The Originalism of F.R. Scott

Preston Jordan Lim*

I. Introduction

Maclean's once called him "the poet who outfought Duplessis".[1] W.C. Meredith, Dean of McGill Law, said that he "would be almost impossible to replace".[2] Intellectual historian Richard Risk put it best when he wrote: "I hasten to remind anyone who knows Frank Scott that no story that includes him can be entirely dull."[3] Few figures have impacted 20th-century Canadian history and thought as deeply as F.R. Scott.

Many remember him today as a socialist. Scott was a founding member of the Co-operative Commonwealth Federation ("CCF") — a precursor organization to the New Democratic Party — and co-wrote the Regina Manifesto, which set out the CCF's mission. Others remember him as a Canadian nationalist. The legal historian Eric Adams, for example, has situated Scott within a broader artistic and literary movement that sought to "define and celebrate Canada on its own terms and for its own merits".[4] Many more revere Scott as a committed civil libertarian; a champion of the underdog, Scott argued the landmark case *Roncarelli v. Duplessis* and was an early proponent of a constitutionally entrenched Bill of Rights. And to many Canadians, Scott remains a household name not due to his constitutional essays, but due instead to his award-winning and evocative poetry. The list goes on and on, for Scott impacted nearly every aspect of Canadian public life.

In the decades since his death, scholars have continued to grapple with Scott's tremendous legacy. Yet although many remember Scott today as a socialist, nationalist, civil libertarian and poet, few remember him as an originalist.[5] This is

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* Preston Jordan Lim is a 2021 J.D. graduate of Yale Law School and a Centre Associate of the UBC Centre for Constitutional Law and Legal Studies. He would like to thank Asher Honickman, Nathaniel Reilly and Nicole Spadotto for their comments on earlier drafts of this paper.

1 Ken Lefolii, "The poet who outfought Duplessis" (April 11, 1959), *Macleans*, online: <https://archive.macleans.ca/article/1959/4/11/the-poet-who-outfought-duplessis/>.

2 Ken Lefolii, "The poet who outfought Duplessis" (April 11, 1959), *Macleans*, online: <https://archive.macleans.ca/article/1959/4/11/the-poet-who-outfought-duplessis/>.

3 R.C.B. Risk, "On the Road to Oz: Common Law Scholarship about Federalism after World War II" in G. Blaine Baker & Jim Phillips, eds., *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press for the Osgoode Society for Legal History, 2006) 403 at 404.

4 Eric M. Adams, "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights" (2006) 51 McGill L.J. 435 at 449.

5 But see Allen Mills, "Of charters and justice: The social thought of F.R. Scott,

unsurprising. Although originalism has deep roots in Canadian legal history, contemporary commentators continue to treat originalism as a foreign, American import and to associate it with the conservative legal movement. As Benjamin Oliphant has observed, the Canadian media typically characterizes originalism as "a conservative and aberrant American preoccupation that has been soundly and uniformly rejected in Canadian law, in favour of the more informed and civilized 'living tree' doctrine".[6] If originalism is but an American import, then surely Scott the Canadian nationalist would have wholeheartedly rejected it. And if originalism is inherently conservative, then surely Scott the socialist and constitutional reformer would have opposed it with all his heart.

In this essay, I argue that F.R. Scott was every inch the originalist. After defining various schools of originalism, I argue that F.R. Scott implicitly espoused two types of originalism: intentionalism and framework originalism. Only in recent decades have scholars fully articulated these two forms of originalism, so it comes as no surprise that Scott did not explicitly use the terms intentionalism or framework originalism. As an intentionalist, Scott treated the Framers' purposes and objectives as paramount in interpreting the *British North America Act, 1867*[7] ("BNA Act"). As a framework originalist, Scott contended that the Framers established a constitutional architecture fully capable of meeting the challenges of future centuries. By way of conclusion, I argue that F.R. Scott's originalism contains broader lessons both for contemporary originalist theory and Canadian constitutional theory.

