Originalism, in a Nutshell

*By Emily C. Cumberland**

What is originalism? It is a bedrock of constitutional interpretation for federalists, but many have found it difficult to define comprehensively what it means. Originalism is, broadly speaking, a catchall term for methods of constitutional interpretation principled on fidelity to the Constitution.[1] It represents not one school of thought but a spectrum of theories about how the Constitution should be interpreted.[2] There is no solid consensus as to when originalism became a formally-recognized method of constitutional interpretation, although at least one account credits Paul Brest with coining the term in "The Misconceived Quest for Original Understanding" in 1980.[3] Another account claims then-Attorney General Edwin Meese III first publicized originalism in a speech before the American Bar Association in 1985.[4] Regardless of its exact debut, originalism has become sensational fodder for debate among constitutional law scholars over the past 30 years.[5]

Phase I: Original Intent

Originalism's methodology has evolved steadily since its creation, as scholars strive to find the best way to reveal the "original" Constitution. The first incarnation of these methodologies was original intent. Black's Law Dictionary provides a cut-and-dried definition of original intent: "[t]he mental state of the drafters or enactors of the U.S. Constitution, a statute, or another document."[6] But what does "mental state" mean? Discourse on how (and whether) to apply the original intent method focuses mostly on how broadly or narrowly "mental state" should be construed. In its broadest form, original intent originalism may be nothing more than "an obligation to avoid direct contradiction of the intentions and expectations of the Constitution's framers."[7] More narrowly, Randy Barnett asserts that an original intent interpretation must defer to the "goals, objectives, or purposes of those who wrote or ratified the text."[8] Barnett also notes that the drafters' goals, objectives, or purposes relevant to this approach may or may not be known to others, even at the time of drafting.[9] Another application of original intent, perhaps the most extreme, holds as binding the "historically demonstrable intentions of the framers."[10] Jefferson Powell argues that this version of original intent goes a step further than the other versions of original intent; it stakes a claim to legitimacy because it claims there is an historical basis for giving effect to the framers' original intent.[11]

Although original intent is considered one branch of originalism, it is not necessarily accepted by today's originalists.[12] One of the attacks on original intent as a theory of interpretation is that it is inherently problematic: did the founding framers intend for their intentions to be binding on contemporary interpreters of the Constitution?[13] Jefferson Powell claims that the earliest interpreters applied techniques of statutory construction, but if original intent were considered it would only be the intent of the sovereign parties to the Constitution, not the framers personally.[14] Another criticism of the original intent theory is that it requires projecting the drafters' personal outlooks onto a future unknown and unimaginable to them.[15] Since these arguments against original intent were put forth, and perhaps in an effort to salvage a workable originalism, there has been a gradual shift among originalists towards interpretation on the basis of original meaning.[16]

Phase II: Original Meaning

The shift from original intent to original meaning was basically a shift from a focus on the framers' subjective intentions to a focus on the text's objective meaning during the framers' time.[17] Originalists generally agree that the focus of this method must be objective, but they tend to disagree on what constitutes "original meaning." On one hand, Robert Bork argues "public understanding" should control: the interpreter should look to "what the public of that time would have understood the words to mean."[18] However, Bork's use of the word "public" leaves much to be desired. Does it mean the actual understanding of the populace as a whole or the understanding of just the literate class (the only class actually able to read and understand the text)?[19] Michael Rappaport asserts that original meaning originalism seeks to understand how knowledgeable individuals would have understood the text of the Constitution when it was drafted and ratified in the late 18th century.[20] Regardless of whether the understanding of the general public or the literate class controls, each approach requires some amount of speculation as the evidence is likely scant.[21] As a middle ground between the two, Bret Boyce claims the only practical approach to original meaning interpretation is to rely on the publicly manifested understanding of the framers and ratifiers.[22] Boyce elaborates, "Since a law is a public act, only its public meaning can have legal force," and public meaning requires actual evidence of the views made known at the time of ratification.[23]

