A MATTER OF INTERPRETATION: HOW A CHANGE OF CONSTITUTIONAL PERSPECTIVE IS NECESSARY TO OVERCOME THE CHALLENGES OF CLIMATE CHANGE

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I. Introduction

There is a shadow on the horizon of the environment's future. Emissions of carbon dioxide are creating an increasingly warmer planet, which in turn is creating rapid changes in ecosystems, affecting the melting of ice shelves, rising ocean levels, and limiting the habitability of local ecosystems worldwide. When the interpretation the United States Constitution lies at the mercy of the Supreme Court, the perspectives and ideologies that are held by the sitting Justices remain paramount in how we can use the Constitution to best adapt to and combat the effects of the changing climate.

There has been a recent trend of self-described originalist and textualist interpretations of the Constitution which are limiting the government's ability to mitigate and possibly prevent the climate challenge at hand. It is public knowledge that we need to act fast, but if we insist in denying the government the ability to act while also faced with a lack of private initiative in this area, the legacy of the Roberts Court will be etched in history as the Court that missed the opportunity. By using what is defined here as *ersatz*-originalism to environmental issues,[1] the Roberts Court has effectively emaciated public action. Worse, it has replaced it with the myth of private solutions, which unfortunately are either lacking or are insufficient.

This paper explains the current theories of constitutional interpretation, namely the theories born from the Federalist Society[2] and their disreputable consequences which grant the current climate crisis to continue to cultivate, rather than mitigating and possibly preventing it. It will also advocate for other constitutional interpretations which are friendlier to public interest and action. There are glimmers of hope in the interpretive lens of progressive-originalists and light in

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1. I define "Ersatz-Originalism" as a view that incorporates the Justices' personal neo-liberal ideologies rather than the Framers' belief in the role of the government. The Ersatz-Originalist view is often veiled as "Originalism" or "Textualism" and marketed as an objective standard of fidelity in how to interpret the Constitution with reverent piety.

2. There are nine justices on the United States Supreme Court bench. Of the nine Justices in the Roberts Court, six of them are members of the Federalist Society. The Federalist Society is a 501(c)(3) non-profit corporation with the established goal of interpreting the United States Constitution through an originalist, or textualist, perspective. Amanda Hollis-Brusky, *Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform*, 86 MORL 517, 529 (2021)

the penumbras of the text of existing law that can be used to successfully establish and permit an effective lawful response to ensure America is best adapted to handle this forthcoming crisis.

II. Originalism and the Roberts Supreme Court Jurisprudence as Defined in Heller

One of the biggest issues with the Roberts Court originalism and textualism is its Ersatz quality. Originalism is a Constitutional interpretation that adheres to history.[3] Textualism is another Constitutional interpretation but it adheres to the plain meaning of its text, rather than its Founders' original intent. [4]

Here I argue though that if the Roberts Court were really to apply originalism, ironically, it would be unfaithful to the Framers' intent. The Framers wrote the Constitution as a living document[5] to guide our nation through a future whose challenges which could not necessarily anticipate and understood they could not anticipate.[6] The Framers, for instance, could not predict the effect of industrialization and the required legal framework to address the resulting carbon dioxide emissions. Moreover, no one in the 18th century could have imagined how those emissions might affect the habitability of the planet, and accordingly the government's duties to regulate behavior, individual or corporate.

> The earliest versions of modern originalism, articulated by Judge Bork, Chief Justice Rehnquist, Edwin Meese, and others in the 1970s and 1980s, explicitly hewed to an "original intent" Focused on the "original

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3. Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 115 (2022).

4. *Id.*

5. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption,* 91 Texas Law Review, 2012 (2015).

6. "In his 2015 book, The Quartet: Orchestrating the Second American Revolution 1783-1789, Pulitzer Prize-winning historian Joseph J. Ellis argues that the Constitution and Bill of Rights were never intended as sacred texts with fixed meanings designed to withstand time. According to the author's interpretation, the founders made the Constitution purposefully vague, considering it a living document with malleable words to be perfected over time and fitting the unfolding experiences of the people of our new nation." Philip N. Meyer, *Origin Stories Do They Define or Help Refine Constitutional Interpretation?,* 107 ABA J. 24, 25 (February/March 2021).

intent" of the framers, this initial version of originalism was predictably "antagonistic" to textualism in many instances, since it called for the primacy of historically-derived intent or expectations about the application of the law, not the meaning of broad textual principles.[7]

