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The author thanks Kellie Tracz for her insights and willingness to read drafts at odd hours. Similarly, the author thanks the Editors and Staff of the University of Dayton Law Review for their hardwork. Any mistakes are the author's alone.

DOCTRINAL EVOLUTION AND THE LIVING CONSTITUTION

Eliot T. Tracz[*]

I. INTRODUCTION

For a constitution to be relevant it must be "capable of growth and development over time to meet the new social, political and historical realities often unimagined by its framers."[1] Is the Constitution of the United States a living constitution? If not, is it a dead constitution, and if so, is it of any use to us now? The idea of the Constitution as a "living organism" is a much-debated concept[2] with a rich intellectual history on both sides of the debate.

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[1] *Hunter v. Southam*, [1984] 11 D.L.R. 641, 649 (Can.).

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

Whether or not evolutionary theory can accurately describe changes in the living constitution is equally divisive.[3] Obviously, the United States Constitution is not a living, breathing entity prone to natural adaptation. The concept of a living constitution is, therefore, entirely metaphorical;[4] yet biological theory may still explain why some clauses and amendments of the United States Constitution are interpreted the way they are. Further, examination of case law provides a firsthand look at the process through which the Constitution changes.

This process is termed "doctrinal evolution." Doctrinal evolution is a theory that describes how changes in time and society create change in law in a manner similar to biological evolutionary theory. Doctrinal evolution has been applied to statutes and the common law with great success, but its application to the United States Constitution is limited. This paper attempts to describe the process of doctrinal evolution as it relates to the Constitution and, in the process, demonstrate that it is in fact a living constitution.

Part II explores the theory of the living constitution and its relation to the concept of doctrinal evolution. Part III examines the history of the theory of doctrinal evolution by exploring the ideas of some of its major proponents. Part IV investigates the history of the Commerce Clause before discussing how it has evolved over time through a number of significant cases. Part V contains a similar analysis of the Second Amendment, first addressing its history and then analyzing how it has evolved. Finally, Part VI explores the significance of doctrinal evolution and a living constitution to the world today.

II. LIVING CONSTITUTION

A. Living Constitution

The idea of a living constitution is a controversial one. The concept of a living constitution involves the idea that a constitution adapts to changes in a nation's circumstances and evolves accordingly over time.[5] This principle has been most adequately described by Justice Holmes in the majority opinion of *Missouri v. Holland*,[6] "[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which

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[3] *See* Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 482 (2005); *see also* Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY. L. REV. 1935, 1953–54 (2008). *But see*, Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (So Far) Irrelevant to the Law*, 29 L. AND PHILOSOPHY 31, 31–33 (2010).

[4] Dodson, *supra* note 2, at 1320.

[5] *Id.*

[6] 252 U.S. 416, 433–34 (1920).

could not have been foreseen completely by the most gifted of its begetters."[7]

Surely the Framers of the Constitution were aware that it might be necessary to one day amend its contents; they prepared for this eventuality by including the means by which to effect such amendment.[8] The Framers were aware that the Constitution they had created was an imperfect document and that the inclusion of an amendment process allowed the Constitution to move closer and closer to perfection as its deficiencies were discovered and fixed. A living constitution, however, does not suggest a change in the substance of the constitution, but rather in the understanding or meaning of its words.

The idea of a living constitution is premised upon the idea that constitutions are, in their barest form, organisms.[9] Lawyers, judges and political scientists alike have long described constitutions in organic terms.[10] More explicitly, the United States Constitution has been "born,"[11] it has been "nurtured,"[12] and it has the ability to "grow" with society.[13]

If constitutions have these characteristics, then there must be some process that drives them to change. Professor Scott Dodson has argued that the metaphor of a living constitution—which includes many allusions to biological theories of evolution—may not be entirely accurate, at least not when described in terms of Darwinian natural selection.[14] In natural selection based change, evolution occurs in a two-step process. First, genetic variation occurs, with neither direction nor purpose, within individual organisms.[15] In the second step, the natural environment exerts pressures on the variants, and those with traits best designed to withstand those pressures survive and reproduce more copies of their traits.[16]

This process is theoretically incompatible with the idea of a living constitution for several reasons. First, the idea of a living constitution is a forward-looking, progressive idea.[17] Darwinian natural selection, on the other hand is backward-looking and undirected.[18] A second related reason is that natural selection is not necessarily a progressive optimizing force.[19] Because

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[7] *Id.* at 433.

[8] U.S. CONST. art. V.

[9] Dodson, *supra* note 2, at 1323.

[10] *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908) ("[G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life."); *see also* Gompers v. United States, 233 U.S. 604, 610 (1914) (recognizing that the provisions of the Constitution are "organic living institutions.")

[11] Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

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

[13] WILSON, *supra* note 10, at 22.

[14] See Dodson, *supra* note 2, at 1329–33.

[15] *Id.* at 1329.

[16] *Id.* at 1329—30.

[17] *Id.* at 1331–32.

[18] Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Principle*, 39 JURIMETRICS J. 291, 293 (1999).

[19] Dodson, *supra* note 2, at 1330–31.

environmental pressure dictates which traits survive in certain circumstances, change can be progressive or regressive and is limited to a small geographic range.[20]

A better metaphor for the living constitution lies in a different Darwinian theory, that of artificial selection.[21] If "artificial selection" is an unfamiliar phrase, it is certainly a familiar concept; artificial selection entails humans acting as the agent whereby certain traits are selected to continue on.[22] The extreme brachycephalic head of the bulldog, thoroughbred horses bred for speed, and tomatoes for size and shape are all examples of artificial selection. Just as humans have selected traits in the above organisms in order to produce an intended result, so too do Americans select an interpretation of the Constitution that leads to their desired result—sometimes with unintended consequences. This process ensures that the Constitution is a living one, yet it also raises several powerful objections.

B. What Causes Constitutions to Evolve?

If there are living constitutions, and those constitutions are subject to change, what need lies at the root of that change? In nature, evolution occurs as a response to increase the likelihood of an organism's survival in a specific geographic locale; in law, there must also be some need for constitutions to adapt.