Jack Balkin asserts there are two steps in original meaning interpretation: the interpreter must (1) give effect to the meaning the language (and its underlying principles) had when the Constitution was drafted and ratified; and (2) apply the language the same as it would have been applied when the Constitution was drafted.[24] Balkin cites as an example Justice Scalia's argument that capital punishment does not violate the Eighth Amendment:

> [The principle underlying the Eighth Amendment] is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not . . . 'whatever may be considered cruel from one generation to the next,' but 'what we consider cruel today [i.e., in 1791]'; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions of the time.[25]

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Balkin highlights the two-step process followed by Justice Scalia to support his proposition that a better name for this approach is "original expected application," because he claims it incorporates the expectation of how the principle would have been applied at the time the Constitution was drafted.[26] Balkin's emphasis on expectation challenges original meaning originalists' focus on objective understanding (can analysis of "moral perceptions" be purely objective?).

Good Originalism Gone Bad[27]

From a thicket of naysayers, the phrase "bad originalism" has sprouted. Bad originalism refers not to a distinct method of interpretation, but to the product of flawed originalist interpretation.[28] The interpretation leading to "bad originalism" may be flawed for either or both of two reasons: (1) the interpreter uses originalist theory or reasoning to advance his political agenda under the guise of fidelity to the Constitution; (2) the interpreter misapplies or errs on the historical record.[29] Bad originalism does not denounce all uses or applications of originalist theory, only those which lead to incorrect or anachronistic results.[30] In the debate over originalism, scholars invoke bad originalism as a rhetorical instrument to varied effect.[31]

Disambiguation

One of the challenges of defining originalism is dismissing the spurious -isms in its midst. In particular, "textualism," "interpretivism," and "strict constructionism" are sometimes used synonymously or conjunctively with originalism and with little clarification as to their differences.[32] Textualism differs from originalism in that a textualist interpretation does not factor in the date a legal provision was enacted or the circumstances surrounding its enactment, whereas these are necessary factors for an originalist's interpretation.[33] Interpretivism is very similar to textualism, if not analogous.[34] Any distinction between the two may be purely rhetorical; for instance, Richard Primus argues interpretivism is a form of jurisprudence that values interpretation and condemns distractions from interpretation such as judicial activism.[35] Last, there is strict constructionism, about which everyone seems to have their own opinion. Black's Law Dictionary lists textualism as a synonym to strict constructionism.[36] On the other hand, Justice Scalia insists that "[t]extualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute."[37] Again, the difference (if any) may be purely rhetorical.

Where Originalism Goes, Controversy Follows

Originalism is generally regarded as an inherently conservative approach to constitutional interpretation.[38] Even so, there is a means-end distinction; originalism is a means which typically but does not necessarily lead to a conservative end.[39] Akhil Amar argues that originalism may yield bipartisan results (or arguably liberal results, referring specifically to originalists Hugo Black and John Hart Ely) by a renewed devotion to historical context when interpreting the Constitution.[40] The conservative-liberal distinction in the context of originalism is helpful insofar as it may shed light on the political agenda of an interpreter applying originalist reasoning or a scholar critiquing originalism's legitimacy. However, both sides of the divide have volleyed arguments for and against originalism; therefore, the focus here is the substance (not the political or ideological affiliation) of these arguments.

We the Originalists…

Some of the leading proponents of originalism, in its various forms, are Yale Law professor Akhil Amar, Georgetown Law professor Randy Barnett, Robert Bork (former Solicitor General, Attorney General, and Federal Judge), Federalist Society founder Steven Calabresi, and current Justices Antonin Scalia and Clarence Thomas.[41]

1. A written constitution fundamentally requires that we give effect to its original meaning.

Originalists such as Justice Scalia argue that the Constitution must be interpreted according to its original meaning because it is a written text and "its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[42] Further, a written Constitution is a law that binds the American people by its terms, and we must understand the terms to mean what they meant when the original authority enacted them.[43] In other words, the purpose of putting the Constitution in writing was to maintain and uphold fixed, agreed-upon terms.

