

NELCO
NELCO Legal Scholarship Repository

Columbia Public Law & Legal Theory Working
Papers

Columbia Law School

3-9-2009

On the Origins of Originalism

Jamal Greene

Columbia University School of Law, jamal.greene@law.columbia.edu

Follow this and additional works at: http://lsr.nellco.org/columbia_pllt

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Greene, Jamal, "On the Origins of Originalism" (2009). *Columbia Public Law & Legal Theory Working Papers*. Paper 09163.
http://lsr.nellco.org/columbia_pllt/09163

This Article is brought to you for free and open access by the Columbia Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Columbia Public Law & Legal Theory Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

On the Origins of Originalism

Jamal Greene[†]

Abstract

For all its proponents' claims of its necessity as a means of constraining judges, originalism is remarkably unpopular outside the United States. Recommended responses to judicial activism in other countries more typically take the form of minimalism or textualism. This Article considers why. I focus particular attention on the political and constitutional histories of Canada and Australia, nations that, like the United States, have well-established traditions of judicial enforcement of a written constitution, and that share with the United States a common-law background adjudicative norm, but whose judicial cultures less readily assimilate judicial restraint to historicist claims. I offer six hypotheses as to the influences that sensitize our popular and judicial culture to such claims: the canonizing influence of time; the revolutionary character of American sovereignty; the rights revolution of the Warren and Burger Courts; the politicization of the judicial nomination process in the United States; the accommodation of an assimilative, as against a pluralist, ethos; and a relatively evangelical religious culture. These six hypotheses suggest, among other things, that originalist argument in the United States is a form of ethical argument, and that the domestic debate over originalism should be understood in ethical terms.

[†] Associate Professor of Law, Columbia Law School. For helpful conversation, generous feedback and thoughtful suggestions I wish to thank Samuel Bray, Philip Hamburger, Paul Horwitz, Vicki Jackson, Henry Monaghan, Elora Mukherjee, Neil Siegel, Wade Wright, and participants at the Columbia Law School Junior Faculty Workshop and the New York City Junior Faculty Colloquium.

Contents

I. Introduction	1
II. Our Originalism.....	8
III. The Lives of Others: The Cases of Canada and Australia	17
A. Canada’s Charter Evolution.....	19
1. Judicial Review Under the BNA Act.....	20
2. A Tree Grows in Canada: Judicial Review Under the Charter	29
3. Critics of Canadian Activism.....	39
B. Australia’s Faint-Hearted Originalism.....	43
1. The Commonwealth of Australia Constitution Act 1900	45
2. Legalism at the Bar of the High Court.....	46
3. The Mason Court Revolution.....	54
4. The Gleeson Counterrevolution.....	61
IV. Six Hypotheses	66
A. Fixating on the Framers	68
B. Revolution vs. Evolution.....	72
C. Rights and the Right.....	74
D. The Politics of Judicial Nominations.....	77
E. Pluralism and <i>Nomos</i>	79
F. Constitutional Faith	83
V. Originalism as Ethical Argument.....	87
VI. Conclusion	95

I. Introduction

For the last quarter-century originalism has been the idiom of judicial restraint in the United States. Originalism's proponents defend it as uniquely appropriate to judging in a constitutional democracy because, unlike its competitors, originalism offers articulable and transparent criteria for discerning the meaning of ambiguous constitutional texts. Without the discipline originalism enforces, judges are free to decide cases according to metrics that are either impermissible—their naked policy preferences, say—or too methodologically opaque to impose the public accountability the judicial role demands.

Despite sustained criticism that has discredited originalists within certain corners of the legal academy, the originalism movement is a success by numerous measures.¹ As others have remarked, the Court's recent decision in *District of Columbia v. Heller*² was less interesting for its result, which was widely anticipated, than for the fact that Justice Stevens's lengthy dissent spent so much space parsing the views of eighteenth-century Americans on the meaning of the Second Amendment's text.³ As Part II of this Article details, originalism is a recurring topic of discussion in newspaper editorials, blogs, talk radio, and confirmation hearings, and consistently large numbers of Americans report in surveys that they believe Supreme Court Justices should interpret the Constitution solely based on the original intentions of its authors.⁴

¹ See Jamal Greene, *Selling Originalism*, 97 GEORGETOWN L.J. ____ (2009).

² 128 S. Ct. 2783 (2008) (establishing an individual constitutional right to keep a loaded handgun in one's home).

