessy* and ended the “separate but equal” doctrine, and still remain true to the underlying premise of original intent? The answer is clearly, no.

To fully understand the incoherence of originalism when held up against the *Brown* decision, the original purpose of the Fourteenth Amendment must be clearly discerned. The core purpose of the Fourteenth Amendment, by its framers, was to provide assurance against government discrimination. Despite the intent to provide protection against government sanctioned discrimination, the Amendment’s framers had different opinions about what exactly that meant, but to be sure, segregation did not, in their minds, equate to discrimination.

For example, if segregation equated to discrimination to the drafters of the Fourteenth Amendment, it would stand to reason that the Senate gallery itself would have ceased to be segregated by race after the adoption and ratification of the Fourteenth Amendment in 1868 – which did not occur. Further, despite debating school segregation in Washington, DC, multiple times between 1870 and 1875, Congress did not include a prohibition against school segregation in the Civil Rights Act of 1875. The best summary of the intent of the framers of the Fourteenth Amendment comes from legal scholar Raoul Berger who wrote, “[I]t is unrealistic to presume that a Congress which has plenary jurisdiction of the District [of Columbia] and yet

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72 Massey, supra.
74 *Id.* at 237.
75 *Id.* at 243.
refused to bar segregation there would turn around and invade state sovereignty, which the framers were zealous to preserve, in order to impose a requirement of desegregation upon the States.” 77 Supporting this contention, Ronald Dworkin wrote that the framers of the Fourteenth Amendment, “shared the view, for example, that racial segregation of public schools did not violate the [Equal Protection] clause. (Many of them, in fact, themselves, voted to segregate schools.)” 78

Robert Bork however, insisted that the decision in Brown was, in fact, consistent with the originalist philosophy because the ratifiers “did not understand” that “equality and segregation were mutually inconsistent,” and that “it is obvious that the Court must choose equality and prohibit state-sponsored segregation.” 79 Indeed, Bork takes the supernatural step of divining the minds of the framers of the Fourteenth Amendment in order to shoe horn the Brown decision into the originalist theory, despite overwhelming scholarly evidence demonstrating that the framers not only understood the differences between segregation and equality, but deliberately distinguished the two from each other.

Conclusion

The doctrine of originalism as a viable theory of constitutional interpretation rests primarily on its steadfast adherence to the concept that all constitutional provisions must be interpreted with fidelity to their meaning at the time of their ratification. This would add validity to the originalist theory if it were true. However, the fact of the matter is that even at the time of the ratification of the Constitution, there were multiple opinions on how the document should be

interpreted. As previously noted, Hamilton favored a broad interpretive approach, Madison a more literal approach, and Elbridge Gerry favored no interpretation at all.

Add to this the fact that originalism needs to modify its own core principles to deliver politically correct results. If Robert Bork held steadfast to the notion that Brown v. Board of Education was, in fact, judicial reinterpretation of the Fourteenth Amendment and thus impermissible under the originalist doctrine, he would have never seen the inside of a confirmation hearing. Had Antonin Scalia not engaged in a wholesale remediation of the Second Amendment in District of Columbia v. Heller, the ability for states to regulate the ownership of handguns would be the contemporary legal reality.

With Scalia and Bork, originalism’s most ardent proponents, no longer with us, the future of the philosophy is somewhat murky. Justice Clarence Thomas’s jurisprudence is typically seen as “strict constructionism” and gives no quarter to the idea of a judge’s ability to go beyond the written text. Additionally, Thomas’s views have not always been consistent with those of Bork and Scalia. Justice Alito’s penchant for focusing on the legislative history of statutory provisions has him at philosophical odds with both the Bork and Scalia styles. With the departure of Bork and Scalia, the high water mark for originalism may have come and gone.

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82 Id. at 556.
CHAPTER 3 – LEGAL PRAGMATISM: JUDGES AS SHAPERS OF SOCIETY

Definition of Legal Pragmatism

Legal pragmatism is an incredibly diverse theory of constitutional and statutory interpretation. Its adherents come from an equally diverse background. Attempting to hone in on one definition of pragmatism does an injustice, of sorts, to the myriad of different concepts that exist within the overarching philosophy. Legal pragmatism has an eclectic element that promotes the idea of “appropriating[ing] insights [from] any source if they seem useful” to reaching a socially beneficial decision.84 Additionally, legal pragmatism is a “results-oriented” approach that focuses on the “well-being of the community” as its principal goal, rather than the “purity or integrity of legal doctrine.”85 In one sense, pragmatism requires, as a matter of principle, that the constitutional or statutory provision in question be evaluated anew each time. This makes pragmatism a philosophy that is, if not wholly indeterminate, then at least strongly influenced by an indeterminate nature.86 Pragmatists believe that judges should “embrace their inevitable roles as de facto lawmakers, and focus on producing the best social results.”87

Judge Richard Posner, arguably the most well-known modern day pragmatist, defines the theory as, “a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.”88 To Posner then, a pragmatist is released from the shackles of constitutional and statutory text and is untethered from precedent in order to reach a decision that provides

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84 David Luban, What’s Pragmatic About Legal Pragmatism, 18 Cardozo L. Rev. 43, 44 (1996).
85 Id.
87 Edward Cantu, Posner’s Pragmatism and the Turn Toward Fidelity, 16 Lewis & Clark L. Rev. 69, 70 (2012).
demonstrable social benefit. From this understanding, pragmatism refutes the dogmatic approach to law, i.e., positivism, and is driven by a results-oriented perspective.  

**Advocates of the Theory**

Judge Richard Posner is the best known practitioner of pragmatism and has written extensively on the subject. Posner currently serves on the Seventh Circuit Court of Appeals. In his book, *How Judges Think*, Posner defends the idea that judges have a legislative role when ruling on an indeterminate area of law. As noted above, this is a classic pragmatist viewpoint. Posner also rejects the natural law theory believing that there should be no “grand moral theory” driving judicial decisions. In Posnerian pragmatism, the view of good democratic government does not always reside with action taken by democratically elected legislators, but with judges, who, he believes, should be principally concerned with maximizing societal welfare. In other words, Posner does not view “judicial activism” as a pejorative term or negative activity. Rather, he views it as an altruistic necessity, especially in areas where the law is vague.