II. A BRIEF DEFINITION OF ORIGINALISM

Although the practice of originalism has deep roots in both Canadian and American legal history, the past several decades have seen a flourishing in originalist scholarship. This is partially due to the efforts of Edwin Meese III, who served as Attorney General in President Ronald Reagan's administration. Robert Post and Reva Siegel have characterized Meese as "probably the person most responsible for fusing conservative activism with the idea of originalism".[8] Justice Samuel Alito has argued that "General Meese began the process of refining and developing Originalist theory in the public eye".[9]

1930-1985" (1997) 32:1 J. Can. Studies 44. Although Mills does not term Scott an originalist, he does identify Scott's preoccupation with the "original conception" of the *British North America Act, 1867*: at 49.

[6] Benjamin Oliphant, "Originalism in Canadian Constitutional Law" (June 25, 2015), *Policy Options*, online: <https://policyoptions.irpp.org/2015/06/25/originalism-in-canadian-constitutional-law/>.

[7] *British North America Act, 1867*, 30 & 31 Vict., c. 3 [now *Constitution Act, 1867*].

[8] Robert Post & Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution" (2006) 75:2 Fordham L. Rev. 545 at 550.

[9] "The Life and Legacy of Edwin Meese III", *Heritage Foundation*, online: <https://www.heritage.org/article/the-life-and-legacy-edwin-meese-iii/>.

Since the 1980s, law professors have theorized and articulated different and sometimes conflicting strands of originalism. As Larry Solum has argued, originalism is not a monolithic approach, but instead refers to a "family of constitutional theories".[10] According to Jack Balkin, "[o]riginalism in its various forms maintains (1) that some feature of the Constitution is fixed at the time of adoption, (2) that this fixed element cannot be altered except through subsequent amendment and (3) that this fixed element matters for correct interpretation".[11] I will not attempt to define every single school of originalism but will discuss those schools of originalism most pertinent to F.R. Scott's theory of the constitution. It is not uncommon for originalists to exhibit multiple types of originalism; F.R. Scott proved no exception.

Original intentions originalism is itself a school of thought that contains several different substrands.[12] Early intentionalists such as Scott focused on the purposes or outcome preferences of the Framers of the constitutional text. In contrast, most contemporary originalists have eschewed previous generations' focus on the Framers' intent. As Larry Solum notes, this shift occurred because of various critics' argument that legislative intent is a meaningless concept, since "only individuals can have intentions, [whereas] legislatures cannot".[13] It does not appear that Scott was aware of such critiques. When faced with a specific constitutional issue, Scott — just like other early intentionalists — essentially asked the question: What would the Framers of the Constitution do? Early intentionalists searched for the original meaning of the Constitution but believed that the best evidence of original meaning lay not in the enacted text, but rather in the stated (and sometimes unstated) intentions of the Framers. I should add that there remain intentionalists today; these new intentionalists take a different theoretical approach than Scott and thus their constitutional vision need not concern us here. In distinguishing F.R. Scott's early intentionalism from the new intentionalism of scholars such as Larry Alexander, I shall apply the term "strict intentionalism" to the former.[14]

Framework originalists, whose approach is most associated with Jack Balkin, argue that the "Constitution is a basic plan for politics".[15] In Balkin's conception,

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[10] Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate" (2019) 113:6 Nw. U.L. Rev. 1243 at 1245-1246.

[11] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 816-818.

[12] Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate" (2019) 113:6 Nw. U.L. Rev. 1243 at 1253-1254.

[13] Lawrence B. Solum, "The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning" (2021) 101:6 B.U.L. Rev. 1953 at 1997.

[14] See, *e.g.*, Larry Alexander, "Simple-Minded Originalism" in Grant Huscroft & Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge: Cambridge University Press, 2011) 87.

[15] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 816.

that "framework consists of the original semantic meanings of the words in the text . . . and the adopters' choice of rules, standards, and principles to limit, guide, and channel future constitutional construction".[16] Framework originalism leaves plenty of room for constitutional adaptation. While a Constitution may spell out certain "hardwired rules", it may be silent on many other issues, "leaving matters to future construction".[17]

Most originalists today are public meaning originalists. Public meaning originalists hold that the original meaning of the Constitution is the "public meaning of the constitutional text at the time each provision was framed and ratified".[18] Rather than focusing on the "concrete intentions of individual drafters of constitutional text", public meaning originalists treat text as the paramount interpretive modality.[19] It should be clear from the above exposition that originalism is far from a monolithic approach and that its varied substrands often conflict with one another.