³ See *id.* at 2822 (Stevens, J., dissenting); *Heller* on a First Read, Posting of Dale Carpenter to the Volokh Conspiracy, <http://volokh.com/posts/1214514180.shtml> (June 26, 2008 5:03 p.m. EST); Some Preliminary Reflections on Heller, Posting of Sandy Levinson to Balkinization, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html> (June 26, 2008 5:47 p.m. EST); More on Heller, Posting of Mark Tushnet to Balkinization, <http://balkin.blogspot.com/2008/06/more-on-heller.html> (June 27, 2008 9:57 a.m. EST); *cf.* Greene, *supra* note 1, at ____ (noting that Justice Stevens's opinion was not originalist in the same sense as Justice Scalia's).

⁴ See Greene, *supra* note 1, at ____.

In light of the claims to singular democratic legitimacy made on originalism's behalf, and given the evident sympathies of many Americans toward those claims, it is curious that originalism is so little celebrated outside the United States. The notion that the meaning of a political constitution is fixed at some point in the past and is authoritative in present cases is pooh-poohed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe, and the text-bound "original meaning" version of originalism that appears ascendant domestically is on the wane in Australia.

The global rejection of American-style originalism would be understandable if constitutional judges in other democratic countries either were ignorant of originalism's claims on judicial restraint or were discouraged from such restraint altogether, but neither is true. The charge of judicial activism is neither unique to nor uniquely stigmatic within American constitutional discourse,⁵ and for all the hostility many originalists show toward importing foreign jurisprudence into American constitutional interpretation, the domestic originalism movement has not been reticent in seeking to export itself abroad.⁶ That so many American judges, theorists, and ordinary citizens take originalism so seriously seems all the more curious in light of the advanced age of the U.S. Constitution. No constitutional framers or ratifiers are less connected to contemporary realities than our own, and yet few peoples more earnestly or enthusiastically engage originalist constitutional premises than we do. It may be the genius of the

⁵ See, e.g., KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE?* (2001); Elke Luise Barnstedt, *Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?*, 13 *JURIDICA INT'L* 38 (2007); Michael Kirby, *Judicial Activism? A Riposte to the Counter-Reformation*, 24 *AUSTR. BAR REV.* 1 (2004).

⁶ See, e.g., Greg Craven, *Original Intent and the Australian Constitution—Coming Soon to a Court Near You?*, 1 *PUB. L. REV.* 166, 166 (1990) ("No one with a serious interest in constitutional law and theory could fail to be aware of the debate that has raged in the United States over the question of 'original intent' (or 'intentionalism') as a theory for the interpretation of that country's Constitution.").

U.S. Constitution that its text so graciously adapts to changing circumstances,⁷ but it is a genius that originalists conspicuously refuse to recognize.

Our relative embrace of originalism is not easily explained, then, as a corollary either to the age of our Constitution, which at first blush seems to cut the other way, or its commitment to writing, which is no longer unique. Nor do we find obvious answers in our politics. Rights revolutions of the sort that the originalism movement is responsive to have proceeded more quickly and more dramatically elsewhere around the globe, and yet those societies have not turned to historicism as a source of constitutional restoration.⁸ Foreign legal cultures tend rather to express objections to judicially engineered constitutional change in terms of either minimalism or legalism, recalling the erstwhile American alternatives of prudentialism and “neutral principles.”⁹

This all raises a strong inference that originalism is not culturally neutral; that is, whether originalism “takes” appears to depend less on *it* than on *us*. If true, recognition that affinity for originalism is culturally contingent could have two salutary effects. First, it could go some way toward debunking the claim, still advanced by many of originalism’s defenders, that originalist interpretation is inseparable from judicially enforced written constitutionalism. Second, it could go even further toward determining the best use of the considerable energy now devoted either to originalism’s defeat or to its appropriation for progressive ends.

Turning the inference into a conclusion is challenging, however. We have no access to a parallel-universe United States in which all relevant variables save an embrace of originalism are held constant. Nonetheless, we do have, in Canada and Australia, two foreign legal regimes that

⁷ See *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

⁸ See Jack M. Balkin, *Originalism and Constitutional Redemption*, 24 CONST. COMM. 427, 506 (2007).

