Has the Supreme Court of Canada Rejected "Originalism"?

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A number of core precepts of Canadian constitutional interpretation—that the Constitution is to be regarded as a "living tree" and that the intentions of the framers should not constrain its growth—have led to the common belief that "originalism" is flatly inconsistent with Canadian law and judicial practice. The authors set out to challenge this conventional wisdom. While one popular strain of originalist thought was rejected early in the life of the Charter*, originalism has grown, changed and diversified a great deal in the last three decades. Today, most originalists are less focused on the subjective intention of the framers and more concerned with identifying a fixed original meaning of constitutional terms, which seeks to constrain the scope of constitutional doctrine but typically leaves considerable room for evolution in the application of that fixed meaning to concrete modern day controversies. In light of these developments, the authors argue that the conventional wisdom—that originalism has been squarely rejected by the Supreme Court of Canada—is not established by the case law to date, and many key decisions of the Court are fully compatible with modern originalist thought. Moreover, the authors suggest that the breezy invocation of constitutional buzzwords like "living tree", while neglecting contemporary debates over constitutional interpretation, has led to a degree of malaise regarding how and under what circumstances the judiciary may alter the Constitution on our collective behalf. A better understanding of the debates surrounding modern originalism may help us identify the extent to which constitutional change ushered in through a majority vote of nine jurists, however eminent, is consistent with a commitment to self-governance in a constitutional democracy.*

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Introduction

Any constitution that has existed for long enough is surrounded by myths—stories told to explain why things are as they are and, often, to reassure listeners and tellers alike that things are as they ought to be. Among the myths surrounding the Canadian Constitution is that originalism has no place in its interpretation. This belief has become commonplace in Canadian constitutional discourse, approaching the status of dogma.[1] In this article, we set out to show that the anti-originalist myth is just that, a myth, not the gospel truth.

As with many myths, this one is rooted in fact. Most often cited in this respect is the famous decision of the Judicial Committee of the Privy Council in *Edwards v Canada (AG)* (the *Persons Case*) in which the Privy Council likened the Constitution to a "living tree capable of growth and expansion within its natural limits".[2] Almost equally important is the opinion of the Supreme Court

1. Upon the passing of famous originalist Antonin Scalia, a number of Canadian media outlets published the thoughts of various former judges and constitutional scholars on the topic of originalism. Almost all agreed that originalism is more or less anathema to Canadian constitutional law. See Sean Fine, "Retired Canadian Jurists Respectfully Dissent from Scalia's Approach, Style", *The Globe and Mail* (15 February 2016), online: <www.theglobeandmail.com>; Ainslie Cruickshank, "Scalia's Judicial Philosophy in Sharp Contrast to SCC", *iPolitics* (15 February 2016), online: <ipolitics.ca>. But see Alexander Panetta, "Scalia: Where His Legal Originalism Came from, and Whether it Exists in Canada", *Canadian Press* (15 February 2016), online: Metro News <www.metronews.ca>.

2. [1930] AC 124 (PC(UK)) at 136 [*Persons Case*].

of Canada in the *Reference re BC* Motor Vehicle Act,[3] one of the first cases applying the *Canadian Charter of Rights and Freedoms*.[4] There, the Court held that its interpretation of the phrase "principles of fundamental justice" in section 7 of the *Charter* should not be bound by evidence of the framers' intentions with respect to the use of that term.[5] Stemming from these rulings, the notion that the Canadian Constitution evolves organically has become an article of faith in our constitutional theology, with the perceived effect that there is no room for the originalist sin committed by many American constitutional lawyers.

While there is some truth to this common narrative, we believe our anti-originalist dogma makes claims much broader than those which its historical foundation can support. Contrary to popular belief, originalism is not altogether absent from Canadian constitutional law. Indeed, we believe that originalism in fact plays an important, and perhaps ineradicable, role in how we interpret the Constitution.[6] However, in order to make this case, we must first clear some brush: that is, the assumption that originalist arguments are fundamentally incompatible with the Supreme Court of Canada's bedrock jurisprudence respecting the proper method of interpreting the Constitution.[7]

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3. *Reference re Section 94(2) of the* Motor Vehicle Act, *RSBC, 1979, c 288, as amended by the* Motor Vehicle Amendment Act, 1982, *1982 (BC), c 36*, [1985] 2 SCR 486, (*sub nom Re BC Motor Vehicle Act*) 24 DLR (4th) 536 [*Motor Vehicle Reference* cited to SCR].

4. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5. *Motor Vehicle Reference*, *supra* note 3 at 508–09.

6. While we cannot make this case fully here, it is covered in some detail in a companion piece. See Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" 49:3 UBC L Rev [forthcoming in 2017].

7. This project was begun by then-Professor, now-Justice, Bradley Miller. Bradley W Miller, "Beguiled By Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can JL & Jur 331 [Miller, "Beguiled"]; Bradley W Miller, "Origin Myth: The *Persons Case*, the Living Tree, and the New Originalism" [Miller, "Origin Myth"] in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 120. In his articles, Miller addresses some of the misconceptions confounding the case law and scholarship—such as the unhelpful dichotomy between "living tree" and "frozen concepts" interpretation—and explains that there is no necessary inconsistency between the foundations of orthodox Canadian interpretation and at least some forms of originalism. This article seeks to develop these ideas further and, along with a companion article, to at least begin the project urged by Miller in describing the next task as "to determine the areas of true disagreement and agreement between originalist interpretation and orthodox Canadian constitutional interpretation". Miller, "Beguiled", *supra* at 354.

This article will proceed as follows. In Part I, we review judicial and scholarly statements to the effect that originalism has no purchase in Canadian constitutional law and outline the presumed jurisprudential basis for this belief. There is no escaping the fact that "originalism" is frequently treated as a dirty word in Canadian constitutional law, to be denigrated or ignored.[8] By and large, the basis for this view is the apparent consensus that Canada has (rightly) adopted a "living tree" approach to interpretation and has (rightly) rejected the binding nature of the framers' intentions as to the meaning of constitutional provisions. However, as we endeavour to show, these premises alone do not lead to the conclusion that originalism, as now understood, is inconsistent with Canadian constitutional law or practice.

In Part II, we review the current state of originalist theory in the United States. Originalism has grown, changed and diversified a great deal in the last three decades, but Canadian discussions of this subject make scant reference to these developments[9] and often rely on outdated caricatures of originalist thought in the course of discrediting it. Today, originalists are less focused on the supposed *intent* of the framers and more concerned with identifying a fixed *meaning* of constitutional terms, which constrains the scope of constitutional doctrine but tends to leave considerable room for evolution in the application of that meaning to concrete modern day controversies.[10] Given the purpose of this article, it will be important to (re)introduce Canadian readers to some key features of contemporary originalist thought, so that we can see more clearly what elements of originalism have been rejected and accepted by the Supreme Court of Canada.

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8. See Adam M Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" (2008) 41 SCLR (2nd) 331 at 333–34 [Dodek, "Originalist View"].

9. For a very recent and notable exception, see J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53:3 Osgoode Hall LJ 745. For a further list of important contributions, see *infra* note 39.

10. This flexibility explains the political diversity among originalist scholars in the US. See e.g. Michael J Perry, "The Constitution, the Courts, and the Question of Minimalism" (1994) 88:1 Nw UL Rev 84 ("it is a serious mistake to think that the originalist approach to constitutional interpretation is necessarily conservative" at 86). This has been recently borne out in Canadian scholarship. See Kerri A Froc, "Is Originalism Bad for Women?: The Curious Case of Canada's 'Equal Rights Amendment'" (2014) 19:2 Rev Const Stud 237 [Froc, "Originalism"]; Kerri Anne Froc, *The Untapped Power of Section 28 of the* Canadian Charter of Rights and Freedoms (PhD Thesis, Queen's University Faculty of Law, 2015) [unpublished] [Froc, *Section 28*].

In Part III, we show that the conventional wisdom—that originalism has been squarely rejected by the Supreme Court of Canada—is not established by the jurisprudence to date. In order to do so, we undertake a closer reading of a range of cases through which originalism has supposedly been banished from Canadian constitutional discourse and show that they are hardly inconsistent with many modern forms of originalist thought.

Our intention in this article is relatively modest: to outline exactly what forms of interpretive reasoning have been rejected by the Supreme Court of Canada as a prelude to showing that while the Court has indeed jettisoned some types of originalist arguments, these roughly correspond to the elements of originalism that have been rejected by most of its modern proponents. Put simply, the discussion has moved on, and we should as well.

I. Everyone Says We Don't Do Originalism in Canada

A. The Supreme Court of Canada's Purported Rejection of Originalism

To the extent that Canadian courts have addressed the topic of originalism directly, they have been at least superficially hostile to the notion that originalist thinking should play any role in Canadian constitutional interpretation. Mentions of the terms "originalism", "originalist", "original intent" or "original meaning" in Canadian constitutional case law are vanishingly few,[11] in passing and almost all negative.[12] To the limited extent that the issue has been expressly addressed by the courts, the judicial consensus appears to be expressed in the

11. An unscientific survey conducted on Quicklaw shows six uses of "originalism" (two of which are statutory interpretation cases) and only a single case where the term "originalist" is used (in the context of statutory interpretation). "Original intent" is used far more frequently, but again, overwhelmingly in the context of statutory interpretation. When used in the same paragraph as "constitution", the phrase appears in two constitutional cases, both of which are discussed, *below*.

12. See e.g. *Ross River Dena Council v Canada (AG)*, 2013 YKCA 6 at para 41, 228 ACWS (3d) 667, citing *Persons Case*, *supra* note 2 ("[o]ur legal system has consistently rejected 'originalism' – the idea that the intentions of the drafters of constitutional documents forever govern their interpretation – as a constitutional precept"); *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457, Iacobucci J, dissenting [*Ontario Hydro* cited to SCR] ("[t]his Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation

words of Jurianz JA: "Originalism is not part of the Canadian constitutional tradition."[13]

While not always articulated, two core propositions typically support this conventional wisdom: First, that constitutional law is not "fixed" and must be periodically adapted to new realities and second, that the views of the framers of the Constitution, while potentially relevant, are not determinative of the meaning of those provisions.

With respect to the former, there is no question that the Supreme Court of Canada has frequently announced its adherence to a progressive, living tree approach to constitutional interpretation, which tends to be seen as the diametric opposite of originalism. The living tree metaphor stems from the decision of the Privy Council in the *Persons Case*. In that judgment, the Privy Council overturned a decision of the Supreme Court of Canada,[14] which had found that the phrase "qualified persons" in section 24 of (what is now) the *Constitution Act, 1867*,[15] respecting the appointment of senators, referred only to male persons. The Supreme Court of Canada came to this conclusion on the basis of the presumption that the constitutional framers would have expected the term "qualified persons" to refer only to men given the state of the common law at the time. In reversing that ruling, the Privy Council famously stated that the *Constitution Act, 1867* "planted in Canada a living tree capable of growth and expansion within its natural limits".[16]

While we will return to the *Persons Case* below, it will suffice for now to observe that it is generally regarded as the *locus classicus* for the Canadian approach to constitutional interpretation. Although this understanding

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on the original intentions of the framers of the Constitution" at 409); *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407, Binnie J, dissenting [*Consolidated Fastfrate*] ("Canadian courts have never accepted the sort of 'originalism' implicit in my colleague's historical description of the thinking in 1867" at para 89); *Reference re* Employment Insurance Act *(Can), ss 22 and 23*, 2005 SCC 56, [2005] 2 SCR 669 [*EI Reference*] (overturning a decision below on the basis that it "adopted an original intent approach to interpreting the Constitution rather than the progressive approach the Court has taken for a number of years" at para 9).

13. *The Criminal Lawyers' Association v Ontario (Public Safety and Security),* 2007 ONCA 392 at para 113, 86 OR (3d) 259.

14. *Reference re meaning of the word "Persons" in s 24 of the* British North America Act, 1867, [1928] SCR 276, 4 DLR 98, rev'd *Persons Case*, *supra* note 2.

15. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

16. *Persons Case*, *supra* note 2 at 136.

took time to develop,[17] the Supreme Court of Canada has confirmed that the living tree metaphor captures "the preferred approach in constitutional interpretation" in Canada,[18] and one that applies to the interpretation of the entire Constitution. *Charter* provisions "cannot be viewed as frozen by particular historical anomalies"[19] and must "have the possibility of growth and adjustment over time".[20] Similarly, the federal heads of powers have been said to be "essentially dynamic",[21] and their interpretation "must evolve and must be tailored to the changing political and cultural realities of Canadian society".[22] Any alternative "frozen concepts" reasoning "runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life",[23] thereby ensuring "that Confederation can be adapted to new social realities".[24] Through such statements, frequently repeated, the Court has emphasized that the meaning of the Constitution should not be seen as fixed or frozen at any historical moment, as originalism is commonly seen to require.[25] Instead, the Constitution is said

17. There was in fact a rather notable gap between the *Persons Case* and the popularization of the living tree metaphor in the *Charter* era. See Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007) ("[o]ne finds only passing reference to the living tree principle in the decisions of the Supreme Court well into the 1970s" at 202). See generally David M Brown, "Tradition and Change in Constitutional Interpretation: Do Living Trees Have Roots?" (2005) 19:1 NJCL 33.

18. *Reference re* Securities Act, 2011 SCC 66 at para 56, [2011] 3 SCR 837 [*Securities Reference*]. See also *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 180, 81 DLR (4th) 16 [*Electoral Boundaries*]; *Canada (AG) v Hislop*, 2007 SCC 10 at paras 94–96, [2007] 1 SCR 429; *Quebec (AG) v Blaikie*, [1979] 2 SCR 1016 at 1029–030, 100 DLR (3d) 394.

19. *Electoral Boundaries, supra* note 18 at 181.

20. *Motor Vehicle Reference*, *supra* note 3 at 509.

21. *EI Reference*, *supra* note 12 at para 9.

22. *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 23, [2007] 2 SCR 3.

23. *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*SSM Reference*]. See also *British Columbia (AG) v Canada Trust Co*, [1980] 2 SCR 466, 112 DLR (3d) 592 [cited to SCR] ("[t]here is nothing static or frozen, narrow or technical, about the Constitution of Canada" at 478); John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 at 354–56.

24. *Securities Reference*, *supra* note 18 at para 56.

25. See Ian Binnie, "Interpreting the Constitution: The Living Tree vs. Original Meaning" (1 October 2007), *Policy Options* (blog), online: <policyoptions.irpp.org/magazines/free-trade-20/interpreting-the-constitution-the-living-tree-vs-original-meaning/> [Binnie, "Living Tree"] ("the theory of 'original meaning,' or as I prefer to call it, a theory of frozen rights with no realistic prospect of a thaw").

to be organic, fluid, flexible and ever prone to change,[26] although presumably only in a favourable direction.[27] Indeed, the progressive or living tree approach to constitutional interpretation is commonly assumed to be "flatly inconsistent with originalism, the whole point of which is to deny that the courts have the power to adapt the Constitution to new conditions and new ideas"[28]—though, as we show below, this is an exaggeration.[29]

The second proposition leading to the apparently wholesale rejection of originalism in Canadian constitutional practice is the unwillingness to rely on the intentions of the framers of the Constitution as determinative of the scope and content of constitutional meaning. The distrust of legislative history is of an old vintage in the context of statutory interpretation,[30] but it was most famously established in the constitutional sphere in the *Motor Vehicle Reference*, which involved the interpretation of section 7 of the *Charter* and its qualification that any deprivation of life, liberty and security of the person

26. See e.g. *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 ("[t]he Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances" at para 33).

27. *Contra* Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57:3 U Cin L Rev 849 [Scalia, "Lesser Evil"] ("[b]ut why, one may reasonably ask—once the original import of the Constitution is cast aside to be replaced by the 'fundamental values' of the current society—why are we invited only to 'expand on' freedoms, and not to contract them as well?" at 855).

28. Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 15th ed supplemented) vol 2 at § 60.1(f) [Hogg, *Constitutional Law*, vol 2]. Hogg adds that progressive interpretation does not "liberate the courts from the normal constraints of interpretation", which requires placing it in "its proper linguistic, philosophical and historical context", but "that progressive interpretation insists . . . that the original understanding is not binding forever". Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 15th ed supplemented) vol 1 at § 15.9(f).