The Originalist perspective of Constitutional interpretation seeks to interpret the constitution strictly based upon the intent the Framers originally meant when they wrote it. Textualism, in contrast, is another conservative-leaning perspective of Constitutional interpretation that gives the most gravity to the explicit expressed text in the Constitution based upon the text's ordinary meaning. However, when the Roberts' Court applies these interpretations, they often miss both marks, as they did in the case of <u>District of Columbia v. Heller</u>.[8]

Penned by the late Justice Scalia -- a member of the Federalist Society – the decision in <u>Heller</u> held that the Second Amendment included the right to own firearms for personal self-defense. It struck down a law that banned unregistered handguns in the District of Columbia, and required citizens to keep their registered handguns at home, unloaded, and dissembled.[9] Writing for the majority, Justice Scalia wrote that "[t]he Amendment could be rephrased, 'Because a well-regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed'." [10] Despite the vocal adherence to Originalism and Textualism, it is apparent that Justice Scalia abandoned a strict Textualist interpretation by rephrasing the text of the Amendment to fit his ruling. By finding a right to bear arms for personal self-defense, outside of an individual's membership to a militia needed only to secure the freedom of the state at the time of the country's founding, Justice Scalia enlarged the scope of the Amendment Second,[11] beyond the Framers' expressed words.[12] The Constitutional text states: 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. [13]

Justice Scalia's loyalty to a particular method of interpretation is rather flexible. After having paraphrased the "sacred" text of the Amendment distancing his Constitutional reading from the Framers', he then returned to a more faithful reading

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7. Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, at 124-125 (2022)
8. District of Columbia v. Heller 128 S.Ct. 2783 (2008).
9. *Id*. at 2785.
10. *Id*. at 2788.
11. U.S. CONST. amend. II.
12. District of Columbia v. Heller, 128 S.Ct. 2783, 2788 (2008)
13. U.S. CONST. amend. II

of the text and concluded that "the sorts of weapons protected were those "in common use at the time.""[14] However, in an Ersatz-Originalist fashion, he simply ignored any difference between the firearms that were available at the time of the drafting of the Constitution, and the modern handguns that were subject to the District of Columbia's law. He defended this lack of distinction with "It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."[15] In doing so, Heller abandoned its fealty to the intent of the Framers, as it did earlier to the plain meaning of the text. Heller is perhaps a showpiece of how Ersatz-Originalism is used by the Roberts Court to achieve an ideological end result and claim Constitutional purity. In doing so, it disregards the theory of interpretation that the Federalist Society Justices claim to encompass that purity; Constitutional originalism and textualism.

a) *Originalism and the Administrative State - Chevron[16] and Kisor[17]*

The increased use of Ersatz-Originalism by the Roberts Court may be explained by its administrative law jurisprudence which tends to limit the power of administrative agencies, and thus of the administrative state.[18] A key insight in how the powers of administrative agencies are being influenced by the Robert's Supreme Court can be seen in the evolution of the "Chevron Deference." Chief Justice Robert's dissenting opinion in City of Arlington, Texas v. Federal Communication Commission[19] can be pinpointed as the potential beginning of the change.

While not an environmental case, Chief Justice Robert's dissent in City of Arlington, Texas focuses on the long used "Chevron Deference" to establish whether an agency under the Executive branch is acting appropriately with power delegated from Congress. The Chevron Deference derived from the case of Chevron U.S.A., Inc.

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14. District of Columbia v. Heller 128 S.Ct. 2783, 2817 (2008).
15. *Id.* at 2819.
16. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. , 468 U.S. 837 (1984).
17. Kisor v. Wilkie, 139 S.Ct. 2400 (2019).
18. "As used here, the administrative state includes those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration--including that which occurs in hybrid forms and spans traditional public-private and nation-state boundaries." Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege,* 131 Harv. L. Rev. 1, 8 (2017)
19. City of Arlington, Texas v. Federal Communication Commission 569 US 290 (2013).

v. Natural Resources Defense Council, Inc.. [20] In it, a legal test was created as to when the court should defer to an agency's answer of interpretation of administrative action, rather than Congress. The Chevron-Deference is important because it can give more power to agencies in how they interpret their actions, which can be valuable for an agency, namely the EPA while attempting to regulate emissions of carbon dioxide.

In City of Arlington, Texas, however, Chief Justice Roberts hints at narrowing the scope of Chevron, and intends to focus more on Congress's interpretation rather than the agencies. "Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency."[21]

The next significant step in the evolution of the Chevron Deference derived from Kisor v. Wilkie.[22] This case was decided in 5-4 split, a little over a year before the passing of Justice Ginsberg, which gave the Court a strong conservative majority.