Posner also believes that in some manner, all judges are pragmatists. To support this somewhat skeptical claim, he cites the Supreme Court decision in *Bush v. Gore*. Here, Posner suggests that the Court’s conservatives, including two well-known originalists (Scalia and Thomas) adopted a pragmatic approach by determining that it was better that they, the Court, decide the case for the themselves rather than allowing the recounts to continue, which would

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89 Luban, *supra* at 72.
92 *Id.* at 197.
93 See generally *id.* at 198.
94 Cantu, *supra* at 76.
95 531 U.S. 98 (2000).
have likely resulted in the election being decided in the House of Representatives. Posner’s assertions are unconvincing. While Posner’s defense of pragmatism as a method for arriving at the Court’s decision may be better than how the Court came to it in actuality, one cannot conclude that the Court’s formalist adherents, i.e., the “conservative” justices, suddenly abandoned their judicial philosophy in favor of Posnerian pragmatism.

The distinguished legal theorist, the late Ronald Dworkin said, “the pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.” Posner countered this by responding, “a pragmatist judge always tries to do the best he can for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past.” Other than the purposeful and slight alteration to Dworkin’s words, Posner essentially agrees with Dworkin (even though he apparently does not want to): the pragmatist jurist decides cases based on what outcome achieves the greatest societal benefit, unbound by either text or precedent. It is further ironic that Posner criticizes the legal realist movement for not having a “method” in judicial decision making, when Posnerian pragmatism is predicated upon ambiguity, subjectivity, and the lack of a singular unifying principle.

In his rejection of legal positivism and his advocacy for legal pragmatism, Posner offers the following distinction between the two: “the positivist starts with and gives more weight to the

100 Richard A. Posner, What Has Pragmatism to Offer Law, 63 S. Cal. L. Rev. 1653, 1659 (1990); Addison W. Moore, Pragmatism and Its Critics, 14 Phil. 322, 323 (1905).
authorities, while the pragmatist starts with and gives more weight to the facts."\textsuperscript{101} With this succinct statement, Posner draws the stark divergence between traditional legal thought and legal thought guided primarily by “common sense.”\textsuperscript{102}

The second contemporary adherent to the pragmatist school of thought is Supreme Court Justice Stephen Breyer. Justice Breyer has put forth his pragmatist approach to jurisprudence in his book, \textit{Active Liberty: Interpreting Our Democratic Constitution}.\textsuperscript{103} While a full analysis of Breyer’s book is beyond the scope of this work, the book has been described as a “rejoinder” to Justice Scalia’s book on statutory interpretation as well as a broad defense of “judicial activism,” which Breyer has retitled, “active liberty.”\textsuperscript{104}

Breyer’s version of pragmatism, i.e., “active liberty,” holds that a constitutional or statutory provision should be interpreted by the courts based on its purpose or intent of the legislative body that enacted it, rather than the literal text.\textsuperscript{105} Consistent with his pragmatist brethren, he believes that the “beneficial consequences of purposivism” lead to making the law “more sensible” and therefore “implement[s] the public’s will,” which is, in his view, consistent with the purpose of the Constitution.\textsuperscript{106} “Law is tied to life, and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit.”\textsuperscript{107} While Breyer repeatedly advocates for “judicial modesty,” it is hard to see how a focus on a law’s \textit{purpose}, instead of the statute’s actual text will result in such modesty.\textsuperscript{108} Nevertheless, Breyer sees pragmatism as a way to increase democratic participation. Speaking to his alma mater,

\textsuperscript{101} Ricard Posner, \textit{Pragmatic Adjudication}, supra at 8.
\textsuperscript{102} \textit{See generally}, Heidi Salaverria, \textit{Who is Exaggerating? The Mystery of Common Sense}, 3 Essays Phil. art. 2 (2002).
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} Breyer, supra at 100.
Breyer stated, “If we cannot bring a degree of diversity into institutions across the United States, we will not have a country that will function as a democracy.”

Surprisingly, other pragmatists find themselves rejecting Breyer’s “active liberty.” Principal among his detractors is, surprisingly, Judge Posner, who wrote, “I do not find Active Liberty convincing.” Generally, Posner views Breyer’s pragmatism expressed in Active Liberty as a “manifesto” and not a well-developed theory.

An example of Justice Breyer’s pragmatism can be seen in his opinion in Zelman v. Simmons-Harris. The case dealt with the constitutionality of a school voucher program that allowed parents to receive vouchers from the state that allowed them to enroll their children in the school of their choice. The case implicates the First Amendment because state funds were being used to pay tuition to religious schools. While the Court’s majority upheld the voucher law, Justice Breyer filed a spirited dissent. Breyer felt that the voucher program would lead to divisiveness and adversely impact the democratic process. He continued by writing, “[t]he majority’s analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem.”

It is not that Breyer’s opinion in Zelman is necessarily wrong. It is the method by which he arrived at it. Where he could have used the Court’s existing Separation Clause jurisprudence, such as Weisman or Lemon, he focuses his dissent on potential social conflict and how the

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109 Justice Stephen Breyer, Address to the University of Michigan Law School (May 5, 2004)
111 See generally id.
113 Id. at 723.
114 Id. at 727.
voucher program does not result in the benefit to society he sees as being necessary to a strong democracy.\textsuperscript{117} It is an opinion consistent with his “active liberty” doctrine, but exemplifies the pragmatist’s avoidance of relying on precedent as the authority for the decision.

Cases Illustrating the Theory’s Shortcoming

Other examples of legal pragmatism run amok can be found in case law. Where \textit{Griswold} was an example of a decision based in the natural law theory, (see Chapter 4), \textit{Roe v. Wade}\textsuperscript{118} was a decision squarely in the pragmatist theory. In \textit{Griswold}, the Court found that the right to privacy “emanated” from the “penumbras” of various amendments. In order to establish abortion as a fundamental right, the Court had to find that the right to terminate a pregnancy emanated from the right to privacy.\textsuperscript{119} Therefore, if the right to privacy is an “emanation” from a “penumbra” of the several amendments cited in Douglas’s \textit{Griswold} Opinion, then the right to terminate one’s pregnancy is an “emanation” of an “emanation” – reasoning that strays far afield from any relationship to the text of the Constitution.\textsuperscript{120}

The more contemporary case of \textit{J.D.B. v. North Carolina}\textsuperscript{121} provides an ideal illustration of legal pragmatism that disregards both precedent and adherence to an authoritative legal source. The case involved a thirteen year old, seventh grader who was suspected of several recent neighborhood robberies. Investigators on the case went to the school of J.D.B. to ask him questions about the robberies \textit{sans} a \textit{Miranda} warning. As a result of this questioning, J.D.B. confessed and was convicted of the robberies. The question for the Court was whether the

\textsuperscript{116} 403 U.S. 602 (1971).
\textsuperscript{117} See generally id. (Breyer, J., dissenting).
\textsuperscript{118} 410 U.S. 113 (1973).
\textsuperscript{119} See generally id.
\textsuperscript{121} 564 U.S. 261 (2011).
questioning at the school constituted being “in custody” and therefore afforded J.D.B. the right to be “Mirandized.”