29. See Part III, *below*.

30. While the courts have historically sought a sort of fictional or constructed legislative intent or purpose, they would typically limit their investigation to the words and structure of the Act itself. Members' statements and other forms of legislative history as evidence of a statute's purpose or meaning were presumptively inadmissible at common law, as the views or opinions of legislators not manifested in the statute were considered likely to obscure or confound the meaning of the terms used. See e.g. Ian Holloway, "Tribunes or Templars?: The Jurisprudence of Antonin Scalia and its Lessons for the British Commonwealth" (1995) 1:2 UC Davis J Intl L & Pol'y 331 at 342–49; Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43:2 McGill LJ 287. It took some time for the courts to reject that proposition in the context of statutory interpretation, but the exceptions have now "hollowed out the rule to such an extent that there is little left of it". Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 282.

must be in accordance with the "principles of fundamental justice".[31] In that case, the Court concluded that, contrary to the apparent intentions of the framers that the section was to be solely procedural in nature, it must have some substantive content as well.[32]

In reaching this conclusion, the Court determined not only that it should not be bound by the framers' intent regarding the meaning and application of this term, but that those intentions (as revealed through parliamentary testimony of public servants involved in the *Charter*'s drafting) should be given very limited weight. The Court reasoned that because the *Charter*'s text is the product "of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*",[33] relying heavily on the comments of certain civil servants "would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*".[34] The Court went on to expressly link the minimal weight to be given to such testimony with the Constitution's nature as a living tree, noting that giving the framers' intent significant weight would risk freezing concepts in time, "with little or no possibility of growth, development and adjustment to changing societal needs".[35] While conceding that this concern was "relatively minor" when the *Motor Vehicle Reference* was decided—three years after the *Charter* was enacted—the Court held that "even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time" the *Charter* was drafted and enacted, and care must be taken to ensure that the framers' intentions "do not stunt its growth".[36]

As we discuss below, both of these propositions—that the legal effect of the Constitution may evolve to meet new realities, and that the framers' intended meaning or assumptions about how this meaning would be applied in specific cases are of limited relevance[37]—can be fully compatible with modern

31. *Motor Vehicle Reference*, *supra* note 3.

32. See e.g. Peter W Hogg, "Canada: From Privy Council to Supreme Court" in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 55 at 83–84 [Hogg, "Canada"].

33. *Motor Vehicle Reference*, *supra* note 3 at 508.

34. *Ibid* at 508–09.

35. *Ibid* at 509.

36. *Ibid.*

37. Indeed, some originalists have been positively hostile to the use of legislative history in the course of interpretation. Justice Scalia has compared the use of such legislative history as the "equivalent of entering a crowded cocktail party and looking over the heads of the guests

originalist theory.[38] Nevertheless, the principles articulated in these cases are typically taken to be dispositive of the state of originalist discourse in Canadian constitutional law: that we don't do originalism here.

B. Extra-Judicial and Academic Statements Rejecting 'Originalism'

With a few notable exceptions,[39] Canadian scholars either flatly reject originalism or consider it irrelevant to Canadian constitutional law, if not both. This began early in the life of the *Charter*. In 1987, Canada's leading constitutional scholar, Peter Hogg, argued against the adoption of reasoning which would give dispositive weight to the subjective intentions of the framers (then commonly called "interpretivism").[40] Hogg noted a range of common

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for one's friends". *Conroy v Aniskoff*, 507 US 511 at 519 (1993), Scalia J, concurring. See also Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws" in Amy Gutmann, ed, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997) 3 at 38 [Scalia, "Common-Law Courts"]. Justice Scalia stated that, "[i]t is curious that most of those who insist that the drafter's intent gives meaning to a statute reject the drafter's intent as the criterion for interpretation of the Constitution. I reject it for both." *Ibid.* See generally, Vasan Kesavan & Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History" (2003) 91:6 Geo LJ 1113 (on the uses of drafters' statements more generally).

38. See Parts III(B)–(C), *below*. As Miller points out, "the tenets of originalism that are used as a definitional contrast are not widely held by originalist constitutional scholars, and are in fact expressly rejected in new originalist theories . . . over the past 20 years". Miller, "Beguiled", *supra* note 7 at 331.

39. See Dodek, "Originalist View", *supra* note 8; Froc, *Section 28*, *supra* note 10; Miller, "Beguiled", *supra* note 7; Grant Huscroft, "The Trouble with Living Tree Interpretation" (2006) 25:1 UQLJ 3 [Huscroft, "Living Tree"]; Grant Huscroft, "A Constitutional 'Work in Progress'?: The Charter and the Limits of Progressive Interpretation" (2004) 23 SCLR (2d) 413 [Huscroft, "Work in Progress"]; Grant Huscroft, "Vagueness, Finiteness, and the Limits of Interpretation and Construction" [Huscroft, "Vagueness"] in Huscroft & Miller, *supra* note 7, 203; Randal NM Graham, "Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and 'Fundamental Laws'" (2006) 34 SCLR 169. For more recent commentary, see Morley, *supra* note 9; Sébastien Grammond, "Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation" (2016) 53:3 Osgoode Hall LJ 799; Jeffrey Goldsworthy & Grant Huscroft, "Originalism in Canada and Australia: Why the Divergence?" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (New York: Cambridge University Press) [forthcoming].

40. This was the common (and not inaccurate) characterization of originalism at the time. See e.g. Marc Gold, "The Rhetoric of Rights: The Supreme Court and the Charter" (1987) 25:2 Osgoode Hall LJ 375 at 396; Jamie Cameron, "Cross Cultural Reflections: Teaching the Charter

objections to relying on the "original intentions" of the framers[41]—most notably the practical difficulties in identifying the relevant "intenders" and the difficulty of attributing to that nebulous conglomerate any definite intentions,[42] as well as the fact that the framers may in fact have *intended* the *Charter* to be interpreted progressively.[43] To Hogg, the (preferred) doctrine of progressive interpretation holds that "the words of the constitution need not be frozen in the sense in which they were understood by the framers, but are to be read in a sense that is appropriate to current conditions".[44] Hogg has since echoed these views in his leading treatise, stating that originalism "has never enjoyed any significant support in Canada"; to the contrary, it has been "squarely rejected" by the Court, with Hogg quipping that "while Americans have debated whether the 'original understanding' should be binding, Canadians have debated whether evidence of the 'original understanding' should even be disclosed to the Court!"[45]

Many Canadian scholars agree, regarding both the lackluster appeal of originalism and its moribund status within Canadian constitutional law. In his overview of Canadian constitutional interpretation, Jean LeClair observes that "judicial review in Canada [does] not imply a search for that elusive original intention"; to the contrary, "in Canada, courts *have repeatedly rejected any form of originalism* (such as a 'founding fathers' approach), choosing instead a rather

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to Americans" (1990) 28:3 Osgoode Hall LJ 613 at 621; Robin M Elliot, "The Supreme Court of Canada and Section 1: The Erosion of the Common Front" (1987) 12:2 Queen's LJ 277 at 289, 299.

41. Peter W Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25:1 Osgoode Hall LJ 87 [Hogg, "American Theories"].

42. *Ibid* at 96. See also James B Kelly & Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16:1 CJLS 3 at 8–9; Elliot, *supra* note 40 at 291. See Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60:2 BUL Rev 204 (for the American counterpart to these critiques).

43. See Hogg, "American Theories", *supra* note 41 at 96. See e.g. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Agincourt, Ont: Carswell, 1987) at 77–78; Dodek, "Originalist View", *supra* note 8 at 337–38; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005). See generally H Jefferson Powell, "The Original Understanding of Original Intent" (1985) 98:5 Harv L Rev 885; Huscroft, "Work in Progress", *supra* note 39.

44. Hogg, "American Theories", *supra* note 41 at 101.

45. Hogg, *Constitutional Law*, vol 2, *supra* note 28 at § 60.1(e). It is worth noting that Hogg appears to conflate "original intentions", "original understandings" and "framers' understanding" throughout his text.

progressive approach to the interpretation of the constitution".[46] Originalism has been not only "denounced"[47] but "barred as an interpretive method" in Canada.[48] Canadian courts have been "quite explicit in rejecting" originalism[49] and "eschewed originalism and other intent-based understandings of constitutional meaning".[50] For this reason, a judge employing originalist reasoning "would be profoundly at odds with the expectations" of her colleagues and "would be seen as not fulfilling her duty to allow the Constitution to reach its destination".[51] To others, originalism is a "misbegotten theory",[52] "philosophically incompatible with the very nature of a constitution" and, therefore, a method to which Canadian courts are (correctly, in the author's view) "extremely resistant", particularly in the context of *Charter* interpretation.[53] As "Canadian jurisprudence has never really accepted the tenets of originalism"[54] and, indeed, has adopted an approach "radically inconsistent with originalism",[55] its

46. Jean LeClair, "Judicial Review in Canadian Constitutional Law: A Brief Overview" (2004) 36:3 Geo Wash Intl L Rev 543 at 545 [emphasis added]. LeClair states that "the Supreme Court has refused to accept *any originalist approach* to the meaning of the *Charter*" at 546 [emphasis added].

47. Miller, "Beguiled", *supra* note 7 at 331 (describing—rather than crediting—the denunciation and banishment).

48. Brian Leiter, "'Originalism Redux' Redux (With a Reply to Solum)" (19 August 2006), *Brian Leiter's Law School Reports* (blog), online: <leiterlawschool.typepad.com/leiter/2006/08/originalism_red.html>.

49. Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 Labour/Le Travail 151 at 165.

50. Carissima Mathen, "The Upside of Dissent in Equality Jurisprudence" (2013) 63 SCLR (2d) 111 at 114.

51. Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution" (2014) 19:1 Rev Const Stud 1 at 8–9. See also *ibid* at 19–20. Cyr notes that there are exceptions, namely the "bargain cases" discussed below, and states that the Court may be interested in the intentions of the framers if they are cast in broader abstract terms relating to the "purpose" of the provisions, but "are not used to limit the possibility of attributing contemporary meaning to the original wording of a specific section". *Ibid* at 8, n 11. On this point, see also Part II(C), *below*; Sirota & Oliphant, *supra* note 6.

52. Gordon P Crann, "*Morgentaler* and American Theories of Judicial Review: The *Roe* v *Wade* Debate in Canadian Disguise?" (1989) 47:2 UT Fac L Rev 499 at 522.

53. See Daniel C Santoro, "The Unprincipled Use of Originalism and Section 24(2) of the *Charter*" (2007) 45:1 Alta L Rev 1 at 19.

54. Carissima Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 UNBLJ 43 at 47.

55. Luc B Tremblay, "Two Models of Constitutionalism and the Legitimacy of Law: Dicey or Marshall?" (2006) 6:1 OUCLJ 77 at 85 [Tremblay, "Two Models"].

use constitutes "a significant break with our country's dominant constitutional traditions".[56] These examples could be multiplied, but the bottom line is that originalist arguments are, for the most part, not taken seriously in Canada.[57]

Even those few Canadian academics open to forms of originalist thinking have largely accepted this conclusion. Adam Dodek has stated that "[o]riginalism is a dirty word in Canadian constitutional law", being "either ignored or denigrated",[58] while Grant Huscroft and Bradley Miller, formerly the standard-bearers of originalism in the legal academy (and now both judges), have understandably concluded that "[o]riginalism has been all but banished from constitutional discourse in Canada in favor of a 'living tree' conception of the constitution".[59]

Canadian judges have joined the chorus extra-judicially, with Binnie J serving as choirmaster. He has penned an influential article, the thrust of which seems to be that, with a few aberrations, originalism has no purchase in Canadian constitutional law, and rightly so.[60] Justice Binnie has repeated such arguments elsewhere, and appears to be the leading Canadian proponent of keeping originalism dead and buried.[61] He is not alone, however. In a 1998 article, L'Heureux-Dubé J offered a diagnosis of why the Supreme Court of

56. Borrows, *supra* note 23 at 361.

57. See also Adam Dodek, "The Supreme Battle", *The Walrus* (22 February 2016), online: <www.thewalrus.ca>. See also Hugo Cyr & Monica Popescu, "Constitutional Reasoning in the Supreme Court of Canada" in András Jakab, Arthur Dyevre & Ginlio Itzcovich, eds, *Comparative Constitutional Reasoning* (tentative title) (Cambridge, UK: Cambridge University Press) at 7 [forthcoming].

58. Dodek, "Originalist View", *supra* note 8 at 333–34.

59. Grant Huscroft & Bradley W Miller, "Introduction" in Huscroft & Miller, *supra* note 7 at 9. This is not to say that Huscroft, Miller or Dodek consider originalism to be *inherently* incompatible with Canadian constitutional dogma, much less with sound constitutional interpretation generally, only that they accept that it is not a subject to which any attention has been paid in Canada, with most denigrating the very thought.

60. Justice Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, Ont: LexisNexis, 2004) 345 [Binnie, "Original Intent"] (the doctrine of original intent "has never really taken hold in Canada and is . . . unlikely to do so" at 370). See also Kirk Makin, "Justice Ian Binnie's Exit Interview", *The Globe and Mail* (23 September 2011), online: <www.theglobeandmail.com> (quoting Binnie J as asserting that in Canada "we have never had" the view that the Constitution has the meaning it had when it was adopted).

61. See e.g. Binnie, "Living Tree", *supra* note 25. Justice Binnie has also been quoted describing originalism as a "quaint form of ancestor worship". See Justice Ian Binnie, "Session Two: The Future of Equality" (Session delivered at the Liberty, Equality, Community: Constitutional Rights

the United States had, in her view, lost influence on the global stage under the leadership of Rehnquist CJ in comparison with his predecessors.[62] Among other reasons she offers for the Supreme Court of the United States' dwindling influence, "perhaps most important" was that Court's fascination with originalism, which is "simply not the focus, or even a topic, of debate elsewhere", adding that few Canadian judges or commentators would dispute the notion that the Constitution should be interpreted as a living tree.[63]

As can be seen, many of these statements—typically made with brief reference to cases like the *Persons Case* and the *Motor Vehicle Reference*—are directed to the notion that originalism requires the interpretation of constitutional provisions to be "frozen" according to the specific intentions of the framers or the framers' intended application of their terms.[64] As discussed below, these relatively narrow claims do not entail a rejection of all forms of originalism outright. Nevertheless, the conventional wisdom has been to conclude that any and all forms of originalism are verboten in Canadian constitutional law.[65] As

in Conflict? Conference, Auckland, 20 August 1999) [unpublished], cited in The Hon Justice Michael Kirby AC CMG, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24:1 Melbourne UL Rev 1 at 2.

62. The Honourable Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa LJ 15 at 33.

63. *Ibid* at 33. See also The Honourable Mr. Justice Michel Bastarache, "Section 33 and the Relationship Between Legislatures and Courts" (2005) 14:3 Const Forum Const 1 at 1, 7 (discussing the original intent behind sections 33 and 1 but distancing his views from "originalism", which he says has been rejected in Canadian constitutional law in favour of a living-tree approach).

64. See Dodek, "Originalist View", *supra* note 8 at 334.

65. See e.g. LeClair, *supra* note 46; James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31:1 Queen's LJ 1 ("[b]y maintaining [the 'living tree'] approach under the *Charter*, the Court closed the door on the future use of American theories of interpretation like 'original intent' and 'original understanding'" at 16, n 75); James Allan, "Australian Originalism without a Bill of Rights: Going Down the Drain with a Different Spin" (2015) 6 Western Australian Jurist 1 (in Canada, "interpretive approaches have vanquished all remnants of originalism when it comes to the top judges there interpreting Canada's entrenched, constitutionalized *Charter of Rights and Freedoms*" (but see qualifications in footnote) at 1); Donna Greschner, "Praise and Promises" (2005) 29 SCLR 63 at 72. Greschner stated, "[a]s we all know, the general approach to Charter interpretation has always been progressive . . .. Interpreters do not search for the original understandings of words or freeze Charter concepts at a particular moment in history. Rather, they interpret words in light of modern understandings to ensure that the principles keep up with the times and have power in new circumstances." *Ibid.* See also William Baude, "Is Originalism Our Law?" (2013) 115:8 Colum L Rev 2349 at 2401 (noting that both external and internal observers generally reject any role for originalism in Canadian law); Hogg, *Constitutional Law*, vol 2, *supra* note 28.

Dodek has explained, cases like the *Motor Vehicle Reference*, rejecting the binding status of the framers' intentions, "together with the talismanic invocation of the living tree doctrine", have "effectively silenced any discussion of originalism in Canada since 1985".[66] To the extent the notion of originalism has been considered worthy of mention by Canadian scholars or judges, it is typically disparaged in passing and without much analysis of the variation in, or development of, originalist thought over the decades.[67]

II. Originalism in 2016: A Brief (Re)Introduction

As the above survey suggests, there seems to be a common belief among Canadians that originalism necessarily and exclusively involves a form of transgenerational mind reading, where the hypothetical subjective beliefs of the departed are considered the sole sources of constitutional meaning.[68] If such an approach ever accurately captured the thrust of originalist thinking,[69] it has long since become a caricature that is both inaccurate and insufficient to describe the breadth of originalist thought.

66. Dodek, "Originalist View", *supra* note 8 at 335. See e.g. Matthew Gourlay, "A Criminal Mind: Originalist Creed a Problematic Approach to Assessing the Law", *Law Times* (10 August 2015), online: <www.lawtimesnews.com> (noting that the decision in the *Motor Vehicles Reference* "effectively declared originalism to be dead on arrival" in Canada).

67. With the same notable exceptions as listed in *supra* note 39. One of the authors of this article pleads guilty to something like this. See Benjamin Oliphant, "Interpreting the *Charter* with International Law: Pitfalls & Principles" (2014) 19 Appeal 105 at 123.

68. Hogg continues to describe originalism as prescribing that the "constitutional text should be read in the sense *intended by its framers*" or based on the "original *understanding of the framers*". Hogg, *Constitutional Law*, vol 2, *supra* note 28 at § 60.1(e) [emphasis added]. See also Binnie, "Original Intent", *supra* note 60 ("Canadian courts have no consistent doctrine or accepted methodological approach to divine the intentions of 'the Fathers'" at 352). Justice Binnie then describes the original intent approach as one that "applied to the mental processes of the Parliamentary Committee". *Ibid* at 369.