⁹ Compare ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962), with Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959).

are in many key respects comparable to our own.¹⁰ Like the United States, Canada and Australia are stable, liberal democracies with independent judiciaries and judicially enforced written constitutions of long standing relative to most of the world. Moreover, all three countries operate under common-law legal systems derived from British practice, and so seem more likely than civil-law countries to approach statutory and constitutional interpretation using the evolutionary and judge-empowering methods generally disfavored by originalists.¹¹ Any explanations for divergence between American attitudes toward constitutional historicism and those of Canadians and Australians cannot readily count on the “writtenness” of the U.S. Constitution, its enforcement by independent and unaccountable judges, or the necessity of checking a judiciary accustomed to the creativity common-law adjudication affords.

As Part III demonstrates, in neither Canada nor Australia is the language of judicial restraint historicist. In Canada, the metaphor of a “living tree” dominates constitutional judicial practice and scholarship; objections to “activist” decisions are more typically framed as errors of application than errors of method. As in much of Europe, Canadian constitutional interpretation is unapologetically, and for the most part uncontroversially, purposive and teleological. The same cannot be said of Australia, whose constitutional jurisprudence is self-consciously “originalist” to a degree unknown in the United States and unimaginable in Canada. Significantly, however, Australia’s judges, theorists, and public are less likely than their American counterparts to marry historicism to judicial restraint. Rather, Australian originalism has for many years been aggressively textualist. In some, perhaps most cases, the end result is

¹⁰ Here, then, I employ a “most similar cases” approach to comparative constitutional law. See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

¹¹ See ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997); see also Michel Rosenfeld, *Constitutional Adjudication in the United States and Europe: Paradoxes and Contrasts*, 2 INT’L J. CONST. L. 633, 655 (2004) (“[T]he countermajoritarian difficulty in the United States stems less from the judicial vindication of antimajoritarian rights than from the danger that judges, nurtured on the broad and open-ended common-law approach, will trample on majoritarian laws much more than is constitutionally necessary.”).

attention to the original understanding of constitutional provisions. But Australian jurists are generally comfortable incorporating contemporary norms, even those given authoritative voice only in foreign jurisdictions or international legal instruments, into interpretation of open-ended textual provisions. Few would doubt, moreover, that the secular trend in Australian constitutionalism is toward greater attention to constitutional purpose and away from the public-meaning originalism promoted by Justice Scalia and by most academic originalists in the United States. In short, although some version of originalist judicial practice is hardly peculiar to the United States, the historicist appeals that support American originalism have a potency that few foreign constitutional courts can match, not the least the two most like our own.

It is not possible, of course, to establish conclusively what produces this result. An uncountable number of factors determine the sorts of interpretive moves that prove persuasive and become conventional within a legal culture; one must admit a certain risk in reaching conclusions based on considered but ultimately anecdotal observation of political histories. Equally obvious, however, is that that observation strongly recommends a set of hypotheses that usefully informs the domestic debate over originalism.

Part IV considers six possibilities. First is the effect that the passage of time has over our tendencies to lionize historical figures and cohorts. Even if we cannot expect Madison to understand our world, his imprimatur is worth more than that of the rascals who currently populate our politics. Moreover, the fact that in principle we have yet to scrap our Constitution inevitably breeds a certain confidence in the correctness of its original assumptions.

Second, and in aid of the first, our Constitution is revolutionary rather than evolutionary. The United States announced its sovereignty quickly, painfully, and without sympathy to its former colonizers. A political identity so formed is not easily refashioned in light of evolving

contemporary circumstances, at least not overtly. The sovereign “moments” of Canada and Australia were glacial by comparison; although both countries had functional constitutions by the start of the twentieth century, neither could be amended domestically until the 1980s.

Third, American originalism is an instrument through which a domestic sociopolitical movement seeks to influence our courts. If that movement is a backlash against the rights-affinity of the Warren and Burger Courts,¹² there is little reason to expect a counterpart to emerge organically from different political conditions in other countries. Australia’s Constitution lacks a bill of rights, thereby tempering (though not eliminating) the High Court’s ability to frustrate legislative majorities to protect individual rights. Canada does of course have the Charter of Rights and Freedoms, and its Supreme Court aggressively polices it, but the Court might have done so too recently to generate an effectively mobilized backlash.

Fourth, and in aid of the third, the American public participates in the selection of Supreme Court Justices to a degree unheard of in most of the world. Confirmation hearings are the principal site at which the socio-political movement behind originalism invites the public into a conversation about constitutional methodology. No remotely comparable mechanism exists in Canada or in Australia, wherein the reigning government selects high court judges and wherein convention dictates that that selection be informed by some combination of expertise and ordinary political patronage rather than by ideological considerations.