Writing for a narrow majority of the Court, Justice Sotomayor concluded that J.D.B. was, in fact, “in custody” when questioned at school and therefore should have been given his *Miranda* warning.\(^{122}\) Sotomayor wrote, “[a] child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action.”\(^{123}\) While the Opinion cites numerous cases where the Court distinguished between adults and minors, Sotomayor relies principally on repetitively using the term “reasonable person” throughout the Opinion and states that it is a “commonsense” conclusion that a child questioned at school will not feel free to leave and therefore should have been Mirandized.\(^{124}\) Once again, it is not necessary to take issue with the Court’s conclusions, but rather the complete lack of attention to adherence to the long standing *Miranda* precedent.\(^{125}\) If the Court wanted to ensure that minors were extended the same rights under *Miranda* as adults, would it not have been more prudent to couch the Opinion as an Equal Protection Clause argument and require that police questioning occur at the police station? At least under that scenario, the decision would have the benefit of being firmly attached to the Constitution, along with long standing *Miranda* precedent.

This analysis has shown that pragmatism, both philosophically and practically, has little compunction about creating new rights. But legal pragmatism can also have the reverse effect as well. One example of this is *San Antonio Independent School District v. Rodriguez*.\(^{126}\) The facts

\(^{122}\) See generally *id.*
\(^{123}\) *Id.* at 273.
\(^{124}\) 564 U.S. 265-281.
\(^{125}\) 564 U.S. 282-298.
\(^{126}\) 411 U.S. 1 (1973).
of the case stem from the Texas system for school funding. Schools in Texas receive funding from local *ad valorem* taxes. Therefore, districts where property values are high will generate more school taxes than districts with low property values. The cumulative total of taxes raised in each district, divided by the number of students in the district generally results in the amount spent per student. In *Rodriguez*, this discrepancy was pointed out to the Court, when it was shown that one district spent $365 per student, but another district spent $694 per student.\(^\text{127}\) The argument put forth in the case was that education is a “fundamental right,” and as such, any funding mechanism that spends unequally on student education violates the Equal Protection Clause – in the same vein as *Brown v. Board of Education*.\(^\text{128}\)

Justice Lewis Powell, a long acknowledged pragmatist,\(^\text{129}\) delivered a rather surprising Opinion for the Court. In a decidedly non-pragmatic statement, Powell wrote, “Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”\(^\text{130}\) Powell’s statement is nothing short of staggering. In this same term, the Court’s pragmatists found abortion to be a “fundamental right,” beyond government infringement (in the early stages), but school funding schemes that lead directly to inequalities in the ability of individual districts to allocate the same amount of money per pupil is not a deprivation of a fundamental right.\(^\text{131}\) Moreover, in *Brown*, a pragmatist Court found that separate educational facilities are “inherently unequal,” but in *Rodriguez*, the pragmatists never address how school districts across Texas that receive varying amounts of funding are to achieve

\(^{128}\) Bolner, *supra* at 254.  
\(^{130}\) 411 U.S. at 23.  
\(^{131}\) Bolner, *supra* at 254.
educational equality. If the Texas *ad valorem* method of school funding is constitutional, as was determined in *Rodriguez*, districts will be appropriated different funding amounts and consequently those districts receiving less money than more affluent districts will naturally not be able to provide facilities, books, teacher salaries, and the like, in an equal manner as districts that are appropriated more funding.

**Conclusion**

As has been illustrated, legal pragmatism has several significant drawbacks as a constitutional interpretive theory. It avoids a “regimented” and “precise” approach to interpretive questions, favoring instead an intuitive approach, regardless of legal authorities, to solve legal dilemmas. The fact that the two main proponents of legal pragmatism, Judge Richard Posner and Justice Stephen Breyer, do not agree on a central unifying philosophy on which pragmatism can be based is problematic to the overall legitimacy of legal pragmatism as a consistent interpretive theory. While Justice Breyer is more apt to consult legal authorities, Judge Posner sees precedent and legal authority as curtailing the pragmatist’s ability to deliver a socially beneficial result.

Finally, the sheer number of types of legal pragmatism compromises the idea that pragmatism represents one legal interpretive theory. Justice Breyer defines a particular brand of pragmatism in his book, *Active Liberty*. Judge Posner defines another type of pragmatism in a variety of his own writings. In his excellent law review article, Justin Desautels-Stein outlines

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132 See generally, 411 U.S. 1-59.
134 See generally, Posner supra.
135 Cantu, supra at 105.
136 Breyer, supra.
137 Cantu, supra.
several different forms of pragmatism, each of which differs from the other.\textsuperscript{138} Even originalism has been called another form of pragmatism.\textsuperscript{139} If pragmatism can be every interpretive philosophy at the same time, then it is no philosophy.

\textsuperscript{138} See generally Desautels-Stein, supra.
CHAPTER 4 – THE NATURAL LAW THEORY: “PENUMBRAS” AND “EMANATIONS”

Definition of the Natural Law Theory

One of the key principles of the natural law legal theory is found in one of the most memorable passages from the Declaration of Independence which states, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights…” Jefferson was invoking the philosophy of John Locke in the Declaration of Independence, when he asserted the people have rights that are “unalienable;” that is, rights that cannot be suppressed by man-made laws. Essentially, the natural law philosophy holds that there exist a set of rights and rules originating by “divine commandment” that are considered superior to any rules of the state. Natural law theory maintains that law be based on moral conditions, unlike positivist legal theories which are based on common law norms, case law, or legislative action. In order to be a practitioner of natural law theory, one must not only agree with the moral basis of law, but be willing to engage in moral reasoning in ascertaining the validity of a law.