Randy Barnett expounds on the significance of the Constitution's "writtenness" by analogizing the Constitution to a contract.[44] He asserts that the Constitution governs lawmakers; therefore, lawmakers and those they govern "are entitled to rely on the Constitution's appearances every bit as much as parties to private contracts."[45] Therefore the objective theory of contractual interpretation, if applied to the Constitution, would require that the interpreter give effect to the publicly-accessible meaning that a reasonable person would attach to the text in context.[46] We look to the meaning the terms had when the agreement was made because, if meaning could be changed at the whim of a party and without written modification, writtenness would have no function.

2. Originalism is necessary to preserve the supermajoritarian basis of the Constitution.

John McGinnis and Michael Rappaport posit that the Constitution's supermajoritarian basis requires judges to interpret the Constitution according to its original meaning.[47] They establish their argument in four steps: (1) entrenched laws fulfill beneficial goals, such as preservation of democratic decision-making, and take priority over ordinary legislation; (2) supermajority rules create desirable entrenchments; (3) the Constitution and its amendments were mostly enacted under supermajority rules, so its entrenchments are desirable; and (4) the Constitution's drafters and ratifiers adopted constitutional provisions according to how they understood them at the time, thus judges must be bound by this original meaning.[48] If a contemporary judge were to give effect to a meaning the drafters and ratifiers did not endorse, it would break down this process and "sever the Constitution's connection with the process responsible for its beneficence."[49]

3. Originalism serves as a check on judicial activism, or alternatively, is less susceptible to judicial activism.

In an address to the American Bar Association in 1985, Attorney General Edwin Meese asserted that the Supreme Court in its 1984 term "continued to roam at large in a veritable constitutional forest."[50] He argued that the variability of the Court's decisions reflected its overall deference to what the Court deemed to be sound public policy instead of a deference to the Constitution, thus weakening the permanence of the Constitution.[51] As a solution, Meese urged the Court make a commitment to a jurisprudence of original intention, which "would produce defensible principles of government that would not be tainted by ideological predilection."[52] In support of his position, Meese emphasized that the Court's obligation is to determine the meaning of the language which framers of the Constitution consciously and carefully chose.[53]

While the originalism community has gradually shifted from a focus on original intent to original meaning since Meese's speech, originalists maintain that the latter approach nonetheless quells judicial activism. The original meaning method is said to "tame the monster of judicial activism" because it requires a basis in historical evidence for the constitutional text's original meaning, and thus ultimately yields a foundation for constitutional adjudication that is objective and reliable (not subjective and variable).[54] History is critical to the originalist inquiry (regardless of whether the focus is original intent or meaning), which Meese also emphasized: "[T]he Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. . . . We know who did what, when, and many times why."[55] In other words, the originalist's argument is that history is to the originalist what public policy is to the nonoriginalist.

Originalist judicial interpretation is less susceptible to judicial activism, "the most significant weakness of the system of judicial review," because its basis is not an evaluation of values but of historical criterion.[56] Finally, Scalia insists originalism is preferable to non-originalism because the latter camp has no defined or agreed-upon methodology, and "'[y]ou can't beat somebody with nobody.'"

On the Other Hand, a Dead Hand

Justice Scalia has argued that non-originalists lack cohesion and have proffered no defined or agreed-upon methodology in opposition to originalism.[57] Yet while non-originalists may not have a team uniform or even a playbook, their oppositions to originalism are nonetheless vocal. Critics of originalism have included Yale Law professor and blogger Jack Balkin,[58] law professor Ronald Dworkin, and Harvard Law professor Laurence Tribe.[59]

1. Living Constitutionalist argument: Originalism requires that contemporary society be bound by the dead hand of the past.

If living constitutionalists had a mission statement (which they do not seem to have), it would mirror this statement by Justice Brennan:

> Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.
>
> Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.[60]

Justice Brennan touches on many concerns of the living constitutionalists in this brief excerpt, but their primary concern is with originalism's insistence on retaining the "static meaning" the Constitution once had; from this principle, as living constitutionalists see it, arise problems with democracy and protection of basic rights.