Fifth, the American ethos of cultural and political assimilation inflates a narrative of fidelity to a unitary interpretation of the Constitution and deflates narratives of interpretive contest or infidelity. The notion that interpretation should be open-ended, not because the Constitution is *vague* but because the Constitution is *indeterminate*, is far more acceptable in

¹² See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Greene, *supra* note 1, at ____.

Canada than in Australia or in the United States. I suggest that this results in part from Canada's existential commitment to multiculturalism.

Finally, something must be said of religion. Constitutionalism is often called our civil religion, and the originalism movement that so glorifies the Constitution's original understanding is conspicuously commingled with an evangelical movement that imperfectly separates human agency from the will of God. The United States in 2009 is the world's most religious Western democracy, and a substantial number of us are at best ambivalent toward the use of reason and creativity in exegesis of sacred texts; yet that is precisely the toolkit of the judge tasked with applying constitutional principles dynamically rather than ministerially.

These six proposed hypotheses vary in strength and persuasiveness. Readers will have their favorites as I have mine. The list is not, moreover, meant to be exhaustive. (In fine non-originalist fashion, it answers not to the canon of *exclusio unius est exclusio alterius*.) It is sufficiently exemplary, however, to demonstrate that originalism is not culturally indifferent. The appeal of originalism domestically lies neither in its integrity as a theory of interpretation¹³ nor, wholly, in its success as a political practice.¹⁴ Rather, originalism is a product of time, of place, and of *ethos*. Part V offers, then, that in the language of Philip Bobbitt's well-known typology,¹⁵ historical argument is itself a form of ethical argument. Taken seriously, that realization is potentially self-defeating for originalists; and for non-originalists, it recommends foregoing the debater's points so common in our literature in favor of an aggressive emphasis on a contrary, more sympathetic ethos.

¹³ A theme I develop in other work, *see* Greene, *supra* note 1.

¹⁴ *See id.*

¹⁵ *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

II. Our Originalism

It is frequently said that all constitutional interpretation is originalist.¹⁶ That is not so much a statement about constitutional theory as about constitutional fidelity. Interpretation of a text entails deciphering one of two meanings: that intended by the text's author or that understood by the text's original audience.¹⁷ To assign some other meaning to a text—our contemporary understanding, for example—is to disclaim fidelity to it. If, by fortuity, the word “Senator” comes in a later age to mean “sandwich,” each state is not thereby entitled to two free lunches. Unless, that is, we are not interested in constitutional fidelity.¹⁸

When it comes to the customary nomenclature of American constitutional theory, we are not all originalists. To call oneself an originalist is not simply to proclaim fidelity to the Constitution but to privilege the original understanding of the document as against alterations to that understanding brought about through social change and judicial innovation. It is, moreover, to consider the original understanding dispositive or at least presumptively correct in matters of first impression. Most constitutional lawyers consider original understanding relevant but not dispositive: Precedent, unwritten implications from constitutional structure, contemporary public understanding, and political consequences are also relevant. Originalists generally are either, by degrees, less sanguine about these alternative sources of constitutional meaning, or believe them

¹⁶ See MICHAEL J. PERRY, *MORALITY POLITICS, AND LAW* 280 (1988); Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory* 61 ALB. L. REV. 459, 472 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1603 (1989).

¹⁷ See PERRY, *supra* note 16; ANTONIN SCALIA, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 144 (1997).

¹⁸ That is not to say that fidelity requires that a principle embodied within a text be applied consistently across generations. See Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 119-20 (1997); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291 (2007); Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Papers Series No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

irrelevant to constitutional meaning but, for prudential reasons, appropriate in limited ways to the crafting of judicial decision rules.¹⁹

My use of the term “original understanding” is deliberate. As I use it, it can refer either to the original subjective intent of the framers or ratifiers as to the meaning and scope of a constitutional provision or to the original semantic meaning of the text of the provision. There has been a gradual but dramatic shift in preference among academic originalists in favor of original meaning rather than original intent.²⁰ Here is not the place to examine the interesting arguments in favor of one or the other, except to note that one’s intent as to the scope of a provision—the original expected application—is theoretically distinct from the original meaning of the provision’s text but in practice may be difficult to disentangle. Justice Scalia, for example, is notionally committed to the authority of original meaning but nonetheless cannot accept that the original meaning of “cruel and unusual” may in later years come to apply to capital punishment. Persuasive evidence as to original expected application, such as the references to capital punishment in the Fifth Amendment, seems in practice to drive Scalia’s assessment of original meaning.²¹ It is indeed difficult to recall a case in which any self-proclaimed originalist judge has perceived daylight between original meaning, original expected application, and original intent, notwithstanding the fierce academic debate over these distinctions.