1. Economic Efficiency

One argument for the root cause of change in the living constitution is the idea that people desire to reduce unnecessary costs and that, over time, legal rules develop that are less wasteful or more economically efficient. Economist Paul Rubin has argued that the evolutionary process drives the law towards economically efficient outcomes.[23] This process is achieved through the litigation process.

In Rubin's model, the litigants are equally responsible for the evolution of law as are the judges who rule on their cases. According to Rubin, if one or more parties has an interest in the future effect of a legal rule that outweighs the cost of litigation, one or more of the parties will force litigation until an equilibrium is reached at or near an efficient solution.[24] If no party has such an interest, the alternative is to settle at a mutually acceptable sum and refrain from challenging the legal foundation of the claim.

In this sense, the litigants, seeking a more efficient rule, spark the

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[20] *Id.* at 1330.
[21] *See* CHARLES DARWIN, THE ORIGIN OF SPECIES 7–43 (1859).
[22] *Id.*
[23] Paul Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55 (1977).
[24] *Id.* at 54–55.

evolution of a legal rule. While the judges may determine how the law will be interpreted or amended, it is the economic interests of the litigants that determine which cases those judges will hear. Therefore, those who favor economic efficiency as the catalyst that spurs legal evolution argue that the law evolves as means to create rules that are more efficient.

2. Social Change

The idea that social change drives legal evolution can be closely tied to Rubin's theory of economics as the source of legal evolution. Again, the interest of the litigants in changing the legal rule outweighs the costs of litigation, yet where social change is the driving force, economic interest may not play a meaningful role. Instead, the interest at stake is of a more social nature. For example, the interest may be in protecting freedom of the press from encroachment by those seeking to limit critical coverage,[25] a general right to privacy,[26] or other, more specific, individual rights.

Cases such as these may see various legal rules repurposed from their original intent, or redefined in order to fit the need of the litigants. In this way, social change causes evolutionary change in a constitution in a manner very similar to natural selection: the changes in the environment force adaptation in order to achieve survival.[27] Interestingly, it is the very use of the court system to drive constitutional change that leads to the most powerful objections to the idea of a living constitution.

C. Arguments Against The Living Constitution

1. Judicial Activism

One traditional objection to the idea of a living constitution is that it is nothing more than a front for judicial activism. But what exactly is "judicial activism" and how does it relate to the idea of a living constitution? The answers to these questions require some digging, and while this is not the place for an extended review of the concept of judicial activism,[28] there is some value in taking a deeper look.

"Judicial activism" is, in the words of Judge Frank Easterbrook, a "notoriously slippery term."[29] It is not uncommon for both liberals and conservatives to level charges of "judicial activism" against opponents whose

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[25] New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[26] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[27] Given the extreme difficulty of amending the U.S. Constitution, it is arguable how long such forced evolution would take without the courts.

[28] See generally Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004), for a very good examination and history of the concept of judicial activism.

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

rulings they find unappealing.[30] Before "judicial activism" became the preferred term in the twentieth century, there was debate about the concept of "judicial legislation," which is to say, judges creating positive law.[31] The idea of judicial legislation is an old concept that has been the subject of much discussion. "Where Blackstone favored judicial legislation as the strongest characteristic of the common law, Bentham regarded this as a usurpation of the legislative function and a charade or "miserable sophistry.""[32] This difference of opinion ought to sound familiar to anyone who has encountered the idea of judicial activism before.

The term "judicial activism" did not first appear until 1947, when historian Arthur Schlesinger, Jr. used the term to describe the informal alliance between Justices Black, Douglas, Murphy, and Rutledge as opposed to that of Justices Frankfurter, Jackson, and Burton, whom he termed "Champions of Self Restraint."[33] Even in its first appearance, the concept of judicial activism is cast as the antithesis of judicial restraint.

But what is judicial activism, really? It is not easy to define exactly what constitutes judicial activism. One broad definition defines judicial activism as "any occasion where a court intervenes and strikes down a piece of duly enacted legislation."[34] Alternatively, judicial activism can be defined as "the practice by judges of disallowing policy choices by other government officials or institutions that the Constitution does not clearly prohibit."[35]

A second definition of judicial activism is "judicial legislation." This is a politically charged definition that accuses judges of actively seeking to make law rather than interpret it. In order to justify the allegation of judicial activism, many refer to the famous line from *Marbury v. Madison*:[36] "It is emphatically the province and duty of the Judicial Department to say what the law is."[37] Others such as Justice Powell in his dissent in the school

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[30] *Id.* ("When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. This means that they want liberal Justices to follow yesterday's holdings rather than engage in independent analysis, which might lead to a different conclusion. When conservatives are ascendant on the Court, liberals praise restraint—by which the mean the following all those activist liberal decisions from the previous cycle!—and denounce 'conservative judicial activism.'").

[31] Kmiec, *supra* note 28, at 1444.

[32] Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 907 n.108 (1999) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998), and quoting RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 56–57 (1996)).

[33] *See* Kmiec, *supra* note 28, at 1446 (discussing Arthur M. Schlesinger, Jr.'s article: *The Supreme Court: 1947*).

[34] Gregory M. Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 143 (2002).

[35] Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996); *see* Easterbrook, *supra* note 29 at 1403–04 (stating "I have the gall to offer yet another definition of activism. It is a definition reflecting my view - which I will state but not here attempt to justify - that unless the application of the Constitution or statute is so clear that it has the traditional qualities of law rather than political or moral philosophy, a judge should let democracy prevail. This means implementing Acts of Congress and decisions of the Executive Branch rather than defeating them").

[36] 5 U.S. 137 (1803).

[37] *Id.* at 177.

desegregation case *Columbus Board of Education v. Penick*,[38] have gone further by pointing out that the courts are "the branch least competent to provide long range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education."[39]

While there are other extant definitions of judicial activism, Keenan Kmiec lists several more in his history of the term "judicial activism";[40] these two definitions supply the two more common beliefs as to what the term means. Bearing these two definitions in mind, it is time to consider another question: how does judicial activism relate to the concept of a living constitution?