69. Even those originalists who seek to identify the original intentions of the framers reject this notion. See Stanley Fish, "Intention is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law" (2007) 29:3 Cardozo L Rev 1109 ("[m]uch of the criticism of intentionalism stems from the mistaken notion that it requires looking into people's heads, but it requires nothing of the kind" at 1131). See also Richard S Kay, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses" (1988) 82:2 Nw UL Rev 226 [Kay, "Original Intentions"] ("[m]y approach is quite different from such a hypothetical seance" at 236).

A. The Evolution of Originalism(s)

Today, "originalism" is the name of a large and ever-growing family of theories of constitutional interpretation.[70] Some members of this family are close, others tolerate each other and others still cannot stand their relatives.[71] It would not be possible to paint an accurate portrait of this multi-generational and increasingly diverse group within the narrow frame of this article.[72] We can only represent, in broad strokes, its most significant members and sketch the key elements of agreement and disagreement between them, emphasizing in particular those aspects of originalist thought which have been largely ignored in Canada. The aim of this presentation is to show that the sheer size and diversity of originalist thought is such that banishing all its members from Canada would be a more difficult endeavour than is commonly supposed, not least due to the dangers of mistaking their identity.[73]

The oldest version of originalism, and the one of which Canadians are likely to think when they discuss originalism, became known as "original intent" or "original intentions" originalism once it became necessary to distinguish it from its progeny. It was first developed by scholars associated with the

70. See e.g. Lawrence B Solum, "What Is Originalism?: The Evolution of Contemporary Originalist Theory" in Huscroft & Miller, *supra* note 7, 12 [Solum, "What is Originalism?"] ("[i]t seems likely that as a matter of lexicography, 'originalism' is a family resemblance term—with several overlapping senses" at 15); Richard H Fallon Jr, "Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?" (2011) 34:1 Harv JL & Pub Pol'y 5 [Fallon, "Originalist Theories"] ("[t]here are multiple strands of originalism, with additional versions proliferating as rapidly as law reviews can publish them" at 7); Mitchell N Berman, "Originalism is Bunk" (2009) 84:1 NYUL Rev 1 [Berman, "Bunk"] (describing and categorizing the "potentially vast number of dimensions in originalist logical space" at 12).

71. See Thomas B Colby & Peter J Smith, "Living Originalism" (2009) 59:2 Duke LJ 239; Thomas B Colby, "The Sacrifice of the New Originalism" (2011) 99:3 Geo LJ 713 at 718.

72. This is largely a summary for the uninitiated, and it has been done many times before. See e.g. Keith E Whittington, "Originalism: A Critical Introduction" (2013) 82:2 Fordham L Rev 375 [Whittington, "Critical Introduction"]; Solum, "What Is Originalism?", *supra* note 70; Kesavan & Paulsen, *supra* note 37 at 1134–148. For a discussion of originalism in the Canadian context, see e.g. Froc, "Originalism", *supra* note 10 at 261–65.

73. The basic tenets of "new originalism" and a number of the key distinctions discussed in this section have been canvassed by a number of Canadian scholars. See especially Morley, *supra* note 9; Froc, "Originalism", *supra* note 10. See also those listed in *supra* note 39. We attempt, however, to do a slightly more in-depth summary, in the hope that doing so may help us identify, with some precision, what it is that the Supreme Court of Canada has rejected with respect to originalist thought, *below*.

American conservative movement in the 1970s.[74] Its proponents were often hostile to the legal legacy of the Warren Court and the political legacy of the New Deal.[75] They sought to limit the power of the judiciary and, in particular, judges' ability to infuse constitutional law with their own values and beliefs.[76] To constrain judges, they argued that constitutional controversies should be settled by reference to the intentions of the framers of the texts.[77]

Original intentions originalism quickly came under sustained scholarly criticism centering upon a few core flaws, a number of which were introduced above by Hogg and accepted by Lamer J, as he then was, in the *Motor Vehicle Reference*. Among other things,[78] the critics charged that the intentions of a group were difficult, if not impossible, to ascertain, and the intentions of the various actors involved in the drafting and the subsequent ratification of a constitutional provision may have conflicted.[79] More obviously still, the framers cannot have had any specific intentions regarding the resolution of particular constitutional questions which they could not have anticipated. Finally, critics charged that this form of originalism was self-defeating in another way: The historical evidence supported the conclusion that the framers did not in fact intend for their intentions to be binding into the future.[80] For these and

74. See e.g. Solum, "What Is Originalism?", *supra* note 70 at 16.

75. See Fallon, "Originalist Theories", *supra* note 70 at 20–21.

76. See e.g. James E Ryan, "Laying Claim to the Constitution: The Promise of New Textualism" (2011) 97:7 Va L Rev 1523 at 1530.

77. See e.g. Edwin Meese III, "The Great Debate: Speech by Attorney General Edward Meese III Before the American Bar Association July 9, 1985) (1 November 1986), *The Federalist Society for Law & Public Studies* (blog), online: <www.fed-soc.org/publications/detail/the-great-debate-attorney-general-ed-meese-iii-july-9-1985>.

78. For a more detailed overview of the criticisms of original intentions originalism, see Solum, "What is Originalism?", *supra* note 70 at 18–19; Ryan, *supra* note 76 at 1530–532. See also Kay's responses in Kay, "Original Intentions", *supra* note 69.

79. See especially Brest, *supra* note 42. This particular critique can be somewhat misleading, except to the extent that it is directed at identifying the subjective state of mind of a group of legislators, rather than a constructed or objective intentions. Of course, courts have been seeking to ascertain the latter sort of intention in the context of statutory interpretation for centuries. See generally Richard Ekins & Jeffrey Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 36:1 Sydney L Rev 39.

80. See especially Powell, *supra* note 43. As with all aspects of originalism, this claim has led to a wealth of literature in the US. See e.g. the discussion in Caleb Nelson, "Originalism and Interpretive Conventions" (2003) 70:2 U Chicago L Rev 519 at 523–53.

other reasons, most scholars came to the conclusion that original intentions originalism was not a sustainable theory of constitutional interpretation.[81]

What has been considered another variant of originalism,[82] which may overlap with various other forms, is sometimes known as "original expected applications" originalism.[83] In addition to the framers' intentions as to the meaning of the words they used, this approach also or exclusively relies on their (supposed) intentions as to the way the constitutional text would actually be applied to concrete controversies. In other words, the effect to be given to constitutional provisions depends "on what the ratifiers and framers believed the Constitution required in certain contexts".[84] It is arguably this version of originalism that the Supreme Court of Canada employed in the *Persons Case* when it found that "persons" qualified for the appointment to the Senate could not be women. As Miller has explained, the Court treated the issue as a "question about expected application", asking itself how the framers of the provision at issue would have answered if asked whether section 24 of the *British North America Act* permits women to be appointed to the Senate.[85] Since it would seem that the framers would have expected the word "persons" to be read as only applying to "male persons" in this context, this is the meaning the Court found it to bear, even though that is not what the document itself says or necessarily implies. Notably, the Court came to this conclusion despite the absence of any good evidence as to the framers *actual* intentions on this point,[86] which highlights Randy Barnett's observation that "ascertaining 'what the framers would have done' is a *counter*factual, not a factual or historical inquiry".[87]

81. See Solum, "What Is Originalism?", *supra* note 70 at 18–19. See also Morley, *supra* note 9, at 756–58 (summarizing the critiques of early originalism).

82. See e.g. James E Fleming, "The Balkinization of Originalism" [2012] 3 U Ill L Rev 669 at 671; Eric Berger, "Originalism's Pretenses" (2013) 16:2 U Pa J Const L 329 at 333; Michael C Dorf, "Tainted Law" (2012) 80:3 U Cin L Rev 923 at 937–38.

83. At least by its critics. See Jack M Balkin, "Abortion and Original Meaning" (2007) 24:2 Const Commentary 291 at 292–97 [Balkin, "Original Meaning"]. See also Ronald Dworkin, "Comment" in Gutmann, *supra* note 37, 115 [Dworkin, "Comment"] (discussing "the crucial distinction between what some officials intended to *say* in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it" at 116 [emphasis in original]).

84. Ryan, *supra* note 76 at 1533.

85. Miller, "Origin Myth", *supra* note 7 at 125.

86. *Ibid* at 128.

87. Randy E Barnett, "Interpretation and Construction" (2011) 34:1 Harv JL & Pub Pol'y 65 at 71 [Barnett, "Construction"] [emphasis in original].

Like original intentions originalism, original expected applications originalism does not seem to enjoy much scholarly support.[88] While it may be the case that the late Scalia J actually embraced this approach in some of his opinions,[89] it has been rejected by some prominent originalists as a stand-alone or even a particularly weighty basis for identifying constitutional meaning.[90] For instance, Barnett has criticized the type of original applications originalism which requires constitutional "channelling" in which originalist clairvoyants ask: "Oh Framers, would you think the thermal imaging of a house to detect increased heat generated by marijuana cultivation is a 'search'?"[91] Thus, and far from the caricatures of originalist thinking found in much of the Canadian discourse, most

88. See e.g. Mitchell N Berman, "Originalism and Its Discontents (Plus a Thought or Two About Abortion)" (2007) 24:2 Const Commentary 383 ("almost nobody espouses fidelity to the originally expected applications" at 384); Colby, *supra* note 71 ("originalists (by and large) have come to reject the search for original expected application" at 730); Steven G Calabresi & Livia Fine, "Two Cheers for Professor Balkin's Originalism" (2009) 103:2 Nw UL Rev 663 ("[w]hat judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law" at 669); Lawrence B Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning" (2015) 91:1 Notre Dame L Rev 1 at 48 [Solum, "Fixation"]; Berman, "Bunk", *supra* note 70 at 28.

89. See e.g. Ryan, *supra* note 76 at 1533; Balkin, "Original Meaning", *supra* note 83 at 295–97.

90. See e.g. Andrew Koppelman, "Phony Originalism and the Establishment Clause" (2009) 103:2 Nw UL Rev 727 at 737–38; Keith E Whittington, "The New Originalism" (2004) 2:2 Geo JL & Pub Pol'y 599 [Whittington, "New Originalism"] ("in a defensible version of originalism, authorial expectations about how the text will be applied are not the important measure of textual meaning" at 610); Whittington, "Critical Introduction", *supra* note 72 (noting the "limited relevance of original expectations about legal applications" at 382). Whittington goes on to argue that the proper approach is "not to ask how the drafters would have resolved the present controversy" but "what constitutional rule was adopted". *Ibid* at 384. See also the sources listed in *supra* note 88.

91. See Randy E Barnett, "The Gravitational Force of Originalism" (2013) 82:2 Fordham L Rev 411 at 412–13; Richard S Kay, "Original Intention and Public Meaning in Constitutional Interpretation" (2009) 103:2 Nw UL Rev 703 [Kay, "Public Meaning"] ("[w]e do not care, that is, what James Madison thought about birth control" at 710). See also Whittington, "Critical Introduction", *supra* note 72 ("[t]he goal of constitutional interpretation is not to capture what James Madison meant but to capture what the constitutional text means" at 381). Whittington explains that "the proper mode of proceeding . . . is not to ask how the drafters would have resolved the present controversy. The proper inquiry is what constitutional rule was adopted." *Ibid* at 384.

contemporary originalists specifically reject any close link between constitutional meaning and any sort of speculative transgenerational mind reading.[92]

The version of originalism that might enjoy the most scholarly support in the United States today, and that is the most interesting for our purposes, is known as original public meaning originalism or "New Originalism"—in contradistinction with the old original intentions originalism. Instead of the intentions of the framers of a constitutional provision, New Originalism seeks to ascertain the meaning its text had at the time of its entrenchment.[93] Unlike the (subjective and private) intentions of the framers, this meaning was objective and public. In Kerri Froc's words, reliance on "original meaning eliminates the concern about the indeterminacy of collective, subjective mental states, as the endeavour becomes instead an objective, empirical exercise to ascertain the meaning of terms as understood and employed by the founding generation".[94] This does not necessarily make the framers' statements, intentions, expected applications or understandings irrelevant, where they can be identified, but they are only relevant insofar as they contribute to the task of determining the original public meaning of the terms used.[95]

However, referring to the meaning of a constitutional provision to settle a dispute presents its own difficulties when that meaning fails to "fully determine

92. However, some New Originalists would rate "expected applications" as potentially relevant, albeit not dispositive. See e.g. Whittington, "Critical Introduction", *supra* note 72 ("expected applications might be helpful to later interpreters in clarifying the substantive content of the embodied constitutional rule" at 385). Others have suggested that constitutional terms should be interpreted according to the interpretive methods the drafters would have expected to be used (i.e., those in place at the time of enactment). See John O McGinnis & Michael B Rappaport, "Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction" (2009) 103:2 Nw UL Rev 751 [McGinnis & Rappaport, "Original Methods"]; John O McGinnis & Michael Rappaport, "Original Interpretive Principles as the Core of Originalism" (2007) 24:2 Const Commentary 371 [McGinnis & Rappaport, "Original Interpretive Principles"].

93. See e.g. Jack M Balkin, "The New Originalism and the Uses of History" (2013) 82:2 Fordham L Rev 641 at 654, 702–03 (noting that for the purposes of original meaning originalism, reference to statements of framers or adopters is theoretically unnecessary, and adoption-era dictionaries or writings would work just as well). See also Randy E Barnett, "An Originalism for Nonoriginalists" (1999) 45:4 Loy L Rev 611 at 620–21 [Barnett, "Nonoriginalists"]; Colby, *supra* note 71 at 727.

94. Froc, "Originalism", *supra* note 10 at 271.

95. *Ibid.* See also Gary Lawson, "Delegation and Original Meaning" (2002) 88:2 Va L Rev 327 ("[a]ctual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence" at 398). Kay, who maintains that original subjective intentions are the proper object of focus, nevertheless comes close to original public meaning in practice, noting that "it will be enough in most cases to

constitutional doctrine or its application to particular cases".[96] Adherents of the New Originalism respond to this problem by distinguishing between two stages of the process of deciding constitutional cases: constitutional *interpretation*, which is "the activity of identifying the semantic meaning of a particular use of language in context",[97] and constitutional *construction*, which is "the activity of applying that meaning to particular factual circumstances".[98] For those who accept the analytical distinction between interpretation and construction,[99] it "marks the difference between linguistic meaning and legal effect"[100] of a text—especially, although not exclusively, a constitutional text.[101] Originalism is only necessarily involved at the first step—it "is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment".[102] It is, in particular, a method for resolving textual ambiguities—situations where a word or a phrase has multiple possible linguistic meanings.[103]

However, the linguistic meaning of a text established by interpretation (whether originalist or not) will often not translate straightforwardly into a rule that can dispose of constitutional disputes.[104] This frequently happens when

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learn what people, at the time, *generally* meant when they used certain language and what people involved in the process of enactment thought was at issue". Kay, "Original Intentions", *supra* note 69 at 250 [emphasis in original]. See also Kay, "Public Meaning", *supra* note 91 at 709–11; Lawrence B Solum, "Originalism and Constitutional Construction" (2013) 82:2 Fordham L Rev 453 [Solum, "Construction"] (observing that while original intentions are not the focus of the inquiry, "[u]nder normal circumstances, the intentions of the Framers will be reflected in the public meaning of the constitutional text" at 464).

96. Solum, "What Is Originalism?", *supra* note 70 at 23.

97. Barnett, "Construction", *supra* note 87 at 66.

98. *Ibid.*

99. For high profile detractors among the originalist camp, see e.g. Richard S Kay, "Constitutional Construction and the (In)Complete Constitution" (2016), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778744>; Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts*, 1st ed (St Paul, Minn: West Group, 2012) at 13–15. See also Solum, "Construction", *supra* note 95 at 483–90 (for a number of objections to the interpretation-construction distinction and Solum's responses).

100. Lawrence B Solum, "The Interpretation-Construction Distinction" (2010) 27:1 Const Commentary 95 at 95 [Solum, "Distinction"].

101. See *ibid* (stating that "the distinction itself applies whenever an authoritative legal text is applied or explicated" at 100).

102. Barnett, "Construction", *supra* note 87 at 69.

103. See Solum, "Distinction", *supra* note 100 at 97–98.

104. It does so sometimes, such as when a constitutional provision is very precise. In such cases, the application of a constitutional provision "will require little, if any, supplementation,

a word or a phrase used in the text is vague, in the sense that it admits of "borderline cases" where the term might or might not apply.[105] Constitutional provisions are often vague in this sense, especially when they appeal to evaluative concepts such as "reasonableness", "cruelty", "equality" and the like. Even those terms that involve no appeal to moral judgment may well be, or become, vague as a result of social or technological changes that occur between the moment of their entrenchment in the constitutional text and that of their application. To use Barnett's example, "[m]ore historical evidence will not tell you whether the thermal imaging of a house is or is not a search".[106] Interpretation alone is rarely sufficient to dispose of the disputes to which vague provisions apply. Such cases typically require courts to enter the "construction zone",[107] in which they must develop legal doctrines "that are nowhere in the text, but are nevertheless a good way to put into effect what the text *does* say"[108]—doctrines that will bridge the gap between the meaning of constitutional text and the facts of the dispute at hand.