III. SCOTT THE STRICT INTENTIONALIST

F.R. Scott's strict intentionalism shines through the clearest in his vociferous attacks upon the Judicial Committee of the Privy Council. The Privy Council was the Dominion of Canada's highest court of appeal from Confederation until well into the 20th century. Scott argued that the Privy Council in its decades of federalism jurisprudence had improperly expanded provincial autonomy, in direct contravention of the BNA Act's original design. According to Scott, the Framers of the Constitution, wary of the failures of America's constitutional model, created a strong central government.

Whereas in the United States those powers not explicitly granted to the federal government lie solely with the states, the Framers of the BNA Act had allotted the "residue of matters of general interest" to the federal legislature.[20] Although section 92(16) of the BNA Act also grants the provinces a power over residuary matters, the Framers had intended the federal residuary power to be the more powerful of the two. As evidence of this view, Scott quoted Sir John A. Macdonald, who had declared during the Confederation Debates that "all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legisla-

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[16] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 817.

[17] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 817.

[18] Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate" (2019) 113:6 Nw. U.L. Rev. 1243 at 1246.

[19] Keith Whittington, "The New Originalism" (2004) 22 Geo. J. L. & Pub. Pol'y. 599 at 609-610.

[20] Frank R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 90 at 98.

tures, shall be conferred upon the general government and legislature".[21]

Thus, in implementing an "alternative theory of a severely limited Dominion but an unlimited provincial residue", the Privy Council had perverted the BNA Act's original design.[22] Scott argued that the federal government was so handicapped by the Privy Council's judicial lawmaking that it could not respond effectively to the Great Depression.[23] In much of his writing, Scott lambasted the Privy Council for having judicially rewritten the BNA Act: "None but foreign judges ignorant of the Canadian environment and none too well versed in Canadian constitutional law could have caused this constitutional revolution".[24] Or as Scott so colourfully put it in his poem, "Some Privy Counsel": "I demand peace, order and good government,/ This you must admit is the aim of Confederation!/ But firmly and sternly I was pushed to a corner/ And covered with the wet blanket of provincial autonomy."[25]

Many scholars have already commented on Scott's distinction between the Privy Council's jurisprudence and the original design of the BNA Act. Eric Adams notes that Scott was far from the only person to make this distinction. Indeed, in the aftermath of the Privy Council decisions striking down Prime Minister R.B. Bennett's New Deal legislation, the Senate formed its own committee "to examine the pre-Confederation records and report on the framers' true intentions".[26] Similarly, Risk notes that Justice Bora Laskin shared Scott's belief that the Privy Council "had greatly and unjustifiably diminished the powers of the federal government, creating a 'destructive, negative' autonomy for the provinces".[27]

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[21] Frank R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 90 at 98.

[22] Frank R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 90 at 99.

[23] Frank R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 90 at 100.

[24] Frank R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 90 at 99.

[25] F.R. Scott, "Some Privy Counsel" (1950) 28:7 Can. Bar. Rev. 780 at 780.

[26] Eric M. Adams, "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights" (2006) 51 McGill L.J. 435 at 463. See Canada, The Parliamentary Counsel, *Report Pursuant to Resolution of the Senate to the Honourable Speaker Relating to the Enactment of the British North America Act, 1867*, by William F O'Connor (Ottawa: March 17, 1939).

[27] R.C.B. Risk, "On the Road to Oz: Common Law Scholarship about Federalism after World War II" in G. Blaine Baker & Jim Phillips, eds., *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press for the Osgoode Society for Legal History, 2006) 403 at 410.

Yet until now, scholars have failed to characterize Scott's theoretical approach as originalist or to focus meaningfully on Scott's conception or implementation of originalist analysis. Roderick Macdonald even contended that F.R. Scott, while a "man of ideas," was not "of a particularly theoretical cast of mind".[28] With all due respect to Macdonald, who knew Scott and later served at McGill as the F.R. Scott Chair in Public and Constitutional Law, I cannot agree. Scott applied a fairly unified theory of constitutional interpretation, even if he did not concisely state it in a single sentence or essay.