The late Chief Justice Rehnquist, in a speech delivered at the University of Texas Law School, articulated two possible views of the meaning of the term "living constitution." The first was consistent with the ideology expressed by Justice Holmes in his *Missouri v. Holland*[41] opinion.[42] Praising the general language of many of the Constitution's clauses and amendments, Rehnquist argued that general language could be applied to scenarios that the Framers could not have conceived of or methods of transacting affairs that did not exist in their time.[43] This view, that generalities in constitutional phrases have enabled the Constitution to evolve as the world has changed, is consistent with the thesis of this paper.

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

> We are asking a great deal of the Court because other branches of government have abdicated their responsibility . . . . Prisoners are like other "discrete and insular" minorities for whom the Court must spread its protective umbrella because no other branch of government will do so . . . . This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be

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[38] 443 U.S. 449, 479 (1979) (Powell, J., dissenting).

[39] *Id.* at 488 (Powell, J., dissenting).

[40] *See* Kmiec, *supra* note 28, at 1442.

[41] *See generally* Mo. v. Holland, 252 U.S. 416 (1920).

[42] *Id.* at 433 ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.").

[43] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

tolerated.[44]

This language struck Rehnquist as an explicit request for non-elected members of the judiciary to rule on social problems for no reason other than the other branches of government had either failed or had simply refused to do so.[45]

Rehnquist's objections to this version of the idea of a living constitution stem from the fact that he equates a living constitution with both of the definitions of "judicial activism" discussed above.[46] Further than that, however, Rehnquist sought to lay blame for some of the Supreme Court's most reviled decisions, namely *Dred Scott v. Sanford*[47] and *Lochner v. New York*,[48] at the feet of proponents of a "living constitution."[49] To Rehnquist's mind, a living constitution was no more than an unelected judiciary supplanting the elected law-makers, resulting in bad jurisprudence, and altogether "genuinely corrosive of the fundamental values of our democratic society."[50]

2. Originalism: The Dead Hand Rules

A second common objection to the concept of a living constitution comes from those who adhere to an originalist view of constitutional and statutory exegesis. Ostensibly, originalism looks to the meaning and/or intent of the Framers of the Constitution or statute in question in order to discern the appropriate legal rule for addressing the concern at issue. Naturally, this puts originalism at odds with the concept of a living constitution whose meaning changes as time passes.

In a lecture at the University of Cincinnati, Justice Scalia described the opinion by Chief Justice Taft in *Myers v. United States*[51] as prime example of originalism.[52] In particular, Justice Scalia praised Taft's use of the text of the U.S. Constitution, contemporaneous understanding of the President's removal powers (especially the understanding of the First Congress), and the

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[44] *Id.* at 695 (alterations in original).

[45] *Id.*

[46] *Id.* at 699 ("At least three serious difficulties flaw the brief writer's version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer's version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.").

[47] *See generally* 60 U.S. 393 (1857).

[48] *See generally* 198 U.S. 45 (1905).

[49] Rehnquist, *supra* note 43, at 700–03. Rehnquist does admit that the term "living constitution" was not yet extant, but blames the idea it represents as responsible for these decisions. *Id.* at 700.

[50] *Id.* at 706.

[51] *See generally* 272 U.S. 52 (1926).

[52] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989).

background of the phrase "executive power" under the English Constitution.[53] Justice Scalia regarded this as the proper exegetical method for dealing with the Constitution, but would go even further, including "placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day."[54]

Originalism, however, is not without its faults. Judge Easterbrook has noted that the use of legislative history assumes that the intent of Congress matters.[55] If intent matters, Easterbrook argued, then the written text reflects imperfectly what the true law is.[56] In other words, the true law is in the minds of the legislators who enacted it, not on the paper containing the statute.[57] If this is so, then it is troubling as it supplants the text of the law, democratically agreed upon by legislators after compromise and then signed into law by the President, with the "intent" of a few legislators, many of whom may not have read the bill itself or the committee reports prepared before the votes.

A second problem with originalism is that it can sometimes lead to the same judicial activism that it purports to oppose. Claiming to be searching for the "intent" of a law allows a court to undertake a number of steps that broaden its power to act outside the literal text of the statute.[58] Judge Easterbrook has described how courts may use this process to shield judicial activism behind the mask of originalism. First, a court has discretion as to whether a statute's language is ambiguous; should the court decide that it is, then the court's decision is no longer controlled by either the language or the subjective intent of the drafters.[59]

Second, when the court attempts to discern which question it would hypothetically ask the framers of a statute or the constitution, the court may decide which question to ask.[60] By way of example, Judge Easterbrook refers to *California Federal Savings and Loan Ass'n v. Guerra*,[61] a case dealing with a statute that required pregnant women be treated the same as other employees for all employment related purposes. At issue was whether employers who favored female workers over male workers by only giving extended leave of absence to women are complying with the law.[62] The *Guerra* court opted to frame the hypothetical question: "Would you object if women got a little

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[53] *Id.* at 852.
[54] *Id.* at 856–57.
[55] Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988).
[56] *Id.*
[57] *Id.* at 60–61.
[58] *Id.* at 62.
[59] *Id.*
[60] *Id.*
[61] 479 U.S. 272, 274–75 (1987).
[62] Easterbrook, *supra* note 55, at 61.

more?"[63] The outcome would surely be different had the question been phrased: "Should the words 'be treated the same as' be construed . . . [to grant] preferential treatment."[64] It is easy to see how framing the question can lead to preselected outcomes.[65]

Third, the court may select who is asked the question.[66] It is much easier to find the desirable answer if only those who championed the courts favored interpretation are asked.[67] While this approach may be useful to a court that already has some idea in what direction they desire to go, it is hardly accurate as it allows the court to ignore those who opposed a congress or those members who voted for the measure without having had a meaningful reason and instead favor those who the court most identifies with.[68]

Finally, we are back to the issue of whether the intentions of congress are "the law."[69] As stated earlier, this method of constitutional exegesis is not much more than an end run around of the legislative process and the final product created by our elected law-makers.[70] The irony is that, despite originalism's disdain for the idea of a living constitution, as this Article will examine in the next section, a court's application of originalism actually supports the theory of the living constitution and doctrinal evolution.