Crucially, unlike interpretation, which, as Lawrence Solum explains, "is guided by linguistic facts—facts about patterns of usage . . . [and thus] does not depend on our normative theories about what the law should be",[109] construction is an endeavour that *does* depend on normative theories about the law.[110] These theories are not themselves originalist, but rather the product of "one's underlying normative commitments".[111] This has made it possible for scholars with a wide variety of underlying normative commitments to embrace originalism. Barnett himself is a libertarian and favours an "engaged" judiciary

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and construction will look indistinguishable in practice from interpretation". See Barnett, "Construction", *supra* note 87 at 67.

105. See Solum, "Distinction", *supra* note 100 at 98. There are other situations in which, according to a New Originalist, a court might be legitimately called upon, including where there are "gaps", "ambiguities" and "contradictions" in the constitutional text. See Solum, "Construction", *supra* note 95 at 469–72; Part III(B), *below*.

106. Barnett, "Construction", *supra* note 87 at 71.

107. Solum, "Distinction", *supra* note 100 at 108.

108. Barnett, "Construction", *supra* note 87 at 69 [emphasis in original].

109. Solum, "Distinction", *supra* note 100 at 104.

110. See *ibid*. See also Randy E Barnett, "The Misconceived Assumption About Constitutional Assumptions" (2009) 103:2 Nw UL Rev 615 ("one's theory of constitutional construction when addressing the problem of vagueness require justification apart from one's theory of interpretation" at 631).

111. Barnett, "Construction", *supra* note 87 at 70.

applying a "presumption of liberty" to constitutional construction[112]—an approach very different from the early, conservative originalists' calls for judicial restraint. Others have hewed more closely to the original objective of restraint, concluding that where the outcome of interpretation is unable to lead to a clear result, courts should defer to the elected branches of government.[113]

Some, however, have taken the interpretation-construction distinction in rather the opposite direction. Jack Balkin, for instance, argues[114] that a constitution will contain rules, principles and standards, which "creates an economy of delegation and constraint".[115] The more precise the text and the clearer its historical meaning, the more rule-like its prescription will be and less room is left for construction. In turn, relatively vague provisions, in the nature of standards or principles, will leave more room to adapt the provisions to modern realities. Balkin is perhaps the most prominent among the left-leaning scholars who have adopted versions of originalism arguing, for example, that rights to abortion (and to sexual privacy more broadly) can be supported by arguments that "have deep roots in the original meaning of the Fourteenth Amendment".[116] Other scholars, of various political persuasions, have invoked originalist arguments to justify constitutional prohibitions on segregation,[117] sex discrimination,[118] and anti-miscegenation laws,[119] as well as marriage equality.[120]

112. Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004).

113. See Solum, "Construction", *supra* note 95 at 511–23 (discussing "Thayerian Originalism"). See e.g. Keith E Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass: Harvard University Press, 1999); Gary Lawson, "Originalism Without Obligation" (2013) 93:4 BUL Rev 1309; Michael Stokes Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?" (2009) 103:2 Nw UL Rev 857.

114. As part of an approach that he has described as "framework originalism" or even "living originalism". Jack M Balkin, *Living Originalism* (Cambridge, Mass: Belknap Press, 2011).

115. Jack M Balkin, "Constitutional Interpretation and Change in the United States: The Official and Unofficial" (2015) at 21, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594925>.

116. Balkin, "Original Meaning", *supra* note 83 at 292.

117. See Michael W McConnell, "Originalism and the Desegregation Decisions" (1995) 81:4 Va L Rev 947.

118. See Steven G Calabresi & Julia T Rickert, "Originalism and Sex Discrimination" (2011) 90:1 Tex L Rev 1.

119. See Steven G Calabresi & Andrea Matthews, "Originalism and *Loving v. Virginia*", (2012) 2012:5 BYUL Rev 1393.

120. See William N Eskridge Jr, "Original Meaning and Marriage Equality" (2015) 52:4 Hous L Rev 1067.

None of these approaches presume or argue that the framers actually *intended* these specific results or consequences; the claim is that the original meaning of the constitutional text requires or permits them.

As these examples show, an originalism focused on the public meaning of constitutional provisions and incorporating the interpretation-construction distinction need not fix constitutional law in the epoch of the framing.[121] Unlike the claims of the earliest originalist scholars, who sought to eliminate judicial discretion almost entirely, most accept that New Originalism leaves a considerable amount of room for the evolution of constitutional norms, particularly where certain rights or freedoms are declared in the text at a high level of abstraction.[122] To be sure, a constitutional text so precise as to leave no room for construction would prevent judges from developing constitutional doctrine so as to keep pace with the changes occurring in society. As Barnett observes, "[w]ere a constitution too specific, its original meaning probably would become outdated very quickly."[123] To many New Originalists, the relative vagueness of substantial parts of a constitutional text means that the constitution "delegates some decisions of application to the judgment of future

121. See e.g. Jeffrey Goldsworthy, "Interpreting the *Constitution* in Its Second Century", (2000) 24:3 Melbourne UL Rev 677 [Goldsworthy, "Interpreting"] ("[o]riginalists agree with non-originalists that no constitution should — or can — be frozen in the past, permanently entrenching the intentions of a founding generation that was necessarily ignorant of future needs and values" at 684); Michael W McConnell, "Active Liberty: A Progressive Alternative to Textualism and Originalism?", Book Review of *Active Liberty: Interpreting our Democratic Constitution* by Stephen Breyer, (2006) 119:8 Harv L Rev 2387 ("[n]o less than any other approach, textualism-originalism understands that constitutional principles are not frozen in time" at 2414); Solum, "Distinction", *supra* note 100 ("[e]ven if the linguistic meaning of the Constitution is fixed (as originalists recognize), the content of constitutional doctrine can grow and change over time (as it obviously does)" at 117).

122. See generally Colby, *supra* note 71 (describing new originalism as affording "massive discretion" at 715 and "plenty of room to maneuver according to contemporary values"at 741); Randy E Barnett, "Trumping Precedent with Original Meaning: Not as Radical as it Sounds" (2005) 22:2 Const Commentary 257 [Barnett, "Precedent"] ("the Constitution includes . . . open-ended or abstract provisions, and thereby delegates discretion to judges" at 264); Whittington, "Critical Introduction", *supra* note 72 ("[i]t is entirely possible for constitutional drafters to establish general or abstract rules or to prefer broad standards over narrow rules" at 386); Jack M Balkin, "Framework Originalism and the Living Constitution" (2009) 103:2 Nw UL Rev 549. Constitutional drafters "use . . . standards or principles because they want to channel politics but delegate the details to future generations". *Ibid* at 553. See also Frank H Easterbrook, "Alternatives to Originalism?" (1996) 19:2 Harv JL & Pub Pol'y 479 at 480–81.

123. Barnett, "Construction", *supra* note 87 at 69–70.

actors, provided these decisions do not conflict with the information that *is* provided by the text".[124] Vagueness being a common and pervasive feature of constitutional texts, constitutions typically leave room for, and indeed require, judicial development of the law.

Not all originalist scholars have accepted original public meaning originalism or the interpretation-construction distinction.[125] For example, John McGinnis and Michael Rappaport have proposed a modified approach, which relies on deploying the interpretative methods in general use at the time a constitutional text was entrenched to eliminate apparent ambiguities or vagueness in its provisions.[126] Other originalists reject the shift to New Originalism altogether, insisting that interpretation always and necessarily involves seeking to discern the actual subjective intentions of the authors, whatever practical difficulties that may pose.[127] Nevertheless, original public meaning originalism seems to currently be the most popular version of originalism among those that have currency in the United States.

Originalism, then, has undergone significant evolution and growth since the time it was initially deemed dead and buried in Canada.[128] While by no means uniform, certain general trends can be observed and briefly summarized.[129] For many contemporary originalist scholars, the focus has shifted from original subjective intentions of the framers to original objective meaning of the constitutional language. Considerably less reliance is now placed on the presumed

124. *Ibid* at 70 [emphasis in original]. See also the sources listed in *supra* note 122; Randy E Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism" (2006) 75:1 U Cin L Rev 7 [Barnett, "Infidelity"]. Barnett notes that the fact that the texts drafters left "some discretion in application to changing circumstances is not a bug. It's a feature." *Ibid* at 23. In the Canadian context, see Graham, *supra* note 39 at 213–19 (arguing that the use of vague language signals to the courts to fill in the blanks through dynamic interpretation).

125. See Solum, "What Is Originalism?", *supra* note 70 at 27–29 (for a review of some of the critiques of the new originalism).

126. See e.g. McGinnis & Rappaport, "Original Interpretive Principles", *supra* note 92; McGinnis & Rappaport, "Original Methods", *supra* note 92.

127. See e.g. Fish, *supra* note 69; Larry Alexander & Saikrishna Prakash, "'Is that English You're Speaking?': Why Intention Free Interpretation is an Impossibility" (2004) 41:2 San Diego L Rev 967; Kay, "Original Intentions", *supra* note 69.

128. So much has the focus shifted, that the "original" originalists, criticized by Hogg and others, are now sometimes described as "proto-originalists", a group whose approach was "only partially theorized". See Solum, "Construction", *supra* note 95 at 462–69.

129. See generally Colby, *supra* note 71 (for the catalogue of differences between "old" and "new" originalism). See also Solum, "What Is Originalism?", *supra* note 70; Barnett, "Nonoriginalists", *supra* note 93; and Whittington, "Critical Introduction", *supra* note 72.

or actual intended applications of constitutional provisions, particularly where the constitutional language appears to provide broad standards or principles in contrast to definite rules. Finally, many New Originalists have accepted that constitutional provisions may leave a considerable amount of discretion in the hands of the judiciary, which will sometimes require (or at least permit) the application of modern normative shifts as well.

B. The Common Core of Originalism Today

Whatever version of originalism they favour, originalists tend to agree on two broad ideas, which Solum calls the "fixation thesis" and the "constraint principle".[130] The former holds "that original meaning [of the Constitution] was fixed or determined at the time each provision of the constitution was framed and ratified",[131] with meaning representing the result of the interpretation step in the analysis. The latter means that constitutional decision making should be, in some sense, constrained or bound by the original semantic meaning of the terms[132] or, more flexibly, "that the original meaning of the Constitution should make a substantial contribution to the content of constitutional doctrine".[133] This leaves considerable scope for disagreement within originalism regarding how to recover the original meaning of constitutional provisions and what to do when the original meaning of the text "runs out". The principle of fixity, however, requires some core meaning to be ascribed to a provision or term which cannot be changed short of a formal amendment.

As for the "constraint" or "contribution" principle, originalists also disagree about the extent to which original meaning ought to, or can, bind judicial

130. Solum, "What is Originalism?", *supra* note 70 at 29, 32.

131. *Ibid* at 33 [emphasis omitted]. This is spelled out in some detail in Solum, "Fixation", *supra* note 88.

132. See e.g. Lawrence B Solum, "Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption" (2012) 91:1 Tex L Rev 147 at 154–55 [Solum, "Faith and Fidelity"]. Whittington describes this point as accepting that originalism can often accommodate a range of interpretive considerations—text, structure, history, precedent, prudence and values—but that "such a wide array of argumentative modalities should be carefully disciplined by the overarching interpretive enterprise". See Whittington, "Critical Introduction", *supra* note 72 at 389.

133. Solum, "What is Originalism?", *supra* note 70 (this latter principle has been described as the "contribution thesis" at 35). See Lawrence B Solum, "*District of Columbia v. Heller* and Originalism" (2009) 103:2 Nw UL Rev 923 at 953; Solum, "Faith and Fidelity", *supra* note 132 at 154–56. In Solum's typology, the contribution thesis seems to have given way to the constraint principle more recently, and while the distinction is important, it need not detain us here.

decision making.[134] As Solum observes, most originalists agree that the outcome of the process of constitutional interpretation must be consistent with original meaning "absent very weighty reasons",[135] but there is disagreement over what these weighty reasons are. Do they, for instance, include the principle of *stare decisis*, so that existing precedents that are inconsistent with original meaning should be left undisturbed,[136] or the intolerable consequences of an originalist interpretation?[137] Some originalists would not allow constitutional doctrine to ever contradict the results of originalist interpretation,[138] while others treat original meaning as presumptively required or even as only one factor among many to consider in constitutional decision making. This latter, "very weak version of originalism", however, would "begin to merge with forms of living constitutionalism that acknowledge that text and original intentions are relevant factors in determining constitutional applications",[139] and it is not clear whether someone who embraces it would identify as an originalist at all.[140]

This all invites the question of whether the contrast or the conflict between originalist and non-originalist constitutional interpretation is as significant as it is sometimes thought to be.[141] In other words, are originalism and "living constitutionalism" not actually compatible in at least some significant

134. Originalists further disagree as to the reason for the constraining effect of the original meaning, whatever its extent. Various originalist theories justify this effect by emphasizing the rule of law, popular sovereignty, judicial restraint, better decisions, or the "writtenness" of the Constitution. See Solum, "What Is Originalism?", *supra* note 70 at 35. This issue is not as important to us here since we are not making a normative argument in favour of originalism, but it ought to be kept in mind when assessing such arguments.

135. Solum, "What is Originalism?", *supra* note 70 at 32. See also Gary Lawson, "On Reading Recipes . . . and Constitutions" (1997) 85:6 Geo LJ 1823 ("interpreting the Constitution and applying the Constitution are two different enterprises" at 1835).

136. See e.g. Barnett, "Precedent", *supra* note 122 at 258; Thomas W Merrill, "Originalism, Stare Decisis and the Promotion of Judicial Restraint" (2005) 22:2 Const Commentary 271 [Merrill, "Stare Decisis"].

137. See Scalia, "Lesser Evil", *supra* note 27 at 861 (stating that no originalist judge would fail to find flogging an unconstitutionally "cruel and unusual" punishment even if it would not have been so regarded at the time of ratification). But see Barnett, "Infidelity", *supra* note 124 at 22–23.

138. See e.g. the description of "strong originalism" in Berman, "Bunk", *supra* note 70 at 10–14.

139. Solum, "What Is Originalism?", *supra* note 70 at 34–35.

140. See e.g. Berman, "Bunk", *supra* note 70 at 16–25.

141. See generally Barnett, "Nonoriginalists", *supra* note 93; Jamal Greene, "A Nonoriginalism for Originalists" (2016) 96:4 BUL Rev 1443.

respects?[142] As Solum observes, this question can be answered differently depending on the precise version of originalism and non-originalism being compared. Originalism and living constitutionalism could be compatible if they are regarded as

> hav[ing] separate domains. Originalism has constitutional *interpretation* as its domain: The linguistic meaning of the Constitution is fixed. Living constitutionalism has constitutional *construction* as its domain: the vague provisions of the constitution can be given constructions that change over time in order to adapt to changing values and circumstances.[143]

By contrast, a version of originalism that denies the existence of a construction zone leaves no room for living constitutionalism, while a version of living constitutionalism that denies the existence of even a "hard core of determinant constitutional meaning [that] should not yield to changing circumstances and values"[144] could not be reconciled with any form of originalism.

The growing popularity and ideological diversity of originalism—and especially of original public meaning originalism—has led some to proclaim its absolute triumph over all alternative interpretive approaches. In the United States, it is not uncommon to hear the refrain that "we are all originalists now" from an eclectic range of sources.[145] James Ryan is convinced that "[l]iving constitutionalism is largely dead. So, too", he says, "is old-style originalism"[146] (i.e., the original intent kind). It seems fair to say that, in the United States, originalism has enjoyed a great deal of success in the realm of constitutional theory and some significant victories in the courts.[147] While these more

142. On these claims, see e.g. Peter J Smith, "How Different are Originalism and Non-Originalism?" (2011) 62:3 Hastings LJ 707; James E Fleming, "The Inclusiveness of the New Originalism" (2014) 82:2 Fordham L Rev 433; Colby, *supra* note 71.

143. Solum, "What Is Originalism?", *supra* note 70 at 39–40 [emphasis added].

144. *Ibid* at 40.

145. Lawrence B Solum, "We Are All Originalists Now" in Robert W Bennett & Lawrence B Solum, eds, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell Press, 2011) 1 at 38–42. Such statements have been heard from the famously liberal Ronald Dworkin, as well as liberal United States Supreme Court Justice Elena Kagan. See Keith E Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation" (2000) 62:2 Rev Politics 197 at 198 [Whittington, "On Dworkin"]; Baude, *supra* note 65 at 2352. Baude quotes Kagan J at her confirmation hearing: "sometimes [the Framers] laid down very specific rules, sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. And so, in that sense, we are all originalists." *Ibid* at 2352.

146. Ryan, *supra* note 76 at 1524.

147. See e.g. Solum, "What Is Originalism?", *supra* note 70 at 30–32; Baude, *supra* note 65.

triumphalist statements are certainly exaggerations[148] and at least some prominent jurists and scholars still firmly reject originalism,[149] there is little questioning the vast impact that originalist thinking has had on constitutional theory and practice in the United States and the enormous growth of, and diversity in, originalist thought since its widespread rejection in the Canadian discourse.[150]

III. Has the Supreme Court of Canada Rejected Originalism?

As the above survey demonstrates, originalism comes in almost as many different forms as it has proponents. In fact, while originalism is commonly seen as a distinctly American innovation (and preoccupation),[151] this is not invariably the case—particularly once the definition of originalism is extended beyond the original subjective intentions or expected applications of the framers.[152] What is remarkable in the face of this vast diversity is the persistent rejection of *any* of these forms of originalism by Canadian courts and scholars, at least by way of self-identification. Originalism has received very little scholarly or

148. At least as a matter of describing judicial practice. See e.g. Merrill, "Stare Decisis", *supra* note 136 at 272 (noting that approximately eighty percent of the arguments in Supreme Court [US or Canada] constitutional law opinions are grounded in precedent, many without reference to text or historical evidence as to meaning). But see Jeremy M Christiansen, "Originalism: The Primary Canon of State Constitutional Interpretation" Geo JL & Pub Pol'y [forthcoming], online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827872> (arguing that originalist constitutional interpretation is pervasive at state level).

