STRICTLY FUNDAMENTAL:

A Comparison of Strict Constitutionalism and Religious Fundamentalism

by

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This research investigates the extent to which strict constitutionalists and religious fundamentalists might be intertwined and what implication this might have on the American legal system. Findings suggest close ties between strict constitutionalism and religious fundamentalism, enough so to consider strict constitutionalism itself a form of fundamentalism. Strict constitutionalists were discovered to share ample core values, ideologies, and practices with religious fundamentals. Supreme Court decisions based on originalist and textualist interpretations were found to be openly endorsed by religious groups. The public eye has begun to associate strict constitutionalism with religion, which has resulted in extensive media traction on the topic. The overlap between religious fundamentalists and strict constitutionalists suggests several potential problems for the American public, including a risk to the separation of church and state and a threat to legitimacy of the judicial branch.

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Introduction

Strict constitutionalism is a style of judicial interpretation that has gained traction in recent years and is currently dominating the Supreme Court. Justices who implement this style of legal interpretation focus on returning to the core values of American society at the time of its founding and looking at the Constitution entirely based on plain text. Originalism and textualism are the two primary methods of strict constitutionalism and are practiced by some justices exclusively and others in unison. Recent Supreme Court rulings based on strict constitutionalism have resulted in a return to traditional values and a step backward in legal history. Most notably, in 2022, the Supreme Court overruled a fifty-year precedent that interpreted abortion as inclusive to the Fourteenth Amendments' right to privacy. This case was overturned with a 5-4 strict constitutionalist majority on the basis that the issue of abortion was previously decided improperly since the explicit inclusion of it is not in the Constitution, nor is abortion a value that the founding fathers would have endorsed. Dismissing the abortion precedent, which was set and reinforced by several cases, demonstrates that these justices value their judicial interpretation far above the principles of stare decisis and the legal opinions of many Justices before them. This decision resulted in a public outcry from abortion advocacy groups and a generation of women who were raised believing their right to choose was protected.

Originalism has long been a legal practice amongst Justices on the Supreme Court. Justices have frequently consulted the notes of the founders, such as James Madison and Alexander Hamilton, in the Federalist Papers when deciphering the Constitution's original intent. However, as society continues to modernize and adopt liberal values, originalism reaches farther into the distant past for answers to legal questions. The logic behind this method of interpretation is questionable when the founders' ideas seem hardly applicable to modern society, which is

beyond anything the founders could have imagined. The tight grasp of tradition through originalism involves more than just legal theory, including the core values and ideologies engrained in the Justices. Values of returning to tradition, devotion to text and ideas of the founding fathers, and resistance to modernizing and evolving moral standards are common among strict constitutionalists. These same values are also seen in other societal phenomena - namely, religious fundamentalism.

Religious fundamentalism and strict constitutionalism share many similar values and practices. Though originalists and textualists do not shape their legal arguments around God, their devotion to the founding fathers is parallel, and their divine treatment of the Constitution resembles that of the Bible and other religious texts. Religious fundamentalism is a phenomenon growing simultaneously in the United States besides strict constitutionalism, and religious fundamentals coincidentally endorse many of the viewpoints and practices of strict constitutionalism. These two groups share similar goals and celebrate the same legal outcomes. Similarities in method, practice, and ideology beg the question of whether these two groups might be related. Does religious fundamentalism influence strict constitutionalists? Or rather, are strict constitutionalists fundamental in their approach to the law? In either case, this close relationship is concerning on many levels, as the American public notices close alliances between these two groups. Such a close relationship threatens the separation of church and state and judicial legitimacy.

Theoretical Framework

Several authors have previously made comparisons and claims of similarity between originalism and religion. Franks, in her book *The Cult of The Constitution,* makes provocative statements associating originalism with religious cults and extreme conservatism in the United States and outlines many consequences of this close relationship. Stanford Levenson, in his book *Constitutional Faith,* builds on Frank's argument but takes an approach more rooted in the specific practices and methods of religion. Levenson makes no mention of cults in his comparison and instead compares constitutional faith to religious groups within the United States and American Christianity as a whole. Both Franks and Levenson make claims that originalists follow devout practices surrounding the legal system and the Constitution. These practices are paralleled to religion with ample examples.

One potential weakness in Frank's *Cult of The Constitution* is her continued use of the word "cult" and lack of support in her depiction of what that term means. The word cult has a negative undertone, especially among religious studies scholars. By using cults as the main agent of comparison, Franks threatens the legitimacy of her argument and risks receiving criticism from religious studies scholars. This thesis plans to instead compare originalism and strict constitutionalism to religious fundamentalism, which is slightly more broad and less targeted. Religious fundamentalism is a more appropriate comparison in this case because it is widespread, occurring in factions of many religions worldwide. Franks likely intended for her comparison of originalism to a cult to attach the negative connotation of the word "cult" to originalist practice. This was not the goal of my research. I intended to use religious fundamentalism as a tool to draw essential comparisons between religion and legal interpretation without degrading either group to the effect Franks has done.

The first step in analyzing the relationship between legal interpretation and religion is a deeper investigation of the meaning and scope of strict constitutionalism. O'Brien's book *Judges on Judging* is a collection of essays and off-the-bench writings from Supreme Court and lower State Court Judges. These essays discuss various methods of constitutional interpretations, the roles of the judiciary, the dynamics of the judicial process, and the constitutional system. The essays include historical and political perspectives from justices across a vast timeline, with some of the oldest essays belonging to Justice Oliver Wendell Holmes Jr., and others from more recent Justice Stephen G. Breyer to name a few. The Fourth Edition of this book includes 34 essays in total, all providing a unique perspective on the functions, purpose, and theories of the judiciary. Several of the essays in this collection detailed judicial modes of interpretation from Justices who instill those practices themselves. Justice Antonin Scalia detailed his perspective of originalism, where he both details the core values of the ideology and defends his claim to it including insertions of his personal beliefs about the legal system. Similarly, Justice William H. Rehnquist speaks to his definition of a living Constitution and how he believes the Constitution should be applied to society today. Beyond pieces concerning judicial modes of interpretation, *Judges on Judging* provided helpful insight into the very different perspectives justices hold on how the legal system should operate. Essays concerning judicial activism, judicial review, innerworkings of the Supreme Court, and the complexity of judging proved immensely helpful to this investigation.

The definition of originalism in Justice Scalia's words from *Judges on Judging* clarified the principles of this style of judicial interpretation. However, other sources further supported the definition of such a term in this paper. Upon initial research into originalism from sources such as *Textualism and Originalism in Our Constitutional Republic* by Russel J. Rucker, it became

clear that Justice Scalia's definition of originalism was not the most suitable for an impartial outlook on the term. Rucker provided further insight into what exactly originalist principles look like and how they differ from other interpretation styles. Another helpful source in this research was Phillip Bobbitt's book, *Constitutional Fate: Theory of the Constitution*. Bobbitt outlined what he considered to be the primary modes of judicial interpretation in his first section of *Constitutional Fate.* An interesting discovery in this investigation of constitutional interpretation styles was that various legal scholars had identified different modes of interpretation that are not uniformly consistent. Bobbitt included six interpretation styles in his discussion of judicial interpretation, some of which converged on many points and were not practiced consistently by Justices throughout time. Comparing how various scholars defined judicial modes of interpretation was valuable in deciding which methods were consistent across scholarship.

Davis E., in his law review on Justice Samuel Alito's statutory interpretation, *The Newer Textualism,* described judicial modes in a method most applicable to this research. Davis considered originalism and textualism to be two distinctly different modes of judicial interpretation, sometimes practiced together and other times separately by various justices throughout time. Davis categorized these two modes of interpretation under one overarching category known as strict constitutionalism. Initially, the focus of this research was aimed to detail only originalism in relation to religion, however, after reading Davis's *The Newer Textualism*, it was clear that strict constitutionalism as a broader category would be a better fit. Davis's work, alongside the work of Bobbitt, O'Brian, and Rucker, directed the focus of my discussion of judicial interpretation.

Directing the scope of religious focus in this study began with an understanding of what it meant to be a religious person. Barbra Holdcroft's book, *What is Religiosity,* led the research

in this understanding. Religiosity proved to be a difficult topic lacking a distinct and consistent definition, but Holdcroft's presentation was one with parameters that were easy to grasp and apply to this discussion. Holdcroft defined religiosity in terms of sociologists, psychologists, and theologians who each consider different factors of religiosity to be of vital importance. For the purpose of this work, I chose to include all three perspectives of the sociologist, psychologist, and theologian when discussing religiosity in an effort to encompass a holistic approach to the term, which applies to several contexts.

Narrowing religiosity further was again a difficult task. Religion is such a vast concept that refining the scope of research was necessary but directing it in a relevant way was difficult to navigate. Fundamentalism was hinted at as similar in function to cults in Frank's book, *The Cult of The Constitution,* and further research confirmed that Fundamentalism would be a good scope of this research. Fundamentalism is another term with vast disagreement across scholarship and a lack of concrete definition. Many articles on Fundamentalism influenced the understanding of it as applied to this research. Emerson and Hartman, in their co-authored article, *The Rise of Religious Fundamentalism,* as well as Martin Marty's, *Fundamentalism as a Social Phenomenon,* were leading sources in my definition of fundamentalism. Both articles, as well as several other sources that investigated fundamentalism, failed to define fundamentalism in a concise format that could easily be relayed into this research. For this reason, I chose to formulate my own definition of fundamentalism by using the overlapping principles recurring in several articles. I created five pillars of fundamentalism, all of which were sourced from key concepts in the works of Marty, Emerson, Hartman, and others. This was the best approach I could take to the difficult task of defining a term that lacks a definition.

The final vital component of my research was composing a list of Supreme Court cases applicable to my research. I sought out cases that were landmark, resulted in lasting changes to legislation, and demonstrated strict constitutional interpretation. The list of applicable cases to this work is endless, and many more could have easily been included than what made the final cut. The Federalist Papers and other primary source documents related to the original intention of the founding fathers were also important in my discussion of originalism. Much of the case law used in this piece was directed from ongoing discovery through my undergraduate education at the University of Oregon. I began with cases I was familiar with and knew to apply to this project and expanded from there, adding many more. Most information on each of these court cases was derived from the majority and dissenting opinions themselves. Some of the landmark cases used in this study included commentary from other sources which discussed the meaning and implications of such decisions. Cases are cited throughout using their respective docket numbers, and much of the analysis on these decisions is my own.

Other sources proved helpful along the journey of this research and deserve notable inclusion. Frank Cross's *Failed Promise of Originalism* and Amanda Hollis Brusky's *Ideas With Consequences* both contributed valuable insights to my analysis. Cross outlined the many pitfalls and potential consequences of originalism in practice, which I discuss extensively throughout this investigation. Brusky outlines the close relationship between church and state through various organizations such as the Federalist Society and the Conservative Coalition. Lastly, Michael Greve, in his article *Is the Roberts Court Legitimate* provided insights into my analysis and conclusion, discussing the legitimacy of the Supreme Court and the potential consequences of illegitimate practices. These supplemental works added great insight to the main point of my research.

The sources abovementioned encompass the foundation for my work in the sections to come. Each of these authors contributed an important piece to my research and sparked a deeper investigation into these topics. I intend to expand on previous work and apply my own comparisons of strict constitutionalism to a new corner of religion in this study. The goal of this work is not to suggest new practices or propose solutions to problems in which I am far from an expert in. These topics are complex and intricately woven into many aspects of American society. My hope is to develop a deeper understanding of the relationship between religion and judicial interpretation and the separation - or lack thereof - of church and state in American government.

