

CONTEXTUALIZING THE DEBATE BETWEEN ORIGINALISM AND THE LIVING CONSTITUTION

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I. INTRODUCTION

One of the most important contemporary constitutional debates is whether the meaning of the Constitution may evolve in light of current circumstances, or whether the Constitution should be interpreted in accordance with how the text was originally understood by the public that ratified it.¹ This debate, in turn, mirrors a societal divide amongst Americans who disagree sharply over two competing moral visions.² Traditionalists look to the past as a source of solutions for contemporary problems, whereas progressives emphasize the need for experimentation and innovation.³ The fault lines running through our society radiate

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1. Originalism, of course, comes in a variety of flavors. This essay focuses on “original public meaning” originalism, as this is the focus of contemporary originalist theory. See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 1 (Apr. 28, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1825543>.

2. The divide runs deeply amongst citizens who are politically active even if there is some disagreement as to how divided ordinary citizens are. See Alan Wolfe, *The Culture War that Never Came*, in *IS THERE A CULTURE WAR? A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* 41, 42 (E.J. Dionne Jr. & Michael Cromartie eds., 2006).

3. James Davison Hunter, *The Enduring Culture War*, in *IS THERE A CULTURE WAR?*, *supra* note 2, at 10, 14–15.

throughout contemporary constitutional law as well.⁴ Proponents of the living constitution fear that originalism places the Constitution in an eighteenth century straightjacket that is incapable of dealing with the problems of contemporary America.⁵ Proponents of originalism, on the other hand, argue that the only permissible form of constitutional change is by amendment⁶ and that judicial review, therefore, should be constrained by the Constitution as originally promulgated and understood.

This year's Drake Constitutional Law Center Symposium addressed this debate by examining Professor David Strauss's *The Living Constitution*, which argues the Constitution should be interpreted as a living document using the techniques of the common law.⁷ The participants included Keith Whittington, the William Nelson Cromwell Professor of Politics, Princeton University; Rebecca Brown, the Newton Professor of Constitutional Law, University of Southern California; and Will Waluchow, the Senator William McMaster Chair in Constitutional Studies, McMaster University.

This foreword is divided into two parts. Part II briefly contextualizes the debate temporally and spatially. Oddly, scholars have largely ignored the societal and historical context of the debate as well as whether Americans might learn from how constitutional courts abroad deal with analogous interpretive problems. Intellectual debates do not occur in a vacuum, however, but are shaped by wider social and political struggles. Part III summarizes the superb papers presented at the symposium.

II. CONTEXTUALIZING THE DEBATE

The debate between originalism and the living constitution has spawned controversy and a considerable literature.⁸ Some proponents of

4. See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 295 (2005) (observing "we find ourselves at a juncture where profound fault lines" are "evident at the very foundations" of constitutional law).

5. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 24–25 (Geoffrey R. Stone ed., 2010).

6. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting) ("The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good enough for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.").

7. See generally STRAUSS, *supra* note 5.

8. See Solum, *supra* note 1, at 1 ("Debates over 'originalism' have been a

originalism argue that originalism flows from the nature of a written constitution. Constitutions are written to provide a fixed point of reference in future political and constitutional struggles. Other proponents argue that, on balance, originalism produces better results than the alternatives and is, therefore, the best means to interpret the Constitution.⁹ All proponents of originalism, believe, however, that other interpretive approaches are not faithful to the Constitution and invite judicial activism. Proponents of the living constitution, on the other hand, dispute whether the “majestic generalities” of the Constitution¹⁰ provide a determinate answer to legal problems. Professor Strauss, for example, answers the charge that a living constitution affords judges too much discretion by arguing that we have, alongside the text of our Constitution, an uncoded common law constitution constraining judges via *stare decisis*.¹¹ The living constitution does not afford judges unconstrained discretion because they are “governed by a set of attitudes: attitudes of humility and cautious empiricism.”¹²

Although originalists ground their claims on the nature of a written constitution, one of the curious aspects of our Constitution—as well as constitutions around the globe—is that it does not contain language informing future generations how it should be interpreted.¹³ Nor should we be surprised by the lack of clear direction from constitutional text. The problems that consume future generations often concern issues that, at best, were only dimly foreseen by the framing generation. The framers could not foresee the dramatic role courts would play in the American republic. Consequently, judicial review played a small and negligible role

central focus of contemporary constitutional theory for three decades”).