The ruling, written by Justice Kagan, affirmed that the Chevron Deference would be upheld, but with an additional third step. The first two steps would remain the same, which would allow the Court to defer to the Executive Agency when the term is (1.) ambiguous, (2.) so long as the interpretation is reasonable. The third step would be to ensure the agency's interpretation is their "official position,"[23] "must in some way implicate its substantive expertise"[24] and "must reflect fair and considered judgement"[25]

While the Court may still uphold the deference for now, the growing momentum of the Court deciding to allow less deference to agencies, and more to Congress is becoming more commonplace. In their concurrence in ruling, but dissent in reasoning of Kisor, Justice Gorsuch and Justice Thomas reject the idea that the Court should have to submit to deferring to administrative agencies, and instead "this

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20. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984).
21. City of Arlington, Texas v. Federal Communication Commission 569 US 290, 312 (2013
22. Kisor v. Wilkie, 139 S.Ct. 2400 (2019).
23. *Id*. at 2416
24. *Id*. at 2417
25. *Id*.

Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve."[26]

Ultimately, the conservative concurrences in Kisor established the rationale (or lack thereof) behind the majority ruling in one of the most important environmental cases of the contemporary Supreme Court; West Virginia v. EPA. [27][28]

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26. *Id*. at 2447.

27. This paper does not argue that the negative impact of originalism resides only with Supreme Court Justices, or that it can be predicted by what President appoints the judge or the justice, as the Ninth Circuit opinion in *Juliana* show. Examples of the shortfalls in originalist and textualist interpretation can be seen in the failure of *Julianna v. United States*, *West Virginia v. EPA*, and the Court's increasing hostility toward the Chevron-Deference standard, most notably seen in the Court's split of *Kisor v. Wilke*. In the case of *Juliana v. United States* 947 F.3d 1159 (2020) the Ninth Circuit of the United States Court of Appeals dismissed a highly followed suit for a lack of standing. *Juliana* began in the United States District Court of the District of Oregon, when 21 youth plaintiffs filed a law suit arguing that the United States government's continued promotion and allowance of fossil fuel emissions violated the plaintiff's due process rights to life, liberty, and property. The District Court ruled that the plaintiffs did have standing. They also ruled that there was a fundamental right to a climate system capable of sustaining human life. After the ruling, which was penned by Judge Aiken, many believed that this case would be a massive step forward for environmentalists. When it was brought to the Nineth Circuit on appeal, however, the optimism was short lived. Judge Hurwitz of the Nine Circuit, who was appointed by Barrack Obama, and not normally seen as an originalist or textualist, ruled that the plaintiffs in *Juliana* did not have standing, due to the text of the Administrative Procedure Act ("APA"). The relevant text is in how the plaintiffs brought their claim. "The plaintiffs do not claim that any individual agency action exceeds statutory authorization or, taken alone, is arbitrary and capricious. Rather, they contend that the totality of various government actions contributes to the deprivation of constitutionally protected rights." *Id.* at 1167. The APA does not allow challenges based on the totality of various government actions, but rather allows challenges to specified "discrete agency decisions" *Id.* at 1167. Furthermore, the Ninth Circuit looked at the redressability sought by the plaintiffs. The Nineth Circuit showed sympathy for the motivations of the plaintiffs. "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular." *Id*. at 1171. However, through the quasi-textualist interpretation of Article III of the United States Constitution, the court found that they would not be able to redress the issue at hand. Stating specifically that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches" *Id.* at 1171. By deferring the power to address this issue to the Executive and Legislative branches, against whom the plaintiffs brought the suit in the first place for their prolonged permission for the fossil fuel industry to continue emitting carbon dioxide into the atmosphere, the Court essentially refused to apply its overseeing role established by Justice Marshall in *Marbury v. Madison* 5 U.S. 137 (1803). "The judicial power of the United States is extended to all cases arising under the constitution." *Id.* at 173 The logic of the *Juliana* ruling evades the responsibility of the court to have a judicial review over the actions of the other branches and ignores the reality that the Executive and Legislative branches have not been able to respond to the issue, despite the lack of response violating the plaintiffs fundamental right to a climate system capable of sustaining human life.