Section I – Judicial Modes of Interpretation

Modes of Judicial Interpretation

The Constitution outlines the fundamental workings of the American government and is considered the supreme law of the United States. The nine articles and subsequent amendments of the Constitution trump all lesser state laws and guide the country's morals. The power of the Constitution is derived not only from the text itself but also from the Supreme Court decisions curated over the previous two and a half centuries, which have created a breadth of legal precedents. The raw verbiage of the Constitution is cryptic and vague, holding little power without the interpretive body of the Judicial branch to derive meaning from ambiguous language. While some clauses of the Constitution outline clear-cut and precise language, such as age requirements to be a United States senator or the term length of a presidency, this specificity is rare. Most of the language of the Constitution is indistinct and requires discussion to interpret and derive meaning.

The founders of the United States intentionally included the Judicial branch in government structure to resolve disputes. The Supreme Court was initially created as an intermediary between states or foreign governments and an appellate for lower courts (Article III, Section II). Decisions by the Supreme Court become legal precedents applying to all states in the union. Thus, critical thought, attention to detail, and forward-thinking in the Court are paramount. The Justices on the Supreme Court are responsible for interpretations of the law that become fixed in meaning indefinitely. This daunting task requires the deliberation of no less than nine highly educated and accredited Justices. Upon confirmation to the Supreme Court, each Justice vows to impartially administer justice under the Constitution (“About the Senate…”). They commit to the highest level of fairness and objectivity and uphold their role diligently.

Despite a unanimous commitment to the Supreme Court and its values, vast discrepancies exist in Justices' opinions. Each Justice agrees to prohibit and correct unconstitutional laws; however, the debate lies in what each Justice considers "unconstitutional." As previously mentioned, the Constitution's language is vague and does not point to one clear meaning. There is not one correct method to view the Constitution. Discrepancies among Justices boil down to a difference in interpretation of the Constitution, which can lead to drastically different opinions about the meaning of the law and the values of American society.

There exists no single precise method to interpret the Constitution. The lack of clarity in the Constitution further validates the innate need for the Judicial Branch and, specifically, the Supreme Court to derive meaning from otherwise cryptic text. The Constitution is inherently contradictory and supports conflicting values (O'Brien, Chapter 18). Judicial interpretation is thus imperative and has immense power in determining the legitimacy and meaning of laws, as well as checking the power of other branches of government. The process of judicial review[1] was assigned to the Supreme Court in 1803, giving the Court power to ensure the Legislative and Executive branches remain subject to the Constitution (O'Brian 13-28). Judicial review is now the most expansive power of the Judiciary and can, at times, have an enormous impact on resolving disputes over American rights. Judicial review can effectively nullify existing laws if determined to violate the Constitution, and thus is a huge responsibility and immense trust given to the Supreme Court Justices.

Legal scholars have identified several modes of judicial interpretation used in the Supreme Court. Modes of interpretation act as argument styles, judicial theories, or different lenses to consider the text of the Constitution. For example, some Justices place a central focus

[1] Established in *Marbury v. Madison* (1803). Gives the Supreme Court the authority to determine when laws and actions of the Legislative and Executive branches are in violation of the Constitution.

on the ethical implications of judicial rulings, while others are primarily concerned with the historical context of the laws and their original meaning. Many Justices endorse a variety of interpretive modes depending on the context of the dispute, failing to fall exclusively into one interpretive category. Other Justices consistently reference a particular theory that remains unchanged in each decision. Each mode of interpretation outlined in this section has significant legal theories supporting it, but not all interpretive methods are equally respected by the American public.

Scholars have made various divisions of interpretive styles, some identifying only two distinct theories and others up to nine. There is no single correct way to divide Supreme Court theorists. For the purpose of this examination, each Supreme Court Justice falls into one of two main categories, strict constitutionalists and living constitutionalists. Under each umbrella, strict or living, exist subcategories of interpretive modes and argument styles. Strict constitutionalists are primarily composed of originalists and textualists, and many Justices practice a combination of these two styles (Davis). Living constitutionalists are primarily structuralists and naturalists, each considering the Constitution a living document. Different outlooks on constitutional law conflict when deciding cases that ultimately have an enormous impact on American law. The clash between strict and living constitutionalists is a prominent issue becoming increasingly politicized. Ultimately, the Supreme Court creates precedents that influence and restrict all state statutes and federal laws and control the rights and liberties of American citizens. Understanding the ideological framework driving Supreme Court decisions is critical in understanding the judiciary's past, present, and future trajectory.

Living Constitutionalists:

Living constitutionalists believe the Constitution is a living document that adapts to societal needs throughout history. These Justices believe that a living document will better withstand the test of time, whereas a dated Constitution can no longer be adequately applied to modern America. Justice William Rehnquist, a self-identifying living constitutionalist, defines his interpretive method by quoting his predecessor Justice Holmes (O'Brian). Holmes describes the Supreme Court as the "voice and conscience of contemporary society" (chapter 18, page 183). Holmes and Rehnquist both assert that the Constitution is intentionally written in vague language because the nation's founders intended the document to be interpreted and applied appropriately to society's changing conscience. Holmes suggests that the founders could never have imagined the multitude of changes brought to American culture over the past two centuries, which is why they left the interpretation and application of the Constitution in the hands of the Supreme Court. Rehnquist includes his own opinion that it is the judiciary's duty to step up and take action where other branches of government have failed to solve societal problems. Rehnquist believes that merely deeming laws unconstitutional does not solve injustices and fails to provide legal remedies. According to Rehnquist, when the Legislative Branch has failed or refused to address societal problems through relevant laws, it is the place of the Court to act (O'Brian 283). Rehnquist believes that relying on the Legislature to implement legal changes quickly is unrealistic due to the inefficiency and extreme polarization of American politics. Thus, living constitutionalists jump on opportunities to create legal solutions within their jurisdiction.

Rehnquist's definition of a living Constitution focuses significantly on the moral obligation of the Supreme Court to solve societal problems (O'Brien 284). His lens on judicial interpretation is an ethical argument applying moral reasoning to justify a broader application of

the law. Ethical arguments such as this are often criticized as judicial activism, which has a political connotation (O'Brian 42-56). Critics of judicial activism argue that it is not within the Court's jurisdiction to create legislation, which is the outcome of creating new legal precedents. Judicial activists often ignore existing precedents or set new precedents based on moral arguments that best fit modern society. Practicing a living Constitution inherently means the document and how it is applied to the law changes over time as society changes. According to Living Constitutionalists, legal precedents set in the 1800s simply cannot remain applicable in the 21st century.

Rehnquist is undoubtedly not alone in his assertions of living constitutionalism. Judicial activism peaked in the 1960s during the era of the Warren court (Cross 73-106). Chief Justice Earl Warren led the most living constitutional-leaning court in American history from 1953-1969, implementing several landmark decisions which expanded civil rights. Criticized for being a judicial activist, Warren headed the decisions for *Brown v Board of Education*[2] *347 U.S. 483* (1954) and *Miranda v Arizona*[3] *384 U.S. 486* (1966), both of which set new legal precedents which expanded constitutional meaning to include and protect a broader category of citizens. *Brown v. Board* was a form of judicial activism that fundamentally changed the United States based on a different interpretation of the constitutional doctrine "separate but equal" previously established in *Plessy v Ferguson*[4] *163 U.S. 537* (1896). The Warren court unanimously agreed in an 8-0 decision that the doctrine established in *Plessy v Ferguson* conflicted with the equal

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2 Established U.S. state racial segregation laws in public schools violate the Fourteenth Amendment. Overturned the previous standing "separate but equal" doctrine, ruling that separate is inherently unequal.

3 Established that the Fifth Amendment protects against self-incrimination. Required law enforcement to advise suspects of their rights upon arrest.

4 Established the doctrine "separate but equal," which appeased the Fourteenth Amendment equal protection clause and inhibited racial segregation.

protection clause of the Fourteenth Amendment, which protected all U.S. citizens, including people of color. Warren's opinion in *Brown* is a textbook example of living constitution theory and judicial activism because it changed a pre-existing precedent to better fit the needs of modern America. Warren's overruling of judicial precedent from *Plessy* was based on the assertion that the country's social conscience was changing, and doctrines such as "separate but equal" could no longer stand.

The Warren Court was also responsible for *Griswold v Connecticut*[5] *381 U.S. 479* (1965), another example of judicial activism that expanded the right to privacy from the Constitution's Fourth Amendment to include "a penumbra of rights" (381 U.S. 484). The penumbra[6] of rights outlined in *Griswold* was established to protect the private use of contraceptives between married couples. This penumbra was later expanded again to include the right to abortion in *Roe v Wade*[7] *410 U.S. 113* (1973) under the Burger Court. These cases are examples of judicial activism because the Court established and upheld protections for actions not explicitly written into the Constitution (O'Brian 42-56). Judicial activists fall into the category of living constitutionalists because they agree that constitutional rights should expand over time as society's morals and ethics evolve. Strict constitutionalists criticize this opinion as inserting personal beliefs into what the Constitution *should be* rather than explicitly is (O'Brian 228-236).

Living constitutionalists sometimes identify as Structuralists, who believe that structurally, the government is designed to support a living Constitution. Structuralists argue that

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5 Established the "right to privacy," which is not explicitly stated but inferred within the constitution. Determined a "penumbra" of rights held in the Fourteenth Amendment. *Griswold* protected the right to marital privacy in the use of contraceptives.

6

7 Expanded the right to privacy established in *Plessy* and determined that the Due Process clause of the Fourteenth Amendment protected a woman's right to Abortion.

the three-branch structure of the American government functionally endorses the notion of a living Constitution because it includes a powerful Judicial Branch (Bobbitt 75-92). The Judicial Branch interprets the meaning of laws and holds Congress and the Executive branch accountable to the Constitution. The purpose of the Supreme Court is to derive meaning from the language of the Constitution, which implies that the Constitution alone is insufficient in outlining federal laws. Needing to hold other branches of government subject to the Constitution implies that the Executive and Legislative branches cannot create and enforce just laws on their own. If the language in the Constitution were absolute and the founders' thoughts were wholly accounted for, judicial interpretation as a system would be unnecessary. The reality is that laws are ambiguous, and Structuralists claim that the ambiguity is intentional, which begs the need for modern judicial interpretations.

Another style of living constitutionalism is that of naturalists. Natural law is a concept first coined by Karl Marx that humans have a generally shared sense of morality in determining right and wrong (Franks). Naturalists believe the law should mimic the moral standards that are agreed upon by most of society. A naturalist approach to the Constitution is a facet of living Constitution theory because it implies that the law should be based on society's naturally existing moral standards. These standards have evolved in the United States since the late 1700s with subsequent civil rights movements, including abolishing slavery, women's suffrage, the right to privacy, applications of free speech, and LGBTQIA+ rights, to name a few. Each movement demonstrated a moral shift towards a more accepting status quo in American society. Naturalists believe the law should reflect that moral shift in changing precedent through judicial activism.

Strict Constitutionalists:

On the other side of the scale exist strict constitutionalists. This umbrella of judicial interpretation includes textualist and originalist theories, which share similarities and are practiced in unison by many Justices (Davis). Strict constitutionalists believe that the Constitution is finite, and its content is absolute. Contrary to living constitutionalists, strict constitutionalists believe that when a moral conflict arises in constitutional doctrine, it is the duty of the Legislative Branch to draft amendments to remedy the problem (O'Brian 228-236). They do not think it is the judiciary's place to legislate from the bench. In most cases, strict constitutionalists do not believe in changing legal precedent in the fashion of judicial activism. There have been recent exceptions to this trend which will be covered in detail below.