The use of Lockean thought in the Declaration of Independence leads to the belief among natural law adherents that the Framers “wove natural law into the fabric of the Constitution.” Accordingly, the forthcoming Constitution was meant to protect rights that the Framers felt were basic and inviolate.

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140 The Declaration of Independence para. 2 (U.S. 1776).
144 Id. at 802.
145 O’Scanlaine supra at 1516.
146 O’Scanlaine, supra at 1519.
Advocates of the Theory

One of the most well-known contemporary advocates of natural law legal theory is federal appellate judge Janice Rogers Brown. In a speech at the Institute for Justice, Judge Brown advocated strongly for the natural law approach in constitutional interpretation, even going so far as to say that there is an “extra constitutional dimension” to constitutional law.\(^{147}\) Her remarks can only be taken to mean that her belief is that there is something beyond the language of the Constitution that does or should factor into constitutional interpretation. In reference to the landmark case of *Lochner v. New York*, which used natural law principles to strike down a law that limited working hours, Judge Brown asserted that Justice Oliver Wendell Holmes’ dissent in *Lochner v. New York* was “simply wrong.”\(^{148}\)

Brown’s natural law jurisprudence is best illustrated by her opinion in *Gilardi v. U.S. Dept. of Health & Human Services.*\(^{149}\) The case centered around an appeal to a district court decision upholding the Affordable Care Act’s mandate for employers to provide coverage for contraception. The Gilardi brothers, owners of Freshway Foods, employed approximately 400 people and were subject to the stipulations of the Affordable Care Act contraceptive mandate. The Gilardi’s were also strict Catholics and opposed contraception on religious grounds. The Gilardi’s contended that the contraceptive mandate was a violation of the First Amendment’s Free Exercise Clause. In her opinion, not only does Judge Brown cite natural law theorist John Locke, but states that the Gilardi’s can either provide the required contraceptive coverage, pay a penalty, or “they become complicit in a grave moral wrong.”\(^{150}\) She continued by paraphrasing from an opinion from the late Justice Brennan, that the contraceptive mandate would compel

\(^{147}\) Judge Janice Rogers Brown, Speech to the Institute for Justice (Aug. 12, 2000).
\(^{148}\) Judge Janice Rogers Brown, Speech to The Federalist Society (April 20, 2000).
\(^{149}\) 733 F.3d 1208 (D.C. Cir. 2013).
\(^{150}\) Id. at 1218.
“affirmation in a repugnant belief.”\(^\text{151}\) Her reliance on Locke, along with her reliance on morals and religious beliefs illustrate precisely what is problematic when natural law theory invades judicial opinions: factors are introduced that have nothing whatsoever to do with the Constitution.

Brown’s unorthodox jurisprudence resulted in her nomination to the federal appeals court being opposed by the National Bar Association, which deemed her “unfit,” and filibustered in the United States Senate.\(^\text{152}\) During the filibuster, Senator Durbin said of her decisions on the California Supreme Court that, “[H]er personal philosophy was more important to her than the law.”\(^\text{153}\) Indeed, by reviewing the Congressional Record during the filibuster of Brown’s nomination, both Republicans and Democrats painted a picture of a judge who is comfortable setting aside the law and established legal principles, and deciding cases on the basis of her own version of the natural law philosophy.\(^\text{154}\)

The late Justice William Brennan can also be included among the contemporary proponents of natural law. In a law review article Brennan authored, he remarked that non-natural law approaches to jurisprudence were morally bankrupt.\(^\text{155}\) In the same article he said that, “law has again come alive as a living process responsible to changing human need.”\(^\text{156}\) Brennan advocated an approach to law that focused on “justice” as opposed to “precedent.”\(^\text{157}\) Based on Brennan’s own writings, it is clear that his definition of “justice” is inextricably linked to morality. These lofty ideals leave little room for positivism in law, or more specifically,
respecting the legislative process in a democratic society. Brennan viewed the Constitution as an outgrowth of the ideas expressed in the Declaration of Independence. 158 In what could be considered Brennan’s version of a textbook definition of the natural law theory, he wrote, “In this way, the Constitution is a ‘timeless’ and ‘sublime’ oration on the dignity of man, a bold commitment by a people to the ideal of a libertarian dignity protected through law.” 159 Justice Brennan, through his own writings, observed the ascendancy of positivist legal thought throughout the nineteenth century and wanted not only to distance himself from it, but interject moral and individualistic elements as “stabilizers” to a society he viewed was becoming ever more complex. 160 The problem with this unorthodox approach is that it led Brennan further afield from respecting the language of the Constitution and the legitimate actions of the legislative branch and closer toward a subjective form of decision making – the primary criticism of the natural law approach. 161

Cases Illustrating the Theory’s Shortcomings

The use of natural law by the Supreme Court can be traced back to the 1798 case of Calder v. Bull. 162 The case deals with the Court deciphering the proper meaning of Article I, Section 10 of the Constitution dealing with ex post facto laws and Bills of Attainder. The facts themselves are not germane to this analysis. The case, while seldom cited on legal grounds, is important because of Justice Chase’s early advocacy for the use of natural law, a mere six years after the ratification of the Bill of Rights.

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159 Id. at 437.
161 Friedlander, supra at 1085-1088.
162 3 U.S. 386 (1798).
Justice Chase makes several references in his *Calder* Opinion that put forth the natural law theory. First, he states, “It seems to me, that the right of property, in its origin, compact express, or implied…”\(^{163}\) The meaning is clear: Justice Chase cites the Constitution as the “express (social) compact,” but also asserts that, at least in the right of property, implied social compacts are at work as well.\(^{164}\) Justice Chase then argues that natural law plays an affirmative role when actions of the legislature violate principles of the social compact where he writes, “An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.”\(^{165}\) For Justice Chase, the “nature of the power” is the “unalienable” rights that Jefferson spoke of in the Declaration of Independence.\(^{166}\)

Justice Iredell, on the other hand, takes issue with Chase’s reasoning. Iredell asserts a familiar originalist tone when he wrote in *Calder*, “If…the Legislature…shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”\(^{167}\) To Iredell, the issue is simple: if the Constitution does not explicitly prohibit a certain type of legislative act, then the actions of the legislature are presumed valid.\(^{168}\) Interestingly, neither Iredell nor Chase

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\(^{163}\) *Id.* at 394.
\(^{165}\) 3 U.S. at 388.
\(^{166}\) Foley, *supra* at 1603.
\(^{167}\) 3 U.S. at 399.
\(^{168}\) Foley, *supra* at 1605.
was entirely sure that the Court was empowered with the ability to declare laws unconstitutional. 169 That issue would be settled, of course, in a few years in *Marbury v. Madison*.