9. Mitchell Berman provides a useful typology of originalism, which this Article adopts. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009). In Professor Berman’s typology, “hard” originalists maintain that originalism, unlike other forms of interpretation, respects the authoritative nature of the Constitutional text. *See id.* at 6 (citing Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 635 (1999)). “Soft” originalists argue that, on balance, originalism is more compatible with democracy than competing interpretive models because it restrains judicial discretion. *See id.*

10. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 27–28 (2005) (quoting Justice William J. Brennan Jr., Speech before the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985)).

11. *See* STRAUSS, *supra* note 5, at 3.

12. *Id.* at 40.

13. *See* WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 471–72 (Sanford Levinson & Jeffrey K. Tulis eds., 2007).

in the preratification debates.¹⁴ The problem of judicial discretion, which is an important leitmotif in contemporary constitutional theory, moreover, was simply not something the framers considered in any sustained fashion.¹⁵ In short, to the extent the contemporary debate between originalism and the living constitution turns on what the framing generation thought about judicial interpretation, it is fought over the interstices of constitutional silence and the largely unarticulated background assumptions that informed the ratification of the Constitution.

The problem that lies at the core of the constitutional project is that the framers sought to fashion institutions that could “survive the corrupting influences of time and fortune.”¹⁶ When Justice Marshall wrote “we must never forget that it is a *constitution* we are expounding,”¹⁷ he understood that the problem of constitutional interpretation was intertwined with that of constitutional longevity. The two major sources of American law at the time of the framing were the principles embodied in the Constitution and the common law.¹⁸ Originalism, therefore, with its emphasis on enduring and unchanging principles has strong roots in the understandings of the framing generation.¹⁹ The common law, however, was also an important source of hermeneutic principles because the “framers shared the

14. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 69–71 (2004).

15. The framers assumed judges did not have discretion when interpreting constitutional text. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 3–4 (Peter Charles Hoffer & N.E.H. Hull eds., 2000); see also *THE FEDERALIST* NO. 78, at 452–53 (Alexander Hamilton) (Am. Bar Ass’n ed. 2009) (assuring those who feared the power the proposed Constitution would afford judges that they would exercise judgment, not will, when invalidating statutes).

16. See John E. Finn, *The Civic Constitution: Some Preliminaries*, in *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE* 41, 42 (Sotirios A. Barber & Robert P. George eds., 2001); see also G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, at 6–7 (Paul A. Freund & Stanley N. Katz eds., 1988) (noting early Americans believed that American ideas and institutions, like the common law and Constitution, were exceptional and capable of resisting “the inexorable process of decay”).

17. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

18. WHITE, *supra* note 16, at 6–7.

19. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985) (“The cultural influences of Enlightenment rationalism and British Protestantism combined in an unlikely alliance to engender a suspicion of any sort of interpretation at all.”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (noting the long history of originalism in American constitutional interpretation).

traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.”²⁰ In short, “the modern interpretive divide between those who see the Constitution as a static document and those who see it as a living organism was present,” albeit in prototypical fashion, “in the revolutionary era.”²¹

The framing era assumptions and beliefs over the judicial role were not put to the test until the late nineteenth century. Constitutional interpretive fault lines are largely invisible until they are exposed by political and social changes that test our commitment to the assumptions and presuppositions that inform and substantiate the constitutional text. The struggle over how best to interpret the Constitution broke out in earnest when elected officials first sought to respond to the changes occurring because of industrialization, and courts resisted by striking down social welfare legislation during what has become known as the *Lochner* era.²² Defenders of the Supreme Court turned to an idealized view of the past to “legitimize their claims for an expansive conception” of judicial review.²³ The judges of the *Lochner* era believed they were enforcing a constitutionally mandated line between valid legislation that promoted the general welfare, and laws that were the product of illegitimate factional politics.²⁴ Madison, for example, believed the new Constitution would prevent factions or special interest groups from undermining the public welfare.²⁵ *Lochner v. New York*,²⁶ and the jurisprudence associated with the case, in short, have important continuities with “legal and political philosophies that had informed American public discourse since the

20. See Powell, *supra* note 19, at 903–04. Powell concluded “there was a tension during this period between global rejection of any and all methods of constitutional construction and a willingness to interpret the constitutional text in accordance with the common law principles.” *Id.* at 887.

21. ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* 19 (2009).

22. See Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case,”* 38 WAKE FOREST L. REV. 375, 377 (2003).

23. *Id.*

24. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 133 (1993) (citations omitted).