The academic discourse around originalism also increasingly distinguishes between constitutional interpretation, which is a hermeneutic exercise common to literature and law alike, and constitutional construction, which is a political and adjudicative exercise designed to fill the

¹⁹ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989); Mitchell N. Berman, *Originalism is Bunk*, at 30 (Dec. 30, 2007), available at <http://ssrn.com/abstract=1078933>.

²⁰ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 608 (2004).

²¹ See SCALIA, *supra* note 11, at 46; Balkin, *supra* note 8, at 443-49.

interstices of constitutional text.²² Interpretive originalists and constructive originalists are conceptually separate populations, but this, again, is a distinction fastidiously maintained in academic literature but generally unexpressed in judicial opinions or public discourse.

It is perhaps obvious but is too little recognized that discussion of originalism is not confined to the academy.²³ Originalism is a term that, today anyway, has content within a public discourse that extends well beyond the law reviews. Rush Limbaugh puts the matter succinctly:

The only antidote to . . . judicial activism is the conservative judicial philosophy known as Originalism. As Supreme Court Justice Clarence Thomas explained in a February 2001 speech . . . : “The Constitution means what the delegates of the Philadelphia Convention and the state ratifying conventions understood it to mean; not what we judges think it should mean.” Hallelujah.

Originalism means not molding the Constitution to fit your political and social beliefs. It means not citing foreign law to support your preferences. It means not imposing your personal policy whims on society via judicial fiat. And where the Constitution is silent, it means not inventing a penumbra to support your own opinion.²⁴

A significant segment of the population associates originalism with the values Limbaugh specifies.²⁵ It is simple, it is suspicious of grants of discretion to legal elites, it is hostile to transnational sources of law, and, significantly, it is the “only antidote” to judicial activism.

Polling data suggests that a substantial number of Americans find originalism at least superficially compelling. A series of polls conducted annually by Quinnipiac University from 2003 to 2008 has consistently found that four in ten Americans or more say that “[i]n making decisions, the Supreme Court should only consider the original intentions of the authors of the

²² See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 7-11 (1999).

²³ See Greene, *supra* note 1; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

²⁴ Rush Limbaugh, *Limbaugh Fundamentals: What is Originalism?*, in *THE LIMBAUGH LETTER* (2005), available at <http://www.rushlimbaugh.com/home/menu/limfunoriginalism.guest.html>.

²⁵ In 2005 Reagan Justice Department alum and radio talk-show host Mark Levin published a book called *Men in Black: How the Supreme Court is Destroying America*, in which originalism featured prominently. The book spent nine weeks on the *New York Times* best seller list. See *Best Sellers: April 24, 2005*, *N.Y. TIMES*, Apr. 24, 2005, at 26.

Constitution” as opposed to “consider[ing] changing times and current realities in applying the principles of the Constitution.”²⁶ These polls also suggest that much of the American public finds the distinction between original intent and original meaning far less interesting than do legal academics. Indeed, even though the debate between Justice Scalia and Justice Stevens in *Heller* is best construed as a contest between the legal authority of constitutional meaning versus constitutional purpose,²⁷ much of the public response to the decision assimilated both opinions to a single interpretive modality: original intent.²⁸ In the great debates of American constitutional theory, this error is a technical one only. As Scalia has written, “The Great Divide with regard to constitutional interpretation is not between Framers’ intent and objective meaning, but rather that between original meaning (whether derived from Framers’ intent or not) and current meaning.”²⁹

Heller demonstrates the elevated space originalism occupies within American legal and political culture. The opinion overruled the opinions of dozens if not hundreds of federal court judges, read a 69-year-old Supreme Court precedent into oblivion, and called into serious question the gun control regulations of several of the nation’s largest and most crime-ridden metropolitan areas, including of course the one in which the Court itself sits. The Court did so over the official objection of four Justices, five states, and the cities of Baltimore, Chicago, Cleveland, Los Angeles, Milwaukee, New York, Oakland, Philadelphia, Sacramento, San

²⁶ Press Release, Quinnipiac Polling Institute, American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, but They Don’t Want Government To Ban It (July 17, 2008), <http://www.quinnipiac.edu/images/polling/us07172008.doc>.