The Supreme Court’s next major foray into natural law occurred with the landmark case, *Lochner v. New York*. 170 In *Lochner*, the Court overturned a New York law which limited the number of hours bakery employees could work. The Court used the natural law concept of “freedom of contract” to invalidate the New York law. 171 While the decision led to what is known as the “Lochner-era,” which lasted into the 1930’s, the decision in *Lochner* was roundly criticized at the time and led to efforts among legal scholars to rethink “rights and protections in reformulated ways.” 172 When *Lochner* was finally overturned, natural law was discredited and largely abandoned. 173 It would experience a resurgence in the mid-1960’s, in one of the most well-known cases of modern Supreme Court jurisprudence – *Griswold v. Connecticut*. 174

The facts of *Griswold* are well known to legal studies students. Estelle Griswold, director of the New Haven chapter of Planned Parenthood began distributing birth control prescriptions and advice in contravention of the Comstock Act of 1879, a law that despite its official status, had never been actively enforced. Griswold was arrested and the conviction was upheld by the Connecticut Supreme Court.

The *Griswold* Opinion was written by Justice William O. Douglas (with Justice Brennan joining the Opinion). The core of the Opinion holds that, “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those

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169 See generally, 3 U.S. 386-395, 398-400.
170 198 U.S. 45 (1905).
172 Id.
173 Id. at 26.
174 381 U.S. 479 (1965).
guarantees that help give them life and substance.” In essence, what Justice Douglas is saying is that the Constitution contains other “rights” not specifically mentioned in the text itself, which are nevertheless fundamental protections. Justice Douglas continues by saying, “Various guarantees create zones of privacy.” He goes on to detail the “zones of privacy” that can be found in the First, Third, Fourth, and Fifth Amendments. 177

The discovery of other “rights” beyond the textual understanding of the Constitution illustrates the indeterminate nature that is the epitome of the natural law doctrine. While few would take issue that individuals do, in fact, have a right to privacy, the way in which Douglas proposes to “discover” it is problematic. Judge O’Scannlain writes that the danger of natural law is that it “empowers judges to base their decisions on their own sense of justice rather than relying on traditional legal sources.” In Griswold, Douglas does not restrain himself to simply find a right to privacy in the Fourth Amendment, where it can be reasonably argued to reside (see Chapter 5). Instead, he chooses to detail a plethora of potential “zones of privacy” that exist in no fewer than four separate amendments – all made applicable to the states by the Fourteenth Amendment under the Incorporation Doctrine.

This point did not escape Justice Hugo Black, who wrote a powerful dissent to Douglas’s Griswold Opinion. Recognizing Douglas’s venture as the personification of natural law, Black writes, “If these formulas based on ‘natural justice,’ or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise and unnecessary.” Black goes on to attack the natural law

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175 381 U.S. at 484.
176 Id.
177 Id.
178 O'Scannlain, supra at 1515.
179 381 U.S. at 511.
aspect of Douglas’s Opinion head-on where he writes, “…I do not believe we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation…is offensive to our own notions of ‘civilized standards of conduct.’”

Douglas’s Opinion in *Griswold* is often treated as a majestic achievement in progressive constitutional law. In reality, it disregarded long held doctrinal barriers and created new doctrine on the spot to achieve a predetermined objective. In Justice Black’s dissenting opinion, and Justice Byron White’s concurring opinion, both agreed that the Connecticut law encroached into the privacy rights of the individual, yet neither advocated the type of sweeping pronouncement that Douglas delivered. Justice Black’s most withering condemnation of natural law occurred almost twenty years before *Griswold* in his dissent in *Adamson v. California*. Here, Justice Black attacked the natural law doctrine by saying that reliance on natural law “to hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and, if so, to what degree, is to frustrate the great design of a written Constitution.”

Conclusion

Even though *Griswold* formally established a fundamental right that is precious, if not expected, the decision is emblematic of problems with the natural law theory. The natural law philosophy allows the insertion of ideas into law “which can plausibly attribute whatever qualities we happen to associate with them.” Despite language in the Declaration of

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180 *Id.* at 512.
182 381 U.S. at 502, 507.
183 322 U.S. 46 (1947).
184 *Id.* at 89-90 (Black J., dissenting).
Independence that strikes a natural law chord, it does not lead one to conclude that the Constitution was meant to directly incorporate the natural law, nor does it in any way support a natural law interpretation of the Constitution in the “absence of a clear constitutional warrant.” As Fleming contends, “even if the Constitution incorporates natural law or natural rights, its content is unknowable or so indeterminate that courts should ignore it or leave it to the legislatures to interpret and enforce it.” Indeed, it is the indeterminacy of the natural law philosophy that is its principal shortcoming and disqualifies it from being a viable method of constitutional interpretation. Natural law was never intended to act as a legal method for use by the courts, but rather a set of moral principles by which people “govern” themselves. The expressed “social compact” that has been discussed in this analysis is the Constitution. In order to avoid chaos in constitutional interpretation, judges cannot simply interject any type of implied social compact, i.e., natural law. The expressed social compact, the Constitution itself, must serve as the primary basis in interpreting areas of the law where the Constitution is not explicit.

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187 Id. at 2295
188 Kirk, supra at 1051.
CHAPTER 5 – A NEW APPROACH: LEGAL TRANSFORMATIONALISM

Definition of Legal Transformationalism

The failures of the current theories of constitutional interpretation make the introduction of a new theory a necessity. The current major theories of constitutional interpretation fail to deliver results consistent with their own philosophical underpinnings. As has been demonstrated herein, the predominant theories of pragmatism, originalism, and natural law have evolved over time to become less about adherence to a philosophy and more about arriving at decisions that fit a certain political, instead of judicial, ideology.