28. West Virginia v. EPA, 142 S.Ct. 2587 (2022)

b) *The Roberts Court Environmental Originalism and West Virginia v. EPA*

I define Environmental Originalism, by reference to originalism, to mean the theory that the Court should look at the perimeters of environmental issues through the standard originalist lens, despite modern environmentalism not gaining national traction until the 1970s, almost two-hundred years after the framers wrote the United States Constitution. The quintessential ruling of Environmental Originalism is West Virginia v. EPA.[29] The case has provided an even more dire example of how textualist and originalist interpretation of the Constitution prevents meaningful action in addressing carbon dioxide emissions.

The facts of the case are as follows: In 2015 the Environmental Protection Agency ("EPA") under the Obama Administration set out to achieve the "best system of emissions reduction" in an attempt to shift the energy sector in the short-term from coal to gas, and in the long-term from fossil fuels to renewable energy, in what was referred to as the "Clean Power Plan" ("CPP"). After the Obama Administration was seceded by the Trump Administration the CPP was abandoned and replaced with the Affordable Clean Energy Rule ("ACE") which was more-so guidelines for States to reference as they develop their own emission plans. On January 19th, 2021 the D.C. Circuit vacated ACE and affirmed the EPA's interpretation of the CPP. The Supreme Court then granted certiorari, once the CPP was challenged.

The issue the Court addressed was whether the CPP permitted the EPA to regulate carbon dioxide emissions in a generation-shifting capacity, as outlined in the CPP. Section 111(d) of the Clean Air Act ("CAA") authorizes the EPA to regulate emission of non-criteria, non-hazardous air pollutants from stationary sources through identification of the "best system of emission reduction" that is "adequately demonstrated." The Court affirmed the EPA did have the ability to regulate carbon dioxide emissions under Section 111(d), since carbon dioxide is a non-criteria, non-hazardous air pollutant. "Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly."[30]. However, the Court denied the ability for the EPA to regulate in a generation-shifting capacity. "It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." [31]

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29. West Virginia v. EPA, 142 S.Ct. 2587 (2022)
30. *Id*. at 2610.
31. *Id*. at 2610.

True to form, the Supreme Court reviewed Section 111(d) through an originalist approach, and interpreted it through the strict meaning of the intention of Congress when it was written. “Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.”[32] “We also find it “highly unlikely that Congress would leave” to “agency discretion” the decision of how much coal- based generation there should be over the coming decades.”[33] “It is doubtful we had in mind that it would claim the authority to require a large shift from coal to natural gas, wind, and solar.”[34]

The Court’s ruling willfully ignores the intent of the CAA was to regulate air pollutants in order to protect public health and welfare. It also ignores the CAA’s intentionally broad language to allow freedom of interpretation to best accomplish what the CAA’s efforts in regulating emissions. As time had passed, and better science confirmed the harmful nature of carbon dioxide emissions, there should be no reason the CAA would not apply to the phasing out of coal-based energy, when the use of coal for energy is directly responsible for the carbon dioxide emissions that are putting the public welfare in jeopardy. Justice Kagan, in her dissenting opinion, reduced this argument to its simplest form: “A generation-shifting system is the best system.”[35]

Relying on the intentions of Congress as strictly as the Court’s interpretation does, blinds itself of the nuance that when the CAA was written, the understanding of carbon dioxide’s effects on the climate was not as well understood or dire as it is now. It would not be unreasonable to further conclude that had the Congress of 1973 known about carbon dioxide’s harm to the welfare of Americans, they would have been just as clear in the Act as they were with particulate and hazardous pollutants. The conclusion the Court issued in the majority ruling of <u>West Virginia</u> ignores this outright. It performs the same song and dance as <u>Heller</u> in that it achieves its result while claiming Constitutional Purity, without reverence for the theory that the Federalist Society Justices claim to be pure.

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32. *Id*. at 2612.
33. *Id*. at 2613.
34. *Id*. at 2613.
35. *Id*. at 2628.

This interpretation limits the power of the court's ability to address the credible issue of carbon dioxide emissions harming the environment. "This Court has obstructed EPA's efforts since the beginning"[36]

The conservative interpretations of originalism and textualism , especially in their current Ersatz-Originalist practice, have and will continue to limit the ability for the government to act in ways that can mitigate the impending harm of Climate Change.

III. Progressive Originalism and the U.S. Constitution

When it comes to the interpretations of the Constitution, the Justices' ideological pendulum has sometime leaned toward more public interest and sometimes to corporate interest. Most notably, with the Warren Court, the Supreme Court has recognized positive rights, penumbras within text, and broad interpretation, which favored the public at large. These interpretations could provide the backbone for future judicial rulings addressing climate action, which rests on the Justices' ability to find "what lies below the surface of words"[37] and implement the public interest when it comes to climate issues.