D. An Evolutionary View of the Living Constitution

The United States Constitution is written in intentionally general terms. Despite the fears of the originalists, or the claims of judicial activism, the reality is that living humans must interpret those general terms. The ineluctable truth is that by selecting the manner in which the Constitution is to be interpreted, artificial selection is creating new constitutional law, for better or for worse.

If, however, artificial selection is responsible for creating a living constitution, how do humans select which legal rule will continue and which will end? Some might argue that it is merely the result of the arbitrary opinions of judges. Law and economics scholars would likely argue that the laws selected reduce costs. A more likely answer is that a living constitution changes through doctrinal evolution.

III. DOCTRINAL EVOLUTION

Evolution is a word that is often "used in everyday speech to convey

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[63] *Id.* at 62.
[64] *Id.* at 62–63.
[65] *Id.* at 63.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 64.
[70] *Id.* at 65.

the idea of change, or[,] [more precisely,] of nonrandom change.[71] It is often described in a Darwinian model, yet ideas of the law as a living thing predate Darwin by hundreds of years. The famous British jurist Sir Edward Coke touched on the issue in his famous work, *Institutes*, writing, "Now as of the old fields must come the new corne, so our old books do excellently expound, and expresse this matter as the Law is holden at this day . . . ."[72]

A. Holmes

In American jurisprudence, one name towers above all others in the area of doctrinal evolution: Oliver Wendell Holmes, Jr. It is, therefore, appropriate to begin the discussion of doctrinal evolution with Holmes and the ideas first presented in his monumental work, *The Common Law*. Beginning as a series of lectures delivered in 1880 at the Lowell Institute, *The Common Law* shocked the legal and academic communities with the depth of its ideas. In his lectures, Holmes introduced and explored the idea that old doctrines do not die out, rather they evolve to fit new policy doctrines. Throughout his career he elaborated on this idea and developed it into a more refined theory:

> Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals.[73]

Such theories, however, do not simply spring anew, and Holmes drew influence from several contemporary movements of equal stature.

It is no coincidence that *The Common Law* is sprinkled with allusions to the theories of evolution that were flourishing at the time of its writing. Charles Darwin had published his Origin of Species in 1859 and though there is no evidence that Holmes ever read it, the influence of Darwin's ideas were alive and thriving in the learned communities.[74] For Holmes, the law was an organic thing, alive and changing with time.

Another, equally powerful, influence on Holmes was his relationship with the founders of pragmatist philosophy, Charles Sanders Pierce and

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[71] Jones & Goldsmith, *supra* note 3, at 479.

[72] SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1642), *reprinted in* THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 801 (Steve Sheppard ed., 2d ed., 2003).

[73] Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899).

[74] Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 362 (1984).

William James. The three were members of a group called the Metaphysical Club, a club whose members worked "to come to terms with the new science, which had put all in doubt."[75] Rejecting a purely logical view of the law, Holmes's pragmatic influences are clearly demonstrated in what may be *The Common Law*'s most famous passage:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[76]

Given such influences, it is not surprising that Holmes would develop a theory that legal doctrines, and therefore the law itself, were subject to evolution.

The most well-known illustration of Holmes's theory traces the origin of owner liability in tort law back as far as the Book of Exodus.[77] Under the Mosaic Law cited by Holmes is a certain familiar passage: "If an ox gore a man or a woman, that they die : then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."[78] Similarly, Holmes finds equivalents in the Roman laws of the *noxæ deditio*[79] as well as the laws of the Salic Franks in Germany.[80] Roman and Salic influences, Holmes found, could be identified in the laws of the United Kingdom as far back as 680 AD, a direct link between the ancient laws and the modern laws.[81] By this time, the owner of a violent animal, employer of a reckless employee, or other such person held responsible for the injury caused on his watch, could simply pay a fee to relieve the liability.[82] One-hundred-thirty years after Holmes delivered *The Common Law* lectures it is easy to identify in the early English laws the predecessor to the doctrine of *respondeat superior*.

Holmes's dedication to his theory that doctrines evolve even after the basis for their origins has disappeared, but did not end with *The Common Law*. In his later works he revisited and refined his theory. Applying his theory, he demonstrated how a mysterious figure from Salic Law known as the Salmannus, who figured prominently in rituals surrounding transfers of real property, would grow to be what we now know as the executor of an estate.[83]

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[75] *Id.* at 362.
[76] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
[77] *Id.* at 6.
[78] *Id.*; *Exodus* 21:28.
[79] HOLMES, THE COMMON LAW, *supra* note 76, at 8.
[80] *Id.* at 17.
[81] *Id.* at 18.
[82] *Id.* at 19.
[83] Holmes, *supra* note 73, at 445–46.

Equally as interesting to Holmes was how the ancient political practice of demanding hostages as surety for the behavior of a defeated foe served as a forerunner for the modern secured transaction.[84] For each of these examples, it was evident that, "just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten."[85] In the law, as in nature, it seemed to Holmes that evolution was at work.

Each of the examples Holmes has given shows a case in which a precedent has successfully evolved from its original purpose to meet some new need. From these examples, it would be easy to assume that old doctrines that continue to be applied are selected for their soundness in their new application. Holmes warns against such an assumption, however, by advising that "if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified."[86] For Holmes, history and experience were acceptable sources for modern doctrines, with the strongest precedents surviving to meet new challenges as their old uses died out. It was, however, the duty of lawyers and judges to continue to examine the precedents to ensure that they remained valid. "History sets us free," Holmes wrote in 1899, "and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old."[87]

B. Clark

Following Holmes's work, references to "evolution" were uncommon between the mid 1920s and the late 1970s.[88] In 1977, Harvard Law Professor Robert C. Clark stepped beyond Holmes's application of evolutionary theory to the common law and applied it to statutory law.[89] Clark was a major proponent of a type of scholarship that he referred to as the interdisciplinary study of legal evolution (ISLE).[90]

Professor Clark's first examination of the evolution of statutes came in his 1977 examination of subchapter C of the Internal Revenue Code.[91] While Clark identified a number of fundamental structural decisions that make up the foundation of framework in which taxpayers, the IRS, and the

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[84] *Id.* at 448.