The concept of a legal transformational approach is not simply to meld the positive attributes of originalism, pragmatism, and natural law theory to arrive at a superior hybridized constitutional philosophy. Legal transformationalism advocates a holistic approach involving respect for the text of the constitutional provision in question, but also a cognizance of the contemporary (as opposed to the original) meaning of the language of the provision(s), coupled with the generally accepted societal expectations that such an interpretation would deliver. While similar to the legal pragmatist approach, the legal transformational approach is distinct in that it does not suggest a judge be untethered from the actual text of the constitutional provision in question and then simply impart his or her own values in seeking to arrive at a decision that, in the judge’s own mind, provides for a positive societal impact. On the contrary, a legal transformational decision must be grounded in the language of the constitutional provision being interpreted, defining the terms of that provision by contemporary standards of its meaning, then seeking, through a variety of sources both legal and sociological, to conclude an understanding of societal attitudes of the issue in question.
No one constitutional interpretive theory will lead to unique adjudicative outcomes. If the question before the Supreme Court is the constitutionality of a given provision, the adjudicatory decision will always be a binary choice; either the provision is constitutional or it is not. Adding the concept of legal transformationalism as a legitimate interpretive methodology represents an important addition to the existing scholarship on the subject because it seeks to deliver a consistent philosophical approach, firmly anchored in the modern day meanings of the text of the Constitution, immune to political machinations, and respectful of certain societal shifts in thought. The demonstrable failings of the three main contemporary constitutional philosophies as shown herein makes both the research into their failings and the defining of a new philosophical approach to constitutional interpretation significant.

The concept of legal transformationalism is this student’s original work. Legal transformationalism is defined by this student as, *a system of constitutional interpretation that uses the evolution or transformations in societal norms that occur over time as a basis to explain and express legal thought and the contemporary meaning of the law.*

The first requirement set forth by the definition of the new interpretive theory is to measure and determine the “evolution or transformations in societal norms.” From the perspective of constitutional interpretation, this includes examining sources outside the law. For example, the issue confronted by the Supreme Court in *Obergefell v. Hodges* was whether same-sex marriage was protected under the Equal Protection Clause of the Fourteenth Amendment. Prior to a legal analysis of the Equal Protection Clause as it relates to the issue in *Obergefell*, the legal transformational approach advocates an analysis and determination of societal feelings on the issue of same-sex marriage. According to polling data done by the Field Research Group, in

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190 See 576 U.S. ___
1971, 58% of Californians opposed same-sex marriage. In 1977, the percentage of Californians opposing same-sex marriage rose to 68%. Moving forward twenty years to 1996, the Gallup poll found that 68% of respondents across the country opposed same-sex marriage. Clearly, between 1977 and 1996 there was virtually no transformation in societal opposition to same-sex marriage. However, between 1996 and 2015, societal attitudes on the issue of same-sex marriage changed dramatically. By 2015, 61% of respondents in the Gallup poll favored legal recognition of same-sex marriage. Essentially, this historical polling data reflects the fact that Americans have come to favor extending legal status to same-sex couples by supporting the recognition of same-sex marriage.

It is precisely this type of societal transformation upon which the concept of legal transformationalism is built. The poll results beg the question, why should judges continue to interpret constitutional provisions that have historically excluded protection of certain rights, when it can clearly and unequivocally be shown that the attitude regarding such rights has evolved?

Another example where sociological studies could be applied to ascertain societal transformation (or lack thereof) is the issue of abortion. In 1973, the Supreme Court decided the case of Roe v. Wade which concluded that women had a constitutional right to terminate a pregnancy arising out of the previously adjudicated right to privacy. According to Gallup, in 1974, 54% of people felt abortion should be legal “under certain circumstances.” Indeed, the

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193 Id.
194 410 U.S. 113 (1973).
Gallup study shows that those favoring legalized abortion “under certain circumstances” has remained remarkably constant from 1974 to present day.\textsuperscript{196} The findings of the Pew Research Institute show similar results.\textsuperscript{197} Given this data, the first prong of a legal transformational analysis would conclude that, at the time of \textit{Roe}, there was no overarching societal support for abortion, nor was there overarching societal opposition to abortion. Further, a contemporary legal transformational analysis would conclude that there has been no shift or transformation in societal attitudes on the legality of abortion since the time of \textit{Roe}.

The legal transformational approach views society as a dynamic, evolving organism, not a static population where views remain fixed. As the beliefs of society evolve, so too will society’s perception of what constitutes their rights. Therefore, the broad language throughout the Constitution can lend itself to reassessment and reinterpretation based on demonstrable societal attitudes. Distinct from the pragmatic approach where a judge takes no issue with subjugating the underlying constitutional principle to deliver a result he or she deems beneficial to society, the legal transformational philosophy seeks to discover overall societal attitudes \textit{at the time a decision is rendered}. To the legal transformationalist, the “original intent” of a constitutional provision is valid for only as long as societal views remain the same as they were when the provision was adopted. Once a comprehensive shift in societal mores can be accurately discerned, a reappraisal of a constitutional provision is in order.

Once the initial analysis discovers shifts in societal perceptions, the legal transformational analysis moves into a phase where legal thought is expressed through the revised perceptions. The best illustration of this phase of the legal transformationalist philosophy

\textsuperscript{196} \textit{Id.} \\
\textsuperscript{197} Michael Lipka, 5 facts about abortion, Pew Research Center, \url{http://www.pewresearch.org/fact-tank/2016/06/27/5-facts-about-abortion/} (last visited August 30, 2016).
involves a return to the *Plessy* and *Brown* cases. In deciding *Brown*, the Court cited a finding from a lower court in Kansas which stated that the decision supporting the constitutionality of the “separate but equal” doctrine in *Plessy* was “amply supported by modern authority.”\(^{198}\) From this, it can be concluded that in 1896 segregation was a socially accepted, if not expected, occurrence. When the issue came before the Supreme Court again in 1954, in *Brown v. Board of Education*, the legal transformational approach would have required that the Court examine whether attitudes towards segregation had changed so significantly as to require a reassessment of whether the Fourteenth Amendment should now encompass segregation under the umbrella of the Equal Protection Clause.

A study by Gallup shortly after the *Brown* decision found that 54% of respondents favored desegregation of public schools.\(^{199}\) Clearly, the *Brown* Court would have been able to determine that societal attitudes toward segregation had undergone a substantial shift since the *Plessy* decision sixty years prior. By the time the Supreme Court considered *Brown*, perceptions on racial segregation had changed. In a sense, legal transformationalism was used in the *Brown* decision, when the Court reappraised the Fourteenth Amendment’s Equal Protection Clause *vis a vis* “separate but equal,” and concluded that the Clause meant that separate is inherently unequal to a society that had clearly transformed its understanding of segregation between the time of the *Plessy* and *Brown* decisions. Consistent with the definition of legal transformationalism, the Court in *Brown* expressed legal thought through a contemporary understanding of the Fourteenth Amendment.