²⁷ See Greene, *supra* note 1, at ____.

²⁸ *Washington Post* columnist Charles Krauthammer’s response was typical of many:

I think what is really interesting is that the dissent by John Paul Stevens, the most distinguished of the liberals on the other side, . . . was almost entirely based on originalism, i.e. it was about what was intended by the founders at the time of the writing of this amendment. . . . So I thought it was interesting agreement on that, on the philosophical premise.

See Fox Special Report with Brit Hume (Fox television broadcast Jun. 26, 2008). For additional examples in this vein, see Greene, *supra* note 1, at ____ and n.____.

²⁹ SCALIA, *supra* note 11, at 38.

Francisco, Seattle, and Trenton.³⁰ Against that opposition the Court relied almost entirely on a single proposition: that the original meaning of “the right of the people to keep and bear arms shall not be infringed” is not limited to the militia-related purpose that concededly animated the right’s codification.³¹

Virtually every constitutional court engages in pluralistic interpretation,³² but in very few would an opinion like *Heller* be remotely possible. First, it is not every court that feels sufficiently legitimated to order local governments to refrain from disarming their citizens. Second, those courts that do enjoy that level of legitimacy are infrequently originalist. Third, whether generally originalist or not, in no other country I am aware of is it conceivable that the court would mount such a direct political challenge solely on the basis of historical arguments that conflict with longstanding precedents and political practice. It was fewer than two decades ago, after all, that former Chief Justice Warren Burger (no pinko, he) called the very argument used successfully in *Heller* “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”³³ Two years earlier Robert Bork—Robert Bork!—had said that the Second Amendment “guarantee[s] the right of states to form militia, not for individuals to bear arms,” and that all state gun-control

³⁰ See *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting); *id.* at 2847 (Breyer, J., dissenting); Brief for New York, et al., as Amici Curiae in Support of Petitioners, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief of Major American Cities, et al., as Amici Curiae in Support of Petitioners, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief of the City of Chicago and the Board of Education of the City of Chicago as Amici Curiae in Support of Petitioners, *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

³¹ *Heller*, 128 S. Ct. at 2801.

³² See Jeffrey Goldsworthy, *Conclusions*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 321, 325 (Jeffrey Goldsworthy ed., 2006); cf. Vicki C. Jackson, *Constitutions as “Living Trees”?* *Comparative Constitutional Law and Interpretive Metaphors*, 75 FORDHAM L. REV. 921, 926 (2006).

³³ *MacNeil/Lehrer Newshour: First Freedoms* (PBS television broadcast Dec. 16, 1991).

laws were “probably constitutional.”³⁴ Yet in the immediate aftermath of *Heller* both John McCain, strongly, and Barack Obama, tepidly, endorsed the Court’s decision.³⁵

Originalism is the instrument and the beneficiary of a deliberate decision by former Attorney General Edwin Meese and others to structure the Reagan Justice Department’s critique of the Warren and Burger Courts in jurisprudential terms. Abetted by organizations like the Federalist Society and think tanks like the Center for Judicial Studies, Meese began a campaign during Reagan’s second term to promote publicly the view that originalism is the only way to control activist judges.³⁶ The rhetorical core of the campaign was a well-publicized series of speeches by Meese in 1985 and 1986. In a July 1985 speech to the American Bar Association, for example, Meese stated, “It has been and will continue to be the policy of this administration to press for a *jurisprudence of original intention*.”³⁷ The Administration, he said, would “resurrect the original meaning” of constitutional provisions as “the only reliable guide for judgment.”³⁸ When Bork was nominated to the Court in the summer of 1987, the American people had already been primed to debate the interpretive methodology Bork notoriously promoted.

Some form of originalism is not new to American judicial culture. It is not unusual to find strong statements of the need to give constitutional text the meaning intended by its framers in nineteenth-century Supreme Court opinions, ranging from Chief Justice Marshall’s dissent in

³⁴ See Claudia Luther, *Bork Says State Gun Laws Constitutional*, L.A. TIMES, Mar. 15, 1989, at B5, *quoted in* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 224 (2008).

³⁵ See Mike Dorning, *Obama Hedges on Gun Ruling; Republicans Accuse Candidate of “Flip-Flop”*, CHI. TRIB., Jun. 27, 2008, at 20.

