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## “Originalism” of Interpretation in the United States Constitution

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Article	Abstract
<p><b>Keywords:</b> <b>Constitutional Interpretation; Living constitutionalism; Originalism; Non-originalism.</b></p> <p><b>Article History</b> Received: Sep 7, 2022; Reviewed: Jan 7, 2023; Accepted: Jul 17, 2023; Published: Jul 31, 2023.</p> <p><b>DOI:</b> 10.28946/slrev.Vol7.Iss2.2 134.pp190-208</p>	<p>Originalism is a viewpoint that is one of the methods and theories of constitutional interpretation. It remains controversial in its application, particularly in the decisions of the United States Supreme Court. Originalism first held that the interpretation of the United States Constitution must follow the original intent of the constitutional drafters or those who ratified it. However, in the 1990s, this stance changed, namely that the interpretation of the Constitution must follow the original meaning of the constitutional text. The aim of this research is to understand the anti-mainstream concepts of originalism interpretation. The fundamental problem lies not to answer which one is better between originalist and non-originalist. Instead, it rather depends on how to use this approach in several cases. It is possible that in one case using an originalist approach will be more relevant and appropriate, while in another case it will be absurd, and it is happened in several decisions in the United States. The Normative legal research method was used in this research with five major approaches. Those are the statute, conceptual, historical, casuistry, and comparative approaches. The result of this study indicates that: first, originalism is a stance directly related to perspective on the issue of interpretation of the Constitution. Meanwhile, the interpretation of the Constitution itself is an attempt to understand the definitions contained in the Constitution and the objectives it aims to achieve. Second, reflecting on the practice in the United States, the originalism approach may be more relevant on some occasions. However, originalism will be absurd if applied on other occasions because society has changed so much. Therefore, in such circumstances, getting out of originalism is a necessity.</p>

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### INTRODUCTION

In mid-February 2016, the news broke suddenly: Associate Justice Antonin Scalia died. The world of justice in the United States was temporarily shaken. The passing of Scalia at the age of 79 was the departure of one of the most “stubborn” originalists in interpreting the Constitution.

However, the pros and cons accompanying this die-hard originalist's stance do not diminish the widely held view that Antonin Scalia was one of the greatest justices of the United States of the 20th century.

Antonin Scalia said that the text is a form of constitutional interpretation closest to the Constitution's original meaning and is least susceptible to political influence.<sup>1</sup> For Scalia, the text of the Written Constitution (of the United States) is law. The judge's task is to interpret the constitutional text based on its original meaning.<sup>2</sup> Critical of those called “non-originalists”. Scalia opposed the United States Supreme Court decisions that he considered had ignored the “original meaning” of the Constitution. He believed, as stated by one of his supporters, Howard Slugh, that if the court (meaning the Supreme Court of the United States of America) continues to decide on constitutional issues without submitting to the original meaning of the Constitution, the balance between the various branches of state power is threatened.<sup>3</sup>

The original meaning is one of the “factions” of originalism (so it is often called “original meaning originalism”). Another “faction” is original intent (so it is often called “original intention originalism”). In interpreting the Constitution, originalism – in any “faction” – is never devoid of debate. Some authors note<sup>4</sup> that although originalism as a “method” of interpreting the Constitution is as old as the Constitution itself (*in casu* of the United States Constitution), as a “theory” of constitutional interpretation, the term did not appear until 1980 when Paul Brest put his thoughts into an article entitled “The Misconceived Quest for Original Understanding.”<sup>5</sup>

The interpretation of the Constitution is one of the fundamental issues in constitutional law. The interpretation is necessary to determine the meaning of ambiguous provisions of the Constitution or to answer fundamental questions left unaddressed by the drafters.<sup>6</sup> Therefore the interpretation of the Constitution is actually one way of elaborating the meanings contained therein,<sup>7</sup> but in essence, it is also an effort to defend the Constitution.<sup>8</sup> In fact, within certain limits, especially for written constitutions, the interpretation of the Constitution is actually part of the effort to perfect the Constitution.<sup>9</sup>

Originalism in the interpretation of the Constitution is directly related to, even a consequence of, acceptance of a written constitution in the constitutional system. The United States was the first country to adopt a written constitution. It is logical that the debate over originalism, both

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<sup>1</sup> Agnes Harvelian et al., “Constitutional Interpretation of Original Intent on Finding The Meaning of Social Justice In The Constitutional Review,” *Yustisia Jurnal Hukum* 9, no. 3 (2020): 348–61.

<sup>2</sup> Richard F Duncan, “Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution,” *Regent UL Rev.* 29 (2016): 9.

<sup>3</sup> Howard Slugh, “Antonin Scalia, the Forward-Looking Justice,” *National Review*, February 2016.

<sup>4</sup> Randy E Barnett and Evan D Bernick, “The Letter and the Spirit: A Unified Theory of Originalism,” *The Georgetown Law Journal* 107 (2018): 1–54.

<sup>5</sup> Paul Brest, “The Misconceived Quest for the Original Understanding,” *Boston University Law Review* 60 (1980): 204.

<sup>6</sup> “Interpreting the Constitution Generally,” *Constitution Annotated*, accessed January 13, 2023, website: [https://constitution.congress.gov/browse/essay/intro-8-1/ALDE\\_00001302/](https://constitution.congress.gov/browse/essay/intro-8-1/ALDE_00001302/).

<sup>7</sup> Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas, 1999).

<sup>8</sup> Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (the John Hopkins University Press, 2007).