For one, the "dead hand" argument posits the problem that the population bound by the Constitution today is not the population that originally agreed to it.[61] Living constitutionalists contend that "[d]emocratic-enactment authority arises from people's right to bind and govern themselves."[62] Requiring judges to adhere to the enactors' original intent or the original meaning of the language during the enactors' time violates this democratic-enactment principle because the enactors and the governed (i.e. today's society) are mutually exclusive groups.[63] Also, living constitutionalists are concerned that some issues we regard as important now (e.g., federal labor, environmental, and civil rights laws) were not important or relevant when the Constitution was passed; thus, the Constitution if interpreted according to its original meaning will improperly limit Congress's ability to legislate in these areas.[64]

2. The Constitution was designed to "endure for the ages." Thus, interpretation is not necessarily restricted to textual or historical basis alone, and future generations' adaptations of the text are permissible.

Laurence Tribe argues that interpreters of the Constitution are not bound to interpret the text by relying solely on the text, historical record, or a combination of the two; indeed, there is no constitutional provision requiring this method of interpretation or (with the exception of the Ninth Amendment) any other method for that matter.[65] Tribe's argument parallels that of the living constitutionalists, who "insist that the legitimacy of the document cannot be fully defended if our first-order approach to it draws exclusively upon the historical."[66] Leib makes the distinction that living constitutionalists are not willing to make the same pledge of faith (i.e., that history or text alone suffices) to the Constitution that originalists make.[67] Instead, the living constitutionalist considers a variety of factors when interpreting the language of the Constitution, including consequences from different interpretative outcomes, underlying principles of political morality, and doctrine, among others. Lastly, Tribe implies that in order to ensure a Constitution designed to "endure for the ages," it may be necessary and more appropriate to have not a fixed set of rights that is resistant to change,

but a set of rights accompanied by underlying principles for adaptations to the needs of future generations.[68]

Conclusion

Originalism has undergone many transformations since it became a topic of popular debate just over a quarter-century ago. What originalism is not has become clearer with time, but there is still no succinct, accurate definition of what originalism is. Instead, it is best understood as a spectrum of theories that is continually evolving. What began as original intent has now become original meaning, as originalists abandon their pursuit for subjective intentions in favor of objective meanings. Originalists of all types continue to bolster their theories with federalist sentiments, historical evidence, and words like "fidelity" and "writtenness." Their tactic might be working; at least one living constitutionalist (Jack Balkin) has jumped ship recently to stake his claim on the originalists' side, or at least nearby. Even still, originalism is not without its critics, who take issue with the originalist's fixation on the stagnant text of the Constitution even while society continues progressively forward.

Endnotes

1 *See generally* Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165, 186 (2008) [hereinafter Primus, *When Should Original Meanings Matter?*] ("Originalism is a family of ideas and practices that locate the authoritative content of legal provisions in meanings that prevailed, actually or constructively, at the time when the provisions were enacted."); Justice Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 851 (1989) (expounding on the defects and merits of originalism) [hereinafter Scalia, *The Lesser Evil*].

2 Primus, *When Should Original Meanings Matter?*, *supra* note 1.

3 Brett Boyce, *Originalism and the Fourteenth Amendment*, 33 Wake Forest L. Rev. 909, 1034 n.1 (1998); *see also* Scalia, *The Lesser Evil*, *supra* note 1 (commenting on Chief Justice Taft's originalist thought in the 1926 Supreme Court opinion *Myers v. United States*); John Harrison, *Forms of Originalism and the Study of History*, 26 Harv. J.L. & Pub. Pol'y 83, 83 (2003) (suggesting originalism took root in then-professor Robert Bork's constitutional law class in 1977).

4 Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, *in* Originalism: A Quarter-Century of Debate 1, 1 (Steven G. Calabresi ed., 2007) [hereinafter Calabresi, *A Critical Introduction to the Originalism Debate*].

5 *Id.*

6 Black's Law Dictionary (8th ed. 2004).

7 Jefferson H. Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 885-886 (1985).

8 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 105 (2001) [hereinafter Barnett, *Original Meaning of the Commerce Clause*].