"Progressive Originalism" is the theory that concludes that the interpretation of the Constitution as a living document was the original intention of the Framers.[38] It holds that to respect the fidelity of the Framers intent, one should not limit the interpretation of the Constitution to only the limited knowledge the Framer's world view as it existed in 1791. Doing so would arguably discount the brilliance and foresight of our Founding Fathers to want to continually evolve our nation into a more perfect union.

Examples of these progressive constitutional interpretations can be seen in seminal case law. The positive right to have an attorney provided to those who cannot afford one was enshrined in Gideon v. Wainwright[39]. The recognition of fundamental rights of privacy were found in Griswold v. Connecticut[40] through the penumbras of text, rather than the strict expressed text itself. Progressive interpretation of recognizing a living constitution which should be read to the times rather than stuck

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36. *Id.* at 2627
37. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV., 527, 533 (1947)
38. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV., 147 (2015)
39. Gideon v. Wainwright, 372 U.S. 335 (1963).
40. Griswold v. Connecticut, 381 U.S. 479 (1965)

in the year of its publication can be found in the landmark decision in Brown v. Board of Education[41]

Gideon v. Wainwright was the seminal Supreme Court case where the Court guaranteed the right to be appointed an attorney by the State if an accused could not afford one during a criminal proceeding. Gideon is important, beyond the expressed ruling, because it is the first time the Supreme Court guaranteed a positive right for American citizens.

A positive right is a right that is provided or guaranteed by the State and made available if it is not possessed by the person it is guaranteed to[42]. A positive right differs from a negative right, which is a right that is guaranteed but not provided by the State, but still enforced by ensuring there are no encumbrances preventing people from obtaining the right on their own[43]. In America's history, the Court has generally guaranteed negative rights with passionate consistency. Examples of these negative rights include the right to practice free speech, the right to practice a religion, the right to possess a gun if one wishes, the right to not be searched by an officer without a warrant or cause, and the right to not be subjected to cruel or unusual punishments. Likewise, the Court has seldom guaranteed a positive right. Examples of the Court denying a positive right can be found in their ruling that there is no right to education, there is no right to welfare, or there is no right to adequate housing.

One of the biggest reasons there is an emphasis on negative rights rather than positive rights is America's long held value it places on liberty. A negative right provides individuals with the freedom to partake in certain rights if they wish, but a positive right creates an obligation on another, which may not always be able to be enforced[44]. An example of this can be seen in the South African Constitution, which guarantees the positive right of housing[45]. While well intentioned, enforcing that right raises another issue. The obligation of the country to have access to housing materials, building the houses, and making them available for any citizen that wants them can pose a impediment when there is a shortage of housing materials, a shortage of workers who build houses, or if there is an increase in demand for the

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41. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U.S. 483 (1954)

42. Arijeet Sensharma, *A Charter of Negative Liberties No Longer: Equal Dignity and the Positive Right to Education* 97 N.Y.U. L. REV. 835 (2022)

43. *Id.* at 837

44. *Id.* at 843

45. S. AFR. CONST., SECT. 26 (1996) "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable measures, within its available resources, to achieve the progressive realization of this right."

houses. By guaranteeing negative rights rather than positive rights, the United States avoids running into the potential of not being able to meet their obligations to their citizens. It is recognized that there are three key doctrinal barriers to recognition of positive rights: 1) that a cognizable due process claim must arise from direct, de jure state deprivation; 2) that separation of powers points towards legislatures, not courts, as the appropriate bodies for curing social and economic ills; and 3) that furnishing equality is not a proper aim of due process.[46]

Despite this, Gideon guaranteed a right to an attorney that is appointed by the State if the accused could not afford one. The Court was not concerned with the possibility of a shortage of lawyers, or the obligation of public defenders having to represent citizens. Because of Gideon, the Supreme Court has set a standard that, if necessary enough, a positive right may be recognized.

When applying this concept to the environment, the right to clean air, clean water, and access to land that is habitable should be recognized as positive rights. By doing so, the government would have more freedoms to protect the environment, as they would be operating for the sake of a fundamental right, rather than operating in accordance with the limitations derived from statutes such as the Clean Air Act or Clean Water Act.