<sup>9</sup> Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Bhuana Ilmu Populer, 2007).

academically and politically, first took place in the United States and continues to this day.<sup>10</sup> The most heated debates took place during the reign of President Ronald Reagan, especially when Reagan proposed that Robert Bork, known as an originalist, be a candidate for Supreme Court justice. At that time, arguments crossed not only in the Senate (which has the authority to confirm the nomination of justices) but also extended to the academic world. In fact, Bork's failure to receive Senate confirmation did not end the "buying and selling" argument about originalism. The debate has expanded in such a way that it has developed into a kind of academic battle regarding the search for "grand constitutional theories" in constitutional interpretation.<sup>11</sup>

Theoretically, when a country adopts a written constitution in its constitutional system, it means that the country accepts the principle that the Constitution is a fundamental law, the highest law in that country – regardless of whether such a principle is affirmed or not in its Constitution. Therefore, all the administration of state life must refer to and must not conflict with the Constitution. This is because a written constitution is an "enforceable law."<sup>12</sup> Up to that point, there is relatively no debate. The United States explicitly affirms this principle in the second paragraph of Article VI of its Constitution (known as the Supremacy Clause):

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

However, the problem is: how can this principle be realised so that the Constitution is truly embodied in the practice of state life? In the United States, that question was only answered after the country's Supreme Court, when chaired by John Marshall, handed down its famous ruling in *Marbury v. Madison* (1803). In legal consideration, John Marshall – who wrote the decision in the *Marbury v. Madison* case – said after affirming that, following the principle of constitutional supremacy, in the event of a case where there is a conflict between the Constitution and the law, then the Constitution must take precedence. Marshall then stated that "an act of the legislature repugnant to the constitution is void" and the institution authorised to declare it is a court.<sup>13</sup>

With this decision, which is now more than 200 years old, the United States Supreme Court not only declared its authority to examine the constitutionality of laws, but at the same time, substantially, the decision also contained the understanding that the court held the final word in interpreting the Constitution, or that the court is the legal interpreter of the Constitution.<sup>14</sup> This

<sup>10</sup> The phenomenon of debate between "originalists" and "non-originalists" since the early years of the United States is reflected in, among other things, the inauguration speech of President Thomas Jefferson (United States president 1801-1809), "*We are all originalists, we are all non-originalists;*" see Joel K Goldstein, "History and Constitutional Interpretation: Some Lessons from the Vice Presidency," *Ark. L. Rev.* 89 (2016): 648.

<sup>11</sup> Keith E Whittington, "Originalism: A Critical Introduction" (2013), *Fordham Law Review* 82 (n.d.): 375–409. One exciting debate occurred between Attorney General Edwin Meese and Chief Justice William Brennan. Goldford called it a "famous and extraordinary exchange" because the debate was no longer solely in the academic realm but had entered the sphere of public awareness.

<sup>12</sup> Jack M Balkin, "Original Meaning and Constitutional Redemption," *Constitutional Commentary* 24 (2007): 427.

<sup>13</sup> William E Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review. Revised and Expanded* (University Press of Kansas, 2018).

<sup>14</sup> Larry D Kramer, "Judicial Supremacy and the End of Judicial Restraint," *California Law Review*, 2012, 621–34.

is where the doctrine (which has now even been accepted as a principle)<sup>15</sup> of judicial supremacy in the interpretation of the Constitution begins.<sup>16</sup> Meanwhile, judicial review is the "core principle of the constitutional system."<sup>17</sup> The premise that the court has the authority to examine the constitutionality of laws (which in turn means that the court is also authorised to interpret the Constitution as fundamental law) had actually been emphasised by one of the drafters of the United States Constitution, Alexander Hamilton:

“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning and the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words, the Constitution ought to be preferred to the statute; the intention of people to the intention of their agents.”<sup>18</sup>

At present, for countries that accept the presence of a constitutional court in their constitutional system, the question of who should uphold and interpret the Constitution is no longer a problem.<sup>19</sup> The Constitutional Court (or by whichever name it is called) was adopted precisely because of the need to answer that question. In other words, the principle of constitutional supremacy in countries that adopt a constitutional court in the constitutional system is implemented by applying the principle of court supremacy so that the constitutional court is given the authority to interpret the Constitution.<sup>20</sup> However, the debate then arose over the question of: how would the court interpret the Constitution?

Therein lies the difficulty. Goldsworthy, to cite one example, aptly illustrates the problems and difficulties of interpretation how a judge should interpret the Constitution concerning a case or cases confronted by him or her when the provisions in the Constitution itself are often ambiguous, vague, contradictory, insufficient, or do not even regulate the substance that is the problem in that case or cases? Furthermore, the provisions in the Constitution are often inadequate to overcome developments in society that threaten the principles protected by the Constitution – developments which the drafters of the Constitution concerned did not anticipate. Therefore, it was no exaggeration when Goldsworthy said, “How judges resolve these problems through ‘interpretation’ is problematic and controversial, mainly because legitimate interpretation can be difficult to distinguish from illegitimate change.”<sup>21</sup>

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<sup>15</sup> Richard H Fallon Jr, “Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age,” *Texas Law Review* 96 (2017): 487.

<sup>16</sup> Veit Bader, “Parliamentary Supremacy Versus Judicial Supremacy-How Can Adversarial Judicial, Public, and Political Dialogue Be Institutionalised?,” *Utrecht Law Review* 12, no. 1 (2016): 159–83.

<sup>17</sup> Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press, 1993).

<sup>18</sup> Alexander Hamilton, James Madison, and John Jay, “The federalist Papers,” *The New American Library* 8 (1961): 465.

<sup>19</sup> According to Andrew Harding's record, since Austria established its Constitutional Court in 1920 (Bundesverfassungsgerichtshof), up to 2017, there have been 85 countries that have adopted constitutional courts in their constitutional system. See Andrew Harding, “The Fundamentals of Constitutional Courts,” *International IDEA Constitution Brief* 2, no. 11 (2017).

<sup>20</sup> I D.G. Palguna, “The Supremacy of the Court in Examining the Constitutionality of the Law and Its Application in Indonesia (Supremasi Pengadilan Dalam Pengujian Konstitusionalitas Undang-Undang Dan Penerapannya Di Indonesia)” in “Sumbangsih Kampus Salemba Empat dalam Membangun Hukum yang Berkeadilan (Postgraduate Program at the Faculty of Law, University of Indonesia, 2019).

<sup>21</sup> Jeffrey Goldsworthy, “Constitutional Interpretation: Originalism,” *Philosophy Compass* 4, no. 4 (2009): 682–702, <https://doi.org/10.1111/j.1747-9991.2009.00207.x>.