Some scholars have argued that originalism has existed since the ratification of the Constitution (Cross). Evidence of originalist activity on the Supreme Court is sparse during the first decades of the nineteenth century because newspaper and journal accounts from court cases during this time are limited. Cross argues that limited evidence of originalism in the early 1800s is irrelevant because the justices at this time were the ratifiers of the Constitution, so they themselves knew the purpose and intention behind the text. However, even during an era so intertwined with American founding, justices disagreed on aspects of the original meaning (Cross, 2013, 75). Other scholars argue that originalism in its current state is unlike any form of judicial interpretation seen before (Cole). Cole argues that in the current Roberts court with four self-identifying originalists, Thomas, Gorsuch, Kavanaugh, Barrett, along with Roberts from time to time and the former Scalia, make the only six originalists. Cole makes a compelling point that the current originalist standpoint is as extreme as it has been; however, the Roberts court is certainly not the genesis of originalism, as Cole suggests.

Justice Antonin Scalia is not the first originalist, nor will he be the last, but he might be the most passionate originalist the court has ever seen (Cross 127). Scalia is known for being a self-proclaimed originalist and frequently citing the work of Madison and Hamilton when deciphering original intent. Scalia claims to endorse originalism not because the founders' ideas are ones that he shares himself but because he considers originalism to be the lesser evil to other various forms of judicial interpretation. (O'Brian 229). Scalia condemns the idea that the Constitution should change from age to age and alternatively favors timeless consistency. He argues that the language is vague with an intended lack of specificity to allow *Congress* to appropriately create and alter legislation over time to match American culture. Scalia delegates this duty to Congress, believing that creating legislation has no place in the judicial system. Though Scalia identifies as an originalist, he and Justice Thomas are both criticized by scholars for failing to hold originalist views on the Fourteenth Amendment[8] (Cross 126). Originalists think that giving the judiciary power to change constitutional meaning to fit modern ethics is a collaborative and expansive assessment of constitutional freedoms (O'Brian 230). They consider the Constitution to have a single explicit meaning that clearly outlines the people's enumerated rights and freedoms, which should not be expanded at the liberty of Supreme Court Justices.

Additionally, Scalia and other practicing originalists call for a "fusion of constitutional law and moral theory" (O'Brian 229). Originalists view the Constitution as a moral guideline for Americans that must be consistent with the intentions from when it was first written. Morals are a fundamental necessity for creating a functioning society and thus should be outlined in

[8] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

straightforward unchanging language. According to Scalia, morals should not change over time, so the concept of a living constitution is unwarranted. Judicial review as a philosophy is not included in the language of the Constitution and was inferred as an unenumerated right of the jury by Justice Marshall in *Marbury v Madison*[9] *5 U.S. 137* (1803). Scalia disagrees with this immense power self-appointed by the court and claims that the justice system has become more powerful than initially intended and has no place in changing the moral guidelines set in the Constitution.

Other definitions of originalism emphasize the original intent of the founders of the Constitution. Originalists are known for commonly referencing the journals and writings of James Madison, Alexander Hamilton, Thomas Jefferson, and others present at the constitutional convention. Most of the recorded opinions of the founders exist in the Federalist Papers, which were propaganda released in the press over nineteen months leading to the majority ratification of the Constitution in 1788 ("Research…"). The Federalist Papers consist of 85 essays written by James Madison, Alexander Hamilton, and John Jay, all of whom advocated for implementing a federal government. These essays, along with the journals of Thomas Jefferson, are the primary sources of information outlining the founders' opinions and are often cited by originalists when deducing original intent.

Originalists receive ample criticism from living constitutionalists for inferring original intent based on only a few documents available from the constitutional convention. There were over 70 representatives at the Constitutional Convention, and only a fraction of those voices aree still referenced today. Ultimately, the extensive length of the ratification process, receiving

[9] Established the concept of judicial review, enabling the courts to deem U.S. federal and state laws unconstitutional. Judicial review was not enumerated in the Constitution but established in this pivotal case. Justice Marshall ruled that the Judiciary Act of 1789 violated article III of the Constitution.

ratification by only a thin majority, and subsequent inclusion of the Bill of Rights is evidence that every delegate at the convention did not unanimously agree on the Constitution's language and principles (Cole). The Constitution represents a legal compromise, and thus inferring a single intention of the 70 representatives is unrealistic. Living constitutionalists suggest that there is no way of referencing the founders' original intent as they all had conflicting opinions. Even the prominent James Madison changed his position on federal jurisdiction from his early essays in the Federalist Papers to his later ones ("Research…"). This inconsistency in the opinion of Madison alone is evidence that the founders likely did not have a clear idea of the future functions of government and likely could not have imagined the extensive changes to society from 1788 to 2023 and beyond. Inconsistencies of opinions and lack of concrete evidence from multiple perspectives are all evidence against the claims of originalists.

Textualism is the concept that was initially coined by Justice Samuel Alito. Textualism is the theory that the written text matters more than the theory or intention behind it (Bobbitt 25-38). Textualists interpret the law as absolute and literal. They recognize that statutes are a product of political compromise and take the state and federal legislators ample time to craft. They believe that the legislative body composed of hundreds of individuals cannot embody one unified intent. When justices add their personal interpretations to these statutes, they disrespect the legal system and undermine the political process (Davis Part III). Simply put, textualists do not rely on referencing stare decisis[10] or the original intent of the laws because they believe the intention is ambiguous and judicial precedent is hardly legal doctrine. Alito refers to his judicial interpretation as "newer textualism," which occasionally references stare decisis but only as a last resort when necessary (Davis 14). Additionally, Justice Alito has been less consistent with

[10] "Stand by things decided" to determine litigation according to precedent.

his legal interpretations over his tenure on the Supreme Court. Each of his decisions takes a Strict Constitutionalist approach, but he waivers slightly between textualist and originalist perspectives.

Living constitutionalists criticize textualism as applying outdated social ethics to current America. Though Textualism does not consult the intention of the authors of the text, it does take the unclear meaning of liberties to be absolute (Bobbitt 25-38). It does not support concepts such as the penumbra of rights established in Griswold or the subsequent rights that have since been included in that penumbra. Over the past several decades, the Supreme Court has been marginally dominated by living constitutionalists who have taken a more liberal approach to civil rights. The current Roberts court, however, is beginning to swing the judiciary in the opposing direction (Epstein). The primary example of strict constitutionalists disregarding judicial precedent was seen in *Dobbs v. Jackson Women's Health*[11] *19-1392, U.S. 597* (2022) (Alicea). This case revisited issues already discussed extensively at the Supreme Court level in *Roe v. Wade 410 U.S. 113* (1973), *Casey v. Planned Parenthood*[12] *505 U.S. 833* (1992), and *June Medical Services v. Russo*[13] 18-1323 U.S. 253 (2020). Justice Alito gave the majority opinion in *Dobbs,* which overturned the fifty-year precedent from these cases under the jurisdiction that "the Constitution makes no such reference to abortion, and no such right is implicitly protected by any Constitutional provision" (18-1323 U.S. 253 – Page 5). Alito adds that non-enumerated rights protected by the Fourteenth Amendment must be "deeply rooted in this nation's history

[11] Questioned whether a ban on abortion after 15 weeks of pregnancy was unconstitutional. Robert's court ruled that the right to an abortion was never explicitly enumerated in the Constitution and determined that Roe and Casey were improperly decided. This case overruled 50 years of judicial precedent protecting abortion.

[12] Established the "undue burden" doctrine which prohibited state laws on abortion access to create obstacles for women's access to abortion services.

[13] Overruled Louisiana state law, which required abortions to be performed by physicians. Reinforced the existing precedent protecting abortion access and prohibiting undue burden.

and tradition" to stand. Alito and the majority are implementing textualist and originalist theory in this decision, first by identifying that abortion is nowhere included in the plain text and second by referencing the nation's history and tradition. The decision heavily criticizes the merits of the ruling in *Roe* as an "abuse of judicial authority," claiming that the opinion looked far too much like a statute enacted by the Legislature (18-1323 U.S. 253 – Page 6).

The Roberts court felt comfortable disregarding stare decisis under the values of strict constitutionalism. However, this decision vastly undermines the legitimacy of the judiciary as a whole. The Supreme Court was asked to hear *Dobbs* to "reaffirm *Roe* and *Casey,*" a concept that is atypical at best. When clear legal doctrine has set precedents, the Supreme Court is not advised to hear additional cases on the matter. Both *Roe* and *Casey* were exceptionally clear in outlining the conditions permitting abortions. The actions in *Dobbs* leave in question which rights established in the penumbra of the Fourteenth Amendment might be at risk next and which unwarranted cases the Court might agree to hear in the future. The abortion conflict has become entirely politicized, incorporating several religious values, and begs the question of whether the Roberts Court had a political or religious agenda in this ruling. Although the Supreme Court is designed to be non-partisan, the stark difference in values and moral obligations between strict constitutionalists and living constitutionalists has naturally aligned with the partisan values of the nation. Additionally, the current political climate of the United States has many conservative politicians campaigning on religious platforms. Thus, the two-party system is very much intertwined with the religious values of Christianity. These subsequent sections will examine the possibility of the current Supreme Court acting on politically conservative, religious, and moral values.

Section II – Religious Fundamentalism

What is Religiosity?

Religiosity is a complex concept to define. Various academic disciplines look at religiosity from different perspectives, which yield dramatically different definitions of the term. Some scholars choose to break religiosity into key defining principles and measure the extent to which an individual meets those defining principles to determine their level of religiosity. Social scientists consider the most imperative measure of religiosity to be church attendance and doctrinal knowledge, while psychologists examine the extent of devotion in personal life, and theologians consider individual faith (Holdcroft). Each of these factors is important in considering religiosity holistically. For the purpose of this paper, religiosity will be examined from all three, sociology, psychology, and theological perspectives. Calculating the exact amount of religiosity will not be necessary for this examination. Noticing key factors and similarities in behavior and thought across groups is the primary goal of this essay.

Sociologists often consider a person's church attendance and religious activity within the community as the primary factor in assessing religiosity (Holdcroft 89). Measuring religious activity is a logical approach by social scientists as these factors are easy to observe and quantify into meaningful results. A person who attends church, temple, synagogue, et cetera, regularly might be considered average on the religiosity scale. In contrast, a person who frequently volunteers for their religious community and attends extra services might be higher on the religiosity scale, and those who rarely attend might be the lowest. Social scientists also consider doctrinal knowledge in their metric and often measure it through religious tests. This aspect is considered the intellectual or orthodoxy factor encompassing knowledge and practice. Though these metrics are logical, they have some critical flaws which make them insufficient

measurements alone. The most extensive critique of this measurement is the argument that a person can be very religious without attending service. This type of person might strictly follow the moral guidelines of their religion, read scripture frequently, and teach religious values to friends and family but choose not to attend service for various reasons. This person might fail to meet the social scientist's standard for religiosity yet might be arguably more devout in their beliefs than one who attends service regularly (Lenski). Simultaneously, someone who attends service regularly might be ignorant of or unwilling to accept all church doctrines. For this reason, church attendance must be coupled with other measurements to determine religiosity.