149. See e.g. Richard A Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) (equating originalism with "bad faith in Sartre's sense—bad faith as the denial of freedom to choose, and so the shirking of personal responsibility" at 104); Eric J Segall, "The Constitution Means What the Supreme Court Says it Means" (2016) 129:4 Harvard L Rev Forum 176; David A Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010) (arguing that "common law constitutionalism" both fits American constitutional law better and is normatively more attractive than thorough-going originalism); Mark Tushnet, "*Heller* and the New Originalism" (2008) 69:4 Ohio St LJ 609.

150. See notes 293–96 and accompanying text, *below*.

151. See e.g. Jamal Greene, "On the Origins of Originalism" (2009) 88:1 Tex L Rev 1 [Greene, "Origins"]; Kim Lane Scheppele, "Jack Balkin Is an American" (2013) 25:1 Yale JL & Human 23; Yvonne Tew, "Originalism at Home and Abroad" (2013) 52:3 Colum J Transnat'l L 780, and the sources cited at 782–83, n 3.

152. See Jeffrey Goldsworthy, "The Case for Originalism" in Huscroft & Miller, *supra* note 7 at 42, 67–68. Goldsworthy has argued that a version of originalism similar to what in the United States would be described as original public meaning originalism is commonly used to interpret

judicial attention, much less support, in Canada. We suspect this may be based more on inertia and outdated assumptions about what originalism entails rather than deliberate engagement with the body of literature surveyed above. In this Part, we seek to investigate the extent to which this lack of interest in originalism can be justified by the common impression that originalism has been firmly rejected by the Supreme Court of Canada, in order to clear the way for a more complete reckoning of the variety of originalist arguments that have contributed to the current state of Canadian constitutional law.[153]

A. The Persons Case *and the* Motor Vehicle Reference

We begin our reconsideration with both the *Persons Case* and the *Motor Vehicle Reference*, the cases to which the Canadian rejection of originalism is most often traced.[154] The *Persons Case*, in particular, is often invoked in a talismanic fashion, without much consideration of the Privy Council's actual reasoning beyond the single sentence, or indeed the single metaphor, for which the case is now remembered. A former Supreme Court of Canada judge has recently frankly admitted having not read the *Persons Case* in full until he came to prepare a lecture on constitutional interpretation—after his retirement from the Court.[155] Reading the judgment, Rothstein J said, caused him to reappraise his belief that "it was this free-floating living tree metaphor that justified the conclusion reached by the Privy Council".[156]

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the Australian Constitution. Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25:1 Fed L Rev 1 at 19 [Goldsworthy, "Originalism"]. In this article, Goldsworthy refers to this form of moderate originalism being "firmly entrenched" in the Australian Constitution. Versions of originalism are also found in a broad array of places, including India, Turkey, Malaysia and Singapore, as well as Austria, where an approach similar to originalism goes by the name of "*Versteinerungstheorie*" (petrification theory). See Sujit Choudhry, "*Living Originalism* in India?: 'Our Law' and Comparative Constitutional Law" (2013) 25:1 Yale JL & Human 1; Ozan O Varol, "The Origins and Limits of Originalism: A Comparative Study" (2011) 44:5 Vand J Transnat'l L 1239; Tew, *supra* note 151; András Jakab, "Judicial Reasoning in Constitutional Courts: A European Perspective" (2013) 14:8 German LJ 1215 at 1234–235 (respectively).

153. See Sirota & Oliphant, *supra* note 6.

154. See Parts I(A)–(B), *above*. See especially Miller, "Origin Myth", *supra* note 7 at 121.

155. See The Honourable Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79:1 Sask L Rev 1 at 1.

156. *Ibid* (in Rothstein J's view, Lord Sankey had in fact employed a "traditional statutory interpretation analysis", rather than engage in "stark judicial activism" in the pursuit of justice, as is commonly assumed at 2).

This belief is widespread and reaches to the very top of Canada's legal community.[157] Yet, Miller has persuasively argued that, contrary to the Canadian conventional wisdom, the Privy Council's decision in the *Persons Case* is consistent with New Originalism and at odds with the proposition that the constitutional meaning can change over time.[158] While Lord Sankey's opinion rejected the original expected applications approach of the Supreme Court of Canada, Miller argues that it accepted "that the meaning of a constitutional text is *fixed* at a particular point in time"[159] and saw its task as "ascertaining the meaning of 'person' as of 1867".[160] That word, the Privy Council concluded, was ambiguous, and interpretation could not dispel the ambiguity. In Miller's view, the Privy Council's decision turned on an "interpretive presumption in favor of 'person' including both male and female",[161] which is an instance of constitutional construction, not interpretation, as contemporary originalists would define the term.

However the framers might have expected the phrase "qualified persons" would be applied, the question the Privy Council answered—consistently with what New Originalists would urge—is not what was intended, or what was expected, but what was said.[162] The *Persons Case* may simply expose an error: the framers' expectation that women could not be "qualified persons" (assuming the historical evidence bore this out) is simply out of line with the meaning the words they used bore at the time of their enactment. While it would be anachronistic to describe the *Persons Case* as an application of New Originalism, it is, as Miller indicates, quite consistent with those versions of originalism that acknowledge the

157. See The Right Honourable Beverley McLachlin, "Keynote" (Address delivered at the Université de Montréal's Supreme Courts and the Common Law Symposium, 27 May 2016), online: YouTube <youtu.be/w__JIR-KO9c> (claiming that the *Persons Case* "held that the changing position of women in society necessitated a change in the law" and that "a time had come to grow a new branch on [the] living tree").

158. See Miller, "Origin Myth", *supra* note 7 at 122. See also Scott Reid, "The Persons Case Eight Decades Later: Reappraising Canada's Most Misunderstood Court Ruling" (2013), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209846>.

159. Miller, "Origin Myth", *supra* note 7 at 129–30 [emphasis in original].

160. *Ibid* at 130.

161. *Ibid* at 135.

162. See Goldsworthy, "Originalism", *supra* note 152 at 30. Goldsworthy states, "once [a constitutional provision's] meaning has been determined, and the question is how it applies in a particular case, [the law-makers'] further intentions are irrelevant. The law consists of the provision which the law-makers actually enacted, and not their possibly mistaken beliefs about

interpretation-construction distinction, the principles of fixity of constitutional meaning and the contribution of original understanding of the terms used.

The other case most frequently cited for the Court's rejection of originalism is the *Motor Vehicle Reference*, where the Court determined that the evidence of the actual intent of certain (unelected) framers would not be binding and should be given minimal weight, lest it stunt the interpretation of the phrase "principles of fundamental justice" for all time.[163] However, as we have explained, many originalists now reject the proposition that framers' intentions respecting the meaning of a constitutional provision should be considered determinative of constitutional meaning.[164] Justice Scalia, for instance, stated that a legal system that determines the meaning of laws on the basis of what was meant rather than what was said would be "tyrannical", adding: "[i]t is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact that bind us."[165]

With the distinction between original intentions and original meaning in mind, the *Motor Vehicle Reference* takes on a new flavour. In concluding that the term "principles of fundamental justice" has a broader, more substantive meaning than that intended or anticipated by the framers, Lamer J relied primarily on both the text and context of section 7, which are the standard fare of New Originalism and generally to be preferred over intentions not manifested in the text itself.[166]

Regarding the text of the provision itself, Lamer J found that the phrase "principles of fundamental justice" was ambiguous and uncertain, which

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its meaning or proper application." *Ibid.* See also Michael W McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution" (1997) 65:4 Fordham L Rev 1269 ("[m]ainstream originalists recognize that the Framers' analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong" at 1284). See also Whittington, "Critical Introduction", *supra* note 72 at 384; Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990) at 81–83 [Bork, *Tempting*]; Calabresi & Rickert, *supra* note 118 at 9; Colby, *supra* note 71 at 730.

163. See *Motor Vehicle Reference*, *supra* note 3 at 504–09.

164. See *supra* notes 88–95 and accompanying text.

165. Scalia, "Common-Law Courts", *supra* note 37 at 17 [emphasis in original].

166. See e.g. Michael Stokes Paulsen, "The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution" (2014) 81:3 U Chicago L Rev 1385 at 1385 ("[t]he text—the whole text, of course, including the relationships and interactions among differing provisions, the structures of government it creates, the logic of its arrangements, and the inferences that fairly can be drawn from its provisions—is the sole object of constitutional

seems to be the consensus.[167] Justice Lamer contrasted this uncertainty with the relatively precise meaning that the term "natural justice" had been given in the administrative law field, noting that that term was limited to procedural safeguards. From this, he reasoned that if the framers had wanted to provide such safeguards only for the interests protected by section 7 of the *Charter*, they could have used that language.[168] They did not, and the Court should not "exchange the terms actually used with terms so obviously avoided".[169] Put simply, the use of the more capacious term *fundamental* justice manifests an intention to capture, or conveys a meaning that captures, some range of interests broader than the narrower term "natural justice", whether or not the framers actually had that subjective intention.[170]

It should be noted that another inference was available to Lamer J based on another term specifically not used, namely "due process of law". As the historical record shows, that term was specifically rejected so as to avoid the American doctrine which had been read to incorporate substantive principles.

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interpretation" at 1385); Whittington, "Critical Introduction", *supra* note 72 ("[t]he text of the Constitution itself, including its structural design, is a primary source of [constitutional meaning]" at 377). Whittington adds that the starting point for an originalist analysis is a "close textual analysis of the words and phrases that were actually chosen for inclusion in the Constitution, the relationships among them, and their relationship to other texts". *Ibid* at 389. See also Barnett, "Nonoriginalists", *supra* note 93 ("one must take the context in which a word or phrase appears into account, combined with how these words are used elsewhere in the document and the general purposes of these clauses that can be ascertained from the document itself and circumstances surrounding its formation" at 633–34). See also The Honourable Antonin Scalia & John F Manning, "A Dialogue on Statutory and Constitutional Interpretation" (2012) 80:6 Geo Wash L Rev 1610 at 1612. In response to a question asking why fidelity to the text is important, Scalia J states, "because we are governed by what the legislators enacted, not by the purposes they had in mind. When what they enacted diverges from what they intended, it is the former that controls . . .. Nothing but the text has received the approval of the majority of the legislature and of the President . . .. Nothing but the text reflects the full legislature's purpose. Nothing." *Ibid.*

167. See also Hogg, "Canada", *supra* note 32 at 83–84; Brian Slattery, "Law's Meaning" (1996) 34:3 Osgoode Hall LJ 553. With respect to the apparent consensus among participants at the legislative drafting committee, Brian Slattery helpfully observes that "[e]ven if it faithfully reflected the outlook of the drafters, it may not have been shared by the members of the parliamentary committee, or by the federal Parliament as a whole, or by the provincial governments that added their seals of approval." *Ibid* at 557.

168. *Motor Vehicle Reference*, *supra* note 3 at 503.

169. *Ibid.*

170. Notably, Lamer J did not reject the historical context relating to the meaning of the term "fundamental justice", but rather found it (plausibly or not) to be inconclusive, observing that the "historical usage of the term 'fundamental justice' is . . . shrouded in ambiguity". *Ibid* at 512.

Some have argued that this would support an even stronger inference against reading "fundamental justice" substantively.[171] Whether or not these two inferences cancel each other out, it might be noted that the narrower interpretation does not equally account for the term actually used—"*fundamental* justice"—upon which Lamer J placed some considerable weight, and which seems (on its face) to encompass a potentially wider range of interests than merely procedural protections.

With respect to the textual context in which the phrase is found, Lamer J pointed out that the term "principles of fundamental justice" was a "qualifier"[172] or restriction on the scope of the rights to life, liberty and security of the person. The narrower the meaning of that phrase, the more easily these superordinate rights could be restricted. Reading the phrase "fundamental justice" as meaning "natural justice" would result in a deprivation of life, liberty or security of the person being easier to sustain than that of one of the more specific legal rights protected in the following provisions of the *Charter*, which Lamer J fairly observed would be "incongruous".[173] This reasoning resembles "arguments grounded in structures or values implicit in or embedded in the constitutional scheme or language" that many originalists accept.[174]

In effect, the Court in the *Motor Vehicle Reference* relied heavily on what it found to be the well-established meaning of the term *not* used, and that it should not ignore the deliberate choice to avoid that language.[175] As for giving a more specific meaning to the uncertain language that *was* used, Lamer J understood that the courts would have to do it "within, of course, the acceptable sphere of

171. See e.g. Huscroft, "Living Tree", *supra* note 39 at 15–16; K Michael Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the *Canadian Charter of Rights and Freedoms*" (2002) 13 NJCL 183; Asher Honickman, "The Case for a Constrained Approach to Section 7" (2016) 41:2 L Matters 12 at 13.

172. *Motor Vehicle Reference*, *supra* note 3 at 501.

173. *Ibid* at 502.

174. Whittington, "Critical Introduction", *supra* note 72 at 390. See also Lawrence Solum, "Originalism and the Unwritten Constitution" [2013] 5 U Ill L Rev 1935 at 1947, 1963–965, 1983–984.

175. As Binnie J has summarized this logic, "if someone handed a judge an apple but called it a banana the judge would still be required by his or her oath of office to fearlessly declare it to be an apple". Binnie, "Original Intent", *supra* note 60 at 351. See also Huscroft, "Living Tree", *supra* note 39 at 15–16. While one might feel uneasy with this result, we must depart from the conclusion that Huscroft drew from the constitutional history: that "every attempt was made to exclude" substantive due process. *Ibid* at 16 [emphasis omitted]. If *every* effort had been made to exclude this interpretation, the drafters could have stated that plainly. Instead, they chose an

judicial activity"[176]—or, as the New Originalists might put it, that it would have to be the object of constitutional construction as opposed to interpretation.[177]

We do not contend that Lamer J's reasoning in the *Motor Vehicle Reference* deliberately reflected originalist commitments, but it strikes us as quite similar to the type of analysis that many (new) originalists would support. Of course, Lamer J may well have been wrong in finding that the term "principles of fundamental justice" did not have a settled, original meaning. Divorced of all context,[178] a constitutional drafter cannot get much more imprecise than "principles of fundamental justice",[179] and so some originalists might agree that it sends a court tasked with interpreting this phrase well into the construction zone.

Others, however, would point out that apparent ambiguities and vagueness can often be resolved by contextual information.[180] For instance, it could be—and was—argued that "principles of fundamental justice", properly understood, essentially means "natural justice" because this would be consistent with definitive judicial interpretations of the former term as used in the *Bill of Rights*.[181] Ironically, Lamer J purported to reject this argument, in part, on the basis of the intentions of the framers, who he said had "sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined".[182] More importantly for many modern originalists, the textual context in the two documents was significantly different: While section 7 qualifies certain core interests (life, liberty and security of the person), it appeared in the *Bill of*

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orotund but ill-understood term that "did not have a clear meaning in pre-*Charter* jurisprudence" and was on its face much broader than the narrower and better understood term "natural justice". *Ibid*, citing Hogg, "Canada", *supra* note 32. What did they think would happen?

176. *Motor Vehicle Reference*, *supra* note 3 at 504.

177. This appears to be the way the case is viewed and would be interpreted under Froc's historically grounded, hybrid originalist/purposivist analysis. See Froc, *Section 28*, *supra* note 10 at 96–97.

178. *Motor Vehicle Reference*, *supra* note 3 ("as the Attorney General for Ontario has acknowledged, 'when one reads the phrase 'principles of fundamental justice', a single incontrovertible meaning is not apparent'" at 501).

179. There is of course no question that without context, the terms "principles", "fundamental" and "justice" are all essentially and necessarily contested concepts, and combining them in this particular manner does not help.

180. See e.g. John O McGinnis & Michael B Rappaport, "The Abstract Meaning Fallacy" [2012] 3 U Ill L Rev 737 at 746; Whittington, "On Dworkin", *supra* note 145.

181. See *Duke v The Queen*, [1972] SCR 917, 28 DLR (3d) 129.

182. *Motor Vehicle Reference*, *supra* note 3 at 511, citing *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422.