Bearing in mind the nature of the written Constitution as explained by Goldsworthy above, the fundamental question that arises is: Is it possible for originalism to "be workable" in interpreting the Constitution? Although at this time, originalism in the interpretation of the Constitution has shifted its meaning from "original intent" to "original meaning",<sup>22</sup> the question remains relevant. This is because originalism in the meaning of "original intent" implies that the interpretation of the Constitution must refer to and depend on "the motivation and understanding that was applied by the actor whose decisions produced the constitutional language whose meaning is at issue" meanwhile, originalism in the meaning of "original meaning" implies that the interpretation of the Constitution must refer to and depend on its application of "the rules of the written constitution in the sense in which those rules were understood by the people who enacted them."<sup>23</sup> Thus, when originalism is defined as original intent and interpreted as original meaning, the difficulties inherent in the written Constitution, as described by Goldsworthy, still need help finding a solution. This is even more so if, in certain matters, the Constitution "says nothing at all."

This issue is important for further analysis for several reasons. First, court decisions in matters regarding or relating to the interpretation of the Constitution, whether implemented by the constitutional court or by the court that functions as a constitutional court, are final and binding. Therefore, the answer to this question will determine the acceptance of the reasoning construction of the legal considerations of the court decision, which is built on the originalism argument, which thus, within certain limits, means also determining the accountability of the court's decision.

Second, court decisions in matters regarding or relating to the interpretation of the Constitution, whether implemented by the constitutional court or by the court which functions as a constitutional court, are declarative. With this nature, sociologically, the suitability of the legal considerations of the decision, which is built with the reasoning based on the originalism argument, will determine the acceptance of the decision.

Third, further analysing originalism will help the judge or court confirm their stance on the case at hand in the event of a situation where originalism – both in the sense of original intent and original meaning – is not found or easily identified. Fourth, further analysis of originalism will help the judge or court to establish their position on the matter being faced in the event of a situation where if adhering to originalism, there is a contradiction between one constitutional provision and another, especially if such contradictions concern matters which are precisely to be protected by the Constitution. Fifth, further analysis of originalism will help the judge or court to assert their position on the matter being faced where society has changed in such a way that originalism, both in the sense of original intent and in the sense of original meaning, is no longer able to answer the demands of need.

Based on the explanation of the background above, the main problem examined in this article is: how is originalism as a point of view in interpreting the Constitution? Then the second

<sup>22</sup> Jamal Greene, "The Case for Original Intent," *George Washington Law Review* 80 (n.d.): 1683.

<sup>23</sup> Adam A Perlin, "What Makes Originalism Original: A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia," *UCLA Pacific Basin Law Journal* 23 (2005): 94–127.

is how the practice of using originalism in interpreting the Constitution is carried out in the United States, which can be learning how relevant this originalism approach is used.

## RESEARCH METHODS

The Normative legal research method was used in this research with three major approaches. Those are the statute, the conceptual, the historical, the case, and the comparative approaches. In line with the description of the background of the problem above, this paper will further analyse an important issue concerning originalism in the interpretation of the Constitution; namely, whether theoretically or practically, originalism is a perspective that binds judges in interpreting the Constitution in the United States. Data were collected from primary legal materials related to originalism in the Constitution of the United States, and secondary legal materials included academic texts and various scientific articles related to originalism in constitutional interpretation in the United States with a study analysis using qualitative analysis.

## ANALYSIS AND DISCUSSION

### Originalism: From Original Intent to Original Meaning

In general, the pattern of Constitution interpretation is divided into original intent and non-original intent, which can also be called textual meaning (originalis) or contextual meaning (non-originalis).<sup>24</sup> At first, originalism was understood as original intent (so it is often called intentionalism or original intention originalism). Original intentionalists argue that the Constitution must be interpreted following the drafters' original intent.<sup>25</sup> Therefore, in the eyes of intentionalists, a liberal approach to interpreting the Constitution – as did the United States Supreme Court under the leadership of Earl Warren – “could not be squared with the intent of the framers”, and based on that reason, such an approach is considered to be illegitimate.<sup>26</sup>

One of the important figures who is considered the champion of the intentionalist circle is Robert Bork – a former judge at the Court of Appeals for the District of Columbia Circuit. In 1971, Bork wrote an article, “Neutral Principles and Some First Amendment Problems.”<sup>27</sup> In that article – which Lawrence B. Solum refers to as “the opening move in the development of contemporary originalist theory”<sup>28</sup> – Bork first cited Herbert Wechsler's view as the basis for his theory. According to Wechsler, the Court (Supreme Court) should not be merely a “naked power organ”. That is, principles must always control decisions.

The principles that control or rely on the court, according to Bork, must be neutral. These neutral principles are contained in the Constitution, namely, the values chosen by the Founding Fathers, not the Supreme Court.<sup>29</sup>

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<sup>24</sup> Harvelian.

<sup>25</sup> James E Ryan, “Laying Claim to the Constitution: The Promise of New Textualism,” *Virginia Law Review*, 2011, 1523–72.

<sup>26</sup> Ryan.

<sup>27</sup> Robert H Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 1, <http://www.repository.law.indiana.edu/ilj/vol47/iss1/1>.

<sup>28</sup> Lawrence B Solum, “What Is Originalism? The Evolution of Contemporary Originalist Theory,” *The Evolution of Contemporary Originalist Theory*, 2011, 6.

<sup>29</sup> Bork, “Neutral Principles and Some First Amendment Problems.” It seems clear here that Bork is trying to “defend” the fundamental weakness of Wechsler's sharply criticised opinion, namely that (neutral) principles

A stricter statement showing Bork as a true intentionalist reflects his opinion in constructing the United States Constitution as "Law" (as referred to in Article VI) and how judges should be bound by this definition when interpreting the Constitution. According to Bork, if the Constitution is "Law" then – as is the case with every "law" – the meaning as intended by the makers of "law" is what binds judges as it binds the branches of the legislative and executive powers. Therefore, in interpreting the Constitution, judges (no matter their level) are bound by the intent of the drafters of the Constitution.

Another adherent of originalism in the sense of original intent is Edwin Meese, who was United States Attorney General from 1985-1988. Before the American Bar Association (1985), Meese strongly criticised the Supreme Court rulings, which he described as "jurisprudence of idiosyncrasy". In his speech, which later sparked a heated debate with Associate Justice William J. Brennan, Meese said, among other things, that the decisions of the Supreme Court during the years 1984–1985, especially in matters related to federalism, criminal law, and religion, reflect policy choices rather than decisions that articulate constitutional principles. Meese argued that to avoid the court being a policymaker and theoretical incoherence. The Supreme Court must use "Jurisprudence of Original Intention. He then explained the meaning of the term:

“Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed as well. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner to at least not contradict the text of the Constitution itself.”<sup>30</sup>

However, the "path" taken by the intentionalists in interpreting the Constitution drew sharp criticism. Criticism has come not only from those who reject originalism but also from fellow originalist "brethren". Two people who are considered founders of the criticism of intentionalism are Paul Brest and Jefferson Powell.<sup>31</sup> According to Brest, it is not easy to ascertain the intent of a multimember body only based on the text.