I argue that Scott regularly applied the tenets of strict intentionalism, treating the Framer's intentions as the paramount focus of constitutional interpretation. A careful reading of his constitutional essays reveals that Scott treated three bodies of evidence as strong indications of the Framers' intent: (1) the Quebec and London Resolutions, which served as a basis for the BNA Act; (2) the Confederation debates of the various provinces that formed the Dominion of Canada in 1867; and (3) the actions of early Parliaments, which counted among their ranks the Framers of the BNA Act.[29] Moreover, while Scott also treated the text of the BNA Act as evidence of the Framer's intentions, he believed that extra-textual evidence of the Framer's intentions could trump clear textual meaning.

First, Scott saw the "proceedings and resolutions of the Quebec and London Conferences" as key evidence of the Framer's original intentions.[30] At both conferences, delegates gathered to discuss the prospect and mechanics of Confederation. One good example of Scott's reliance on the two Conferences comes in his interpretation of section 92(13) of the BNA Act, which states that the provinces may exclusively make laws in relation to property and civil rights in the province.[31] Scott argued that the Framers intended the provinces to share jurisdiction over property and civil rights with the federal government.[32] In support of this conclusion, Scott did not focus on the text of section 92(13) as enacted. Instead, he pointed to the Quebec and London Resolutions, which had qualified provincial jurisdiction over

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[28] Roderick A. Macdonald, "F.R. Scott's Constitution (Inaugural Lecture)" (1997) 42 McGill. L.J. 11 at 14.

[29] See Frank R. Scott, "The Development of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 35 at 36. Scott also argued that "early judicial pronouncements ... by Canadian judges" constituted a key source for the reconstruction of the Framers' intent, but he only rarely focused on such judicial pronouncements in his constitutional essays: at 36. Thus, in practice, Scott did not meaningfully look to early Canadian cases as evidence of original intent.

[30] Frank R. Scott, "The Development of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 35 at 36.

[31] *Constitution Act, 1867* (UK) 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, Appendix II, No. 5 [hereinafter the "BNA Act"].

[32] Frank R. Scott, "The Special Nature of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 175 at 181.

property and civil rights by adding "the words 'excepting those portions thereof assigned to the General Parliament'".[33] To Scott, the Quebec and London Conferences constituted strong evidence of the Framers' intentions.

Second, in divining the Framers' intentions, Scott regularly drew upon the Confederation debates. In so doing, Scott continued the legacy of his own constitutional law professor, Herbert Smith, who had taught the former to seek the intentions of the Fathers of Confederation not only in the words of the BNA Act but also in the Confederation debates.[34] Scott regularly cited the debates in which legislators of the various provinces that formed the Dominion of Canada in 1867 had argued about Confederation.[35] For example, in interpreting the BNA Act's provisions on minority rights, Scott argued that the "original Fathers of Confederation did not look upon the minority guarantees in the 1867 constitution as being a maximum, but rather as a minimum on which to build".[36] In support of this view, Scott turned to the Confederation debates of the Province of Canada and quoted Sir John A. Macdonald, who stated therein that "the use of the French language should form one of the principles upon which the Confederation should be established".[37]

Third, Scott treated the debates and actions of the early post-1867 federal Parliaments as evidence of original intent. After all, these early Parliaments contained the same men who had drafted the Constitution and partaken in the Confederation debates. In one essay, for example, Scott argued that the federal Parliament alone held the power of constitutional amendment because such a power was a matter of common interest to the country, rather than one of local interest to the provinces; Scott criticized the compact theory, under which the dissent of one province could prevent the passage of a constitutional amendment.[38] In support of his view, Scott cited as an example an 1869 incident in which the federal Parliament amended subsidies arrangements for Nova Scotia. One Member of Parliament introduced a motion arguing that all the provinces had to assent to such a change, which came under the purview of section 118 of the BNA Act. Yet the House of Commons rejected that motion. In discussing this example, Scott wrote that action by Parliaments "containing most of the Fathers of Confederation, and taken while

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[33] Frank R. Scott, "The Special Nature of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 175 at 181.

[34] Frank R. Scott, "Our Changing Constitution" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 390 at 390-391.

[35] See, *e.g.*, Frank R. Scott, "Political Nationalism and Confederation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 3.