[85] HOLMES, *supra* note 76, at 35.

[86] *Id.* at 37.

[87] Holmes, *supra* note 73, at 452.

[88] E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 59 (1985).

[89] *See generally* Robert C. Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90 (1977).

[90] *See generally* Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L. J. 1238 (1980).

[91] Clark, *The Morphogenesis of Subchapter C*, *supra* note 89, at 90.

courts interact, he theorized that within that framework lawyers and taxpayers were constantly attempting to discover new ways of reducing their taxes.[92] Professor E. Donald Elliott has noted that while Clark described a valid model of change, and despite his use of evolutionary language, it is unclear at this point of his career in what sense he means that these changes are evolutionary.[93]

In a 1981 paper, Professor Clark developed his most coherent theory of statutory evolution. He identified two general patterns of change that explained the development of laws.[94] First, Professor Clark identified a four-part pattern of development.[95] In the first part, external changes, whether technological, social, or other, create new opportunities for legal rules to reduce costs of certain kinds.[96] The second part featured a responsive legal invention, in which a new legal principle or institution is created which reduces costs better than previously identified alternatives.[97] In the third part, the success of the new legal principle creates new needs and opportunities for reducing costs.[98] Finally, in the fourth part, substantial legal activity occurs which results in the creation of statutes, regulations, and case law aimed at exploiting those opportunities.[99]

The cost reduction that Professor Clark has identified as a goal of the legal change falls into two different classes: primary and secondary.[100] Primary cost reduction is the result of basic, simple principles of institutional design.[101] Secondary cost reduction is achieved after lengthy, complex efflorescence of doctrinal detail and, in Clark's estimation, the associated legal developments are more capable of being studies without appealing to changes in exogenous factors.[102]

The second pattern identified by Professor Clark involves the connection between changes in the size of economic units or transactions and the development of legal rules.[103] This pattern of development is, in Professor Clark's opinion, particularly applicable to corporate and securities law.[104] Professor Clark attributes the rise of the corporate organizational form to its

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[92] *Id.* at 95.
[93] Elliott, *supra* note 88, at 60.
[94] Clark, *Interdisciplinary Study*, *supra* note 90, at 1241.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1241–42.
[102] *Id.* at 1242.
[103] *Id.*
[104] *Id.* at 1242–47.

competitive success over alternative forms of organization.[105] Professor Clark's theories tend to show that pattern of cost reduction as the underlying force driving the evolution of legal rules,[106] therefore supporting the economic argument for why constitutions change over time.

IV. THE LIVING COMMERCE CLAUSE

One of the most used, and therefore most contested, clauses in the United States Constitution is the Commerce Clause. This Clause gives Congress the power "[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."[107] It has been invoked as justification for a range of cases covering everything from successfully upholding the Civil Rights Act of 1964[108] to unsuccessfully attempting to uphold bans on hand guns in school zones.[109] Given the diverse groups of laws, and social goals, for which the Commerce Clause has been claimed as a legal basis, it is a fitting first example of the reality of the living constitution.

A. History

Dating from the period of the founding of the United States, until about the beginning of the New Deal, the Commerce Clause was generally understood to grant Congress the power to regulate trade, transportation, and communication across state lines.[110] In the 1824 case of *Gibbons v. Ogden*,[111] Chief Justice Marshall struggled with how to define "commerce", writing, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[112] At the same time, Chief Justice Marshall found that "commerce" excluded activity that not was not interstate: including trade, transportation, and communication that stayed within a state's borders.[113]

Justice Story, who joined in the majority opinion in *Gibbons*, wrote that the lack of a congressional power to regulate commerce was among the great defects in the Articles of Confederation.[114] In Story's view of the Commerce Clause, it was clear that "[i]n regard to foreign nations, it is universally admitted, that the words comprehend every species of commercial

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[105] *Id.* at 1243 (stating that the corporate form of organization includes such characteristics as limited liability, free transferability of shares, strong legal personality, and centralized management).

[106] Elliott, *supra* note 88, at 62.

[107] U.S. CONST. art. 1, § 8, cl. 3.

[108] Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964).

[109] United States v. Lopez, 514 U.S. 549, 561 (1995).

[110] Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403, 409 (2002).

[111] 22 U.S. 1, 189–190 (1824).

[112] *Id.* at 189.

[113] *Id.* at 194–95.

[114] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 359 (1833).

intercourse."[115] Similarly, there was exclusive power to deal with the Indian tribes.[116] When it came to commerce between the states, Story believed that Congress had the power to regulate in order to prevent states from taking advantage of one another through the levying of duties.[117]

Of course, whilst Story and Marshall held these beliefs about what the Commerce Clause enabled Congress to do, it is equally important what they believed Congress was barred from doing. In order to differentiate between those activities that could be regulated by Congress, and those that were beyond its grasp, the Supreme Court crafted the "direct effects" test. If an action directly affected interstate commerce, then Congress had the power to regulate it.[118]

This line of thinking predominated Commerce Clause thinking until the early twentieth century. By then, the United States had changed; transcontinental railroads connected the Atlantic and the Pacific coasts, the country was moving from having an agrarian economy to an industrialized economy, and the Progressive Era had begun.[119] As the country changed, many scholars believed that the Constitution should change as well. For example, Woodrow Wilson, then President of Princeton University, believed that when a society does not adapt, develop and accommodate, it "stagnates," "decays," or dies.[120] Progress, Wilson believed, required "alterations of . . . constitutional understanding,"[121] due to the fact that "governments have their natural evolution and are one thing in one age, another in another."[122]

The Progressive Era failed to affect significant change on the Commerce Clause, yet change was not far off with the dawn of the New Deal. Professor Claeys has argued that as late as 1932, it could still be argued that the Commerce Clause was one of a number of limited and enumerated powers but, within a decade, the Commerce Clause could be seen as granting nearly unlimited power to the federal government.[123] New Deal politicians, for better or for worse, were determined to use the Commerce Clause as the means through which national legislation could be used to address any problem which the American people considered to be a national problem.[124]