Although acknowledging that the text of a provision in the Constitution is useful as a guide toward the intentions of those who adopt the Constitution (the adopters' intentions), Brest emphasises, "but the text does not enjoy a favoured status over other sources."<sup>32</sup> He also criticises intentionalists who often treat the writings or statements of the drafters of the Constitution as evidence regarding the intent of those who adopted the Constitution.

In summary, Brest's critique of original intention originalism can be grouped as follows:<sup>33</sup> (1) difficulty in ascertaining the general institutional intent of a multimember institution; (2) specific issues relating to identifying the intent of the members of the Philadelphia Convention and the intent of the states ratifying the conventions (which preceded the Philadelphia Convention – *Author*) in the case of the original Constitution and the intentions of the members of Congress and the intent of the state legislatures in respect of various amendments to the (original) Constitution; (3) the problem in determining the generality or specificity of the intent of the Designers or the ratifiers; (4) the problem of drawing conclusions regarding the purpose by departing from

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must control the adjudication process. However, he does not explain where these principles come from or from where they are derived.

<sup>30</sup> Dennis J. Goldford.

<sup>31</sup> Solum, "What Is Originalism? The Evolution of Contemporary Originalist Theory."

<sup>32</sup> Brest, "The Misconceived Quest for the Original Understanding."

<sup>33</sup> Brest.

the constitutional structure; (5) it is difficult to translate the beliefs and values of the Designers and the ratifiers given the changes that are happening over time; (6) the problem of democratic legitimacy – namely that the Constitution of 1789 was drafted and ratified without the participation of women and slaves; (7) instability problems, in the sense that an inflexible constitutional order is incapable of adapting to constantly changing circumstances.<sup>34</sup>

Meanwhile, Jefferson Powell highlighted the intentionalists' view that the drafters of the Constitution wanted the Constitution they drafted to be interpreted according to their intentions. While acknowledging that there were references to “original intent” and “designer's intent” in the debate during the drafting of the Constitution, Powell says that these phrases do not represent an earlier version of original intention originalism.<sup>35</sup> On the contrary, Powell further emphasised that debates among the framers about the language used in the document (the United States Constitution) were abundant. However, in none of those debates was there any indication that any delegate suggested that to avoid misunderstanding the Constitution's text, future interpreters could resolve it by consulting evidence regarding the purposes articulated during the Constitutional Convention.

Apart from Brest and Powell, there are many other scholars who oppose “original intention originalism.” However, according to Solum, the combination of Brest and Powell's thoughts played an important role in building the scholarly consensus of that era, namely that “the original intentions of the Framers could not serve as the basis for a viable theory of constitutional interpretation and construction.”<sup>36</sup>

Since the end of the 20th century, originalism in the sense of intentionalism has begun to be abandoned, where originalism is then understood as original meaning.<sup>37</sup> The shift occurred after Antonin Scalia delivered his speech at a seminar held by the Department of Justice (DOJ), which Attorney General Edwin Meese then led. On that occasion, inspired in part by his dislike of the use of legislative history by the courts in interpreting laws,<sup>38</sup> Scalia advised DOJ prosecutors to abandon the search for the original intentions of the formulators of the Constitution and replace them by finding the “original public meaning” of the text of the Constitution.<sup>39</sup> His reason is that the Constitution is a text. The Constitution must be interpreted according to its original meaning. Thus, in its application, the Constitution must be interpreted as it was generally understood when it was ratified.<sup>40</sup> In other words, finding the original meaning (or original public meaning) really depends on the texts and traditions that exist in society.

According to Scalia, holding on to the original meaning – which means adhering to texts and traditions – is one way to apply the brakes to or control judicial discretion. Applying the brakes to judicial discretion is important because, in Scalia's view, the greatest danger in a judge's interpretation of a constitution (or any interpretation of any law) is if the judge erroneously conducts

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<sup>34</sup> Solum, “What Is Originalism? The Evolution of Contemporary Originalist Theory.”

<sup>35</sup> Imam Sujono, “Urgency Of Rechtsvinding And Jurisprudence In The Constitutional Court Authority: Urgensi Penemuan Hukum Dan Yurisprudensi Dalam Kewenangan Mahkamah Konstitusi” *Constitutional Law Society* 1, no. 2 (2022): 161–78.

<sup>36</sup> Solum, “What Is Originalism? The Evolution of Contemporary Originalist Theory.”

<sup>37</sup> Richard S Kay, “Original Intention and Public Meaning in Constitutional Interpretation,” *Northwestern University Law Review* 103 (2009): 705–9.

<sup>38</sup> Ralph A Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (University Press of Kansas, 2006).

<sup>39</sup> Barnett and Bernick, “The Letter and the Spirit: A Unified Theory of Originalism.”

<sup>40</sup> Notes, “Original Meaning and Its Limits,” *Harvard Law Review* 120, no. 1279 (2007): 1280.



his or her own biases or preferences. Therefore, sincere adherence to the text of the Constitution or (in the case of ambiguity) to the traditional meaning of those who originally adopted the Constitution will reduce the danger of the judge using his or her beliefs to replace the people's beliefs.<sup>41</sup>

Scalia believes that "the rule of law is the law of rules." So, when the text forms a rule, the judge only needs to apply the rule as law. Therefore, "When text and tradition fail to supply a rule, there is no rule, no law for judges to apply to contradict the actions of the popular branches, and therefore no warrant for judicial intervention."<sup>42</sup> Scalia always wanted to express himself as an original meaning originalist. This attitude was even emphatically shown through his response to questions raised by Senator Howard Metzenbaum in his confirmation hearings as a candidate for associate justice before the Senate:

"[A] constitution has to have ultimately majoritarian underpinnings. To be sure, a constitution is a document that protects against future democratic excesses. Nevertheless, when it is adopted, it is adopted by the democratic process. That is what legitimates it. ... [I]f the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language if their laws at the time do not reflect that that right existed, nor do the laws at the present date reflect that the society believes that right exists, I worry about my deciding that it exists. I worry that I am not reflecting our society's most fundamental, deeply felt beliefs, which is what a constitution means. However, rather, I am reflecting Scalia's most deeply felt beliefs, which is not what I want to impose on society."<sup>43</sup>

Richard Kay suggests two groups of reasons for the shift in originalism from original intent to original meaning. The first reason is inherent in the proposition that only the text of the Constitution has the status of a legitimate law. Only the text, not the unspoken intent of the drafters of the Constitution, was offered for ratification in 1787. Likewise, it is only the text of the amendments proposed for and ratified by state legislators. The second reason is based on the argument that the original meaning is capable of warding off attacks aimed at intentionalists – that is, attacks that question the practical utility of investigating that purpose.<sup>44</sup>

In connection with the second reason above, the objection to original intent is based on two arguments. First, the original intent focused on the people who drafted the constitutional text, even though it should have been the views of those who ratified the Constitution that should be considered because they made the draft into the Constitution. Second, and more importantly, the question of purpose is psychological. It is impossible to identify laws according to the psychological states of historical actors – whether they are drafters or those who ratify – because they may not have the same mental state because their intentions are very likely to be unknowable and because they may have no intention at all for a state that was not achieved or could not be achieved while they were alive.<sup>45</sup>

As a matter of theory, the change in the substance of originalism from original intent to original meaning has significant value, but in practice, it hardly brings any significant changes. As Ryan said, conservative groups are often unwilling to follow this revised version of originalism if it will lead the courts to outcomes they consider liberal.<sup>46</sup> The methodology used, according

<sup>41</sup> Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition*.

<sup>42</sup> Rossum.

<sup>43</sup> Rossum.

<sup>44</sup> Kay, "Original Intention and Public Meaning in Constitutional Interpretation."

<sup>45</sup> Balkin, "Original Meaning and Constitutional Redemption."

<sup>46</sup> Ryan, "Laying Claim to the Constitution: The Promise of New Textualism."

to Ryan, is also relatively unchanged. In theory, uncovering the meaning of the language used in the Constitution should entail a search of contemporary dictionaries, a search for other lexical clues in the document (the Constitution), and an understanding of the historical context in which the language was adopted, as well as the more specific history of enactments. The aim is to understand the semantic meaning of the language and the purposes behind the language to clarify (where necessary) what meaning is contained in the words or phrases.<sup>47</sup>

Based on Ryan's analysis above, the original meaning is not different from the original intent. In fact, as explained above, original meaning originalism was born as a criticism of original intention originalism. Therefore, this means the main purpose of original meaning originalism is not achieved. According to Balkin, the main objective is “setting up a basic structure for government, making politics possible, and creating a framework for future constitutional construction.”<sup>48</sup>

Jack N. Rakove gives another critical note relating to originalism.<sup>49</sup> Among other things, he said that talking about the United States Constitution is not talking about one Constitution but two. First, the formal documents received between 1787 and 1789 (along with all amendments thereof). Second, “the working constitution comprising the body of precedents, habits, understandings, and attitudes that shape how federal system operates at any historical moment.”<sup>50</sup> Thus, the problem of originalism is not only about the relationship between the Constitution of 1787 and the constitutions of the next period but also about the relationship between the interpretive predictions during 1787–1788 and the interpretive processes that developed after that. So, the question then is, “Would the debates of these months themselves become evidentiary sources on which later interpreters would rely, or would the ‘construction’ of the Constitution depend on other rules and methods?”<sup>51</sup>

Recently, among originalists, there have been efforts to develop a theory that proponents claimed to be “a unified theory of originalism” called “good-faith constitutional construction.” This constitutional construction is intended to implement the Constitution faithfully. The method is “by ascertaining and adhering to the original functions of the constitutional text – its ‘spirit’”.<sup>52</sup> According to the proponents of this theory, what is needed is not only loyalty to the original meaning of the text of the Constitution but also to the original spirit of the Constitution – which they interpret as “functions, purposes, goals, or aims implicit in its individual clauses and structural design.”<sup>53</sup>

This theory combines “interpretation” activities with “construction” activities. “Interpretation” is defined as the activity of ascertaining the communicative content of the text. At the same time, “construction” is “the activity of giving that content legal effect – typically (but not exclusively) by developing implementing rules through which the text will be applied in a particular context. These implementing rules are not part of the communicative content of the

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<sup>47</sup> Ryan.

<sup>48</sup> Balkin, “Original Meaning and Constitutional Redemption.”

<sup>49</sup> Jack N Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Vintage, 2010).

<sup>50</sup> Rakove.

<sup>51</sup> Rakove.

<sup>52</sup> Barnett and Bernick, “The Letter and the Spirit: A Unified Theory of Originalism.”

<sup>53</sup> Barnett and Bernick.

text.”<sup>54</sup> By combining the intended “interpretation” and “construction” activities, the proponents of this theory claim that the theory they develop will be able to unite supporters of original intent originalism and supporters of original meaning originalism and, at the same time, distinguish originalism from supporters of some purposive versions of living constitutionalism:

“On our account, first comes the original meaning or letter of a provision (interpretation), and then, to implement that meaning, comes its original spirit or function (construction). That is, construction must neither precede interpretation nor give rise to a rule that contradicts original meaning.”<sup>55</sup>

Regardless of whether or not the above claim of the proponents of the theory of “good-faith constitutional construction” is true or not, this theory still does not abandon the two main theses of originalism touched on at the beginning of this sub-chapter, namely “Fixation Thesis” and “Constraint Principle.” Thus, this theory is still unable to answer the questions outlined in Chapter I, namely how judges should interpret the Constitution concerning a case or cases confronted by them when the provisions in the Constitution itself are often ambiguous, vague, contradictory, not firm enough, or do not even completely regulate the substance that is the problem in that case or case? It is this question that, among other things, leads to originalism being challenged by living constitutionalism – as will be described below.