[36] Frank R. Scott, "Political Nationalism and Confederation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 3 at 16.

[37] Frank R. Scott, "Political Nationalism and Confederation" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 3 at 16.

[38] Frank R. Scott, "The Special Nature of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 175 at 186.

the idea and the purpose of Confederation were still fresh in the public mind, is sufficient proof of the understanding which existed about the method of amending the BNA Act".[39]

Of course, many types of originalists — not just strict intentionalists — consult such sources regularly. Public meaning originalists might consult the Confederation debates or the actions of early Parliamentarians as evidence of how the Framers understood various constitutional provisions to operate — they might in turn suggest that these original understandings buttress their analysis of original public meaning. By the same token, while strict intentionalists focus on the Framers' intentions, they, just like other originalists, place weight on the text of the constitution itself. Scott was no exception. He often referred to the text of the BNA Act as evidence of the Framer's intentions.[40] Yet so attached was Scott to the Framers' intentions that he sometimes viewed the constitutional text as but a secondary interpretive modality. Scott's sidelining of the text is clearest in his essay on section 94 of the BNA Act.[41]

Section 94 states that Parliament can make provision for the uniformity of laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick.[42] A public meaning originalist might conclude that section 94 does not automatically apply to new provinces that joined the Dominion after 1867. The text only lists the provinces of Ontario, Nova Scotia and New Brunswick. The Framers' failure to include a basket phrase in section 94 — consider a hypothetical version of section 94 that allows Parliament to make provision for the uniformity of laws in those three provinces "and other common law provinces" — is dispositive under such a reading. Alternatively, a public meaning originalist might conclude that a reasonable member of the Canadian public in 1867 would have understood section 94 to automatically apply to all provinces other than Quebec.

My aim is not to offer a definitive, public meaning interpretation of section 94, but to argue that Scott resolved the question quite easily by appealing directly to the Framers' intentions.[43] He did not dwell on the text of the provision. Instead, Scott concluded that although the Framers intended to except Quebec from section 94's ambit, they also intended for the section to automatically apply to new common law provinces. Occasionally, Scott's argument devolved into worship of the Framers. In ridiculing a textualist reading of section 94, for example, he suggested that "[i]t is

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[39] Frank R. Scott, "The Special Nature of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 175 at 188.

[40] See Frank R. Scott, "The Special Nature of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 175 at 186.

[41] Frank R. Scott, "Section 94 of the British North America Act" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 112.

[42] BNA Act, s. 94.

[43] Frank R. Scott, "Section 94 of the British North America Act" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 112 at 115-118.

a little difficult to conceive that men of the intellectual calibre of Sir John Macdonald, Sir George Carter and others would have supported" such a "curious restriction on the idea of national unity".[44] Scott thus implied that a theory of constitutional interpretation that began and ended with the text of the BNA Act was overly insular. It was necessary to discern the intentions of the Framers, which were sourced not only in the constitutional text, but also in such varied bodies of evidence as pre- and post-Confederation debates as well as the Quebec and London Resolutions.

In sum, Scott was no haphazard adherent of strict intentionalism. Rather, Scott had a comprehensive vision of original-intentions originalism and systematically applied that vision to his interpretation of the BNA Act.

IV. SCOTT THE FRAMEWORK ORIGINALIST

While Scott was first and foremost an intentionalist, his originalism also resembled framework originalism in certain respects. I argue that Scott viewed the BNA Act as, to quote Jack Balkin's definition, an "initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction".[45] Yet Scott's vision also complicates Balkin's view of framework originalism. As I have previously established, Scott believed that extra-textual evidence of intent could displace clear textual meaning as part of the process of constitutional interpretation. Thus, while Scott likely would have argued that the Framers set out a framework for politics, he viewed the Framers' intentions rather than text of the BNA Act as the main pillar of that framework. In contrast, Balkin has argued that where the Constitution stipulates clear, hardwired rules, "we apply the rule today, because that is what the text says".[46]

Scott viewed the BNA Act as a flexible constitution largely capable of responding to the challenges of the 20th century. In a 1945 essay, Scott remarked that while the BNA Act was one of the world's older constitutions, Canadians had succeeded in meeting various demographic, political and international challenges "without any major revision of the fundamental law of the constitution".[47] Scott even used the language of framework originalism. In a 1961 speech, Scott argued that "A constitution establishes a structure and framework for a country based on certain values. If, like ours, it is largely a written constitution for a federal state, it is a law

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[44] Frank R. Scott, "Section 94 of the British North America Act" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 112 at 117.