Rights to specifically condition a "right to a fair hearing", which more obviously indicates procedural content.[183]

However, even if Lamer J was wrong to suggest that the term "principles of fundamental justice" was ambiguous in the relevant sense—a point on which originalists might differ—that does not mean that the method he purported to employ was incompatible with original meaning originalism. Of course, relying heavily on text and context as the primary indicia of legal meaning would necessarily lead a court to the original meaning of that term, given that the decision was decided a few years after the *Charter*'s enactment. Thus, we think Binnie J has it right in observing that the *Motor Vehicle Reference* is in fact based on the "original meaning" of the disputed term.[184]

Like the *Persons Case*, the *Motor Vehicle Reference* is more clearly a rejection of one type of originalist reasoning, namely the original intent approach.[185] It is, in many respects, consistent with the approach favoured by many modern originalists, in that it at least purports to ensure that the original meaning of the constitutional provision that was actually enacted prevails over whatever the framers might have subjectively intended to be the meaning or consequences of their enactment.[186] In our view, then, it is hard to read either of these seminal judgments as rejecting more than the harder edges of original applications or original intent originalism, which have, in any case, largely gone out of style in originalist thinking.

Nor, in our view, do subsequent decisions render originalist thinking anathema to constitutional interpretation in Canada. It is interesting to observe that, despite the conventional wisdom, the two most conspicuous statements denouncing originalism in the Supreme Court Reports actually appear in dissenting judgments. Justice Iacobucci's statement in *Ontario Hydro v Ontario* that "[t]his Court has never adopted" a form of constitutional interpretation

183. *Motor Vehicle Reference*, *supra* note 3 at 511.

184. Binnie, "Original Intent", *supra* note 60 (adding that, based on the metric of original meaning, the conclusion "is clearly correct" at 369).

185. Froc, "Originalism", *supra* note 10 ("[m]uch of the Court's professed difficulty with accepting original meaning as authoritative seems to be based to some extent on older versions of originalism and concerns about accepting original intended applications as authoritative" at 266).

186. Accord Bork, *Tempting*, *supra* note 162 at 144. "The search is not for a subjective intention. . . . When lawmakers use words, the law that results is what those words ordinarily mean". *Ibid.* See also Barnett, "Nonoriginalists", *supra* note 93 at 632–33; *supra* notes 88–95 and accompanying text.

dependent on "the original intentions of the framers of the Constitution"[187] is itself a rejection of only one form of originalist reasoning. But in any event, it appeared in dissent and in reaction to a Court of Appeal (and a highly respected appellate judge, Tarnopolsky JA) relying upon certain statements from the relevant debates (and doing so after the *Motor Vehicle Reference*), as well as a majority judgment which rejected Iacobucci J's more flexible approach to constitutional interpretation.[188]

The second clear rejection of originalism by name also appears in a dissenting judgment, in *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, where Binnie J claimed that "Canadian courts have never accepted the sort of 'originalism' implicit in [his] colleague's historical description of the thinking in 1867".[189] This was again in response to a judgment—written by Rothstein J and signed on to by LeBel, Deschamps, Abella, Charron and Cromwell JJ—which relied on the understandings and intentions of the framers with respect to the provision in question. Had originalism of all sorts been banished from Canadian constitutional law, someone might have informed more than half of the top court. While these dissenting judgments—particularly Iacobucci J's—are often given as evidence that the Supreme Court of Canada has thoroughly abandoned any originalist leanings,[190] they seem to us to be particularly weak data points.

B. Is Originalism Inconsistent with Progressive Interpretations?

But what of the unequivocal embrace of "living tree-ism"? Does that necessarily preclude any and all forms of originalist reasoning? Surely not. We have already observed that certain versions of originalism are entirely compatible with certain versions of living constitutionalism, depending on how each term is used and applied. Some forms of originalist reasoning accept the idea that the application of constitutional terms may evolve, particularly in the "construction zone", where originalism itself may supply

187. *Ontario Hydro*, *supra* note 12 at 409.

188. To the majority, while there was no doubt that the interpretation offered "fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists". *Ibid* at 370.

189. *Supra* note 12 at para 89, Binnie J, dissenting. We discuss the majority's reasons in the companion article, Sirota & Oliphant, *supra* note 6 at 9–10.

190. See e.g. Scheppele, *supra* note 151 at 24, n 5; Greene, "Origins", *supra* note 151 at 35–36; Borrows, *supra* note 23 at 359–60.

no clear answers.[191] There are a wide number of situations in which this can occur in a manner consistent with modern forms of originalism. Drawing on Jeffrey Goldsworthy's careful work,[192] which presaged much New Originalist scholarship, we will focus on a few of the most commonly cited cases for the Supreme Court of Canada's purported rejection of originalism.

First, evolution may be required to fill a constitutional "gap"[193] respecting a particular phenomenon unknown at the time of enactment (e.g., a provision delegating power to the federal government over "Armies" and "Navies", could be reasonably extended to cover "Air Forces").[194] To do otherwise would frustrate the clear, undisputed purposes of such provisions (i.e., in the above example, to assign power over the armed forces to the federal government). This form of extrapolation, typically of the *eiusdem generis* variety,[195] is not uncommon, nor is it particularly controversial.[196] While the proper metes and bounds of this type of reasoning are hotly debated in originalist circles,[197] the general principle—that courts must seek to fit genuinely new phenomena within the existing constitutional structure, as far as possible—appears to be well accepted, by originalists and non-originalists alike.[198]

We have a more recent example of this type of evolution: the *Reference re Same-Sex Marriage*. To be sure, the Court's opinion denounced "[t]he 'frozen

191. See generally *supra* notes 104–14, and accompanying text.

192. Goldsworthy, "Originalism", *supra* note 152.

193. For a discussion of constitutional "gap-filling", see Solum, "Construction", *supra* note 95 at 471–72.

194. See Goldsworthy, "Originalism", *supra* note 152 at 33–34. See also Miller, "Beguiled", *supra* note 7 at 336–38.

195. See Miller, "Beguiled", *supra* note 7 at 337–38.

196. See *ibid* (noting the wide acceptance of this type of reasoning by proponents of different interpretive approaches, and asserting that "Originalists, whatever their denomination, seem to have no problem with this sort of modest gap-filling" at 338). Although disagreeing with her on many points, Miller cites for this proposition Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can JL & Jur 55 at 80.

197. See generally Jeffrey Goldsworthy, "Constitutional Cultures, Democracy, and Unwritten Principles" [2012] 3 U Ill L Rev 683 [Goldsworthy, "Unwritten"].

198. We of course have many conspicuous examples in Canada, particularly in the division of powers cases where a phenomenon unknown at the time of Confederation must be divided between the levels of government. See e.g. *Re Regulation and Control of Radio Communication in Canada*, [1932] AC 304 (PC(UK)) (radio communications); *Capital Cities Communications Inc v Canadian Radio-Television Commission* (1977), [1978] 2 SCR 141, 81 DLR (3d) 609 (television); *Re The Regulation and Control of Aeronautics in Canada* (1931), [1932] AC 54 (PC(UK)) (airplanes); *Ontario Hydro*, *supra* note 12 (atomic energy).

concepts' reasoning"[199] according to which the use of the term "marriage" used in section 91(26) of the *Constitution Act, 1867* "effectively entrenches the common law definition of 'marriage' as it stood in 1867",[200] contrary to the dictates of progressive interpretation.[201] Arguably, the notion that the term "marriage" can only refer to the sort of marriages that would have been recognized at the time it was written into the constitutional text is one about original expected applications, as opposed to the central, core meaning of the term.[202] However, even assuming that the sex or gender of the participants was a constituent part of the original meaning of the term "marriage" in 1867, the existence of same-sex marriages then leaves a gap which, for many originalists, must be resolved by construction.

This task may be usefully guided by the purposes of the relevant provisions,[203] including the purpose of granting Parliament legislative competence over "Marriage and Divorce" while making "The Solemnization of Marriage" a matter within provincial jurisdiction.[204] First, as Goldsworthy observes in the (very similar) Australian context, marriage was made a federal matter "to make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore, social welfare throughout the nation".[205] It was clearly not to prevent Parliament from making any changes to the rules determining who was able to marry whom generally or to prevent the recognition of same-sex marriages specifically. This becomes more obvious when we consider the purposes of the division of powers more broadly, including the principle of Parliamentary sovereignty, according to which "Parliament . . . has . . . the right to make or unmake any law whatever".[206] This means—and would already have been understood to mean in 1867—that legislative competence over marriage, as over anything else, enabled

199. *SSM Reference*, *supra* note 23 at para 22.

200. *Ibid* at para 21.

201. *Ibid* at para 22.

202. See Froc, *Section 28*, *supra* note 10 at 43–45. Goldsworthy rejects this argument, stating that marriage as the union of one man and one woman would "almost certainly" have been regarded as an essential part of the meaning of the term "marriage" in 1900 (and presumably, 1867), and not just how it was assumed that meaning would be applied. See Jeffrey Goldsworthy, "Interpreting the *Constitution* in its Second Century" (2000) 24:3 Melbourne UL Rev 677 at 699.

203. See Sirota & Oliphant, *supra* note 6, Part II(A).

204. *Constitution Act, 1867*, *supra* note 15, ss 91(26), 92(12).

205. Goldsworthy, "Interpreting", *supra* note 121 at 700.

206. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan, 1927) at 38.

Parliament to modify the rules applicable to marriage, subject only to exclusive provincial jurisdiction. In short, the obvious purpose of section 91(26) had nothing at all to do with entrenching a certain conception of marriage, and it had everything to do with assigning that definitional task to Parliament.

Once this context is considered, as it ought to be on any interpretive approach, originalist or not, it becomes apparent that it was not necessary to resort to a living tree interpretation to answer the question of Parliament's competence to recognize same-sex marriage, as the Supreme Court of Canada did. Either the original meaning of section 91(26) did not prevent the extension of the definition of marriage to include same-sex unions—even if the application of that term was not contemplated by the framers of this provision—or the regulation of the institution was of a type that clearly was intended to be allocated to Parliament. While the *SSM Reference*, along with the *Persons Case* and the *Motor Vehicle Reference*, clearly rules out giving decisive weight to original expected applications, it does not necessarily stand for a rejection of other forms of originalism.

Even more widely accepted is the fact that constitutional rights provisions must be able to apply to circumstances unforeseen at the time of their enactment.[207] Ironically, an example of this type of constitutional "evolution" is contained in a decision authored by Scalia J, *Kyllo v United States*,[208] the "originalist" reasoning of which was conspicuously rejected by the Supreme Court of Canada in *R v Tessling*.[209] The issue in both cases was whether the use of a thermal imaging device by the police amounted to a "search" within the meaning, respectively, of the Fourth Amendment to the United States Constitution and section 8 of the *Charter*. In *Kyllo*, Scalia J, for the majority, found that because information about what went on within the home—however collected—would have been secure from search and seizure at the time the Fourth Amendment was passed, the state cannot now invade that sphere of privacy through the use of new technology.[210]

Justice Binnie, writing for a unanimous Supreme Court of Canada, disagreed not only with Scalia J, but also with Abella JA, as she then was, who

207. See Huscroft, "Work in Progress", *supra* note 39 ("[n]o one argues that constitutional amendment is required whenever unforeseen circumstances arise" at 418); Kay, "Original Intentions", *supra* note 69 (observing there is no question that "the ban on 'cruel and unusual punishment' prohibits the use of an electric as well as a manual thumbscrew" at 255).

208. *Kyllo v United States*, 533 US 27 (2001) [*Kyllo*].

209. 2004 SCC 67, [2004] 3 SCR 432 [*Tessling*].

210. *Kyllo*, *supra* note 208.

had written the decision of the Court of Appeal for Ontario reaching the same result as the Court in *Kyllo*.[211] Justice Binnie emphasized that, in Canada, section 8 protects "people, not places",[212] and as thermal imaging merely shows that "some of the activities in the house generate heat", that was not enough to establish a breach of section 8.[213] Justice Binnie rejected the relevance of *Kyllo* as "predicated on the 'originalism' philosophy of Scalia J"[214] and because it is not "helpful in the Canadian context to compare the state of technology in 2004 with that which existed at Confederation in 1867 or in 1982 when section 8 of the *Charter* was adopted".[215]

Tessling is an odd hill upon which to make a stand against originalism. *Kyllo*, which the Court in *Tessling* refused to follow, did not restrict constitutional application to those technological realities foreseen by the framers, as originalism does according to the "frozen rights" or "dead constitution" caricature frequently encountered in the Canadian literature. It did precisely the opposite.[216] If anything, *Kyllo* demonstrates that the application of constitutional terms can and must be understood in such a way to meet modern realities on

211. *R v Tessling*, (2003) 63 OR (3d) 1, 171 CCC (3d) 361 (CA), rev'd 2004 SCC 67, [2004] 3 SCR 432. Justice Abella liberally quoted Scalia J's decision in *Kyllo*, even though they might fairly be considered judicial opposites. See Rosalie Silberman Abella, "Public Policy and the Judicial Role" (1989) 34:4 McGill LJ 1021. *Cf* Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175. While the decision of Abella JA did not contain originalist reasoning, it nevertheless demonstrates the potential compatibility between originalist and non-originalist approaches, at least at the level of applications.

212. *Tessling*, *supra* note 209 at para 16, citing *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641.

213. *Ibid* at para 62.

214. *Ibid* at para 61.

215. *Ibid* at para 62.

216. See also *District of Columbia v Heller*, 554 US 570 (2008). Justice Scalia cited *inter alia*, *Kyllo* for the proposition that it "border[s] on the frivolous" to "interpret constitutional rights" as applying only to those technologies or circumstances that existed at the time the *Bill of Rights* was ratified. *Ibid* at 582.

an originalist approach to interpretation, as much as any other,[217] and the error in equating the meaning of a rule with its anticipated applications.[218]

Indeed, it is not clear to us just what Binnie J is actually rejecting in refusing to follow the "originalist" philosophy underlying *Kyllo* or in stating that it is unhelpful "to compare the state of technology in 2004 with that which existed in . . . 1982".[219] The logic of *Kyllo* was to deny that changes in technology can diminish the scope of constitutional protection over time; there was no comparison of technologies, because changes in technology were irrelevant to the interpretive question of what was protected. And in any event, Binnie J certainly did not endorse the contrary position—that the meaning of "unreasonable search and seizure" or its underlying purposes have somehow evolved from the time of the *Charter*'s passage. Indeed, we may suppose that it is not Binnie J's view that advances in technology should serve to diminish the scope of constitutional protection, properly understood; nor does the Court in *Tessling* seem to suggest that some aspect of privacy protected by the *Charter* at its adoption must now go unprotected due to technological advances or societal evolution.

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217. See Huscroft, "Work in Progress", *supra* note 39 at 420. Huscroft noted that

> Scalia J., who emphatically rejects what he calls the 'Living Constitution' and the ability of the U.S. *Bill of Rights* to change through interpretation, had no difficulty in concluding that a 200-year-old constitutional right applies to the modern technique of thermal imaging. Justice Scalia's decision is only remarkable, however, if one exaggerates not only the shortcomings of the originalism he espouses but also the difficulty in applying generally worded rights, and hence the need for progressive interpretation.

Ibid [citation omitted].

218. See e.g. Kay, "Public Meaning", *supra* note 91 at 710.

219. *Kyllo*, *supra* note 208 at para 62. Perhaps Binnie J's point was simply that the scope of protection of the two guarantees are different, which may be sensible given that the *text* of the relevant provisions is different. While section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure", and therefore clearly protects "people, not places", *Kyllo*, *supra* note 208 at para 62, the Fourth Amendment speaks of a "right of the people to be secure *in their persons, houses, papers, and effects*, against unreasonable searches and seizures" [emphasis added], which would appear to place greater emphasis on the inviolability of the home and other "places", as the Court in *Kyllo* does. (And would it be pedantic to point out that the invocation that the right protects "people, not places" was initially found in a decision of the Supreme Court of the United States, *Katz v United States*, 389 US 347 (1967) at 351? And that the scope of the doctrine was at least arguably *expanded* upon in *Kyllo*, and certainly not retrenched?)

Ultimately, the principal point of disagreement between the Supreme Court of Canada in *Tessling* and the Supreme Court of the United States in *Kyllo* concerned the extent of the intrusion upon privacy occasioned by thermal imaging technology. While Scalia J described the use of thermal imaging as permitting the state "to explore details of the home that would previously have been unknowable without physical intrusion",[220] Binnie J concluded that thermal imaging technology "does *not* disclose 'details of the home'"[221] and, therefore, rejected the notion that its use was "the functional equivalent of placing the police inside the home".[222] This is, of course, a crucial question, but it is a practical one regarding the impact and characterization of the impugned state action, not one of constitutional interpretation. Had Binnie J's views on this point coincided with Scalia J's, he presumably would have found that a "search" had occurred as easily as Scalia J did. In the ultimate result, and despite frequent and nebulous assertions that the *Charter* must be read in a large, liberal and generous manner, Scalia J's originalist philosophy unquestionably resulted in a more general and robust protection for personal privacy than Binnie J's "purposive" approach to interpreting section 8 of the *Charter*.

A third example of evolution consistent with many forms of modern originalism occurs in those circumstances where the inquiry mandated by the text includes questions of "fact or value" or provisions "incorporating a moral or other evaluative principle", such as "cruel" or "unreasonable", which might require an interpreter to give to those terms a meaning consistent with "current understandings".[223] Indeed, some words or phrases may in fact *mandate* an evolving character[224]—such as the term "unusual", which appears to require some sort of comparison with contemporary realities so as to determine what is "usual".[225] As noted above, the logic here is that, by enacting terms in abstract or evaluative language, the enacting body may have, in purpose or in fact,

220. *Kyllo*, *supra* note 208 at 40.

221. *Tessling*, *supra* note 209 at para 58 [emphasis in original].