### Case and Comparative Studies of Originalism

One of the cases attached to the originalist is *Employment Division v. Smith*, 1990.<sup>56</sup> The case began when Native Americans Alfred Smith and Galen Black were fired from their jobs because they smoked peyote during a religious ceremony. Oregon's controlled substance laws prohibit the use of peyote and make no exceptions for religious purposes. Smith then sought welfare benefits, but the employment division ruled that he was ineligible because he had been laid off. Judge Scalia issued a landmark ruling against using the “compelling interest” test, the standard test in freedom of religion cases. Justice Scalia delivered the opinion of the court:

“If the ‘compelling interest’ test is to be applied at all, then it must be applied across the board to all actions thought to be religiously commanded. Moreover, if ‘compelling interest’ really means what it says (and watering it down here would subvert its rigour in the other fields where it is applied), many laws will not meet the test.”

Although this issue was not debated or briefed, Judge Scalia formulated the novel concept of “hybrid rights” to prohibit the use of peyote, which was already used in religious ceremonies before the Fathers established anything. Judge Scalia's decision drew criticism from many parties, one of which was because Scalia preferred the government over religion.

Another case is *Boyle v. United Technologies Corporation*,<sup>57</sup> 1988. In this case, the father of a marine pilot whose son drowned in a helicopter crashed off the Virginia coast assumed the helicopter was poorly designed. Justice Scalia wrote an opinion addressed to the Supreme Court, stating that federal common law provides for a tort defence to immunise military contractors from lawsuits. Based on this opinion, William P. Marshall considers that no constitutional structure, context or history supports such a defence, given the fact that federal courts are not common law courts.

The next case, *Torres v. Madrid*, occurred in 2014. Roxanne Torres was involved in an incident with police officers where she drove under the influence of methamphetamine. She tried to

<sup>54</sup> Barnett and Bernick.

<sup>55</sup> Barnett and Bernick.

<sup>56</sup> Amul R Thapar, “Smith, Scalia, and Originalism,” *Cath. UL Rev.* 68 (2019): 687.

<sup>57</sup> Bradford R Clark, “Boyle as Constitutional Preemption,” *Notre Dame L. Rev.* 92 (2016): 2129.

escape to the point of endangering the officers who were chasing him. Officers opened fire and injured Torres. She did not submit any objections to the three crimes: running away from the officers, assaulting the officers, and taking a motorised vehicle illegally. However, Torres filed a civil action against the officers in the United States District Court for the District of New Mexico. Torres claimed that the use of gunfire by the police officer was excessive under the Fourth Amendment. The Trial Judge concluded that under the circumstances, Torres was never arrested. There is a role of originalism in resolving the dispute. At the time of entry into force of the Fourth Amendment, "arrest" for officers is to apply physical force in a failed attempt to detain. However, the common law context in which courts define arrest this way differs greatly from the current context.<sup>58</sup>

In March 2021, the Supreme Court ruled an officer seized a person when he shot Torres.<sup>59</sup> Under court precedents, common law arrests are considered seizures under the Fourth Amendment, and the application of force to a person's body during detention constitutes arrest even if the detainee escapes. The use of weapons here is to make arrests. There is no reason to draw a fine line between holding a detainee's hand and applying physical force to make an arrest. The main consideration is whether the behaviour objectively manifests the officer's intention to detain. In this case, the officer's actions clearly demonstrated the intention to detain Torres. Therefore the case constitutes a confiscation under the fourth amendment.

In America, many decisions have an originalist nuance. Moreover, some judges are clearly originalists, including Hugo Black, Antonin Scalia and Robert Bork. Unlike America, the German Federal Constitutional Court (FCC) uses the interpretation approach in conformity with community law.<sup>60</sup> To The Germany legislature, in drafting legislation, the judgments of the FCC are taking place in a prominent role. The role of the FCC makes the German constitutional system significant and quizzing concurrently.<sup>61</sup> The integration clause allowing for the transfer of sovereign powers is crucial for the constitutional foundation of Germany's participation in the EU's multi-level constitutionalism.<sup>62</sup>

India also has a constitutional interpretation system which is different from America. An increase in judicial power has accompanied the India Supreme Court's shift away from textualism (recall the second and third judges' cases) or expanded the scope of judicial review. The exponential growth of judgments interpreting the Constitution has led to increasingly precedent-laden and doctrine-heavy decisions that sometimes lose sight of the document being interpreted (although this development has been undercut by small bench, sub-Supreme Court decision-making in recent years).<sup>63</sup> Yet, the Supreme Court's interpretive outlook has been distinctive in many ways, particularly compared to that of the US Supreme Court. Judges have not been tied down to particular philosophies and have manifested the flexibility to reconsider their interpretive approaches.

Compared with Indonesia, it has relatively the same method of constitutional interpretation as the United States. The difference lies in the models of constitutional review of these two countries. The United States adheres to the model of reviewing the Constitution through concrete cases, while

<sup>58</sup> Laurent Sacharoff, "Torres and the Limits of Originalism," *Ohio St. J. Crim. L.* 19 (2021): 201.

<sup>59</sup> George M Dery III, "Unintentional Destruction: Torres v. Madrid, in Defining a Fourth Amendment Seizure of the Person as a Common Law Arrest, Turned Terry v. Ohio into Collateral Damage," *Hastings Const. LQ* 49 (2022): 83.

<sup>60</sup> Nge Nge Aung, "The Basis of Constitutional Adjudication in Germany," *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 1 (2022): 47–64.

<sup>61</sup> I Palguna and Dewa Gede, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Const. Rev.* 3 (2017): 1.

<sup>62</sup> Dieter Grimm, "The Role of Fundamental Rights after Sixty-Five Years of Constitutional Jurisprudence in Germany," *International Journal of Constitutional Law* 13, no. 1 (2015): 9–29.

<sup>63</sup> Chintan Chandrachud, "Constitutional Interpretation," 2015.

Indonesia applies the abstract review model. In the United States, judges deliver a constitutional interpretation of a particular aspect of the Constitution if a concrete case is presented before them (e.g. cases of segregation of schools based on skin colour, cases of persons being tried without the presence of legal counsel, etc.). Whereas in Indonesia, this interpretation does not require a concrete case beforehand. For example, it is in judicial review issues. If there is an opinion that a particular law (its article, paragraph, or certain part of it) is considered contrary to the Constitution, a petition to review the law's constitutionality can be submitted before the Constitutional Court without having to wait for a concrete case first.