Early attempts at manipulating the Commerce Clause to meet the political agenda of the New Deal were not successful. The National Industrial

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[115] *Id.* at 363.
[116] *Id.*
[117] *Id.* at 364.
[118] Claeys, *supra* note 110, at 410.
[119] *Id.* at 412–13.
[120] WILSON, *supra* note 10, at 196.
[121] *Id.* at 50.
[122] *Id.* at 54.
[123] Claeys, *supra* note 110, at 425.
[124] *Id.*

Recovery Act,[125] having been found unconstitutional on both separation of powers and Commerce Clause grounds, was unanimously struck down in *A.L.A. Schecter Poultry Corp. v. United States*.[126] The Bituminous Coal Conservation Act of 1935[127] attempted to regulate wages and hours for coal workers; again the Supreme Court found that the Commerce Power granted Congress no such power.[128] Not until the National Labor Relations Act,[129] was the Supreme Court finally persuaded by the New Dealers usage of the Commerce Clause to affect social change.[130] Professor Claeys notes the Act was crafted in such a manner to show that it was not labor relations that were of national interest, but rather the union strife that affected interstate commerce.[131]

A further effect of the New Dealers' use of the Commerce Clause was the rise of the Rational Basis Test. In *NLRB v. Jones & Laughlin*, the Supreme Court began to signal that intrastate activities may be regulated if Congress could demonstrate a substantial relationship between the intrastate activity and interstate commerce.[132] Shortly after, in the case of *Wickard v. Filburn*,[133] the Supreme Court firmly established the validity of the New Dealers' methods. After *Wickard*, economics-based legislation and the realization that all business activities are interdependent persuaded the Supreme Court to extend the Commerce Clause well beyond the meaning of *Gibbons*.

Some may argue that the Rehnquist Court dialed back the broad powers of the Commerce Clause in cases like *United States v. Lopez*[134] and *United States v. Morrison*.[135] Others might argue that these decisions merely indicate the outer limits of the powers granted by the Commerce Clause.[136] What is clear, however, is that the *Lopez* and *Morrison* decisions have left the Commerce Clause with far broader powers than the *Gibbons* Court would have allowed and that there is little chance of those powers being rolled back.

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[125] National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (granting the President the power to establish fair competition codes for any industry of his choosing).

[126] 295 U.S. 495, 551 (1935).

[127] Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, 49 Stat. 991 (1935).

[128] *See* Carter v. Carter Coal Co., 298 U.S. 238, 291–92 (1936).

[129] National Labor Relations Act, 49 U.S.C. §§ 151–69 (2000).

[130] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937)

[131] Claeys, *supra* note 110, at 428.

[132] 301 U.S. at 37 ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and abstractions, Congress cannot be denied the power to exercise that control.").

[133] 317 U.S. 111, 125 (1942).

[134] 514 U.S. 549, 567 (1995) (finding that the Gun Free School Zones Act was not related to commerce or economic activity).

[135] 529 U.S. 598, 617 (2000) (finding that gender-motivated crimes of violence are not economic activity).

[136] *See* Claeys, *supra* note 110, at 437.

B. The Commerce Clause and the Living Constitution

Having looked briefly at the history of the Commerce Clause, the question arises: how does this relate to the concept of a living constitution? The answer is that due to the history of case law it is possible, easy even, to visualize how the process of artificial selection drives the doctrinal evolution of the Commerce Clause.

In the earliest Commerce Clause cases, the Supreme Court was forced to find a definition for "commerce" in order to determine whether Congressional actions were appropriate.[137] Chief Justice Marshall, who had himself been an advocate in favor of ratifying the Constitution while serving in the Virginia House of Burgesses, penned the *Gibbons* opinion. The opinion by Marshall in *Gibbons* gave rise to the effects test, which would remain the test for Commerce Clause cases until the New Deal.

While the effects test was in use, however, the United States underwent seismic shifts both ideologically and economically. Eventually, more progressive minded Congresses realized that the Commerce Clause, in conjunction with the Sweeping Clause,[138] could be used to effect large-scale social change. This is where we see the human hand of artificial selection enter into play. Despite rejections of the New Dealers' early attempts to use the Commerce Clause to affect social change, the Supreme Court was eventually persuaded to select a new definition for commerce, which expanded the powers of the Commerce Clause.

This sort of evolution, even if through an artificial process such judges selecting a new rule or deciding to reinstate an old one, should not be viewed as threatening to the Constitution. Rather, it should seem inevitable. When it comes to commerce, change is a natural occurrence. Improvements in technology, job specialization,[139] changing consumer demands, concepts such as comparative advantage, all things that have an effect on commerce, would all have eventually necessitated change in the doctrine surrounding the Commerce Clause. The doctrinal evolution of the Commerce Clause stands as strong evidence of the living constitution.

V. THE LIVING SECOND AMENDMENT

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[140] Few parts of the Constitution elicit as visceral of a response as the Second

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[137] *See* Gibbons v. Ogden, 22 U.S. 1, 189–90 (1824).

[138] U.S. CONST. art. 1, § 8, cl. 18. This clause is better known as the necessary and proper clause.

[139] Adam Smith's great work "The Wealth of Nations," which touches on the benefits of specialization, was first published in 1776, by the time the Constitution was drafted the full extent of Smith's ideas on economics could not have possibly begun to be realized.

[140] U.S. CONST. amend. II.

Amendment; some love it, some hate it, but nearly everyone has an opinion about it. This section will attempt to present a similar analysis of the Second Amendment, but it is not intended to provide an opinion one way or another as to the value or importance of the amendment.

A. History

1. Militia Service in Context

In order to honestly examine the Second Amendment, it is critical to examine the concept of the "Militia" in a historical sense. Blackstone traced the existence of some form of militia at least as far back as Alfred the Great.[141] At the time, prior to the Norman Conquest, militia service was considered an obligation and failure to serve could result in fines or the loss of land.[142] As an obligation, armament in preparation of service would have been expected.