³⁶ See Greene, *supra* note 1, at ___; Siegel, *supra* note 34, at 220-22.

³⁷ Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986) (emphasis in original).

³⁸ *Id.* at 465-66.

Ogden v. Saunders,³⁹ to Chief Justice Taney’s majority opinion in *Dred Scott v. Sandford*,⁴⁰ to Chief Justice Fuller’s opinion in *Pollock v. Farmers’ Loan & Trust*.⁴¹ *Ex parte Bain*, a habeas case concerning the ability of a federal prosecutor to amend an indictment, is typical of nineteenth-century rhetoric. Justice Miller wrote: “It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.”⁴²

The Progressive era saw the first serious scholarly and judicial challenges to the assumption that constitutional interpretation should be tied to original understanding. Justice Holmes’s pragmatism and Justice Brandeis’s prudentialism led both to be suspicious of doctrinaire interpretive modalities that limited the Constitution’s capacity to adapt to modern problems. Thus, in *Missouri v. Holland*, Justice Holmes urged that the Constitution must grow along with the nation it is meant to govern:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to

³⁹ 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, J., dissenting) (“To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not contemplated in them, nor contemplated by its framers; — is to repeat what has been already said more at large, and is all that can be necessary.”).

⁴⁰ 60 U.S. 393, 426 (1857) (“If any of [the Constitution’s] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning . . . and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.”).

⁴¹ 157 U.S. 429, 558 (1895) (framing the Court’s inquiry into the constitutionality of the income tax as “what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?”).

⁴² 121 U.S. 1, 12 (1887).

prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁴³

Justice Brandeis brandished his nonoriginalist credentials most pointedly in his dissent in *Olmstead v. United States*, in which he argued that the Fourth Amendment applies to the wiretapping of telephone conversations. He wrote, “[G]eneral limitations on the powers of Government . . . do not forbid the United States or the States from meeting modern conditions by regulations which a century ago, or probably even a half a century ago, probably would have been rejected as arbitrary and oppressive,” and likewise “[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”⁴⁴ The Court’s progressives “won” with Justice Roberts’s embrace of progressive interpretation over Justice Sutherland’s originalist dissent in *West Coast Hotel v. Parrish*, and in the 45 years between Sutherland’s retirement in 1941 and Justice Scalia’s appointment in 1986, Hugo Black was the Court’s only self-avowed originalist.⁴⁵

Meese and his allies’ frequent resort to metaphors of restoration—his use of the word “resurrect” is no accident—was facilitated by the Warren and Burger Courts’ refusal to ground a series of prominent individual rights decisions in originalist terms. *Griswold v. Connecticut*,⁴⁶ *Mapp v. Ohio*,⁴⁷ *Miranda v. Arizona*,⁴⁸ *New York Times v. Sullivan*,⁴⁹ *Reynolds v. Sims*,⁵⁰ and *Roe v. Wade*⁵¹ are among the usual suspects, and we could add *Brown v. Board of Education*⁵² to the list were that case not preternaturally immune from judicial critique. Bork and Scalia alike

⁴³ 252 U.S. 416, 433 (1920).

⁴⁴ *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

⁴⁵ See HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH (1968).

⁴⁶ 381 U.S. 479 (1965).

⁴⁷ 367 U.S. 643 (1961).

⁴⁸ 384 U.S. 436 (1966).

⁴⁹ 376 U.S. 254 (1964).

⁵⁰ 377 U.S. 533 (1964).

⁵¹ 410 U.S. 113 (1973).

⁵² 347 U.S. 483 (1954).

have suggested that the Warren Court’s abandonment of originalism is an historical anomaly, and that it is the duty of the Court’s conservatives to right the ship.⁵³ But in important ways, Our Originalism—the methodological child of the Meese movement—is not our fathers’. As Meese, Limbaugh, and Scalia frequently explain, they understand originalism to be a tool of judicial restraint; its alternative is an unattractive world in which “nine lawyers presume to be the authoritative conscience of the nation.”⁵⁴ Justice Sutherland’s originalism emphatically did not emphasize judicial restraint, which Sutherland said “belongs in the domain of will and not of judgment.”⁵⁵

It is ironic, then, that another distinguishing characteristic of the latest originalism movement is its hostility to precedent. Justice Thomas has suggested a willingness to overrule constitutional precedents that are contrary to the original understanding,⁵⁶ and Justice Scalia, who has called himself a “faint-hearted originalist,”⁵⁷ has indicated that his occasional deference to longstanding precedent that he disagrees with is “not *part of* [his] originalist philosophy, [but] a pragmatic *exception* to it.”⁵⁸ *Heller* was blithely dismissive of the Court’s Second Amendment decision in *United States v. Miller*,⁵⁹ and Justice Scalia has advocated abandoning prior precedent in favor of original understanding in Eighth Amendment, campaign finance, and abortion cases among others.⁶⁰ By contrast, there was no significant tension articulated between originalism and *stare decisis* before Justice Black’s tenure on the Court.