In Indonesia, it is not easy to analyse whether a certain judge is an originalist. Because the *ratio decidendi* of court decisions is not formulated in such a way as to refer to individual judges but is presented as considerations of the panel of judges, except for a dissenting opinion. However, we can examine the decisions that have a pattern of originalism. One example is the Decision of the Constitutional Court No. 30/PUU-XVI/2018, namely the case regarding the prohibition of political party officials from becoming members of the Regional People's Representative Council (DPD). One of the basic considerations of the judges was related to the original intent of forming the DPD during the debate in the First Ad Hoc Committee of the People's Consultative Council – which drafted the Amendment of the Indonesian Constitution (the so-called *UUD 1945*).<sup>64</sup>

### **Originalism versus Non-originalism (Living Constitutionalism)**

The above-described views of originalists have met with strong opposition from non-originalists, who view the Constitution as a "living organism" which develops in order to meet needs and values that are constantly changing in society – that is why the views of these non-originalists are often called living constitutionalism because they view and treat the Constitution as a living constitution. Although the symptoms of the "fever" of living constitutionalism only emerged in the late 19th century and peaked at the beginning to the middle of the 20th century (see the following description), experts generally<sup>65</sup> say that living constitutionalists<sup>66</sup> derive their inspiration from the decision of the Supreme Court passed in the early 19th century in the case of *McCulloch v. Maryland* (1819). John Marshall, who wrote the decision, put forward a consideration (which later became timeless words for non-originalists, especially living constitutionalists) which, in essence, stated that the (United States) Constitution was intended to last for centuries to come and consequently, we must be able to adapt in facing the various crises facing humankind.<sup>67</sup>

In the view of living constitutionalists, if the meaning of the Constitution is limited to certain views of the drafters, then the Constitution cannot be used to govern the modern world. As explained by Marshall Berger, the term "living constitution" refers to the proposition that the normative provisions of the constitutional text – in this case, referring to the norms of equal protection and due process – must be seen as something whose meaning develops and reflects the moral progress of civilisation.<sup>68</sup> Or, as Robert Sedler puts it, the Constitution as a living document implies that "its meaning must change to express the fundamental values of each

<sup>64</sup> Decision of Constitutional Court No. 30/PUU-XVI/2018, 18<sup>th</sup> of July 2018.

<sup>65</sup> For example, giving just one reference, Goldstein, "History and Constitutional Interpretation: Some Lessons from the Vice Presidency."

<sup>66</sup> Howard Gillman, "Political Development and the Origins of the Living Constitution," *Advance* 1 (2007): 17.

<sup>67</sup> No Title (n.d.). <https://www.oyez.org/cases/1789-1850/17us316>.

<sup>68</sup> Dennis J. Goldford.

generation.”<sup>69</sup> Meanwhile, the meaning of the Constitution must evolve because it is with this evolving meaning that the Constitution will be able to survive.

Erwin Chemerinsky, a proponent of living constitutionalism, strongly opposes the stance of originalists. He said, among other things, there are serious methodological problems at the premise of the originalists' ideas:

“Reading constitutional history for original intent cannot be value-neutral because of the subjective process of deciding whose intent counts (the drafters? the ratifiers? which ones?), of ascertaining which of their views matters, and of determining the intent of a large number of people who often had different objectives.”<sup>70</sup>

Even if these methodological problems are resolved, Chemerinsky says certain aims of originalism often lead us to absurd conclusions. For example, the power of Congress under Article I to establish the Army and Navy does not include the Air Force because that is not specifically stated as the designer's intent; equal protection conditions cannot be applied to the federal government because that is not what the drafters of the Fifth Amendment intended. He added, “*In fact, if only the specific intent of the framers controlled, it would be unconstitutional to elect a woman as President or Vice President because article II refers to these officeholders as ‘he’ and the framers unquestionably expected that only men would serve in these positions.*”<sup>71</sup> Concerning the concept of a living Constitution, he explained that the basis for it lies in the fact that it is impossible for modern society to be governed by certain views of a number of individuals who lived two centuries ago.<sup>72</sup>

In another of his writings, which talks about the interpretation of the Constitution for the 21st century, Chemerinsky says it is absurd that efforts to develop an understanding of the Constitution for the 21st century are carried out by looking back to the 18th century. He points out that throughout American history, the Supreme Court has determined the meaning of the Constitution by looking at its text, its purpose, its structure, precedents, historical practice, and current needs and values:

“This is what constitutional law has been about and always should be about. It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist.”<sup>73</sup>

Chemerinsky further says that in American history, only a handful of Supreme Court justices embraced the philosophy of originalism, and they only became originalists at certain times. In other words, they needed to be more consistent. He cites the examples of (and at the same time criticises) Supreme Court Justices Clarence Thomas and Antonin Scalia, who claimed to be originalists and believed that the meaning of the Constitution was confirmed when the Constitution was adopted so that the interpretation of the Constitution is the process of finding and following its original meaning (which has been confirmed).

“But these Justices did not apply originalism in their last decade's Tenth and Eleventh Amendment decisions. The court's decisions prohibiting Congress from commandeering state governments and forcing them to adopt laws or regulations cannot be derived from the text of the Tenth Amendment, its intent, or its historical meaning. Nor can originalism explain the court's expansion of sovereign immunity to bar suits against states by their

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<sup>69</sup> Dennis J. Goldford.

<sup>70</sup> E Chemerinsky, “The Supreme Court 1988 Tem-Forward: The Vanishing Constitution”(1989),” *Harvard Law Review* 103 (n.d.): 43.

<sup>71</sup> Chemerinsky.

<sup>72</sup> Chemerinsky.