25. See THE FEDERALIST NO. 10 (James Madison), *supra* note 15, at 45–51.

26. *Lochner v. New York*, 198 U.S. 45 (1905).

nation's founding."²⁷

The problem with *Lochner* is not that it violated the original understanding of the Constitution, but that it ran head on into a political maelstrom.²⁸ Progressive political forces vehemently criticized the courts and argued for the curtailment, if not the outright abrogation, of judicial review.²⁹ Jurisprudentially, progressives turned to the idea of a living constitution by distinguishing "the more abstract goals of the framers from their specific intents and purposes."³⁰ Courts, the progressives argued, should be deferential in applying the open-ended provisions of the Constitution because they did not provide determinate answers to concrete constitutional problems. In one of the most influential essays written on constitutional law,³¹ James Bradley Thayer argued courts should act only when the legislature made a mistake "so clear that it is not open to rational question."³² Franklin Roosevelt drew on progressive criticisms of the Supreme Court when he declared in his First Inaugural Address that the federal government had the power to deal with the Depression because the "Constitution is so simple, so practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."³³

The living constitution was proposed and defended in the first part of the twentieth century as a means to restrain judicial power but would be pressed into service to achieve far-reaching social and political reforms by

27. David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299, 301 (Michael C. Dorf ed., 2d ed. 2009).

28. *See id.* at 322.

29. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 49 (1994); *see also* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 203 (2010).

30. Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 222 (1997); *see also* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 561 (2009) (noting the "concept of a 'living' Constitution arose in the early twentieth century due to innovations by Congress and by state and local governments in constructing early versions of the regulatory state." (citing Gillman, *supra*)).

31. *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 13 (2008).

32. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

33. President Franklin Delano Roosevelt, First Inaugural Address (Mar. 4 1933), available at <http://www.americanrhetoric.com/speeches/fdrfirstinaugural.html>.

the second half of the century. For better or worse, the constitutional fate of living constitutionalism would become intertwined with the jurisprudential output of the Warren Court. By the 1960s, the Court's agenda began to emphasize individual rights.³⁴ In particular, the Court revolutionized and modernized constitutional law by nationalizing rights and undermining the South as a "unique legal and cultural region."³⁵ Arguments based on what constitutional provisions meant when they were framed, moreover, were noticeably absent from many of the key decisions of the Warren Court. The Court in *Brown*, for example, expressly eschewed reliance on originalism:

In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.³⁶

The transformations ushered in by the Warren Court facilitated a political backlash that would eventually ripen into a social movement that embraced originalism.³⁷ The populist critics of the Warren Court, much like the progressive era critics of the *Lochner* era, believed that the Court had engaged in impermissible judicial activism. What placed originalism on the front burner of the American constitutional debate in the 1980s, as

34. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 2 (1998) (citations omitted) (observing that in the 1930s, less than ten percent of the Court's decisions involved individual rights other than property rights but by the late 1960s, almost seventy percent of its decisions concerned individual rights).

35. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490 (2000).

36. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). There is considerable disagreement whether *Brown* can be reconciled with an originalist interpretation of the Fourteenth Amendment. David Strauss, for example, concludes *Brown* cannot be justified on originalist grounds. STRAUSS, *supra* note 5, at 78. For a discussion of how conservatives came to embrace *Brown*, see ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 210–30 (Peter Charles Hoffer & N.E.H. Hull eds., 2003).

37. See Ken I. Kersch, *Ecumenalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955–1980*, 25 *STUD. AM. POL. DEV.* 86, 87 (2011) (footnotes omitted); see generally Steven M. Teles, *Conservative Mobilization Against Entrenched Liberalism*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 160–88 (Paul Pierson & Theda Skocpol eds., 2007) (discussing the rise of the conservative movement during the late twentieth century).

had been true of living constitutionalism in the 1930s, was politics. Ronald Reagan, much like Roosevelt before him, reshaped constitutional politics by articulating a normative vision anchored in originalism and appointing judges who were ideologically in tune with this vision.³⁸ Politically, originalism differs from living constitutionalism in two key respects. First, it provides a useful narrative that mobilizes conservative voters by demonizing its opponents as lacking fidelity to the Constitution.³⁹ Originalism, unlike living constitutionalism, has popular roots in our contemporary constitutional culture. Second, while originalism began as a critique of liberal activism, it is not a theory of judicial restraint. The Supreme Court has shown its willingness to strike down federal statutes in what has become known as the federalism revolution.⁴⁰

The debate between living constitutionalism and originalism is, at bottom, a disagreement over what constitutes the best means to interpret a written constitution if it is to withstand the test of time. The United States, of course, is not the only polity faced with the problem of judicial interpretation, but originalism has not proven attractive abroad.⁴¹ The lack of interest in originalism abroad is not surprising to the extent that originalism is a response to contingent configurations of American politics. Voters abroad can and do become incensed over judicial opinions, but the political banners used to mobilize citizen anger will understandably flow

38. See Dawn E. Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 367 (2003).

39. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 572 (2006).

40. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 2* (2004) (noting when it comes to federal power, the Rehnquist Court was "the least deferential of any in the history of the U.S. Supreme Court, striking down thirty provisions of federal law from 1995 to 2001").

41. See MURPHY, *supra* note 13, at 476–77 (noting originalism "is pretty much restricted to the United States"); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in EUROPEAN AND US CONSTITUTIONALISM 186–87 (Georg Nolte ed., 2005) (noting the European Court engages in "dynamic interpretation of the Convention" resulting in a case-by-case analysis, which sometimes jeopardizes "uniformity, predictability and legal certainty"); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 85–88 (Sujit Choudhry ed., 2007); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 62–77 (2009) (stating "hardly any sober or respectable foreign nation . . . boasts a similar mass of opinion in favor of American-style originalism").

from autochthonous elements of a constitutional order. It is quite possible, moreover, that the problems facing the United States Supreme Court are very different than those facing constitutional courts abroad. The United States has a long historical experience with judicial review, whereas judicially enforceable constitutional rights did not become the norm abroad until after the Second World War.⁴² It may be that political movements abroad will seek to marshal the past as a resource in constitutional struggle as constitutions age, as has occurred in the United States.

Nonetheless, the practices of constitutional courts abroad present originalism with two challenges. First, the argument that originalism flows from the nature of a written constitution is empirically suspect. Originalism may be mandated by the text of our Constitution, but it does not ineluctably flow from the decision to write a constitution. The core of the postwar paradigm of judicial review is that courts should cite and borrow from each other's work and rely on international law as important sources in constitutional interpretation.⁴³ It is difficult to reconcile this paradigm with the core tenets of originalism: the meaning of the Constitution is fixed at the time of the framing and that meaning should, barring exceptional circumstances, trump other sources of law.⁴⁴ Second, to the extent that proponents of originalism argue it is superior to the alternatives, the best practices of constitutional courts abroad present a problem. The global norm is that courts seek to spread the values of a constitution throughout society by creating and relying on a body of precedent.⁴⁵ Constitutional courts around the globe, in short, are busy creating a common law of the constitution. The task of judicial interpretation, moreover, is understood differently abroad. One of the "key features of constitutional courts is that they do not shy away from the more abstract principles of political morality that are included in the bill of rights."⁴⁶

42. See Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1477–86 (2009) (citations omitted).

43. Weinrib, *supra* note 41; see also Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 144–45 (2005). South Africa has constitutionalized the principle that courts should look at international and comparative sources. See MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* 8 (2009) (quoting S. AFR. CONST. § 39(I)(c) (1996)).

44. See Solum, *supra* note 1, at 28–32.

45. See DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW* 5 (2010).

46. VÍCTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND*

III. THE DEBATE AT THE 2011 DRAKE UNIVERSITY LAW SCHOOL CONSTITUTIONAL LAW SYMPOSIUM

The long-standing debate between proponents of the living constitution and originalism was enriched by the superb contributions made at the 2011 Drake University Law School Constitutional Law Symposium. Professor David Strauss began the Symposium by stating, “One of the most fundamental facts about American constitutional law is that it changes.”⁴⁷ These changes occurred not by amendment but by judicial interpretation. The deep question of constitutional law, he argues in his Article, is what justifies such change. Originalists argue change is justified only if we discover something new about the past. The problem with this approach, argues Professor Strauss, is that it does not explain our constitutional order. Much of contemporary constitutional law cannot be reconciled with what was originally understood when the Constitution was adopted.

Originalists contend that informal, constitutional change opens the door to judicial discretion. Strauss answers the charge by arguing that we have a common law constitution. The common law is a “system that emphasizes precedent and tradition but that allows for innovation—in carefully circumscribed ways.”⁴⁸ The common law, in short, constrains judges in constitutional law in much the same way it does in private law. The common law approach is cautiously empirical, as it rests on a “set of attitudes: attitudes of humility, distrust of abstractions, and a willingness to accept arrangements that seem to have worked tolerably well for a long period of time.”⁴⁹

Professor Rebecca Brown observes, “*The Living Constitution* is an inspiring metaphor and supplies an elegant argument.”⁵⁰ Professor Strauss’s work, she notes, appeals to common sense because when we think of the Constitution, we think of precedent.⁵¹ Professor Brown also criticizes

DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 46 (2009); *see also* Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395, 395 (1994) (noting the German Constitution is viewed “more as a substantive charter of justice”).