[45] Jack Balkin, "Framework Originalism and the Living Constitution" (2009) 103:2 Nw. U.L. Rev. 549 at 550.

[46] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 817.

[47] Frank R. Scott, "Constitutional Adaptations to Changing Functions of Government" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 142 at 143.

for making laws, looking to the future exercise of the powers distributed for the attainment of the desired ends."[48] Perhaps it was Scott's framework originalism that led Allen Mills to argue that there was "a sort of generic Burkeanism" to Scott.[49] After all, Burke's "idea of constitutional change preserving the style of the original document or structure" was compatible with Scott's view of the Constitution as a foundation rather than as a straitjacket.[50]

Despite Scott's admiration for Canada's constitutional framework, he by no means found the BNA Act or the Canadian Constitution more broadly to be perfect.[51] Scott viewed the BNA Act as "an old constitution, [which] shows the marks of its age".[52] He argued, for example, that Canada should patriate her Constitution.[53] Moreover, Scott's commitment to the constitutional entrenchment of a Bill of Rights was proof of his belief that contemporary thinkers and lawyers could further improve the BNA Act. But although Scott argued for constitutional reform and suggested various constitutional amendments,[54] he also believed that the biggest problem with the BNA Act lay not with the Framers' design, but rather in the Privy Council's incorrect construction of the Constitution. In limiting the federal government's powers, the Privy Council had wrought an "evil", which was "probably too great to be remedied by anything short of constitutional amendments".[55] In other words, Scott predominantly viewed constitutional amendment not as a tool with which to improve or change the Framers' design, but as a pathway of return to the original framework of the Constitution. It is telling that Scott closed his edited

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[48] Frank R. Scott, "Our Changing Constitution" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 390 at 392.

[49] Allen Mills, "Of charters and justice: The social thought of F.R. Scott, 1930-1985" (1997) 32:1 J. Can. Studies 44 at 51.

[50] Allen Mills, "Of charters and justice: The social thought of F.R. Scott, 1930-1985" (1997) 32:1 J. Can. Studies 44 at 51.

[51] The Constitution of Canada consists of more than just the BNA Act and the *Constitution Act, 1982*. Scott occasionally wrote about some of these other constitutional documents or orders: see, *e.g.*, Frank R. Scott, "The British North America (No. 2) Act, 1949" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 202. He tended, however, to focus in his constitutional writings on the BNA Act.

[52] Frank R. Scott, "The Historical Tradition" in *The Canadian Constitution and Human Rights: Four Talks for CBC Radio* (Toronto: The Hunter Rose Co. Limited for the CBC Publications Branch, 1959) 26.

[53] Frank R. Scott, "The Redistribution of Imperial Sovereignty" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 244 at 248.

[54] Frank R. Scott, "Constitutional Adaptations to Changing Functions of Government" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 142 at 156.

[55] Frank R. Scott, "The Development of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 35 at 48.

volume of *Essays on the Constitution* with these words: "I am one of those who believe that the original constitution of Canada, changing as it must in face of new demands and new challenges, is still basically adapted to the sum total of our various hopes and aspirations".[56] The Framers had established an enduring framework.

Finally, although I have characterized Scott as a framework originalist, I am keenly aware of the differences between Scott's approach and Jack Balkin's framework originalism. Balkin treats constitutional text as the paramount modality of constitutional interpretation, but suggests that vast swathes of the U.S. Constitution are indeterminate enough in meaning such that judges today have plenty of room for manoeuvre in applying the Constitution to particular disputes.[57] While Scott argued that the Framers of the BNA Act had established a framework for constitutional adjudication, he did not see constitutional text as the paramount pillar of that framework. Rather, Scott's intentionalism shaped his framework originalism; Scott did not rely solely or even primarily on text in articulating the original framework of Canada's constitution.