Psychologists frequently consider the most critical dimension of religiosity to be the cognitive connection to faith (Holdcroft 91). This factor would be considered one's personal account of their faithfulness and belief in religious doctrine. For example, a person could mentally consider themselves devoutly religious and hold religion close to their identity, while the exterior world considers this person's religious devotion to be marginal. Personal psychological accounts of religiosity can differ greatly from other observable measurements of religiosity. Psychological factors of religiosity identify religion as a vital aspect of a person's identity and personality. Religion becomes psychologically intertwined into a person's life when measured high on the psychologist's scale. High cognitive connections to faith might make a person find comfort and peace in their day-to-day life. The psychologist's measurement of religiosity is critical to consider because it details the personal relationship to faith. Relationships, identity, and self-image of religion are often perceived as more compelling measures of religiosity than church attendance. However, cognitive measures alone are insufficient in fully understanding religiosity as they do not indicate an individual's membership within the community. The psychologist's analysis of religiosity also fails to recognize that

knowledge of religious scripture and doctrine is necessary to practice the faith even minimally (Clayton). Cognitive measures alone fail to capture scriptural knowledge and community participation outlined by the social scientist.

Theologians highlight a third feature of religiosity. Theologians frequently consider faith itself, which can be defined as the belief in the divine. An individual's theological connection with the divine is a foundational aspect of many religions that cannot be overlooked (Holdcroft 89). Worshiping a holy figure considered non-human or divine is the measurement of the theologian. Aspects of this measurement might include believing in eternal salvation, personal relationship with God(s), and existential certainty. Because much of religion is not defined through science, measures of faith and belief in the divine are vital in examining religiosity.

These three measures of the social scientist, psychologist, and theologian together provide a holistic view of religiosity. The social scientist examines the tangible aspects of religion, such as church attendance, doctrinal knowledge, and overall community involvement. The psychologist analyzes individuals' psychological, personal relationship with religion and the extent to which a person identifies as religious and accepts moral principles. The theologian observes the theoretical aspects of religion and its abstract relationship with divinity and belief in the supernatural. Each of these three measures is helpful in examining religiosity, yet each alone provides an insufficient perspective. Using the three measures together is essential for fully understanding religiosity.

What is Fundamentalism?

Fundamentalism is generally understood as a traditional approach to an institution or belief system which aims to restore the original core values of the practice. Fundamentalism is often assimilated with traditionalism, extremism, or orthodoxy; however, it has distinct

differences. Like the term religiosity, fundamentalism is challenging to articulate in precise language that fully covers the various meanings and applications of the term. This is partially due to the innate ambiguity of the English language, as well as disagreement amongst scholars on the scope of fundamentalism (Marty). While some might consider fundamentalism a purely religious term, others consider it a concept that might be applied to various other institutions. Scholars who do agree that fundamentalism is solely applicable in a religious context further disagree in which religions fundamentalism can be found. Koopmans and Marty both agree that fundamentalism can be applicable to Islam and even non-monotheistic religions, while Emerson and Hartman assert that Muslims reject the term fundamentalism. Some Muslims consider all sects of Islam to treat the Quran equally seriously, and fundamentalism would imply that one group of Muslims interprets text more strictly than others (Emerson and Hartman 130). To better understand the scope and history of fundamentalism, the following section will attempt to create a working definition of the term based on the perspectives of several religious studies, scholars, and sociologists.

According to Koopmans, the term fundamentalism is best understood as directly opposed to modernization which downgrades the role of religion (Koopmans 37). Modernity is known as a time period where societies transition into the modern, and currently, the post-modern era. This transition has included several change processes, including industrialization, scientific advancement, growth of nationalism, globalization, secularization, et cetera. Many religious scholars agree that fundamentalism is reactionary to modernization and opposes liberalizing moral standards. Maltby describes fundamentalism as a clash against the postmodern era, an "antithetical paradigm" similar to the polarization between liberal and conservative, secular and religious. As societies modernize, they often secularize, moving away from religion being the

absolute authority. Emerson and Hartman claim that when fundamentalism first emerged among American Evangelicals, it militantly opposed the liberalization of the Christian faith (Emerson and Hartman, 132). Marty discusses fundamentalism as occasionally militant in its opposition to modernizing society but also apparent in non-militant forms. Despite fundamentalism appearing in several forms across various religions and geographies, scholars generally agree that fundamentalism is reactionary to modernity. Fundamentalism, thus, cannot exist in isolation from modernizing societies.

Also associated with the modernization of society is the tendency of societies to innovate, grow, and adopt new values. As societies do this, they tend to move away from the absolute authority of religion and threaten religious institutions with opposing ideas (Emerson 130). Historically, nearly all societies were religiously based. However, as societies begin to modernize through the creation of government, standardized education, and legal systems - religious standards are generally removed from the moral code. Marsden suggests that fundamentalism is most seen amongst religious groups as an effort to return to the fundamental principles, teachings, and morals of a religion. Since the early twentieth century, when society began to modernize and move away from religious-based cultures, fundamentalists emerged in an effort to stop the spread of secularization and restore faith-based society (Marsden).

Fundamentalism first emerged in the United States Evangelical Church in the late nineteenth century (Marsden). The term was coined to classify the American Evangelical community's social and political response to the secularization of politics and modernization of society. Evangelicals were deeply offended by newly founded liberal ideas such as the theory of evolution and secularization and took dramatic social-political action. Modernizing Evangelicals were becoming more liberal and accepting new faith principles centered around logic and reason

rather than belief in miracles and the supernatural (Kenney 846). Liberal movements interpreted the Bible as a metaphor rather than a truthful account of history, infuriating Evangelicals. In response, Evangelicals took a fundamentalist approach to the situation and pushed for a return to traditional principles of Christianity.

By the early 1920s, the Evangelical Church in the United States began dividing between modernists and traditionalists. Disagreements over the validity of principles such as literalism of scripture and the absolute authority of God were sparked by societal modernism introducing ideas of *pluralism*[14] and *relativism*[15], which directly opposed traditional Evangelical Christianity. Many Evangelicals began adopting modernist principles within the church, viewing scripture as metaphorical rather than literal (Marsden). Fundamentalism arose in direct opposition to these reforms. Traditionalists self-identified as fundamentalists in the 1920s with the press release of The Fundamental Pamphlets, which were political propaganda resisting modernization within the church. The introduction of the theory of evolution significantly contributed to the onset of fundamentalism. As Evolution Theory[16] was introduced into the public school system, traditional evangelicals turned to fundamentalism as an avenue for advocating for traditional Christianity in the social and political sphere.

Since fundamentalism began in American Evangelical culture, it is often associated with Christianity. Many scholars believe that fundamentalism is exclusively a Christian phenomenon and reject the application of fundamentalism to other religious groups (Marsden). Others

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[14] Condition of peaceful coexistence of several groups with differing religions, classes, politics, interests, convictions, and lifestyles.

[15] The doctrine that knowledge, truth, and morality exist in relation to culture, society, or historical context, and are not absolute.

[16] Also known as "Darwinism" - the theory of biological evolution which indicates that species share a common ancestor and evolve over time through natural selection. Explains humans to be ancestors of other species, which directly conflicts with Christian Creation Theory.

consider fundamentalism a social phenomenon that can be applied to various cultural situations (Marty 15; Kenny 846). Due to the discrepancy in the scope of the term, definitions vary across scholars, and each includes various elements that define fundamentalism. In her book *The Cult of The Constitution*, Mary Anne Franks describes religious fundamentalism as:

> "The idealization of authority figures, selective and self-serving interpretations of sacred texts, an unfounded sense of persecution, and a belief in natural hierarchies." (29).

This definition provides specific characteristics of religious fundamentalism which are easy to quantify and observe. Other definitions of fundamentalism propose vague and subjective standards with loose language. These definitions make fundamentalism appear broader. For example, Kenney describes fundamentalism as:

> "A term used loosely to describe a reaction of (neo) traditional religion against the pressures of modernity, *fundamentalism* became a widespread topic of interest in the media and the academy during the last quarter of the twentieth century." (846)

Kenney's definition incorporates the reactionary aspect of fundamentalism to modernity. His use of "neo-traditional" emphasizes that fundamentalism is a return to pre-existing values; however, by including the prefix "neo," Kenney is implying that fundamentalism is not merely a return to tradition but that, in fact, fundamentalism includes new modern aspects as well. For example, some might argue that modern literalist Creationism is "Neo-traditional" and not truly "traditional"—because many or most Christians in the pre-modern past weren't insistent that the Genesis account of Creation literally referred to a 7-day period. Kenney also outlines the origin of fundamentalism in the United States and the deep overlap between American Evangelical fundamentalism and other political movements such as the New Christian Right[17], the Moral

[17] A political faction developed in the United States 1940s which seeks to influence politics with conservative and traditional teachings of Christianity.

Majority[18], and the Conservative Coalition[19] (847). Though fundamentalism is distinctly different from political conservatism, many core values of each group intersect, and most fundamentalists align with the conservative party. Kenney considers fundamentalism to have become applicable to several religions worldwide that follow similar patterns in their reactions to modernity.

Emerson and Hartman write similarly about fundamentalism as applying to several religions worldwide and consider it to even expand into parliaments, assemblies, and political systems (128). Their definition of fundamentalism, as outlined in *The Rise of Religious Fundamentalism,* classifies fundamentalism as:

> "Movements, organizations, and people who re-mystify, and who resist demystification"(128).

The notion of "mystification" has a religious undertone since a huge aspect of religiosity is the theoretical belief in the divine. However, Emerson and Hartman also indicate that:

> "Groups that want their religion practiced purely are called fundamentalist, as are groups pushing for an overhaul of the national or global political system who are at best culturally connected to a religion." (129).

They address the idea that although fundamentalism began as a religious term and is most often used in a religious context, it also stands as a political platform. They note that fundamentalism has emerged worldwide, becoming especially apparent in Iran, Sudan, Turkey, Afghanistan, and India, where fundamentalism has taken a political role. These countries have shown penetrations of fundamentalist ideals into assemblies, parliaments, and political parties.

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[18] A political action group formed in the United States in the 1970s to further conservative and religious agendas.
[19] Unofficial alliance of United States Congress members including the most conservative of both the Democratic and Republican parties. Greatly influenced Congress from 1937-1963.

Fundamentalism as it appears in these countries is commonly characterized by the media as militant and associated with religiously motivated violence such as suicide bombings and terrorism. Emerson and Hartman claim that in Jordan, Israel, Egypt, Morocco, Pakistan, and the United States, fundamentalism has become integrated into political systems (128). Lastly, Emerson and Hartman include fundamentalism movements in non-monotheistic[20] religions such as Sikhism, neo-Confucianism, Hinduism, and Buddhism (128). This application of fundamentalism in such a broad context and applied to non-monotheistic religions and political movements worldwide is a less common approach among fundamentalism scholars.

In contrast to this application, Marty considers fundamentalism applicable only to absolutist religions (21). According to Marty, fundamentalism opposes relativism, pluralism, and ambiguity and is thus inapplicable to religions without absolute authority. Similarly, to Franks, Marty notes that a strict interpretation of religious scripture is necessary to fit the definition of fundamentalism. They both accuse fundamentalists of "selective retrieval," which is picking and choosing scripture to best support social agendas (20). Uniformly, for Marty, fundamentalists are agents of sacred power who act in God's representation which "endows them with authorizing power to enact the divine will" (22). Marty agrees that fundamentalists are always reactive and strongly oppose modernity.

This concept is like the argument made by Marsden, which classifies fundamentalism as only applicable to Abrahamic faiths (2889). Marsden introduces the idea of dispensationalism which he argues is the strongest proponent of religious fundamentalism. Dispensationalism is the "systematic scheme for interpreting all of history on the basis of the Bible" (2889). Fundamentalists practicing dispensationalism consider the Bible entirely absolute with no error

[20] Characterized by the belief that there is only one God. Also often referred to as "Abrahamic" religions which include Christianity, Islam, and Judaism.

in detail. They give absolute authority to God and his scriptures and justify social means to uphold Christian core values. Dispensationalism is directly threatened by liberal Christianity, which considers the Bible metaphorical, science that proposes other theories opposed to Creation theory and debunks mystic aspects of the Bible, and atheism, which denies the truth of religion altogether. Dispensationalism is thus the cornerstone of fundamentalism in Marsden's view because it is the direct opposition that fuels social and political opposition to modernity.