47. David A. Strauss, *Do We Have a Living Constitution*, 59 DRAKE L. REV. 973, 973 (2011).

48. *Id.* at 976 (citing STRAUSS, *supra* note 5, at 62–76).

49. *Id.* at 977 (citing STRAUSS, *supra* note 5, at 40–42).

50. Rebecca L. Brown, *Assisted Living for the Constitution*, 59 DRAKE L. REV. 985 (2011).

51. *Id.* at 986–87.

originalism for failing to adequately describe the workings of our constitutional practice.⁵² However, she finds Strauss's account incomplete because it fails to take political principle and political morality into account.⁵³

Brown argues that the the common law is backwards looking.⁵⁴ It codifies existing social practices and is democratic precisely because it "restates and makes coherent the practice that has already gained popular acceptance as societal custom."⁵⁵ Constitutional interpretation is a different enterprise; it is not simply reflective of shared expectations but rather "seeks to assist the community" to adapt its rules "to conform to an external, more timeless standard that the people aspire to meet."⁵⁶ Constitutional interpretation is not backward, but forward, looking. "The Living Constitution gains its democratic legitimacy by virtue of the very quality that distinguishes it from the common law: its reliance on principles of justice."⁵⁷ While the metaphor of the constitution as a common law constitution is admirable, it "needs a little assistance."⁵⁸

Professor Waluchow observes in his article that living constitutionalism is the "accepted paradigm in Canadian constitutional theory and practice."⁵⁹ Professor Waluchow explains that Canadian courts have rejected originalism and adopted the idea of the constitution as a "living tree."⁶⁰ This idea was articulated in one of the most famous and influential cases of Canadian constitutional law, *Edwards*, or the "Persons case."⁶¹ Canada's Constitution, the British North America Act of 1867, stated only "persons" could become Senators.⁶² When Emily Murphy's name was put forward for the Senate, it was rejected on the grounds that a

52. *Id.* at 986.

53. *Id.* at 987.

54. *Id.*

55. *Id.* at 990.

56. *Id.* at 993.

57. *Id.* at 1000.

58. *Id.*

59. W.J. Waluchow, *Democracy and the Living Tree Constitution*, 59 DRAKE L. REV. 1001, 1002 (2011).

60. *Id.* (quoting *Edwards v. Canada (Att'y Gen.)*, [1930] A.C. 124 (P.C.) 136 (appeal taken from Can.)).

61. *Edwards*, [1930] A.C. at 136.

62. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 24 (U.K.). This Act was originally cited as The British North American Act, 1867. However, as of 1982, the Act may be cited as the Constitutional Act, 1867. *Id.* § 1 & n.2.

woman was not a person for purposes of the British North America Act.⁶³ She, along with four other women known as the Famous Five, challenged the Prime Minister's decision before the Canadian Supreme Court.⁶⁴ They lost and appealed to the Privy Council.⁶⁵

There is no doubt that Emily Murphy should have lost under an originalist reading of the British North America Act. As Professor Waluchow explains, the court reasoned that constitutions are different than statutes and that "such instruments are deliberately designed to facilitate evolution so as to meet changing social circumstances."⁶⁶ The court stated, "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."⁶⁷ Professor Waluchow concludes that Canadian courts have repeatedly "rejected the view that anything but strict adherence to some robust form of originalism constitutes a serious threat to democracy and the rule of law."⁶⁸

On behalf of Drake Law School, I would like to thank the participants at the conference for their important articles. I would also like to congratulate the editors of the *Drake Law Review* for their tireless work and professionalism. Lastly, I want to express appreciation to the distinguished Des Moines law firm of Belin McCormick, P.C., for its continued sponsorship of this event.

63. See *Edwards*, [1930] A.C. at 126–27.

64. *Id.*

65. *Id.*

66. Waluchow, *supra* note 59, at 1007 (citing *Edwards*, [1930] A.C. at 136–37).

67. *Edwards*, [1930] A.C. at 136.

68. Waluchow, *supra* note 59, at 1007–08 (citing *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, paras. 52–53 (Can.)).