V. THE LEGACY OF SCOTT'S ORIGINALISM

F.R. Scott's originalism contains several lessons for the modern constitutional theorist. One lesson for modern Canadians is that it would be ahistorical to view originalism as merely a tool of the political right.[58] American scholars recognize that originalism in that country has not always been tied to the conservative legal movement; as an example, Noah Feldman has argued that Justice Hugo Black — a constitutional liberal — pioneered originalism on the modern Supreme Court, applying it "as a liberal tool to make the states comply with the Bill of Rights".[59] It should come as no surprise that the Canadian narrative is similarly complex. And although plenty of scholars have at least alluded to the historical roots and complexity of Canadian originalism, most lawyers and media commentators today continue to view originalism as inherently conservative or as an American import. Modern debates about the appropriateness of originalism in the Canadian context must account for the twin facts that originalism is already part and parcel of our own history and that members of the political left have at times embraced originalism.

Second, Scott's constitutional vision demonstrates that not all originalists see their approach as purely methodological. To apply Ilya Somin's terminology, Scott

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[56] Frank R. Scott, "Our Changing Constitution" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 390 at 403.

[57] Jack M. Balkin, "Nine Perspectives on *Living Originalism*" (2012) U. Ill. L. Rev. 815 at 817.

[58] See also Kerri A. Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015) 19:2 Rev. Const. Stud. 237.

[59] Noah Feldman, "Justice Scalia, the Last Originalist" (February 16, 2016), *Bloomberg*, online: <https://www.bloomberg.com/opinion/articles/2016-02-16/justice-scalia-the-last-originalist/>.

was an instrumental originalist, who believed that "following the original meaning leads to good consequences".[60] Scott was not an intrinsic originalist, for he did not believe that adherence to original meaning was "inherently valuable, independent of consequences".[61] That is, Scott was an originalist because the results of his originalist analysis accorded entirely with his normative stances as a socialist. As a constitutional theorist, Scott concluded that the Framers had intended a strong, central government. As a socialist, Scott believed that only a strong, central government that was intimately involved in the national economy could face up to challenges such as the Great Depression. Thus, the Framer's intentions accorded with his normative priors.

Third, Scott's instrumental originalism sounds as a clarion call for modern originalists who would urge an originalist reading of the Canadian Constitution. In elucidating the original intentions behind the BNA Act, Scott did not argue that his contemporaries should be automatically bound by those intentions. Scott prioritized normative arguments, suggesting that the new constitution — constructed by the Privy Council — "is not as good as the old".[62] Or as he put it some years later, "We may even reach a time when Canadians of all races and creeds will decide that the original intentions of the Fathers of Confederation were good and should be carried out."[63] In Scott's mind, his contemporaries still had to decide for themselves that the original constitutional framework was one worth pursuing. Modern constitutional theorists who advocate for an originalist reading of Canada's Constitution would do well to consider the normative power of Scott's approach. They must ask themselves: are Canadians likely to adopt originalism if they see originalism as a purely methodological approach, or are they more likely to be swayed by Scott-style normative arguments?

It is a measure of Scott's brilliance and legacy that so many continue to debate the contents, structure and implications of his constitutional theory. I have argued in these pages that just as Scott was a socialist, Canadian nationalist and civil libertarian, so too was he a committed originalist. Scott viewed all these substrands of his thought as harmonious and mutually reinforcing. To ignore Scott's originalism then is to misunderstand both Scott and originalism. To ignore Scott's originalism is

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[60] Ilya Somin, "Intrinsic vs. Instrumental Justifications for Originalism" (May 23, 2018), *The Volokh Conspiracy*, online: <https://reason.com/volokh/2018/05/23/intrinsic-vs-instrumentalist-justificati/>.

[61] Ilya Somin, "Intrinsic vs. Instrumental Justifications for Originalism" (May 23, 2018), *The Volokh Conspiracy*, online: <https://reason.com/volokh/2018/05/23/intrinsic-vs-instrumentalist-justificati/>.

[62] Frank R. Scott, "The Development of Canadian Federalism" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 35 at 48.

[63] Frank R. Scott, "Section 94 of the British North America Act" in Frank R. Scott, ed., *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 112 at 130.

to dishonour the man who entreated us to love — and not merely study — our Constitution.