222. *Ibid* at para 62.

223. Goldsworthy, "Originalism", *supra* note 152 at 30–31. See also Barnett, "Infidelity", *supra* note 124 at 22–23.

224. See Baude, *supra* note 65 at 2360. Baude stated, "the use of evolving language is likely an example of a sub-method that is *required* by originalism. Giving evolving terms their intended evolving meaning is necessary to be faithful to their original sense." *Ibid* [emphasis in original].

225. As with all such issues, there is a fair deal of disagreement as to the extent to which such an argument is properly originalist. See Scalia, "Lesser Evil", *supra* note 27 at 861–63; Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia,

delegated discretion to the courts.[226] While most originalists would insist that the courts could not pick a concept inconsistent with the original meaning,[227] that meaning may be expressed at such a high level of abstraction that there is considerable room for evolution in the application of the term. As noted above, originalists disagree on the degree of vagueness that can be resolved by historical sources and context, but the notion that vagueness will require some degree of constitutional construction is widely accepted by originalists[228] and non-originalists alike.[229]

Fourth, Goldsworthy explains that the legal effect of a constitutional provision may change insofar as the meaning or sense of a term now applies to a new range of specific instances.[230] Goldsworthy gives the example of the word "juries" in the Australian Constitution, which is not vague in the sense that there may be borderline cases of "jury-ness", but nevertheless applies to different circumstances each time a new jury is composed. Although the provision in question was enacted at a time when juries, as a matter of fact, only included men, "juries" may reasonably have been understood to mean "a panel representing the community convened to decide questions of fact", which would include women, properly understood.[231] This is, in effect, simply another way of confirming that the courts need not—and indeed cannot—be bound by any originally expected *applications* of constitutional terms, unless those are necessarily manifested in the meaning of the text itself.

Examples of this type of evolution abound within the Canadian living tree canon. One example may be the *Reference re* Employment Insurance Act *(Can), ss 22 and 23*,[232] where the issue was whether federal parental leave benefits could validly be enacted under section 91(2A) of the *Constitution Act, 1867*, which grants Parliament the power to legislate with respect to "Unemployment

Tribe, and Nerve" (1997) 65:4 Fordham L Rev 1249 at 1253–254, 1256–257 [Dworkin, "Virtue"]. See generally John F Stinneford, "The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation" (2008) 102:4 Nw UL Rev 1739.

226. See *supra* notes 115, 122–24 and accompanying text.

227. See Barnett, "Infidelity", *supra* note 124 (denying "that the broader provisions of the text lack all historical meaning and are open to anything we may wish them to mean" at 23).

228. See *supra* notes 115–22 and surrounding text.

229. See e.g. Powell, *supra* note 43 at 903; Brest, *supra* note 42 at 216–17; Binnie, "Original Intent", *supra* note 60 at 346–48; Kavanagh, *supra* note 196 at 65–66.

230. Goldsworthy, "Originalism", *supra* note 152 at 31–32.

231. *Ibid.*

232. See also Morley, *supra* note 9 at 775–76. Morley discusses the *EI Reference* and describes its reasoning as "consistent with new, but not with old, originalism". *Ibid* at 775.

insurance".[233] The unanimous decision, authored by Deschamps J, found that by giving historical materials[234] "predominant weight" in ascertaining the meaning of the provision, "the Quebec Court of Appeal adopted an original intent approach to interpreting the Constitution rather than the progressive approach the Court has taken for a number of years".[235] Justice Deschamps recited the "living tree" metaphor, as is customary, and suggested that "[w]hile the debates or correspondence relating to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive" because those debates and correspondence "reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic".[236]

Justice Deschamps also rejected an argument made by Quebec, which can readily be described as based on original expected applications, according to which Parliament's "jurisdiction over unemployment insurance is limited by the parameters defined in the early legislation" on the matter.[237] Justice Deschamps suggested—as would New Originalists—that while these expectations are relevant to the meaning of the term used, they are not in and of themselves binding.[238] According to her, the "*objectives* of the framers are taken as a starting point" and the question is how those "may be adapted to contemporary realities".[239]

In explaining this approach, Deschamps J stated that "[o]n the one hand, no constitutional head of power is static. On the other hand, *the evolution of*

233. As is often the case, the text itself provides little clear guidance: it simply places "Unemployment insurance", without specification or qualification, within the list of powers reserved to the federal government. See *Constitution Act, 1867*, *supra* note 15 at s 91(2A). See also *EI Reference*, *supra* note 12.

234. Including liberal quotations of both Hansard debates at the time the provision was enacted (1940), correspondence between Prime Minister Mackenzie King and provincial premiers at that time, and a Royal Commission report discussing the mischief to which the amendment was addressed, all of which the Court of Appeal found shed light on the purpose of the amendment in question. See *Reference re* Employment Insurance Act *(Can)*, 245 DLR (4th) 515 at paras 53–71, [2004] RJQ 399 (CA).

235. *EI Reference*, *supra* note 12 at para 9.

236. *Ibid*, citing *Martin Service Station Ltd v Canada (MNR)*, [1977] 2 SCR 996 at 1006, 67 DLR (3d) 294.

237. *EI Reference*, *supra* note 12 at para 39.

238. See *ibid* ("[w]hile the views of the framers are not conclusive where constitutional interpretation is concerned, the context in which the amendment was made is nonetheless relevant" at para 40).

239. *Ibid* [emphasis added].

society cannot justify changing the nature of a power assigned by the Constitution to either level of government."[240] Anticipating our confusion, Deschamps J added that "[t]hese two statements are not contradictory" and quoted Henri Brun and Guy Tremblay as stating that "[u]ltimately . . . there is no inconsistency between dynamic interpretation and adherence to the original intent of the framers: in order for something to evolve, it must have a starting point."[241] Taken alone, this is a perplexing statement. There is a fairly clear inconsistency between following original intentions to arrive at one meaning and following some other consideration to arrive at a similar but different meaning, insofar as the latter trumps the former.

However, this seems intelligible—or can at least be made intelligible—when seen through the lens of modern originalism. What Deschamps J may be taken to mean is that the core meaning of a legislative competence, as informed by the original purposes and the historical context in which the amendment occurred, serves to limit its scope of future growth (i.e., "the nature of a power" itself is not susceptible to change based on the evolution of society).[242] At the same time, that competence is not limited to "the way in which [it was] initially exercised"[243] by the relevant legislature; it is not to be bound by the subjective views of the framers regarding the application of the terms.

Recasting this, we might say that the Court read the words "Unemployment insurance" not as referring to or being exhausted by the *specific* regimes in place at that time, but rather up a level of abstraction, as covering the *types* of regimes dealing with maintaining workers' economic security during interruptions of employment.[244] Whether the terms themselves could have plausibly had this connotation in 1940 is unclear and would require some historical investigation. Nevertheless, we might take Deschamps J to mean that the underlying purpose and core linguistic meaning of the provision is in a real sense fixed, but that fixed meaning then has to be applied in light of modern realities and, in particular, certain factual developments in a changing society—which in that case included the greater participation of women in the workforce, the role

240. *Ibid* at para 45 [emphasis added].

241. *Ibid.*

242. *Ibid* at paras 40–45.

243. *Ibid* at para 39.

244. Put differently, Deschamps J may be read as drawing a distinction between the meanings of the provision on the one hand and the question of to what sphere of activity that meaning applies today, which for modern originalists are different inquiries (interpretation and construction, respectively).

of fathers in child care, and the resulting expansion of "insurance" schemes dealing with "unemployment".[245]

Whatever the best reading of the judgment, like many modern originalists, the Court in the *EI Reference* has apparently blended some form of originalism and some form of living constitutionalism and, indeed, insisted that there is no necessary conflict between them. Other examples of this type of work are not uncommon in Canadian constitutional law and are by no means necessarily inconsistent with originalist thought.[246] In short, modern originalism can and does accommodate various types of constitutional evolution, while at the same time imposing some strictures on the scope of interpretive license.

C. Is Originalism Incompatible with Purposive Interpretations?

If the fact that the Constitution is a living tree does not necessarily rule out originalist methodologies, what about the fact that the Constitution must be read purposively? Is this not a wholesale rejection of originalism? Again, it depends. On at least some theories, purposivism is an essential element of originalist reasoning, so we must look closely.[247] The purposive approach was set out most clearly in *R v Big M Drug Mart Ltd*, where Dickson J, as he then was, emphasized that the proper approach to the definition of the rights and freedoms in the *Charter* was one according to which "[t]he meaning of a right

245. See *EI Reference*, *supra* note 12 at paras 51–56, 57–66, respectively. Indeed, Deschamps J was at pains to show—plausibly or not—that the impugned benefits scheme was in fact an "insurance" measure relating to "unemployment", albeit she does not reference the meaning of those terms at the time of the amendment. *Ibid.*

246. See generally Sirota & Oliphant, *supra* note 6. See e.g. *Beauregard v Canada*, [1986] 2 SCR 56, 30 DLR (4th) 481 [cited to SCR]. *Beauregard v Canada* raised the question of whether the power given to Parliament to regulate the "Salaries, Allowances, and Pensions" of superior court judges included contributory pensions or could only cover the specific type of pensions in place at the time of Confederation (non-contributory). The Court sensibly rejected the latter original expectations approach, noting that "if the Constitution can accommodate, as it has, many subjects unknown in 1867—airplanes, nuclear energy, hydroelectric power—it is surely not straining s. 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'". *Ibid* at 81. Despite suggesting that the meaning or understanding of "pensions" had changed, we think this is more clearly a question of the meaning being consistently applied, with the types of arrangements to which that meaning can be appropriately applied changing as a result of new forms of pension arrangements.

247. For instance, some suggest that original intent originalism is necessarily purposive. See Fish, *supra* note 69 at 1137–139. Others categorize purposivism as a species of originalism or vice versa. See e.g. Graham, *supra* note 39 at 178, n 21. Others largely equate the two. See

or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect."[248]

This borderline tautological[249] inquiry is cleverly posed in the passive voice, as an inquiry into the interests that *were meant* to be protected or the interests that the *Charter* was *meant* to secure, as if those "actual purposes" exist in some constitutional ether or in Plato's world of forms.[250] But words on paper have no will or agency and thus can have no purposes, objectives or intentions independent of willful actors.[251] The obvious question is: meant or intended by whom?

Arguably, identifying the purpose of a given provision is, at least in one sense or to some degree, directed at ascertaining or illustrating what the persons who wrote or voted on it—namely the framers or legislators—were trying to achieve.[252] As Patrick Monahan once observed, "it would seem impossible or

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John Harrison, "On the Hypotheses That Lie at the Foundations of Originalism" (2008) 31:2 Harv JL & Pub Pol'y 473 at 479–81. Others argue that they may be compatible, particularly where original purposes are framed at a high level of abstraction. See Vicki C Jackson, "Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet" (2008) 26:3 Quinnipiac L Rev 599 at 604, n 14, 611, n 31. Some purposivists, in fact, criticize public meaning originalists for failing to pay sufficient attention to authorial intention. See Aharon Barak, "A Judge on Judging: The Role of a Supreme Court Judge in a Democracy" (2002) 116:16 Harv L Rev 19 at 69, 72, 83. Others still classify originalists, such as Balkin, as "purposivists". See Thomas W Merrill, "Faithful Agent, Integrative, and Welfarist Interpretation" (2010) 14:4 Lewis & Clark L Rev 1565 at 1598 [Merrill, "Faithful Agent"].

248. [1985] 1 SCR 295 at 344, 60 AR 161 [*Big M*] [emphasis in original].

249. Although commonly referenced, this statement alone tells us very little: The entire point of *Charter* interpretation is to determine *what* interests it was meant to protect. See Sirota & Oliphant, *supra* note 6, Part II(A).

250. See e.g. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577 [cited to SCR] ("the interests and purposes that are meant to be protected by the particular right or freedom" at 766); *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 [cited to SCR] ("rights and liberties that the *Charter* was meant to secure" at 361).

251. See Goldsworthy, "Unwritten", *supra* note 197 at 705–06; Goldsworthy, "Interpreting", *supra* note 121 at 689. Nevertheless, this may be how the Court has conceived of constitutional "purposes", at least in Miller's estimation. See Miller, "Beguiled", *supra* note 7 ("the Court employs the fiction that the *Charter* is an organic creature—a 'living tree'—that has *its own* purpose which is neither the framers' nor the Courts', nor any identifiable person's or group's" at 340 [emphasis in original]). See also Tremblay, "Two Models", *supra* note 55 at 86.

252. See Froc, "Originalism", *supra* note 10 ("while it is true that the Supreme Court of Canada has expressed a distaste for originalism, it has considered framers' intent as part of its approved, 'purposive interpretation'" at 266).

absurd to attempt to construe the *Charter* without taking the intentions of the drafters into account in some fashion", given that the "Court has declared its support for a 'purposive' interpretation of the *Charter*, which surely makes the purposes of the drafters of the document relevant and significant".[253]

As such, we might not be surprised that the author of the *Motor Vehicle Reference*, no less, has explained that the purposive inquiry is directed to the *framers'* purposes, although not necessarily their specifically intended or expected applications.[254] In *B(R) v Children's Aid Society of Metropolitan Toronto*,[255] Lamer CJC recognized that judges must play an "important creative . . . role . . . enabl[ing] the law to change and adapt constantly to our society, . . . such interpretation must be strictly limited and circumscribed by the guidelines laid down by the Constitution or the legislation that our country, through its elected leaders and representatives, has adopted".[256] It is, therefore, not the case that "its provisions can be given whatever interpretation might be deemed useful or convenient",[257] nor can the *Charter* "be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time".[258] To Lamer CJC, the "flexibility of the principles [the *Charter*] expresses does not give us authority to distort their true meaning and purpose, nor to manufacture a constitutional law that goes beyond *the manifest intention of its framers*".[259]

We find further support for the argument that purposivism accommodates, and indeed invites, some measure of originalist thinking in the indicia of

253. Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 UBC L Rev 87 at 123. Indeed, even those hostile to originalist reasoning and in favour of purposivism have criticized cases like the *Motor Vehicle Reference* for departing so brazenly from the original intentions of the framers. See Hogg, *Constitutional Law*, vol 2, *supra* note 28 (arguing that while Lamer J's approach to original intentions was "generally the correct approach", in the *Motor Vehicle Reference* "the legislative history ought to have been respected" at § 60.1(g)).

254. Justice Binnie appears to concur with this conclusion. See Binnie, "Original Intent", *supra* note 60 at 346. Justice Binnie links constitutional purposivism with the purposes of the framers: "our Supreme Court has said that 'purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable'". *Ibid*, citing *Big M*, *supra* note 248 at 344.

255. [1995] 1 SCR 315, 122 DLR (4th) 1 [*BR* cited to SCR].

256. *Ibid* at 337.

257. *Ibid.*

258. *Reference Re* Public Service Employee Relations Act *(Alta)*, [1987] 1 SCR 313 at 394, 38 DLR (4th) 161.

259. *BR*, *supra* note 255 at 337 [emphasis added].

purpose that the Supreme Court of Canada consults. In *Big M*, Dickson J explained that the purposes of a provision must be determined

> by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.[260]

While adding that interpretation must be "generous rather than . . . legalistic", Dickson J cautioned that "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts".[261]

It seems awkward to think of adherence to the constitutional text, context or structure—which most would concede are important to any meaningful process of interpretation, on any theory—as amounting to a form of originalism.[262] However, this point is based on a simple premise: The framers drafted the text of the Constitution and established its structure, neither of which will change in the absence of a formal amendment. If we are worried about freezing rights or being governed by the "dead hand" of the past, meaningful adherence to these signposts of constitutional meaning will all exacerbate the problem, not alleviate it. They will lead judges to conclusions they might otherwise reject if guided only by their sense of what the modern conscience considers necessary or seeking to advance the "will and intentions of the present inheritors and possessors of sovereign power".[263]

Although no Canadian court, to our knowledge, has sought to draw a distinction between constitutional interpretation and construction as such,[264] the approach outlined in *Big M* may well be consistent with New Originalism, at least insofar as it seeks to identify the core meaning of

260. *Supra* note 248 at 344.

261. *Ibid.*

262. See the discussion in Sirota & Oliphant, *supra* note 6, Part II(A).

263. Kirby, *supra* note 61 at 11, citing A Inglis Clark, *Studies in Australian Constitutional Law,* 2nd ed (Melbourne: Charles F Maxwell, 1901). See also Fish, *supra* note 69. In his rebuttal, Fish stated: "But if this is your 'method' why bother with the text of the Constitution (or any text) at all? Why not take the shorter route and just enact statutes that reflect your will and be done with it?" *Ibid* at 1115.