Understandably, English traditions filtered down into the Colonies. In *United States v. Miller*, the Supreme Court cited the work of late Columbia University history Professor Herbert L. Osgood, who, in his 1904 work, "The American Colonies in the 17th Century," wrote:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former. A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts].[143]

This is consistent with several laws in place in the Colonies just prior to the ratification of the United States Constitution.

Bearing this in mind, the Framers of the Constitution granted Congress the power "[t]o provide for calling forth the Militia to execute laws of the Union, suppress Insurrections and repel Invasions,"[144] as well as:

> [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the

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[141] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 409 (1796).

[142] C. WARREN HOLLISTER, ANGLO-SAXON MILITARY INSTITUTIONS: ON THE EVE OF THE NORMAN CONQUEST 59–60 (1962).

[143] United States v. Miller, 307 U.S. 174, 179–80 (1939) (alterations in original) (citation omitted).

[144] U.S. CONST. art. 1, § 8, cl. 14.

> States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[145]

This seems to indicate that if Congress is given the power to organize, arm, and discipline the Militia, this would necessary imply the ability to regulate those firearms necessary for militia service. Put another way, it is implied that Congress actually does have the power to regulate what arms the people are allowed to keep and bear to the extent that Congress may decide what arms are necessary (or unnecessary) for those members of the militia to own. The question then, is how would such power be compatible with the Second Amendment? To answer that question requires a look at the Founding Fathers' views of the militia.

2. Militia and the Founding Fathers

Not a part of the original text of the Constitution, the Second Amendment was one of a twelve proposed amendments sent to the states for ratification, ten of which would go on to become the first ten amendments, also known as the Bill of Rights.[146] It is well known (though little discussed due the political expediency of claiming that the Founding Fathers spoke with one voice) that not all framers of the Constitution agreed with the Bill of Rights or even thought it was necessary.[147] Their words, however, still provide an insightful view of how many of the framers understood the language of the Second Amendment.

For Justice Story, the relationship between the existence of the militia and the right to keep and bear arms was undeniable.[148] "The militia," Justice Story wrote, "is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpation of powers by rulers."[149] Story echoed the popular concern that it was better to avoid employing a standing army for two reasons: (1) the expense was prohibitive, and (2) the ease with which a standing army would allow an ambitious president or other official to usurp power from the people.[150] The right to keep and bear arms then must be related to the ability of the citizens to serve in the militia, who in turn are tasked with the national defense and discouraging those who might seek to use a standing army for personal gain.[151]

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[145] U.S. CONST. art. 1, § 8, cl. 15.

[146] Interestingly, the 27th Amendment, the most recently ratified amendment, was also first presented to Congress as one of those twelve original proposed amendments.

[147] *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

[148] STORY, *supra* note 114, at 708.

[149] *Id.*

[150] *Id.*

[151] *Id.*

Alexander Hamilton presaged some of Justice Story's arguments, including the fear of despotic misuse of a standing army.[152] Hamilton touched extensively on the use of the militia, but also wrote about the regulation of the militia.[153] First, Hamilton objected to the idea of the entire citizenry being part of the "well regulated militia" because it was simply impractical to expect tradesmen and others similarly situated to have the time to commit to becoming experts in military movements, and the economic effects may even make it dangerous to attempt to try such an experiment.[154] Instead, Hamilton favored the creation of a select corps, ready to take the field in defense of the State, whenever may be necessary.[155] What is important though, is that whatever means of defense, either militia or select corps, Congress was granted the power to see that they be well regulated.[156] This seems to imply that, via use of the Sweeping Clause, Congress does have the power, to some extent, to regulate the right to keep and bear arms.

The Anti-Federalists, while strongly advocating a Bill of Rights, urged that particular rights were of higher importance.[157] The right to keep and bear arms is not among those rights. Nor were the Anti-Federalists concerned with the understanding of a militia; instead, they were concerned about the potential dangers of having a standing army and the potential oppression it could create.[158] As with Hamilton and the Federalists, the concern is with the idea of a standing army.

Given the relationship between the former colonies and the concept of a militia as the preferred form of defense, it seems odd that somewhere, between gaining independence and drafting the Second Amendment, the keeping and bearing of arms changed from being an obligation to being a right. This change is difficult to account for and any reasons suggested by this Article would be speculative at best. Given that this Article is not intended to argue a particular view of the Second Amendment, it should suffice to say that whatever the reason for the switch from obligation to right, the important part is that a switch was made and the results have been divisive.

3. Modern Changes

The early history of the Supreme Court is surprisingly absent of significant Second Amendment cases. There is no significant case on record regarding the Second Amendment before the 1939 decision in *United States*

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[152] *See* THE FEDERALIST NO. 29 (Alexander Hamilton).
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *See* John Dewitt, *Essay II*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 189 (Ralph Ketcham ed., 2003).
[158] Brutus, *Essay I*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 269 (Ralph Ketcham ed., 2003).

v. Miller.[159] In *Miller*, two men, Jack Miller and Frank Layton, were charged with violating the National Firearms Act[160] by transporting a double barreled shotgun with a barrel length under 18 inches from Oklahoma to Arizona without having the proper documentation to show that it was lawfully taxed.[161] The defendants argued that the National Firearms Act violated the Second Amendment.[162] The District Court of the Western District of Arkansas found that the National Firearms Act did, in fact, violate the Second Amendment.[163]

The Supreme Court disagreed.[164] Due to the lack of evidence that possessing or using a shotgun with a barrel under 18 inches was in any way reasonably related to the preservation or efficiency of a well regulated militia, the Court ruled that the Second Amendment did not grant the right for individuals to own such a weapon.[165] The result of *Miller* is that not only does Congress have the right to regulate firearms, but that there is also no individual right to possess any arms not approved by Congress for militia service.