Considering these definitions, several key aspects in defining fundamentalism are generally agreed upon amongst scholars. For the purpose of this essay, the overlapping concepts identified above will be the primary focus of fundamentalism. These will include:

1. Direct opposition and resistance to modernization.
2. Return to traditional core values of religion.
3. The absolute authority of God or a religious figure.
4. The selective interpretation of scripture.
5. Political engagement on behalf of religious motives.

These five aspects of fundamentalism are the concepts that are most commonly agreed upon among scholars. For the purpose of this paper, fundamentalism will be centered in a religious context, as most scholars have agreed that is where the term belongs. I will not distinguish which religious denominations fundamentalism should and should not apply to, as the specific scope of religions is irrelevant to my analysis. I will not define fundamentalism as applicable only to Abrahamic faiths. In the following sections, these five core aspects of fundamentalism will be compared against politics in the United States, specifically judicial interpretations of the Constitution.

Section III – Strict Constitutionalism and Fundamentalism Compared

This section will examine the similarities between topics covered in the previous two sections. I will draw on the analysis of judicial interpretation, religiosity, and fundamentalism and how these concepts converge and overlap. Specifically, this section will focus on strict constitutionalism and how its adherents share close similarities with practitioners of religious fundamentalism. This section will not make claims that strict constitutionalism is the same as religiosity or fundamentalism but instead aim to highlight the similarities between these two groups. The goal is to spark further thought and discussion on the topic, not to make claims of what something is or how it should be.

There exist possible patterns in method and practice between judicial modes of interpretation, religiosity, and fundamentalism. In her book The Cult of the Constitution, Mary Anne Franks introduces the idea of "constitutional fundamentalism," where she applies the term fundamentalism to strict constitutionalists (36). As section II outlines, most scholars define fundamentalism as reserved primarily for religious groups. Frank's use of fundamentalism to an entirely non-religious entity such as the Supreme Court is undoubtedly a choice that would receive resistance from some scholars. However, by doing so, Franks sparks a critical discussion of how these two groups are related and to what extent this comparison may or may not be valid.

Franks begins by provocatively claiming that strict constitutionalists share many similarities with cults (18). She defines religious fundamentalism in her own words as: "The combination of reverence and ignorance is at the heart of all fundamentalisms. (18)". While cults are often characterized by excessive devotion to a charismatic leader, the object of cult-like devotion can also be an idea or a text. Many radical religious groups are fanatically devoted to sacred scriptures such as the Bible or the Koran. Common characteristics of religious

fundamentalism include the idealization of authority figures, selective and self-serving interpretations of sacred texts, an unfounded sense of persecution, and a belief in natural hierarchies.

> "Constitutional fundamentalists exhibit these same tendencies. They idealize the founding fathers, read passages from the Constitution in isolation and out of context, believe themselves and their values to be constantly under attack and rationalize extreme inequality as the product of natural competition." (Franks 18).

Franks uses the term "cult" loosely, encompassing many branches of religious extremism and religious fundamentalism within the term. She then takes each aspect outlined in her definition of religious fundamentalism and applies it to strict constitutionalists' actions and thought processes. Her ultimate goal in this comparison is to claim that strict constitutionalism is a cult, and its followers are acting similarly to religious extremists.

Frank's blunt conclusions do not acknowledge the nuance between religiosity and fundamentalism. It would be fairer to consider strict constitutionalism a fundamentalism-like movement. A direct comparison of strict constitutionalism to a cult is a far reach with several holes that are not adequately analyzed. Other scholars have made similar claims to Frank's regarding the quasi-religious following of the Constitution. Sandford Levinson grapples with the intersection of patriotism and religion in his book Constitutional Faith. Levinson identifies patriotic devotion to the Constitution as similar to adherence to religious scripture and outlines many specific similarities between the American government and religious life. Both Levinson and Franks draw connections between religion and constitutional interpretations and suggest the consequences of this relationship. I intend to analyze similar patterns using the definitions of religiosity and fundamentalism forged through my own research.

Strict Constitutionalism as a Form of Fundamentalism:

After studying the various definitions of fundamentalism, five key components stand out above others. As section II outlines, fundamentalism entails:

1. Direct opposition and resistance to modernity.
2. Return to traditional core values of religion.
3. The selective interpretation of scripture.
4. The absolute authority of God or a religious figure.
5. Political engagement on behalf of religious motives.

These five components of fundamentalism were derived from analyzing religious fundamentalism; however, these principles can also apply to phenomena beyond the realm of religion. Building on the arguments of Franks and Levinson, strict constitutionalists might also follow this definition in some respects. Though strict constitutionalists are not inherently religious, Franks and Levinson argue that they essentially treat the American government like a religion of its own and adhere to its principles in similar fashions as religious followers. Due to the occasional overlap of originalist and textualist practice, it is best to look at strict constitutionalists as a whole unit for this initial comparison. Applying strict constitutionalism to these five standards of fundamentalism might look something like this:

1. Direct opposition and resistance to modernization *and liberalism*.
2. Return to traditional core values of ~~religion~~ *the Constitution, and the founding fathers.*
3. The absolute authority of ~~God or a religious figure,~~ *the founding fathers.* (Originalists do this).
4. The selective interpretation of ~~scripture~~ the Constitution. (Textualists do this).

5. Political engagement ~~on behalf of religious motives~~ *through judicial activism and changing legal precedent.*

Upon further examination, it is first evident that strict constitutionalists strongly oppose modernity and judicial liberalism. This claim is supported by the tendency for originalists and textualists to cite the law's original meaning and reject modernizing moral values of what the law should be. Rejecting modernization is seen in the Supreme Court when Justices claim that the Constitution was never intended to support various new statutes or social changes. *Dred Scott* was a perfect example of this, as the Court used the concept of originalism to reject the growing desire to expunge the institution of slavery. This same rhetoric was reinforced in subsequent cases regarding civil rights for many decades to come, effectively limiting social modernization and liberalization.

Additionally, strict constitutionalists turn to the traditional core values of the Constitution and the founding fathers. Verbiage such as "the founders never intended…" are common among originalist opinions. Originalists aim to restore the social and political climate of the United States to its original form, at least in some respects. Some key case examples of strict constitutionalists rejecting modernity and pushing for a return to traditional meaning include *Dred Scott v Sandford*[21] 60 U.S. 393 (1856), *The Civil Rights Cases*[22] 109 U.S. 3 (1883), *Pollock*

[21] Landmark decision in the Supreme Court. Dred Scott was a slave living in Missouri, a slave state. Scott later moved to Illinois, a free state and sued the state of Missouri for his freedom based on the Missouri Compromise of 1820. The Supreme Court ruled that Scott didn't have any standing to sue in federal court because he was not considered a citizen of the United States. The court added that the founders never intended for a "negro" or descendant of slaves to be included in "we the people".

[22] A collection of cases were black persons sued for equal accommodations in privately owned public spaces. Argued that due to businesses being public, they were subject to public regulations created by the federal Civil Rights Act of 1875. The Supreme Court ruled that the 14th Amendment did not give the federal government power to regulate acts of discrimination between private parties. They ruled the Civil Rights Act of 1875 unconstitutional and voided it.

v Farmers' Loan & Trust Co[23] 157 U.S. 429 (1895), *DC v Heller*[24] 554 U.S. 570 (2008), *Kennedy v Bremerton*[25] 21-418 U.S. 597 (2022), *Dobbs v Jackson*[26] 19-1392 U.S. 597 (2022), to name a few. In *Dred Scott*, the Court noted that people of color were "not intended to be included, under the word 'citizens' in the Constitution." In *Pollock,* the Court referenced those who "framed and adopted" the Constitution when determining the legality of tax law. And in *DC v Heller,* Justice Scalia noted that "At the time of the founding, as now, to 'bear' meant to 'carry.'." The Court conducted extensive discussion on the original meaning of "militia" and the intention of the Second Amendment in the context of early America. Each of these cases cites the intentions and context of the social and political climate at the time of the founding.

Building on this point, strict constitutionalists, and specifically originalists, place great importance on the founders' intentions in a way that resembles praise. The absolute authority of a religious figure is a pillar of religious fundamentalism. As discovered when analyzing religiosity, the theological aspect of belief in the divine is vital to monotheistic religions (Holdcroft). Characteristics of theological faith in religion include worshiping figures such as God, various prophets, or other religious figures. People with strong religiosity take the words and actions of their saviors to be holy, divine, and absolute (Marty 21). Similarly, strict constitutionalists place absolute authority on the founding fathers. This relationship is not identical to religion.

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[23] Ruled that the implementation of federal income tax in 1894 was a violation of Article I section IX of the Constitution. This was later overruled with the passing of the 16th Amendment which allowed this taxation.

[24] Concerns District of Columbia's regulations on handguns and concealed carry. The Supreme Court ruled that such restrictions violate the Second Amendment.

[25] Discusses the First Amendment Free Exercise and Freedom of Speech clauses. Ruled that a public-school coach cannot be barred by the school district from praying before games. Established "historical practices and understandings" test which references the intentions of the First Amendment when established.

[26] Concerns the Constitutionality of abortion restrictions in Mississippi. The Supreme Court ruled that restrictions were within Constitutional provisions, despite violating precedent set by *Roe v Wade* and *Casey v Planned Parenthood.* The Court reasoned that the initial decision in *Roe* in 1971 was inappropriately decided as the right to privacy is not enumerated in the Constitution. The reversal of legal precedent in this decision aimed to return to the original intent of the Constitution and limit modernizing interpretations.

Originalists likely do not praise the founders, worship them, or centralize them as a core piece of daily life. However, they consider their ideals absolute, stick firmly to their theories, and spread their ideas. There is at least some level of praise that cannot be ignored when analyzing the religious tendencies of strict constitutionalists.

To the fourth point of fundamentalism, strict constitutionalists interpret the text of the Constitution literally and selectively (Davis). This is primarily true of textualists. The actual words in the Constitution are most important to textualists compared to the legal precedents set by past judges. This dynamic is very similar to the scriptural dynamic seen in Abrahamic religions (Emerson 131). Most religious scholars give foremost authority to religious texts or words of God and subsequently follow the terms and teachings of other prophets. In the same way, strict constitutionalists are first and foremost referencing the plain text of the Constitution and subsequently following laws set through precedent. Both scriptural text and the Constitution are the first absolute authority. Similarly, both the teachings of prophets and judicial opinions represent influential and respected jurisdiction but not the first tier of law (Davis). Franks' point about reading the Constitution in isolation and out of context is synonymous with the idea of selective retrieval from fundamentalism research. Cherry-picking constitutional text to fit an argument or idea best is similar to using selective scripture by religious fundamentals.

Additionally, as outlined in Levenson in his book Constitutional Faith, the Constitution itself is treated with divine care.

> "[s]ome men look at constitutions with sanctimonious reverence and deem them like sacred to be touched." (Levenson, 9).

Levenson outlines that such a high standard of care is also seen in religious texts. This adds yet another layer to the divine authority of scripture in the eyes of strict constitutionalists.

The words themselves cannot be altered and must be interpreted at face value, as well as in the physical document. This is yet another similarity between strict constitutionalism and religious fundamentalism.