9 *Id.*

10 Powell, *supra* note 7, at 886.

11 *Id.*

12 *See, e.g.,* Justice Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the U.S. Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 3, 38 (Amy Gutmann ed., 1997) [hereinafter A Matter of Interpretation] ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

13 *See* Powell, *supra* note 7.

14 *Id.* at 948.

15 Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. Rev. 204, 221 (1980).

16 Randy Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 620 (1999) [hereinafter Barnett, *An Originalism for Nonoriginalists*].

17 *Id.* at 621.

18 Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 Wake Forest L. Rev. 909, 916 (1998) (quoting Robert Bork, The Tempting of America: The Political Seduction of the Law 144 (1989)).

19 Boyce, *supra* note 18, at 916-917.

20 Michael Rappaport, *Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1493 (2005) (emphasis added).

21 Boyce, *supra* note 18, at 917.

22 *Id.*

23 *Id.*

24 Jack Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 296 (2007) [hereinafter Balkin, *Abortion and Original Meaning*].

25 *Id.* (quoting Scalia, *Response*, *in* A Matter of Interpretation 129, *supra* note 12, at 145) (emphasis in original).

26 Balkin, *Abortion and Original Meaning*, *supra* note 24.

27 Arguably, this subheading belongs with the critical perspectives (under "On the Other Hand, a Dead Hand"), but I think it is important background to the debate because (1) it is referenced frequently enough as a stand-alone phrase to merit explanation of what it means, and (2) it may not be a bone of contention but rather a defect of originalist interpretation acknowledged by originalist critics and proponents alike. *See* Justice Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871, 872 (2008) [hereinafter Scalia, *Foreword*].

28 Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1378 (1990). Posner's reference to "bad originalism" is merely peripheral in the context of this article; nevertheless, other scholars such as Balkin have kept the phrase alive.

29 Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49, 71 (2007).

30 *Id.*

31 *Compare* Charles J. Cooper, *Harry Jaffa's Bad Originalism*, 1994 Pub. Int. L. Rev. 189 (1994) (book review) ("A bad originalist is just another judicial activist."), *with* Barry Friedman, 67 Law & Contemp. Probs. 149, 159 ("[I]f bad originalism were a sin, many Supreme Court Justices would be rewriting their opinions in purgatory at this very moment."), *and* Scalia, *Foreword*, *supra* note 27 ("Bad originalism is originalism nonetheless, and holds forth the promise of future redemption.").

32 *See, e.g.,* Steven J. Markman, *An Interpretivist Judge and the Media*, 32 Harv. J.L. & Pub. Pol'y 149, 151. (2009) (arguing "[the media's] intermediary role poses a particular problem for judges committed to a traditional judicial philosophy, termed either "interpretivism," "textualism," or "originalism"); Justice Scalia, Address at Catholic University of America (Oct. 10, 1986) (transcript available at http://www.joink.com/homes/users/ninoville/cua10-18-96.asp) ("I belong to a school, a small but hardy school, called 'textualists' or 'originalists.'").

33 Primus, *When Should Original Meanings Matter?*, *supra* note 1, at 187.

34 Richard A. Primus, *The Limits of Interpretivism*, 32 Harv. J.L. & Pub. Pol'y 159, 162 (2009).

35 *Id.* at 163; *see also* 6 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 23.5(b) (4th ed. 2009) ("Interpretivist theory is an effort to cabin the judge, to place some limits on judicial review.").

36 Black's Law Dictionary 1462 (8th ed. 2004) (defining strict constructionism as "[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning.").

37 Scalia, *Common-Law Courts in a Civil-Law System*, *in* A Matter of

Interpretation 3, *supra* note 12, at 23. *But see* Joseph Grcic, *The Supreme Court Decision: Consensus or Coercion?*, 54 Fed. Law. 52, 54 (2007) ("Those who favor what is sometimes called 'strict constructionism' seek a more constrained Supreme Court and believe that its power can be curbed by adopting 'textualism' as a method of interpreting the Constitution.")