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\(^{198}\) *Brown*, 347 U.S. at 494-495.

The *stare decisis* doctrine is an important rule of law in that it provides some level of predictability of how a constitutional provision will be interpreted.\(^{200}\) Any viable constitutional interpretative theory needs to establish a position relative to how it deals with the issue of precedent. Pragmatists, for instance, will dispense entirely with past precedent if, in the opinion of the judge, the decision will serve a greater societal purpose.\(^{201}\) An example of this would be when Justices Brennan and Marshall persisted in dissenting in all Supreme Court decisions that held the death penalty to be constitutional.\(^{202}\) Precedent for the constitutionality of the death penalty was established in *Gregg v. Georgia*.\(^{203}\) Therefore, if Brennan and Marshall were adherents to the doctrine of *stare decisis*, they would not have dissented based on their personal feelings, but rather would have either upheld subsequent death penalty decisions on the basis of adhering to precedent, or dissented based on some other legal nuance. Originalists, such as Antonin Scalia will also ignore past precedent if the provision has been previously interpreted on the basis of the “legislative intent” and not the adopted text.\(^{204}\)

For the legal transformationalist, adherence to *stare decisis* hinges upon not whether precedent is being honored, but whether the precedent is right or wrong when viewed contemporaneous to the legal issue being considered. To be clear, rejecting precedent for purely personal reasons, such as Brennan and Marshall did with the death penalty, is not consistent with the legal transformational approach. Ignoring the legislative history of a statutory or constitutional provision in order to strictly adhere to the provision’s text, as Scalia favored, is also inconsistent with the legal transformational approach. In sum, the legal transformational

\(^{202}\) Foster, *supra* at 1864.
theory recognizes the importance of *stare decisis* but only to the point where precedent continues to accurately reflect societal mores when viewed in concert with the words of the constitutional or statutory provision being interpreted.

**Cases Illustrating the Theory’s Application**

With the introduction of the definition of legal transformationalism as an interpretive theory and the role that the *stare decisis* doctrine occupies in its implementation, this analysis turns now to how the theory would have been used in key Supreme Court decisions.

As has been demonstrated earlier, the landmark case of *Griswold v. Connecticut* was decided on the natural law contention that certain fundamental rights, such as the right to privacy, exist as “penumbras” that “emanate” from certain enumerated rights in the Constitution.205 As an interpretive theory, legal transformationalism would disagree with this finding. The legal transformational philosophy sees no reason to engage in interpretive gymnastics to find a right to privacy in the Constitution. Rather, one need only look at the opening language of the Fourth Amendment which states, “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated…”206 To the legal transformationalist, this clearly and unambiguously conveys a right to privacy. The amendment protects not only one’s “person” from “unreasonable” government interference, but one’s “house” as well. Therefore, with specificity to the *Griswold* case, the government has no compelling state interest in a preventing a person, in the privacy of their own home, from using legal, medically available contraception. This same reasoning would

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205 See *Griswold*, 381 U.S. at 486.
206 U.S. Const., amend. IV.
result in a legal transformationalist dissenting from the *Bowers v. Hardwick* decision in 1986, which found anti-sodomy laws to be constitutional.207

For the legal transformationalist, the issue of the constitutionality of the death penalty is equally clear. In *Furman v. Georgia,208* Justice Thurgood Marshall, in a concurring opinion, reached the dramatic conclusion that the death penalty in all cases was violative of the Eighth Amendment. In a classic pragmatist approach, Justice Marshall, in complete disregard to the constitutional text *outside* of the Eighth Amendment, stated that the death penalty is, “morally unacceptable to the people of the United States at this time in their history.”209 Despite this pronouncement, Justice Marshall offered no evidence to support his contention. Indeed, according to a Gallup poll, Americans’ support for the death penalty was at 57% when Marshall penned his opinion and has remained remarkably stable since that time.210 While legal transformationalism may advocate, in a general sense, a pragmatic approach, Marshall’s opinion in *Furman* distinguishes a philosophically pragmatic approach from a legally pragmatic approach. In this case, legal transformationalism would first point to Marshall’s error in asserting that “at this time in our history” the death penalty is unacceptable. Next, the legal transformationalist would point to the Fifth Amendment which reads, “No person shall...be deprived of *life*, liberty, or property without due process of law,” (emphasis added).211 In writing this, the Framers clearly did not consider the death penalty to be either cruel or unusual, for if they did, they would not have included the reference to depriving a person of their life. Indeed,
they mandated that a lawful process respecting the rights of the accused be undertaken before depriving the convict of their life.

Looking toward the future, if societal attitudes should transform in a way where an overwhelming number of Americans feel the death penalty is repugnant, obviously there is nothing in the Constitution to prohibit states from abolishing it – as nineteen have already done. Indeed, the Constitution contains nothing that requires that someone be put to death; it merely states that it is an option. However, for the legal transformationalist, the death penalty is never unconstitutional.

Conclusion

There is no presumption that the theory introduced herein is complete in all of its requisite components to comprise a fully operational constitutional interpretive theory. The intent is to provide a skeletal framework for a new interpretive theory that would function in a manner superior to the theories discussed in this research paper. It is not entirely accurate to label legal transformationalism as a theory that supports the concept of a “living Constitution.” It is not the Constitution that evolves, but society that evolves. It is also not correct to describe legal transformationalism as an outgrowth of legal pragmatism.

A core element of legal transformationalism requires its practitioners to reach beyond the law in order to determine society’s expectations. In so doing, it does not mean that legal transformationalism is an indeterminate form of constitutional interpretation, in the same vein as natural law. Legal transformationalism advocates for, and is dependent upon, a legal positivist approach – meaning that interpretation of statutes (or constitutional provisions) should emerge

from an understanding that laws originate from legislatures and courts.\textsuperscript{213} The focus on ascertaining any transformation in societal mores relative to the provision being interpreted makes legal transformationalism a type of “socio-positivist” approach to jurisprudence – to the extent such a term of art exists. H.L.A. Hart said in the preface to his book, \textit{The Concept of Law}, that “the book may also be regarded as an essay in descriptive sociology.”\textsuperscript{214} Whether Hart was announcing his support for certain sociological considerations in legal interpretation along the same lines advocated in this paper by the introduction of legal transformationalism, is the subjective opinion of the reader.