The fifth point of fundamentalism can only loosely be applied to strict constitutionalists because of the nature of the Supreme Court as not partisan. It would be unfair to claim that all strict constitutionalists engage politically on behalf of their beliefs. It would also be unfair to claim political activism to be true of strict constitutionalists and not living constitutionalists (Franks). Accusations of judicial activism are prevalent on both sides of the aisle. Despite stare decisis being a judicial doctrine, the Court frequently overturns existing case precedents (O'Brian 2013). Overruling was less common in the 19th century as the country was still young and had minimal case history to disagree with. But since the twentieth and twenty-first centuries, overruling has become much more common. On average, the Supreme Court overturns precedent in one to two out of every ten cases. An exception to this has been the Warren Court, which overturned 56 case precedents in its tenure, being coined as judicially activist (O'Brian 2020). In response to Warner, the Burger Court, directly following this, overturned 55 case precedents in the reverse moral and political direction. The current Roberts Court, active since 2005, has begun to follow similar patterns, already overturning 17 of the 21 precedent cases it has heard. Most precedent overruling occurs in the first few years under the newly appointed chief justice. This is generally due to a change in the political and moral demographic of the Court.

Accusations of judicial activism have been a topic of recent discourse since the three Supreme Court appointees of the Trump administration. The current Roberts Court has successfully begun to set back the legal clock to resemble the original intentions and meaning of the Constitution more closely (Alecia). They have participated in judicial activism by rejecting

precedents established in previous cases and undermining past judicial interpretation. Rejecting past precedent is not an uncommon practice, but what is uncommon is the quoting and citing of the original meaning and intention of the Constitution when participating in activism. Most incidents of precedent reversals are working towards modernization by removing and updating outdated precedents. In the political sphere, "activism" generally has a liberal connotation. Participating in activism with the goal of discarding modern legal standards and returning to outdated social dynamics from the 1800s is less common. This practice of turning back time is the primary objective of the Roberts Court, prompting extensive media attention and critique. The recent decision by the Roberts Court in *Dobbs v Whole Woman Health* reversed an over fifty-year living precedent set by *Roe v Wade*. This decision of judicial activism hinges on the rights established in *Roe* not being enumerated in the original Constitution or the founders' foresight.

Examples of judicial activism can involve gun rights, the right to privacy, and religious freedoms, to name a few. Cases that affect individual liberties generally gain more media traction and are the most controversial, making them precise forms of activism. At other times, judicial activism can be as subtle as agreeing to hear cases that could otherwise be dismissed on stare decisis (O'Brian 2020). Deciding what cases to decide is often politically motivated, especially as Supreme Court appointees become more controversial and politically motivated.

Strict constitutionalists have, in their own way, forged a path very similar to that of religious fundamentalists. The systems are not identical, and strict constitutionalism certainly lacks the criteria to be considered a religion. But it does seem fair to consider strict constitutionalism a form of fundamentalism. As discussed in Section II, many scholars agree that fundamentalism can be applied to various social and political systems. Patriotic originalists and

textualists meet enough of these criteria for a compelling case on this comparison. Comparing strict constitutionalism with fundamentalism using the five pillars highlights the similarities between these two groups.

Cross Comparison of Textual Commitment and Authority of Figures

The graph below compares two of the five pillars of fundamentalism. Strict commitment to text is seen on the green axis, and the absolute authority of religious figures is on the blue. These two aspects of fundamentalism have the most cross-over with the core values of strict constitutionalism. As the graph demonstrates, many practitioners of strict constitutionalism reside in a similar space on the graph as religious fundamentalist groups.

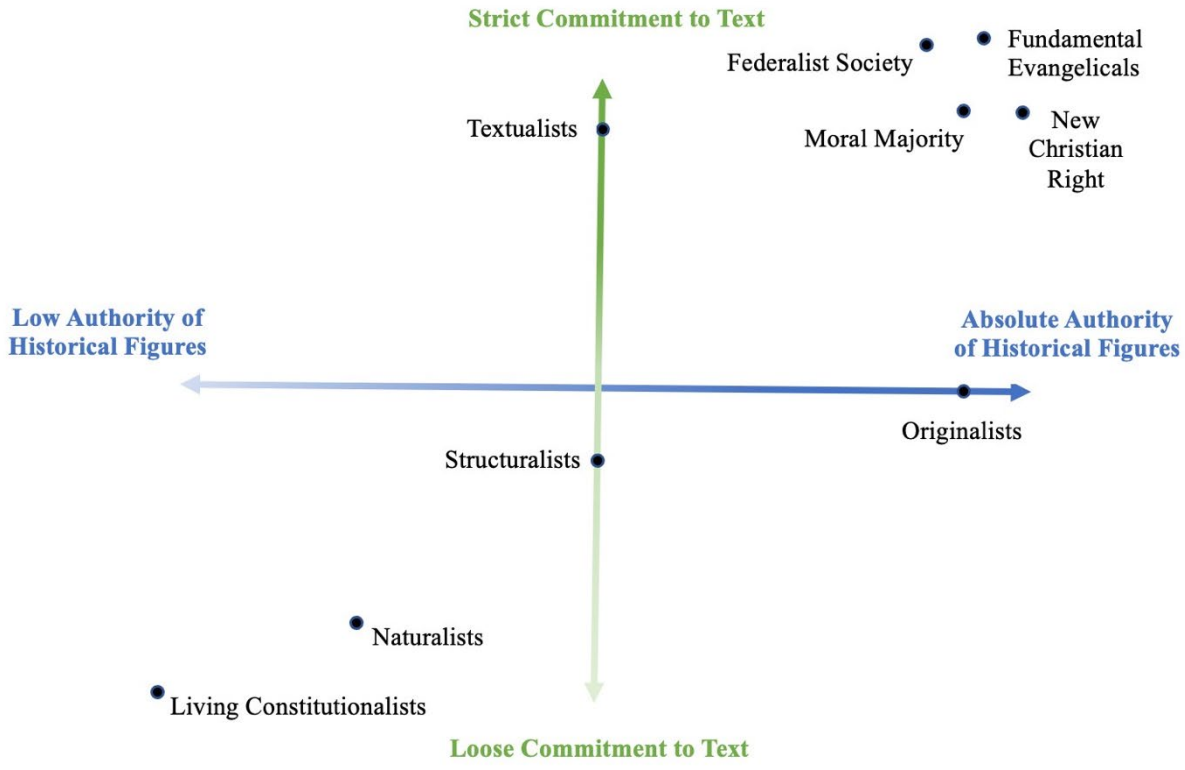

Figure 1. Relation of textual commitment and absolute authority of historical figures.

Originalists are shown on the graph to be at the highest point of the absolute authority of religious figures and in the middle of textual commitment. Textualists then are located at the highest point of textual commitment and in the middle of absolute authority. Strict constitutionalists, or justices who practice both textualism and originalism, reside in the upper right quadrant of the graph. Also shown in the upper right quadrant are fundamental Evangelicals, who devoutly practice strict commitment to religious texts and the absolute authority of historical figures. Other groups, such as the Moral Majority and the New Christian Right, practice similar levels of textual commitment and absolute authority, which place them in the upper right quadrant as well. Lastly, the Federalist Society, a legal, educational group that promotes strict interpretation, is located in the upper right quadrant. The similar placement on the graph of fundamental religious people, strict constitutionalists, and other politically conservative groups demonstrates their similar views on textual commitment and authority of figures. These various people share core values that are reflected in their lifestyles and professions.

Though this comparison only addresses two of the five pillars of fundamentalism, it evaluates the components which are easiest to measure and most consequential in the legal sphere. Strong commitment to the text and absolute authority of historical figures results in legal decisions through the courts, significantly impacting American society. If the core values of justices with a strict interpretation closely align with the values of religious groups, the motives of fundamental religion and strict constitutionalism are arguably similar. Both groups act to defend and uphold their core values. This results in outcomes that are preferable to both fundamental evangelicals and strict constitutionalists. Though the logic behind each group might differ, that does not disregard the similar outcome in practice. Fundamental Evangelicals, strict constitutionalists, and politically conservative groups are all pushing for similar legislation,

moral values, and societal norms. These groups also reject ideas that misalign with their created norm in a similar fashion.

This comparison is not to say that all strict constitutionalists are religious or that all religious fundamentals are involved in the legal or political system. Some cross-over among these groups is expected, as the alignment of core values would assume association with like-minded individuals. An example of a group with multidiscipline crossover is The Federalist Society, a legal group founded in 1982 to promote the originalist and textualist interpretation of the law and train future lawyers in this discipline (Hollis-Brusky, 16). The primary focus of the Federalist Society is education, being primarily active throughout law schools. The objective is to instill morals and theories of legal interpretation in future lawyers who will go on to implement those theories through law and politics. Though political activism is not the main focus of the group, nor are political propaganda and campaigns coordinated by the group, many group members are politically active on behalf of the organization (Hollis-Brusky). The recent appointment of Justices Barret, Kavanagh, and Gorsuch was highly influenced by the Federalist Society, which is when the organization began gaining media attention (Schwartz).

Beyond having strong originalist theories, the Federalist Society has ties to religious practice as well (Schwartz). According to Schwartz, much of the Federalist Society's legal theory is closely related to Catholic natural law theories that are over 800 years old. In many ways, Catholic natural law parallels originalism in that it hinges on a strict following to text and authority figures. However, in the case of Catholic natural law, the text of adherence is the Bible, and the divine figure of authority is God. Catholic natural law and religious freedoms are mentioned extensively on the Federalist Society website, in equal or greater frequency to mentions of originalism (Schwartz). Noticing the similarities between Catholic natural law and

strict constitutionalism and how each theory is vital to the Federalist Society helps illuminate the inherent religious presence in the group's ideas. Catholic natural law may or may not be delineated as fundamental, however, the fact that it is both religious and a strict interpreter is notable.

Section IV - Implications

Section III outlined the similarities between strict constitutionalism and religious fundamentalism. It demonstrated how the pillars of religious fundamentalism could be applied to strict constitutionalism and how practices between the two groups parallel. Assuming that this comparison is accurate, what are the possible implications? Certain risks are associated with the close tie between fundamental religion and strict legal interpretation. No justice on the bench openly endorses imposing personal religious beliefs into their work. However, if their legal decisions result in outcomes that are celebrated by religious groups, then this shows that strict constitutionalists might have similar interests and goals with certain religious institutions. The Justices' commitment to neutrality holds little legitimacy if outcomes consistently follow patterns of other religious groups. Or might this close correlation between interests and results indicate that, to some degree, the laws are written to support religious interests?

Regardless of the reason for this similarity, the American public perceives this close relationship as a problem. Franks and Levinson both outline several issues with the devout following of the Constitution in their respective books, as previously outlined in Section III. Franks clearly states in the closing chapter of her book, The Cult of The Constitution, that:

"Constitutional fundamentalism has for far too long allowed white men to enjoy the benefits of constitutional rights while forcing women and nonwhite men to shoulder the costs" (Franks, 212).

Frank's claim outlines how constitutional fundamentalism allows for oppressive systems to persist, a clear consequence of this judicial interpretation. The media also has extensively covered originalism, hinting at issues with close religious relationships. The Justices may claim otherwise, stating that the reasoning supporting their decisions is rooted in legal theories that are

not inherently religious. Nonetheless, the results and goals of religious groups and strict constitutionalists align. Religious fundamentalists and strict constitutionalists taking similar stances on social decisions indicate that they share similar values. Especially considering that other Justices interpret identical social dilemmas through an entirely different lens, it can be concluded that the purpose of most legislation is not finite and often requires a balancing of core values. One could argue that religious fundamentalists and strict constitutionalists coming to similar conclusions is just happenstance and, therefore, not a real issue. That is a possibility; however, the problem arises as the American public begins to express concerns, and thus it must be addressed.