<sup>73</sup> Chemerinsky.

citizens in federal or state courts. Perhaps even more profoundly, these Justices pay no attention to originalism in condemning all affirmative action programs despite strong evidence that the original intent of the Fourteenth Amendment was very much to allow such efforts.<sup>74</sup>

The debate over and surrounding the living Constitution has distinctive historical and political origins.<sup>75</sup> According to Gillman's notes, historically,<sup>76</sup> the debate arose in the late 19th century and hit an "initial fever pitch" during the New Deal constitutional battles.<sup>77</sup> Meanwhile, politically, the theory of the living Constitution was originally not intended as an effort to identify new rights (innovative rights) that reflect the developing concepts of appropriateness and justice but as an effort to support the acceptance of new government powers capable of overcoming challenges in the socio-economic field that were born as a result of industrialisation.<sup>78</sup>

The social changes that have occurred (as a result of industrialisation) have given birth to – to borrow a term used by the political scientist Stephen Skowronek – "a new American state" which demands the "dismantling" of the established political order. This means that political transformation is inevitable. Central components in that transformation include the expansion of federal legislative powers and forming "a modern, regulatory executive establishment." However, many matters related to this issue are difficult to reconcile with a living understanding of the "original intent" of the Constitution concerning the scope and structure of federal power. Therefore, the pressure of this political development has led to the birth of similar developments in the justice field. By illustrating the unavailability of "intellectual currents" in the drafters of the Constitution, those with progressive thoughts put forward the stance that the Constitution is designed to be able to adapt to various environmental changes and social goals.<sup>79</sup>

By looking at the historical background and rationale above, it becomes clear that originalism and living Constitutionalism depart from a starting point that is not just different but completely contradictory. Because of that, the two of them seem impossible to reconcile. However, this does not mean that efforts to get originalism "closer" to living constitutionalism have never been carried out. In mid-2005, Jack M. Balkin wrote an article entitled "Why no one truly believes in a dead Constitution."<sup>80</sup> This article opens with a quite "provocative" statement: "We

<sup>74</sup> Chemerinsky.

<sup>75</sup> I Dewa Gede Palguna, "Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara," 2013, 380–82.

<sup>76</sup> The New Deal refers to the domestic programs that President Franklin Delano Roosevelt intensively organised to overcome the Great Depression between 1933 (when Roosevelt took office) and World War II (1939). To overcome the Great Depression, President Roosevelt did not want to be confined by the stance that it was not the role of the government to involve itself in the economy because it was considered to be against the ideology of liberalism. For example, he organised a program of direct assistance to people experiencing economic difficulties – a policy that was contrary to his predecessor, President Herbert Hoover. This brought Roosevelt into conflict with the Supreme Court, where the Supreme Court cancelled many policies in Roosevelt's New Deal programs because they were considered to be contrary to the Fourteenth Amendment; see Rodney P Carlisle, *Encyclopedia of Politics: The Left and the Right*, vol. 1 (Thousand Oaks-London-New Delhi: Sage, 2005).

<sup>77</sup> James Q Wilson and J J DiJulio, "American Government, Lexington: D," *D.C. Heath and Company*, 1995.

<sup>78</sup> Gillman, "Political Development and the Origins of the Living Constitution."

<sup>79</sup> Gillman.

<sup>80</sup> Jack M. Balkin, "Why No One Truly Believes in a Dead Constitution," *Slate Plus*, 2005. Seen sequentially, it seems that after this paper had received a lot of criticism, one of which was from Ethan Leib (as shown in the following description), Balkin was encouraged to put his thoughts into a longer and more comprehensive writing, "Original Meaning and Constitutional Redemption", *supra*, in which he repeated his statement.

are all living constitutionalists now. However, only some of us are willing to admit it.”<sup>81</sup> In essence, through this article, Balkin states that the choice between originalism and living constitutionalism is exaggerated and relies on a false dichotomy. According to Balkin, allegiance to the original meaning of the document (meaning 'the Constitution' – *Author*) must be maintained – however, this loyalty is achieved through adhering to the original meaning of "text and principle" not to "original expected application" of the text and principles. The former ("the original meaning of the text and the principles") is the binding law, while the latter ("the original intended application") is not. So, according to Balkin, once we accept this difference, we can maintain the flexibility and adaptability of the agenda of living constitutionalism and, simultaneously, be loyal to the original meaning of originalism.<sup>82</sup>

However, Balkin's analysis, which seems plausible at first glance, received a critical response from Ethan Leib, who considered it an attempt by Balkin, whom he labelled “a lefty originalist,” to bury living constitutionalism as an independent theory stripped of its power.<sup>83</sup> Original meaning originalism and living constitutionalism are not at all two sides of the same coin, as Balkin concludes. Based on the reading of originalism, whether leftist or otherwise, history is its main capital. Here, Balkin is no different from other originalists who make “original public meaning at the time of ratification” the core of their theory, and it gains a special place in Balkin's thinking. *“Tying the text and principles to the historical fact of the matter is his basic concession to originalism, whereas his flexibility in application and implementation is his attempt to incorporate living constitutionalism.”*<sup>84</sup>

Balkin did not adequately explain why the "text and principles" that are to be derived only from their original historical meaning are deemed immutable and binding, whereas the "application and implementation" of the text and principles may change at any time. In fact, supporters of living constitutionalism do not give history (or ratification) a special place in interpreting the Constitution. For them, history, text and structure are only part of the variety of materials in interpreting the Constitution. The essence of the concern of proponents of living constitutionalism is not to let the "dead hands of the past" control the present generation. Therefore, according to them, updating documents or texts that underline these principles is always needed if the principles are expected to bind everyone living today. After critically analysing Balkin's descriptions above, Leib concluded that Balkin was ultimately not accepted by originalists and, at the same time, rejected by living constitutionalists.<sup>85</sup>

## CONCLUSION

Originalism is a stance that is directly related to perspective on the issue of interpretation of the Constitution. Meanwhile, the interpretation of the Constitution itself is an attempt to understand the definitions contained in the Constitution and the objectives it aims to achieve. Therefore, interpreting the Constitution is basically an activity to elaborate on these definitions and goals so that the Constitution is truly embodied in the practice of state life. Thus, in the last analysis, the

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<sup>81</sup> Balkin.

<sup>82</sup> Balkin.

<sup>83</sup> Ethan J Leib, “The Perpetual Anxiety of Living Constitutionalism,” *Const. Comment.* 24 (2007): 353.

<sup>84</sup> Leib.

<sup>85</sup> Ethan J. Leib.



interpretation of the Constitution is actually an effort to defend it so that it is strictly adhered to in practice. Reflecting on the practice that took place in the United States, the first country to adopt a written constitution, the important factor that can be noted is that the fundamental problem lies not in the answer to the question of whether it is more appropriate to be originalist or non-originalist in interpreting the Constitution but in the question of how we understand the meanings contained in the Constitution and how to achieve them. Therefore, on some occasions, the originalism approach may be more relevant, but on other occasions, originalism will be absurd if applied because society has changed so much. Therefore, in such circumstances, getting out of originalism is a necessity.

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