Beyond the mere theoretical, legal transformationalism seeks to produce “clear guidance and uncontested outcomes by straightforward legal language, black letter law, and the conventional devices of legal reasoning.”\textsuperscript{215} To that extent, legal transformationalism falls within the family of legal realism.\textsuperscript{216} As Shauer points out, legal realists are not bound only to the traditional legal sources and doctrine, but rely on “substantial influence” from non-legal supplements, “whose existence and application are variable and manipulable,” to achieve “proper legal outcomes.”\textsuperscript{217}

A government only functions when people agree to be governed. A constitution only functions when people agree to live by its provisions. Therefore, if our society is to continue to operate under the Constitution, the evolution of societal thought must be a factor taken into consideration under any scheme of constitutional interpretation. No interpretive theory examined in this research paper advocates for such an approach.


\textsuperscript{215} Frederick Shauer, \textit{Legal Realism Untamed}, 91 Tex. L. Rev. 749 (2013).

\textsuperscript{216} See generally, \textit{id}.

\textsuperscript{217} \textit{id.} at 754.
CHAPTER 6 - CONCLUSION

This project examined three theories of constitutional interpretation: originalism, legal pragmatism, and natural law theory. One of the purposes of the research was to determine whether or not the theories delivered judicial decisions consistent with the underlying principles governing each theory. The results of this research found that in the case of each theory, there were significant divergences in the application of the theory in delivering results consistent with the philosophical viewpoint to which the theory purported to adhere.

Each of the three theories examined was first defined by consulting the writings of the main proponents of the theory or by consulting law review articles written by legal scholars who have thoroughly studied the theory. Once a definition of the theory was established, additional focus was placed on understanding each theory fully through legal opinions, books, articles, speeches, interviews, and other available resources of well-known adherents of each of the interpretive philosophies. The analysis of originalism focused on Robert Bork and Antonin Scalia. Research on pragmatism focused on Stephen Breyer and Richard Posner. Finally, in the study of the natural law theory, the writings and opinions of William Brennan and Janice Rogers Brown were consulted.

When analyzing all of the written material consulted during the course of this research project, it was found that each interpretive philosophy had significant deficiencies. These deficiencies result in judicial decisions that are at variance with the established philosophical foundation on which the interpretive theory is based.

For example, one cannot reconcile the principal philosophical elements of originalism with some major Supreme Court decisions. This research examined the original intent of the
Fourteenth Amendment and found that segregation was not a consideration of those that wrote or debated the Amendment. Therefore, the decision sanctioning segregation, *Plessy v. Ferguson*, is consistent with a true application of the originalist philosophy and the subsequent decision which ruled segregation in schools to be unconstitutional, *Brown v. Board of Education*, would be inconsistent with the originalist viewpoint of the Fourteenth Amendment. Nevertheless, Robert Bork insisted, as shown herein, that *Brown* was consistent with the originalist interpretive theory.

It is equally hard to reconcile Justice Scalia’s allegedly originalist opinion in *District of Columbia v. Heller* when contrasted against originalism’s emphasis of interpreting the “plain meaning” of a constitutional provision. Scalia, as was illustrated, spent the majority of his *Heller* decision reconstructing the language of the Second Amendment in order to establish an individual right to bear arms, instead of looking at the text’s plain language combined with the historical setting in existence at the time of the Amendment’s ratification.

The examination and analysis of legal pragmatism also showed critical defects. This research studied the writings of the two main protagonists of the legal pragmatist movement, Justice Stephen Breyer and Judge Richard Posner. The research found that not only does Posner disagree with Breyer’s main assertions about pragmatism, but also where Breyer expresses a belief that legal authoritative sources and precedent should be consulted in reaching judicial conclusions, Posner readily admits he has no problem disregarding them in favor of reaching decisions based on his intuition of which result would deliver a superior social outcome.

It is difficult to defend pragmatism as a viable constitutional interpretive theory when its most famous proponents cannot agree on a set of principles that form its fundamental foundation. This research paper found one law review article that actually made a rather compelling
argument that originalism was, in reality, an alternative form of pragmatism. The findings herein conclude that pragmatism fails in both application and theory primarily because it is a theory that attempts to be all things to all people.

The last interpretive theory that was examined was the natural law theory. The natural law theory suffers from several fatal flaws. First, the idea that a series of rights exist beyond the expressed social compact, the Constitution, leads inevitably to inconsistent judicial decisions based on the whims of each judge. Natural law’s indeterminate nature grounds it neither to legal authority nor to consistent judicial outcomes. Interestingly however, natural law theory has been invoked in the last century for two landmark Supreme Court decisions: 

*Lochner v. New York* and *Griswold v. Connecticut*. As was demonstrated in this research paper, the results delivered by each decision were drastically different. The natural law concept of “freedom of contract” used in *Lochner* led to a lack of protection for employees. Additionally, while the famous “emanations” from “penumbras” in *Griswold* established the fundamental right of privacy, the natural law element of the decision has led to further “emanations” found by subsequent courts, rather than relying on textual legal authorities, precedent, and societal considerations.

This then leads to the introduction of a new constitutional interpretive philosophy, offered by this student in the course of this research. Termed *legal transformationalism*, the theory seeks to combine the broad concepts of legal positivism and legal realism with an acknowledgement of societal evolution. The combination of these considerations ideally would lead to a contemporary interpretation of the constitutional provision being examined and either a recognition of fundamental rights based on that contemporary understanding, or a yielding of a determination of establishing of rights to the states via the Tenth Amendment.
It was not the intention of this research project to develop a fully formed constitutional interpretive theory in the same vein as the more established theories examined herein. Rather, the point of this research and its conclusions was to identify factually that the current major interpretive theories were flawed and the need exists for significant revisions or, in this case, the introduction of a new theory – one that acknowledges the transformational nature of society.

In conclusion, it is the hope of this student that in the future the foundational ideas expressed herein defining and establishing legal transformationalism can be built upon and formed into a comprehensive interpretive theory of a stature similar to the three other theories analyzed in the project.