264. See generally Miller, "Beguiled", *supra* note 7. Miller argues that "[w]hat is clear from Dickson CJ's meditation is that ascertaining the semantic meaning of the text is a first step

typically vague provisions in light of "contextual enrichment"[265] (i.e., the linguistic, philosophic and historical contexts). When directed to ascertaining the meaning of the terms actually used,[266] one could argue that the key factors in undertaking a purposive interpretation outlined in *Big M* are all, at least in some sense, means of determining either what the framers meant in drafting and enacting certain provisions in certain terms or how those terms would have been understood at the time the *Charter* was adopted.[267]

In addition, we should note that many originalists recognize that purposivism may be a useful way to undertake constitutional *construction* in the course of applying broader and more vaguely worded formulations.[268] As Barnett notes, where a term is vague or imprecise, interpreters may need to "resort to teleological or purposive considerations to determine their appropriate meaning as applied to a particular problem".[269]

Indeed, there are certain obvious parallels between the purposive approach described in *Big M*—which seeks to ascertain the purposes behind a provision in their linguistic, philosophical, structural and historical context—and the description of originalism provided by none other than Robert Bork a year later:

> In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. *That premise states a core value that the Framers intended to protect.* The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee.[270]

We do not mean to alarm our Canadian readers. Our point is only that one can struggle to draw a bright line between a "contextually enriched" purposive

towards understanding the purposive or teleological meaning. They are not mutually exclusive in this methodology." *Ibid* at 341.

265. This term is Solum's. See Solum, "Construction", *supra* note 95 at 464–67.

266. As one of us has argued that they should be. See Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*" (2015) 65:3 UTLJ 239.

267. See generally Sirota & Oliphant, *supra* note 6, Part II(A).

268. See *ibid.* See e.g. Solum, "Construction", *supra* note 95 (noting that construction is "especially likely when an area of constitutional law involves a provision that is highly vague and abstract" at 499).

269. Barnett, "Nonoriginalists", *supra* note 93 at 644. See Solum, "Distinction", *supra* note 100 at 99, 107.

270. Robert H Bork, "The Constitution, Original Intent, and Economic Rights" (1986) 23:4 San Diego L Rev 823 at 826 [emphasis added]. See also Bork, *Tempting*, *supra* note 162 ("[i]t is the task

approach and one dependent upon forms of originalist reasoning, which is important in eroding the belief that the two are incompatible. Much will depend on the precise application of these concepts in concrete cases and whether the Court starts to shift around the supposedly core meaning or purposes.[271]

D. Summary

We could not possibly maintain that the Supreme Court of Canada's approach to constitutional interpretation reflects any particular form of originalism in any rigorous sense, or even in broad strokes. Rather, our point is a relatively trite one: that there is no necessary incompatibility between (most) modern versions of originalism and the notion that the constitutional applications may change and must be sensibly applied to new realities often unimagined by its framers. Indeed, to some originalists, the vast majority of constitutional practice, particularly under the most contentious provisions expressed in "majestic generalities", is a product not of (empirical) interpretation, but of (normative) constitutional construction. As noted, this engages another set of concerns entirely and is a process for which purposivism may be a useful technique.[272] Canadian readers repulsed by the assumption that originalism requires us to pore over the diary of John A. Macdonald to discern his views on same-sex marriage should take note. The real debate has long since moved on,[273] and is over how much can be determined through interpretation and how the words so interpreted interact with the legal rules designed to put constitutional meaning into practice. These are questions of degrees, nuance and emphasis, not stark dichotomies.

In large part, the compatibility between the pivotal judgments of the Supreme Court of Canada and modern forms of originalism is a result of the fact that modern originalists have internalized and accepted many of the criticisms of reasoning focused exclusively on "original intent". Most have abandoned fantasies of complete judicial restraint for more defensible approaches or have dismissed those fantasies as normatively unattractive. In this respect, it is originalists who have come around to accept the limits of the

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of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know" at 167–68).

271. See generally Sirota & Oliphant, *supra* note 6, Part II(A).

272. See text accompanying note 259, *above*.

273. See Solum, "Distinction", *supra* note 100 ("once we have the interpretation-construction distinction at hand, it turns out that some of the apparent disagreement between Originalism and Living Constitutional dissolves" at 116).

earlier variants of originalism rejected in cases like the *Motor Vehicle Reference*, and to embrace other more sophisticated ways of maintaining fidelity to a written constitution.

Seen in this light, we have good reason to believe that, even beyond the range of cases addressed above, a fair deal of Canadian constitutional law—invoking the living tree metaphor or not—is at least compatible with modern forms of originalism. Indeed, as we discuss in more detail in a companion article, various elements of originalist reasoning pervade Canadian constitutional decisions.[274]

Perhaps most conspicuously, it is widely recognized that the Supreme Court of Canada will use originalism when it comes to cases seen to encapsulate a constitutional bargain.[275] However, the impact of originalist forms of argumentation in Canadian constitutional law goes much further. We have already noted cases like *Consolidated Fastfrate*, where the majority adopted a rather clearly originalist approach and it was the dissenting judges who felt the need to remind their colleagues that their approach contravenes constitutional dogma.[276] More recent decisions, like *Caron v Alberta*,[277] involve a clash of originalisms, with the majority judges adopting some form of public meaning originalism[278] and the dissenting judges invoking original intentions,[279] both clearly grounding the meaning of relevant constitutional provision in the events of a distant past and making no effort to adapt them to modern needs or realities. Similarly, the *Reference re* Supreme Court Act, *ss 5 and 6*[280] involved

274. See Sirota & Oliphant, *supra* note 6, Parts I–II.

275. This is the frequently cited "exception" to the "rule" that originalism has no place in Canadian constitutional law, acknowledged by most serious writers on the subject. See e.g. Greene "Origins", *supra* note 151 at 36, n 241; Miller, "Beguiled", *supra* note 7 at 344–45; Binnie, "Original Intent", *supra* note 60 at 362–63; Froc, "Originalism", *supra* note 10 at 276; Cyr, *supra* note 51 at 8, n 12; Grammond, *supra* note 39. See also Sirota & Oliphant, *supra* note 6, Parts I(B), II(C).

276. *Consolidated Fastfrate*, *supra* note 12. Other examples in the division of powers cases are too many to mention. See e.g. *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929, 137 DLR (4th) 449 [cited to SCR] (adopting a meaning of "indirect taxes" based on John Stuart Mill's classification, as "[t]o do otherwise would, as the Privy Council pointed out in that case, be to permit Parliament to enter fields assigned to the provinces contrary to the intention of the framers of the Constitution" at 1002–003). See also Sirota & Oliphant, *supra* note 6, Part I(A).

277. 2015 SCC 56, [2015] 3 SCR 511.

278. See *ibid*, Cromwell & Karakatsanis JJ (focussing on how the words "legal rights" would have been understood in 1870 and throughout Canadian history).

279. See *ibid*, Wagner & Côté JJ, dissenting (focussing on how the parties to the agreement in 1870 would have intended the provisions at issue to operate).

280. 2014 SCC 21, [2014] 1 SCR 433.

a textualist/intentionalist analysis, relying especially on the purportedly "plain meaning" of the words "from among", as well as historical evidence and legislative history as to the purposes behind a provision to resolve an ambiguity.

Other examples abound: Originalism suffuses the interpretation and application of aboriginal rights,[281] section 96 grounds the core jurisdiction of the Superior Courts in their scope at the time of Confederation,[282] and the language rights provisions must be "aimed at identifying the framers' objective at the time of its enactment".[283] Moreover, a range of rights—most notably property and economic rights—have been expressly excluded from the Constitution, not because they cannot "fit within the language", but because they were intentionally left out by the framers.[284] Identifying these various strands of originalism in Supreme Court of Canada decision making is a much larger project, and so for the purposes of this paper we must leave the reader with a reiteration of our belief that originalist reasoning is far more common in Canadian constitutional law than one would typically guess.

Conclusion

Following Scalia J's death, some prominent non-originalist commentators have questioned whether originalism has a future in the courts or even in academic literature. Noah Feldman forecasts that "over the long-term, Scalia's originalism will fade as an intellectual force . . . until a new generation finds it useful for as yet unknown purposes".[285] Eric Posner is even more categorical, arguing that the lack of an originalist audience at the Supreme Court of the United States will cause advocates and scholars to lose interest in originalism,[286]

281. See generally Borrows, *supra* note 23. See especially *R v Blais*, 2003 SCC 44 at para 40, [2003] 2 SCR 236. The Court stated, "this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision." *Ibid.* See also Sirota & Oliphant, *supra* note 6, Part II(C).

282. See e.g. *Reference re Amendments to the* Residential Tenancies Act *(NS)*, [1996] 1 SCR 186, 131 DLR (4th) 609; Sirota & Oliphant, *supra* note 6, Part I(C).

283. *Quebec (Education, Recreation and Sports) v Nguyen*, 2009 SCC 47 at para 26, [2009] 3 SCR 208.

284. See Huscroft, "Vagueness", *supra* note 39; Sirota & Oliphant, *supra* note 6, Part II(C).

285. Noah Feldman, "Justice Scalia, the Last Originalist", *Bloomberg View* (16 February 2016), online: <www.bloombergview.com>.

286. Eric Posner, "Why Originalism Will Fade" (18 February 2016), *Eric Posner* (blog), online: <ericposner.com/why-originalism-will-fade/>.

which will survive, if at all, as a meaningless political "code word".[287] Originalist scholars, however, insist that their approach will "[n]ot fade away", to use the title of a blog post by Solum.[288] Solum points out that there is "an increasing presence of young and sophisticated originalist scholars"[289] in the legal academy, while Balkin insists that originalist arguments will retain their attraction for judges—especially in cases of first impression or as a justification for overturning precedent—even if "originalism as a comprehensive theory of constitutional interpretation" loses some of its appeal.[290]

Whatever the future holds, there is no question that advancing, defending, questioning, criticizing and refining forms of originalism has absorbed many of the best legal minds in the United States for decades. And just as originalists have accepted and adapted to many of the criticisms levied against them, many so-called living constitutionalists have begun to accept and adapt certain core originalist precepts as well.[291] Despite all of their significant differences, many if not most United States scholars across the

287. Eric Posner, "More on the End of Originalism" (22 February 2016), *Eric Posner* (blog), online: <ericposner.com/more-on-the-end-of-originalism/>.

288. Lawrence Solum, "Not Fade Away" (18 February 2016), *Legal Theory Blog* (blog), online: <lsolum.typepad.com/legaltheory/2016/02/not-fade-away.html>.

289. *Ibid.* For his part, Ilya Somin echoes their thoughts and adds that, "influential academic theories have their greatest impact on the younger generation of lawyers and jurists who – unlike most Supreme Court justices – often have not yet formed strong opinions on major constitutional issues". Ilya Somin, "The Future of Originalism After Scalia", Opinion, *The Washington Post* (22 February 2016), online: <www.washingtonpost.com>.

290. Jack Balkin, "Why Originalism Will Not Fade Away" (19 February 2016), *Balkinization* (blog), online: <balkin.blogspot.ca/2016/02/why-originalism-will-not-fade-away.html>.

291. See Richard H Fallon Jr, "The Many and Varied Roles of History in Constitutional Adjudication" (2015) 90:5 Notre Dame L Rev 1753 [Fallon, "Roles of History"] (nearly all non-originalists "readily acknowledge the importance to constitutional adjudication of evidence bearing on the original meaning of constitutional language", for which he cites a range of sources at 1754). See also Goldsworthy, "Interpreting", *supra* note 121 ("[g]iven its fatal flaws, it is not surprising that in the United States, radical non-originalism is now being repudiated even by eminent erstwhile proponents" at 695); Merrill, "Faithful Agent", *supra* note 247 (arguing that the "vacuity" of unbounded living constitutionalism "has apparently led to its quiet abandonment" and observing "the migration of erstwhile proponents of living constitutionalism into the camp of originalism, albeit of the broad purposive variety" at 1597); Dworkin, "Comment", *supra* note 83 (describing the notion that constitutional provisions "are chameleons which change their meaning to conform to the needs and spirit of new times" as "hardly even intelligible" at 121); Ethan J Leib, "The Perpetual Anxiety of Living Constitutionalism" (2007) 24:2 Const Commentary 353 at 353–54.

political spectrum embrace various aspects of characteristically originalist thinking—whether it is that the notion that constitutional "meaning", if narrowly defined and properly understood, cannot "change" with time,[292] or that the original public meaning or intentions must make some important contribution to constitutional interpretation.[293] Indeed, it has been said that the belief that original intentions or meaning have little or no relevance to constitutional adjudication is now defended by no one.[294] Yet, the notion that constitutional meaning can and should change and evolve on a rather routine basis and with only a passing regard for original meanings, understandings or intentions would seem to be relatively uncontroversial in Canada.

Perhaps that is for the best, but it is a proposition which requires careful thought. We fear that because so little attention has been paid to these issues in Canada, there have been few serious efforts to investigate what degree of constitutional "change" ushered in through a majority vote of nine jurists,[295] however eminent, is consistent with a meaningful commitment to democratic self-governance. We fear that the customary recital and uncritical acceptance of

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292. In addition to all self-styled originalists, this list arguably includes Ronald Dworkin, Lawrence Lessig and Cass Sunstein. See Dworkin, "Virtue", *supra* note 225 at 1260; Lawrence Lessig & Cass R Sunstein, "The President and the Administration" (1994) 94:1 Colum L Rev 1 ("the Constitution should not be made to take on values that are not fairly traceable to founding commitments" at 93).

293. See e.g. Richard H Fallon Jr, "The Political Function of Originalist Ambiguity" (1996) 19:2 Harv JL & Pub Pol'y 487 ("most views—my own included—assume that original understanding and purposes are relevant to constitutional interpretation" at 488); Smith, *supra* note 142 ("most non-originalists – or at least most scholars or judges who do not readily identify as originalists – believe that the original meaning is highly relevant and often dispositive" at 722 [footnote omitted]); Perry, *supra* note 10 at 85; Akhil Reed Amar, "The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine" (2000) 114:1 Harv L Rev 26 at 29; John Finnis, "Prisoners' Voting and Judges' Powers" (2015), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687247>; Goldsworthy, "Interpreting", *supra* note 121 at 697–98, and the sources cited therein.

294. See Berman, "Bunk", *supra* note 70 (the notion that originalist arguments are relevant to interpretation is "a trivial thesis without dissenters" at 21); Daniel A Farber, "The Originalism Debate: A Guide for the Perplexed" (1989) 49:4 Ohio St LJ 1085 ("[a]lmost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation" at 1086); David A Strauss, "Common Law Constitutional Interpretation" (1996) 63:3 U Chicago L Rev 877 (noting that "[v]irtually everyone would agree" that original meaning matters in constitutional interpretation at 881).

295. See Jeremy Waldron, "Five to Four: Why Do Bare Majorities Rule on Courts?" (2014) 123:6 Yale LJ 1692 (questioning the authority of majority voting in judicial decision making).

buzzwords like "living tree" and "large, liberal and generous" risks promoting a degree of malaise regarding how and under what circumstances the judiciary may effectively amend the Constitution on our collective behalf.[296] We are told rather simply that the Constitution can "change" through judicial interpretation, but beyond that, we do not know much as to how it changes, when a change is appropriate, what type of changes are apposite to the institutional role of the judiciary, or when present society's needs—distilled through an institution deliberately designed to be unrepresentative—can trump any established meaning or purpose.

Originalists and their critics are preoccupied with these important issues. Nearly everyone agrees that interpretive license must have limits[297] and that the judiciary must in some sense be bound by the Constitution as much or more than anyone else. From that perspective, concerns about "a pack of lawyers . . . changing the terms of the deal, reneging on behalf of a society that did not appoint them for that purpose"[298] are not especially unfair, *if* all this is happening without some effort to identify principled and coherent grounds for distinguishing legitimate constitutional evolution from illegitimate judicial

296. See Reid, *supra* note 158 at 1. Reid observes that "[a]ltering the definition of the words in a constitution is in practice indistinguishable from a formal amendment. Thus, the advocates of 'progressive interpretation' are claiming that the Supreme Court has the authority to amend the Constitution". *Ibid.* See also Grégoire Webber, "Changing the constitution is easy—if you're a Supreme Court Justice", *National Post* (29 June 2015), online: <www.news.nationalpost.com>; Grégoire Webber, "The Remaking of the Constitution of Canada" (1 July 2015), *UK Constitutional Law Association* (blog), online: <ukconstitutionallaw.org/2015/07/01/gregoire-webber-the-remaking-of-the-constitution-of-canada/>.

297. See Huscroft, "Work in Progress", *supra* note 39 (noting that "even the most ardent supporters of judicial review purport to accept limitations on what interpretation may accomplish" at 428).

298. Frank H Easterbrook, "Textualism and the Dead Hand" (1998) 66:5&6 Geo Wash L Rev 1119 at 1121. See also Goldsworthy, "Interpreting", *supra* note 121 at 686. Goldsworthy stated that

> [w]henever non-originalists trot out the tired old refrain that 'we', 'today's Australians', 'the present generation', etc, should not be bound by 'the dead hand of the past', they really mean that the judges should not be bound by it. They assume that the judges speak for 'us', and imply that to limit the judges' ability to change the *Constitution* by pseudo-interpretation is to limit 'our' ability to do so democratically. The assumption is highly questionable, and the implication plainly false.

Ibid at 686–87.

amendment. Perhaps looking at the enormous body of originalist scholarship and its critics will teach us nothing,[299] but we will not know until we look, and to date, the Supreme Court of Canada has given us no reason not to.

299. See Eric J Segall, "A Century Lost: The End of the Originalism Debate" (1998) 15:3 Const Commentary 411; Fallon, "Roles of History", *supra* note 291 (arguing that the "for or against" originalism debate tends to obscure deep commonalities in interpretive approaches).

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