Likewise, the concern over the shortage of a positive right should be negligible, and the recognition of these positive rights should have the same text as the South African Constitution, not guaranteeing the right outright but rather guaranteeing the effort: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."[47]

Moreover, in another Warren Court holding, Griswold v. Connecticut,[48] the court found a fundamental right to privacy for American citizens despite there being no texts on the matter in the Constitution. The ruling, penned by Justice Douglas, famously declared "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[49]

46. Arijeet Sensharma, *A Charter of Negative Liberties No Longer: Equal Dignity and the Positive Right to Education* 97 N.Y.U. L. REV. 835 (2022)

47. S. AFR. CONST., SECT. 26 (1996)

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

49. *Id*. at 484

Since there was an absence of the Constitution explicitly stating there is a right to privacy, the right was still found through the implications of what was being guaranteed in other rights that were explicit. By looking at the first amendment, third amendment, fourth amendment, and fifth amendment, there lived a consistent priority to give individuals privacy despite the text refraining from expressing the right to privacy verbatim. Because of Griswold, the Supreme Court has set a standard that there are implications in the Constitution, the penumbras of those implications can be just as affirming of a right as the text itself.

In the context of the environment, there exists two penumbras in the United States Constitution. The first is that there exists a right to life. While it is not written in the Constitution as a positive right, the Fourteenth Amendment states "Nor shall any state deprive any person of life, liberty, or property, without due process of law."[50] From this it is fair to say there exists a right to live, since in order to deprive another of it, one would have to go through the due process of law. Once established, the right to life allows for the reasonable recognition of another penumbra, which is a right to the most basic necessities for life. Those necessities would be clean water, clean air, and access to habitable land.

Griswold establishes that in the alternative, or in concert, to the recognition of positive rights, the government would enjoy the same freedoms with their ability to protect the environment by recognizing the rights of air, water, and land, through the penumbra of the right to life, as well.

Lastly, in the third relevant Warren Court decision, Brown v. Board of Education[51], the court produced a broad interpretation of the fourteenth amendment, and successfully overturned Plessy v. Ferguson, which allowed segregation practices to exist in schools.

What makes Brown so impactful, beyond its subject matter, was how the Supreme Court interpreted the case. In it, the Court explicitly states "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson[52] was written. We must consider public education in the light of its full development and its present place in American

50. U.S. CONST. amend. XIV (1868)

51. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U.S. 483 (1954)

52. Plessy v. Ferguson 163 U.S. 537 (1896)

life throughout the Nation. Only in this way can it be determined if segregation in the public schools deprives these plaintiffs of the equal protection of the laws."[53]

This language is not only the launchpad for one of the most important Civil Rights cases in American history, but also reads like a manifesto decrying strict textualist and originalist interpretations in the face of the present. "We cannot turn the clock back," alone, speaks to the progressive nature of "living document" or "progressive originalism" Constitutional interpretation.[54] In his language, Chief Justice Warren rejects the self-imposed limitation of being unable to look beyond the text of a document and the intent at the time of its creation. Instead, he considered "the light of its full development and its present place in American life throughout the Nation."[55] It enshrines, with prose, Chief Justice Warren's decision to not bring America back to 1868, but instead, bring documents of the past into the existing day.

Brown serves as the truss support for the defiance of the originalist and textualist interpretations to climate change. West Virginia v. EPA[56] failed the public in how it turned the clock back to 1973[57]. The question of whether the EPA can enforce generation-shifting regulations deserved to be considered in the light of its full development and its present place in American life, which would have accounted for the necessity to limit carbon emissions, and importance of ensuring a cleaner environment for the public.

IV. Conclusion

The current trend of originalism, textualism, and neoliberal-result-driven Ersatz-Originalism in how the Supreme Court majority performs Constitutional interpretation, if not changed, will drastically limit the Country's ability to combat climate change.

Through the tools that the Warren Court provided in the mid-20th century such as the recognition of positive rights, penumbras, and interpreting the Constitution through a "Progressive Originalist" lens, the potential to reinvigorate the powers of the United States to confront the new environmental threats exists. The Roberts Court may understandably want to create its own jurisprudence; however, it may

53. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347, 492-493 (1954)

54. *Id.*

55. *Id.*

56. West Virginia v. EPA, 142 S.Ct. 2587 (2022)

57. The year that the Clean Air Act was amended to contain the relevant text which was interpreted in *West Virginia*.

want to reconsider the politics used to achieve that goal. Far from a neutral reading of the Constitution – assuming that it is possible – the Roberts Court is subverting their majority political reading of the Constitution to achieve ideological ends: a reduction of individual rights and a decrease in public interest.

An honest and transparent interpretation of the Constitution would account for the reality of the present day, and demand we recognize the effects carbon emissions has and will continue to have on society, and to create social policy accordingly.