Namely, this close relationship contradicts the alleged separation of church and state. The First Amendment's Establishment Clause explicitly states that “Congress shall make no law respecting an establishment of religion.” (“First Amendment and Religion.”). This amendment was interpreted for roughly the first 150 years since the United States' founding to imply the separation of church and state within government (Ryman). During the ratification of the Constitution, the colonies were divided, some endorsing religious involvement in government and others advocating for the separation of church and state (Ryman). In 1802, Thomas Jefferson famously wrote that the Establishment Clause metaphorically acts as a “wall of separation between church and state” (Ryman). Although the Establishment Clause only explicitly calls out Congress, the Judicial Branch plays a significant role in interpreting this amendment. The Judicial Branch directs the interpretation of laws, adding meaning and directing legislation; thus, in theory, the Establishment Clause should be equally relevant to it. The separation of church and state has been a controversial topic in recent history as Establishment Clause cases have reached

the Supreme Court. However, the Supreme Court has consistently held and reinforced that the purpose of the Establishment Clause is to separate church and state.

Disagreement over the meaning of the Establishment Clause did not arise until *Everson v Board of Education*[27] *330 U.S. 1* (1947). This was a landmark case involving indirect taxpayer aid to private religious schools. The case concerned a New Jersey law that authorized tax reimbursement of transportation costs to and from school for public and private school parents. The petitioner accused New Jersey legislation of funding religious schools using taxpayer dollars, which violated the Establishment Clause. The Supreme Court upheld in a 5-4 decision that the reimbursements for transportation costs did not directly fund religious schools and instead were intended to target all parents of all schools, regardless of religious affiliation. The majority opinion in *Everson* was written by Justice Hugo Black, a Textualist (Pacelle). This case began the discussion amongst the Supreme Court to delineate which laws and legal principles might contradict the Establishment Clause and which others do not. As the climate of the Court fluctuates over time, the extent of church and state entanglement distinguished by the Court also fluctuates. Changes in this relationship reflect the values of the Court, as some Courts might allow higher levels of church and state entanglement while others do not.

Several similar cases involving the Establishment Clause have raised additional concerns about government funding for religious schools and organizations. *Lemon v Kurtzman*[28] *403 U.S. 602* (1971) declared Rhode Island and Pennsylvania laws that supplemented teacher salaries and educational material costs in private schools unconstitutional. In an 8-0 decision, the Supreme

[27] Ruled that reimbursements to parents for transportation costs to and from school, including religious private schools, did not violate the Establishment Clause of the First Amendment.

[28] Ruled that state funding of non-public, non-secular schools was an excessive entanglement of church and state and a violation of the Establishment Clause. Created "Lemon Test" to use on future legislation involving church and state.

Court led by Justice Burger found that these laws directly funded private religious schools, which violated the Establishment Clause. The Court created a doctrine called the "Lemon Test," which outlined a three-pronged test that legislation must pass to avoid violating the Establishment Clause. The test outlined that the statute must 1. Have a secular purpose, 2. Its principal or primary effect cannot promote nor inhibit religion, and 3. And it cannot foster "government entanglement with religion" (397 U.S. 674). The precedent set in *Lemon* changed the conversation surrounding religious establishment from the previous precedent in *Everson*. The Court reasoned that there is insufficient distance between church and state in this case. Although legislation in *Lemon* might have benefited parents of all schools - not just religious schools, direct funding of teacher salaries and educational materials was seen as a direct state involvement. *Lemon* created stricter boundaries for legislation to remain within the bounds of the First Amendment, further specifying the parameters of the Establishment Clause.

Agostini v Felton[29] *521 U.S. 203* (1997) dismissed part of the Lemon Test, stating that only cases with an extensive conflict between church and state violate the Establishment Clause (Dulk). *Agostini* involved a New York public school program that federally funded public school teachers to provide remedial instruction in parochial[30] schools. The District Court deemed this public funding and relocating of public-school teachers to religious schools as a violation of the Establishment Clause. Twelve years after this District Court decision, the Supreme Court overruled the District Court in a 5-4 majority opinion led by Justice Sandra Day O'Connor and joined by justices Scalia, Thomas, Rehnquist, and Kennedy. This mixed majority of living and

[29] Ruled that it is not a violation of the Establishment Clause for public school teachers on public salary to teach remedially in parochial schools. Reasoned there is no evidence that public school teachings working in parochial schools will lead to the indoctrination of religion into the state. Changed the Lemon Test to only persecute excessive conflicts between church and state.

[30] Relating to a church parish.

strict constitutionalists declared that not all entanglements of church and state should be deemed to have advancements or prohibitory impacts on religion, thus not being a concerning entanglement of church and state (Dulk). This case removed the "secular purpose" prong of the Lemon Test and changed the trajectory of the Establishment Clause once again. By overruling a District Court decision in *Agostini* and allowing the entanglement of church and state to persist, this decision shows the values of the Supreme Court at the time (Dulk). Justices involved in this majority opinion thought that the federal aid of underprivileged communities and religious schools that demonstrated the need for public assistance outweighed the enforcement of the Establishment Clause.

In sister cases, *McCreary County v American Civil Liberties Union*[31] *545 U.S. 844* (2005) and *Van Orden v Perry*[32] *545 U.S. 677* (2005), the Supreme Court ruled that the display of the Ten Commandments within Kentucky Courtrooms and Texas the State Capitol building was a violation of the Establishment Clause. In *McCreary,* the Court considered this religious display to have the clear purpose of advancing religion and required the Kentucky Court to remove religious displays (Ravitch). However, in *Van Orden*, despite the Court declaring the display of the Ten Commandments to be a violation of the First Amendment, the Court did not require the removal of the Ten Commandments because they were displayed on a long-standing religious monument. By failing to force the Texas capitol building to remove the Ten Commandments, this case shows how tradition and preserving national monuments took on a higher value than

[31] Involved ACLU lawsuit against three Kentucky Federal Districts Courts for displaying framed Ten Commandments in the courtroom. The Supreme Court ruled this religious demonstration to violate the Establishment clause.

[32] Ruled that although the display of Christian Ten Commandments in Texas capitol building was in violation of the Establishment Clause, the display was a monument and therefore preserving historical monuments outweighed the First Amendment violation and the Ten Commandments remained intact.

deconstructing religious entanglement with the state. These cases being so similar yet yielding different outcomes also demonstrates the complexity of the relationship between church and state. This again reflects a weighing of conflicting values among the Court. In this case, other values outweighed the threat to the Establishment Clause.

Despite the Establishment Clause being a core value of the American government, religion continues to be a component of many judicial practices. To this day, each Supreme Court session commences with the words "God save the United States and this honorable court" (Ryman). Supreme Court Justices are bound by the oath of the Constitution and the Judicial Oath upon confirmation to the Court. Both the Constitutional Oath and the Judicial Oath include language of "faithfulness," "bear true faith," and "so help me God" ("About the Senate…"). Justices customarily recite these oaths with one hand atop a Christian Bible; however, this is not a requirement (Jones). What do these practices say about the separation of church and state? If the purpose of the Establishment Clause is to prohibit a national establishment of religion and distance state practices from religion, why have customs such as these persisted?

The cases mentioned above are only a few of many involving the Establishment Clause that have reached the Supreme Court. What is clear from this investigation is that despite changes to legal tests, judicial doctrine, and degrees of religious and state entanglement, the Establishment Clause has been continuously interpreted to protect the separation of church and state. As delineating what laws violate the Establishment Clause has changed slightly throughout time, the value of the separation of church and state has also fluctuated among justices. Some justices place a higher priority on aiding communities through reimbursements and tax funding, preserving national monuments, or upholding the right to free speech - considering these values outweigh the importance of separating church and state (*Everson*). When various values and

human rights collide, noticing how the Court reasons and weights religion in the equation helps determine their perspective. Some may criticize court decisions that allow church and state to be closely intertwined. Many secular organizations, such as the ACLU and National Education Association, disagree with any amount of public funding to religious schools (Graham). Other perspectives consider some amount of church and state relation acceptable, so long as one religion is not favored over others, and the values the law is intended to promote outweigh the potential risks of church and state relationships.

The line between church and state is blurred, and there is no clear answer on how to uphold the vague language of the Establishment Clause. Originalist justices often side with allowing religious ties and religious freedoms to persist, while living constitutionalists consider the changing and secularizing American society as evidence to support entirely separating church and state. From the abovementioned cases, strict constitutionalists tend to defend religion when deciding cases. There are many reasons why this may be the case, and it fails to be a consistent trend one hundred percent of the time. Occasionally justices with differing perspectives on law and religion agree on where religion lies in the law. The relationship here is not perfectly divided or entirely transparent. What is essential when analyzing the Establishment Clause's history and meaning is the American public's perception of it. Citizens criticize the Supreme Court for making decisions that favor religion. Whether or not this concern is always valid is questionable. However, the conversation regarding religion amongst the Supreme Court is becoming a topic of concern and deserves further investigation.

Many justices themself are religious. On the current Roberts Court, all nine Justices identify with a major religion. Six of the nine current justices practice Catholicism, Ketanji Brown Jackson and Neil Gorsuch make up the only non-denominational Protestant Christians,

and Elena Kagan is the sole Jewish Justice currently on the Court (Newport). Although serving on the Supreme Court is an impartial role, and these justices swear oaths to interpret the Constitution unbiasedly, this expectation is nearly impossible to achieve perfectly. Justices adopt interpretation styles based on core values and general perspectives on society and moral standards. If religion is a driving factor in the life of a Supreme Court justice, it will to some extent, influence their general values and guide the way they see the world and thus the methods in which they interpret laws.

As Section III of this thesis outlines, many core values between religious fundamentalism and strict constitutionalism overlap. None of the current Court's Justices openly practice religious fundamentalism; however, the values of justices such as Barret, Kavanaugh, Alito, Thomas, Gorsuch, and Roberts have proven to be like fundamentalism in their devotion and practice—namely textual interpretation and absolute authority of historical figures (Davis). Decisions by the current Roberts Court, which verge on the side of strict constitutionalists, have produced outcomes that are often favorable for religious groups. This begs the question of whether religious values can truly be separated from legal decisions and, further, if the interpretive method of strict constitutionalism has become a theory that itself is fundamental. Strict constitutionalists already hold overlapping values with religious fundamentalists. Does their additional commitment to religion in their personal lives further this complicated entanglement of religion and law? Many argue yes, and this has been a huge debate amongst the American public.

On another point, many of the living constitutionalists on the Court also practice religion in their personal life. This further complicates the role of religion in the equation of judicial interpretation. If a justice can be religious, and practice living constitutional interpretation, then

does religion actually impact judicial decisions? This point outlines a critical angle of the argument. It is not, in fact, that religion influences strict constitutionalists; it is that strict constitutionalists have adopted religious values and engrained them into legal theory. Religion is not necessarily the force driving strict constitutionalism. It is that strict constitutionalists have adopted fundamental practices and begun a neo-traditional and extreme return to tradition. Since religion is a part of the conversation, and the methods of strict constitutionalists so closely resemble religious practices, the narrative has been contorted to villainize religion in all facets. This is unwarranted, as most justices of all judicial styles have been members of a religion.