38 *E.g.,* Calabresi, *A Critical Introduction to the Originalism Debate*, *supra* note 4; Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 Seton Hall L. Rev. 479, 490 (2008); Charles J. Kesler, *Thinking About Originalism*, 31 Harv. J.L. & Pub. Pol'y 1121, 1121; Scalia, *Foreword*, *supra* note 27.

39 *See* Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 Tul. L. Rev. 1533, 1548 (2008).

40 *See* Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, Slate, Sept. 21, 2005, http://www.slate.com/id/2126680/. *But see* Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 Harv. J.L. & Pub. Pol'y 937, 938 (2008).

41 All of whom, with the exception of Justice Thomas, have been cited in this article. See Clarence Thomas, Why Federalism Matters, Remarks at Drake University Law School's Dwight D. Opperman Lecture (Sept. 24, 1999), *in* 48 Drake L. Rev. 231 (2000), for a discussion of the need for federalism in constitutional interpretation in which Justice Thomas incorporates original understanding.

42 Scalia, *Common-Law Courts in a Civil-Law System*, *in* A Matter of Interpretation 3, *supra* note 12, at 40.

43 Primus, *When Should Original Meanings Matter?*, *supra* note 1, at 178.

44 Barnett, *An Originalism for Nonoriginalists*, *supra* note 16, at 633. He also makes explicit that he does not view the Constitution as a contract in a literal sense. *Id.* at 629.

45 *Id.* at 633.

46 *Id.* at 632.

47 John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 Harv. J.L. & Pub Pol'y 917, 919-920 (2008).

48 *Id.*

49 *Id.*

50 Edwin Meese III, Speech Before the American Bar Association, Washington, D.C. (Jul. 9, 1985), *in* Originalism: A Quarter-Century of Debate 57, 50 (Steven G. Calabresi ed., 2007).

51 *Id.* at 52-53.

52 *Id.* at 53.

53 *Id.*

54 Laurence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 Okla. L. Rev. 1, 1 (2007).

55 Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division, Washington, D.C. (Nov. 15, 1985), *in* Originalism: A Quarter-Century of Debate 71, 72 (Steven G. Calabresi ed., 2007); *see also* Scalia, *The Lesser Evil*, *supra* note 1, at 862.

56 *Id.* at 863-864.

57 *Id.* at 855. *But cf.* Thomas B. Colby & Peter J. Smith, Living Originalism 4 (Geo. Wash. U. Law Sch. Legal Studies Research Paper No. 393, 2008), *available at* http://ssrn.com/abstract=1090282 (arguing originalism lacks cohesion and consistency, despite being a so-called unified body of theories, and there is "profound internal disagreement" among originalists).

58 Ethan Leib claims that Jack Balkin was once a staunch advocate of "living constitutionalism" but has since abandoned the non-originalist camp (perhaps to espouse his own "expected original application" theory, discussed *supra* p. 52); a series of Balkin's writings seem to affirm Leib's charge. *See* Ethan Leib, *The Perpetual Anxiety of the Living Constitutionalism*, 24 Const. Comment. 353, 353 (2007). *Compare* Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, Slate, Aug. 29, 2005, http://www.slate.com/id/2125226/, *with* Balkin, *Abortion and Original Meaning*, *supra* note 24, *and* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427 (2007) [hereinafter Balkin, *Original Meaning and Constitutional Redemption*].

59 All of whom have been cited in this article.

60 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1985).

61 Primus, *supra* note 1, at 168.

62 *Id.* at 192.

63 *Id.* NB—The "dead hand" argument does not support the conclusion that the Constitution is altogether invalid, only that original meaning is an unacceptable method of constitutional interpretation.

64 Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 67, at 433.

65 Richard Tribe, *Comment*, *in* A Matter of Interpretation 65, *supra* note 12, at 77.

66 Leib, *supra* note 58, at 359-360.

67 *Id.*

68 Tribe, *Comment*, *in* A Matter of Interpretation 65, *supra* note 12, at 89.