Miller remained the defining Second Amendment case until 2008. In that year, the Supreme Court heard *District of Columbia v. Heller*,[166] a case arising out of a District of Columbia law making it a crime to carry an unregistered firearm and also prohibiting the licensing of firearms.[167] A local D.C. police officer who wanted to keep a personal firearm in his home challenged this law, taking his challenge all the way to the Supreme Court.[168]

The dissenters in *Heller* took the view of the *Miller* Court, that the Second Amendment protects the right to keep and bear arms for certain military purposes, but it does not prevent Congress from regulating the non-military use and ownership of weapons.[169] Justice Stevens went even further by drawing attention to the fact that, while certain state constitutions expressly stated that the right to keep and bears arms was partly for purposes hunting and self-defense, the Framers of the United States Constitution actively made the decision to avoid such statements.[170] For the dissenters, under the precedent set by *Miller*, the case should have been easily disposed.

The majority, however, took a different view. In the majority opinion, authored by Justice Scalia, the Court seems to have abandoned the

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[159] *See generally* 307 U.S. 174 (1939).
[160] National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).
[161] Miller, 307 U.S. at 175.
[162] *Id.* at 176.
[163] *Id.* at 177.
[164] *Id.* at 178.
[165] *Id.*
[166] 554 U.S. 570, 574 (2008).
[167] *Id.* at 574–75.
[168] *Id.* at 577.
[169] *Id.* at 637 (Stevens, J., dissenting).
[170] *Id.* at 642 (Stevens, J., dissenting).

reasoning in *Miller*, and then took the even more unprecedented step of arguing that the first half of the Second Amendment was a prefatory clause, and therefore, not important to the interpretation of the Second Amendment.[171] Scalia purports to examine the language of the "operative clause" of the Second Amendment by engaging in an in depth analysis of the text which included examination of the meaning of militia,[172] examination of similar state constitutions,[173] and an attempt to show consistency with prior precedent.[174] For better or for worse, the majority found that under this analysis the Second Amendment does guarantee an individual right to keep a firearm for self-defense.[175]

B. Analysis

What can we discern from the history of the Second Amendment in regards to the theory of a living constitution? Is the Second Amendment another example of the living constitution? Several facts seem to weigh in favor of viewing the Second Amendment as part of a living constitution and each should be discussed in turn.

First, the right to keep and bear arms itself appears to have evolved from an earlier obligation. As we have already seen, there was, in England, a duty to be armed for service in the militia.[176] Failure to be so armed had real penalties up to and including loss of property.[177] This duty to serve in the militia naturally spread to the colonies, where it was, in some circumstances, written into law.[178]

At some point, the Framers of the Constitution reinterpreted the duty to be armed for service as a right to keep and bear arms. There is little to account for this change, and any guesses are mere speculation. Yet it seems that the Second Amendment is not a pre-existing right as some have argued, and is, in reality, a rebranding of a prior legal obligation.

Second, there is perhaps no clearer example of artificial selection in all Supreme Court case law than there is in *Heller*. Recalling that artificial selection is the process by which a human agent selects which traits will continue on, so too in law does artificial selection allow a judge to select which parts of a law will survive review. In *Heller*, Justice Scalia found the

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[171] *Id.* at 579–89.

[172] *Id.*

[173] *Id.* at 619–20. This is a curious attempt at establishing legitimacy since several of the state constitutions Scalia cited include express rights to possess weapons for self-defense or for hunting game; Congress, who would have been aware of such a possibility, opted NOT to include such rights.

[174] *Id.* at 619–21.

[175] While a detailed look at *Heller* would be nice, such an undertaking would be well beyond the scope of this paper and indeed would constitute an entire paper in itself. A simple Lexis Advance search for "Heller" turns up hundreds of articles, far too many to pick the even the best to recommend.

[176] HOLLISTER, *supra* note 142, at 59–60.

[177] *Id.*

[178] United States v. Miller, 307 U.S. 174, 179–80 (1939).

first half of the Second Amendment to be a prefatory clause,[179] and therefore, not part of the Constitution endowed with any legal significance.[180] The result is that what Scalia termed as the "operative clause," the right of the individual to keep and bear arms, is selected as the sole meaning of the Second Amendment.

Third, as much as *Heller* provides evidence of artificial selection in case law and, necessarily of the Constitution as a living organism, it also validates Chief Justice Rehnquist's fears of a relationship between judicial activism and a living constitution. Before *Heller*, the Second Amendment, when viewed in relationship to Congress's Article I powers, should allow Congress to regulate firearms. If we adopt Judge Easterbrook's definition of judicial activism, then for the Supreme Court to vote to overturn a democratically enacted law that was within the constitutional powers of Congress to enact is nothing short of judicial activism. Whether this is good or bad is not the point of this Article, nor is it possible to definitively answer such a subjective question. What does matter is that, even when judicial activism is involved in the evolution of a living constitution, its results are not necessarily negative, but rather a matter of perspective.

VI. CONCLUSION

By reviewing the history and application of the Commerce Clause and the Second Amendment, we can discern several things. First, that there is evidence that the articles and amendments that make up the United States Constitution have evolved over time. Whether it is the economy changing from agrarian to industrial, or the New Deal or the Civil Rights Movement, the Commerce Clause was bound to be used as the justification for a number of different laws, which may seem only tangentially related to Interstate Commerce. So too with the Second Amendment.

Second, the fact that a constitution is a living constitution does not favor any political ideology. Indeed, analysis of both the Commerce Clause and the Second Amendment shows that both liberal and conservative courts have manipulated the Constitution to serve their own ends at various points in history. Ideological manipulation of the Constitution, through the process of artificial selection, is not new and cannot be shown to be objectively bad. Further, given the partisan nature of American government, it is inevitable that changes would be ideological in nature.

Finally, and perhaps most importantly, being a living constitution, changing through the process of doctrinal evolution, does not diminish the power or integrity of the United States Constitution. Instead, it allows generally phrased powers and provisions to adapt to the rapidly changing

[179] District of Columbia v. Heller, 554 U.S. 570, 595–600 (2008).
[180] *Id.* at 595–601.

world in which we live. In short, because the United States Constitution is necessarily a living constitution, it is capable of continuing to serve as the basis of government for our country during a time of dynamic change.