Current cases arising relevant to this work from the Roberts court with potential consequences for the American public have included *Hobby Lobby v Burwell*[33] *573 U.S. 682* (2014), *June Medical Services v Russo 18-1323 U.S.* (2022), *Masterpiece Cakeshop v Colorado*[34] *570 U.S. 644* (2018), *319 U.S. 624* (201*8), Gonzales v. Carhart*[35] *550 U.S. 124* (20*07), Federal Election Commission v. Wisconsin Right to Life*[36] *551 U.S. 449* (2007), *Morse v. Frederick*[37] *551 U.S. 393* (2007), *District of Columbia v. Heller* (2008*), Citizens United v. Federal Election Commission*[38] (2010) to name a few ("On The Issues…"). These cases concern a plethora of societal issues, including Second Amendment rights to gun ownership, First

[33] Ruled that corporations which are "closely held" can claim religious affiliation and deny employees of contraceptive coverage in company provided health care plans based on religious values.

[34] Ruled that Masterpiece Cakeshop can deny service to same-sex couples based on religion under the Free Exercise Clause of the First Amendment. Court reasoned that free exercise of religion outweighed the Fourteenth Amendment protections for same-sex couples against discrimination.

[35] Ruled than bans on partial-birth abortions did not pose an undue burden on women seeking abortion.

[36] Wisconsin's Right to Life (WRTL), a political advocacy corporation, ran advertisements encouraging voters to oppose judicial nominees within 60 days of an election - in violation of the Bipartisan Campaign Reform Act (BCRA). The Supreme Court ruled the BCRA unconstitutional when applied to issue ads such as WRTL's. The Court allowed the ads to commence.

[37] The Supreme Court reversed Ninth Circuit Court decision, ruling that schools may prohibit students' free speech when messages promote illegal drug use.

[38] Ruled that corporate funding of independent political broadcasts in candidate elections cannot be limited.

Amendment rights to free speech, the collision of free speech and religion, voting rights, election practices, etc. Each case demonstrated a majority vote supported by strict constitutionalists, split across ideological lines. Justices Scalia, Kennedy, Alito, Roberts, and Thomas represent the majority opinion in most of these decisions. More recent additions of Barrett, Kavanaugh, and Gorsuch will keep the Supreme Court at a strict constitutionalist majority for years to come. This demonstrates how a slim majority on the Court can result in legislative changes that have lasting effects on the American public. Many of these cases cite original intent, strict constitutional meaning, and the founding fathers' visions of the American government. These decisions demonstrate a higher value being placed on tradition and strictly following the Constitution over other evolving American values.

Many of these cases have nothing to do with religion, establishment thereof, or free exercise. Justices have not asserted their own religious opinions in any of these cases. What has been made clear through these cases is the devout commitment to textualist practices. Many of these controversial and divided opinions have resulted in consequences for minority groups, secular groups, and the general American public. *Masterpiece Cakeshop* is a key example of this, where the Court defended the free exercise of religion, resulting in discriminatory practices towards same-sex couples. Similarly, *Hobby Lobby* allowed religious corporations to deny contraceptives through employee healthcare packages due to religious opposition to their usage. *Dobbs* overturned a more than fifty-year-long precedent that interpreted a woman's right to privacy in abortion as constitutionally endowed. Each of these cases yields real effects for the American public, many prohibiting modernization and liberalism in favor of traditional values. Upholding traditional values in legislation promotes an outdated system of oppression that is not

inclusive of LGBTQ communities or women's rights, as demonstrated in these decisions. The precedent set by justices in these decisions limits future legislation and essentially creates laws.

Criticism of these decisions, and the merit of the Roberts Court, in general, has been rampant, especially in recent years (Greve). The appointment of three justices during the Trump administration surged colossal skepticism about the judicial legitimacy of the three openly religious and strict constitutionalist justices. Greve defines judicial legitimacy as "the political and public acceptance or acceptability of judicial decisions" and outlines that the court is at risk of judicial legitimacy for several reasons. According to Greve, the most significant threat posed to the current Roberts Court is that citizens will only respect judicial rulings which align with their personally held political beliefs. Greve considers this to be partially the fault of the Supreme Court for both its passionately held ideologies and its's recent actions in political cases. Greve claims that the Court has conducted subtle, well-timed, and carefully crafted decisions in cases under both the Obama and Trump administrations which affected proposed legislation. Actions such as these and engagement with cases of high political temper further push the narrative that the Court is acting on behalf of personal political or religious agendas.

Greve also acknowledges that the decline in judicial legitimacy is not solely at the fault of the Court and its actions (Greve). He notes four other factors in the current American political climate that perpetuate this problem, including: intense partisan polarization, a lack of a dominant political coalition, an unprecedented degree of social mobilization, and the rise of Executive power. These factors amplify the actions of the Supreme Court, making the issue of judicial legitimacy all the more pressing.

There will never exist a Supreme Court bench that is adored by the entire American public, but if skepticism over judicial legitimacy persists, the overall authority of the judicial

branch is at risk. One potential solution Greve suggests involves justices taking more temperate measures when approaching court cases (Greve). He urges greater judicial candor, restraint, and deference in their legislative judgments. This essentially suggests that Justices should take a more moderate approach to the law and only use and aggressively defend extreme interpretation methods when necessary. Greve notes that currently, Justices tend to engage in the lengthy majority, concurring, and dissenting opinions where such extensive discussions of topics are not relevant. If the Court could come to more opinions of agreeance across various ideologies, the American public would recognize that these justices do find common ground in legal decisions, despite their differing views. Most recent Supreme Court cases concerning politically charged topics result in 5-4 decisions, split across ideological lines. If this pattern could be extinguished, the Court might have hope of restoring judicial legitimacy.

The recent actions of the Roberts Court in overturning a decades-long precedent based on strict constitutional interpretation is a major concern of public interest groups. If this trajectory continues, the legitimacy of the Judicial Branch is at risk (Greve). The American public has already begun drawing conclusions about the merits of the current Court. If this continues as it is likely to do, the Court may start to lose authority and legitimacy. Whether or not justices are religiously motivated cannot be answered definitively. All that can be discovered on this topic is the trends of these justices and the values that they hold. Topics such as abortion and Second Amendment rights to gun ownership are sensitive and polarized nationwide. The outcomes of these types of cases will receive significant media attention and undoubtedly upset a large portion of the population, regardless of which way these decisions fall. If justices can reach more moderate conclusions on these politically charged problems and find common grounds across ideological lines, the legitimacy of the Court may prevail. Textualism and originalism hold very

passionate and extreme positions on law and, therefore, cannot be the answer. Recognizing this current pattern and its possible implications is the first step in addressing the problem. Judicial interpretations of the recent Supreme Court are heavily weighted in strict constitutionalism. With the close resemblance that this interpretation method has to fundamentalism, the Court risks losing its legitimacy in the eyes of the American public.

Conclusion

This research examined the parallels between strict constitutionalism and religious fundamentalism in method and practice. Clear patterns emerged across the ideologies of the two groups. Similarities in textual commitment, the authority of historical figures, return to traditional core values, resistance to modernization, and political engagement through judicial activism or otherwise were identified as the key similarities between strict constitutionalists and religious fundamentalists. Textual commitment and absolute authority of historical figures were particularly relevant, as originalism and textualism are devoted entirely to these two facets, respectively. Strict constitutionalists displayed many of the same characteristics of fundamental religious groups, which ultimately supports the classification of strict constitutionalism as fundamental.

Many court cases demonstrated the possible implications of the close relationship between strict constitutionalists and fundamentalism. As the current Supreme Court trends in a strict constitutionalist direction. A neo-traditionalist return to core values has emerged in recent case decisions. The devout commitment to text and tradition in the opinions of justices with strict ideologies further supports their fundamental classification. Cases that place values of tradition above other core values shared by many Americans prove that strict interpretation has consequences. Valuing tradition and original commitment to the Constitution has limited other rights, such as abortion accessibility, protections for same-sex couples, free speech infringements, et cetera. When conflicting values arise, strict constitutionalists err on the side of tradition. Furthermore, their traditional values closely follow those of religion, and it has often been the case that religious values take priority over other values based on textualism and

originalism. Religious priority was shown when examining the complexities of the Establishment Clause.

As American society modernizes and becomes more liberal, citizens adopt new values. Since the country's founding, the American legal system has come to enfranchise people of color, give women the right to vote, expand anti-discrimination protections, legalize same-sex marriage, legalize contraceptives, permit abortion, and in many states, decriminalize recreational drug use. The climate of the country in 1787 was drastically different from today. Innovations such as cell phones, computers, the internet, modern medical technologies, and semi-automatic weapons were unimaginable to the founding fathers. The United States has fundamentally changed in so many ways, and with innovation has come a moral shift in core values and an increase in secularization. Concepts such as originalism, which seeks to consult the founding fathers' thoughts on every legal decision, simply do not make sense in a modern context. It is illogical to force the legal system into a mold of tradition that the country has far outgrown. Holding the raw text of the Constitution - which endorsed slavery, considered people of color non-human, and did not initially afford rights to women - is not practical. Consulting the founding fathers on their vision of “the right to bear arms” is irrelevant in an era when muskets were the highest caliber gun on the market. The right to free speech in a Twitter post is not something the founding fathers can offer guidance on. If originalism fails the logic test, why is it still used?

The dynamics between strict constitutionalism and religious fundamentalism are essential to examine because of their possible implications on past, present, and future court cases. In the past, originalist interpretation has held onto an oppressive system of government. Currently, originalism is attempting to turn back time toward traditional values. Who knows what the future

might hold if strict constitutionalism persists or gains popularity? The close similarity in practice between the two groups is concerning primarily because of how the public perceives them. The media takes decisions by strict constitutionalists and creates a narrative that appeals to specific interest groups. The public eye has associated strict constitutionalism with conservative, traditional, and religious values, resulting in disapproval from liberal and secular groups. In the polarized political climate of modern America, Justices who take such a strict and extreme view of the law are vehemently opposed by a large portion of the population. The media only reinforces this misalignment in values, making the distance between strict constitutionalism and liberalism even more extreme.

Regardless of whether justices are devotedly religious in practice and regardless of how closely related strict constitutionalism is to fundamentalism in reality, the media and the public are expressing concern. This is where the problem lies. In any political issue, once the American public reaches passionate concern, it needs to be dealt with. The cornerstone of the United States government is democracy. Citizens want to be heard when they express concern, and representatives must act on such matters. Maybe strict constitutionalism is not the big issue it is made up to be. But it has indeed reached a point of household conversation, and Americans have strong opinions on both sides of the aisle. Recognizing the complicated dynamics which affect American views on judicial practice is essential.

There is certainly space for future research on the relationship between strict constitutionalists and religious fundamentalists. Namely, a deeper dive into the precise language of judicial decisions as compared to religious interpretation would be helpful. A more expansive understanding of the stance that media platforms take on judicial decisions would also be valuable to the conversation in evaluating which concerns are more valid than others. Noticing

how state governments have navigated the problem of judicial interpretation and comparing how some states have different laws and outcomes than others - all while residing under the same national Constitution. After recent decisions on abortion, some states have taken actions to restrict its practice while others have increased accessibility. Investigating the proportions of states taking legal action in both directions on abortion and other issues would yield a better understanding of how the general public views these problems and shed light on which state systems are most effective.

There will likely never be a clear answer as to which judicial method of interpretation is best. In the politically polarized and ideologically diverse modern era, there will always be groups of people who reject one ideology or another. Strict constitutionalism has been shown to be insufficient in its logical application to current times. It closely relates to religious practice, which is unfavorable for much of the public. Living constitutionalists receive similar criticisms from religious groups and are subject to criticism in their subjective interpretation. The purpose of this paper is not to propose one system superior to another but instead to raise awareness of the current problems in judicial interpretation and add to the conversation.

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