⁵³ See BORK, *supra* note 19, at 143; Scalia, *supra* note 19, at 852-54.

⁵⁴ *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

⁵⁵ *West Coast Hotel*, 300 U.S. at 403 (Sutherland, J., dissenting).

⁵⁶ See *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring).

⁵⁷ Scalia, *supra* note 19, at 864.

⁵⁸ SCALIA, *supra* note 17, at 140; see Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 32 (1994).

⁵⁹ 307 U.S. 174 (1939); see *Heller*, 128 S. Ct. at 2814-15.

⁶⁰ See *Harmelin v. Michigan*, 501 U.S. 957 (1990) (opinion of Scalia, J.) (rejecting the holding of *Solem v. Helm*, 463 U.S. 277 (1983), that the Eighth Amendment contains a proportionality guarantee); *McConnell v. FEC*, 540 U.S. 93, 247 (Scalia, J., concurring in part and dissenting in part) (arguing, *pace Austin v. Mich. Chamber of*

Finally, and perhaps most significantly, the originalism of today is the product of a political mobilization. It is not merely the idiosyncratic preference of a single Justice, as in the case of *Black*; it is a movement that preceded the nominations of Justice Scalia and Justice Thomas and was deliberately designed to produce their jurisprudential approaches. It is discussed on talk radio and in bestselling books; in blogs and in newspaper columns; in presidential campaigns and at water coolers. Originalism has not “triumphed,” as some suggested in the wake of *Heller*.⁶¹ But it has proven persuasive in a non-trivial number of cases,⁶² it lies squarely at the center of academic conversation in constitutional theory, and it is part of the national dialogue, such as there is one, about the proper role of the judiciary within a democracy. Or our democracy, at least.

III. The Lives of Others: The Cases of Canada and Australia

Outside the United States, American originalism is as well-known as it is marginalized. The reasons for the latter, which I take up in Part IV, are complicated. The former is more easily explained, in light of the cross-pollination of constitutional theory through scholarly exchange, transnational judicial conferences, and cross-reference in judicial practice—what Sujit

Commerce, 494 U.S. 652 (1990), that limitations on corporate campaign expenditures violate the First Amendment and noting his view that, *pace Buckley v. Valeo*, 424 U.S. 1 (1976), campaign contribution limits also violate the First Amendment); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that *Roe v. Wade*, (1973), should be overruled); *see also Crawford v. Washington*, 541 U.S. 236 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), to hold that the admission of testimonial hearsay violates the Sixth Amendment).

⁶¹ *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling of the Rule of Law*, 95 VA. L. REV. ____ (forthcoming 2009), available at <http://ssrn.com/abstract=1265118>; Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13; *Heller* on a First Read, Posting of Dale Carpenter to the Volokh Conspiracy, <http://volokh.com/posts/1214514180.shtml> (June 26, 2008 5:03 p.m. EST); *cf.* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (declaring originalism’s ascendancy by the end of the 1990s).

⁶² *See Heller*, 128 S. Ct. 2783; *Crawford*, 541 U.S. 236; *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).

Choudhury has called the “migration” of constitutional ideas.⁶³ Since the start of 2003 more than 100 academic articles with originalism *in the title* have been published in legal periodicals, and a vast array of resources greet the foreign judge or constitutional theorist interested in comparative study. The law journal database maintained by Washington & Lee School of Law includes more than 200 international and comparative law journals, 87 of which are located outside the United States,⁶⁴ and Lexis-Nexis serves customers in more than 100 countries.⁶⁵ Judges around the world also of course interact in person in a wide range of settings,⁶⁶ and Justice Scalia is no exception. Justice Scalia took at least 25 expense-paid trips to foreign locations for speeches, teaching, and conferences from 2003 to 2007.⁶⁷ Originalism is a frequent topic of conversation at those appearances.⁶⁸

The trouble is, hardly anyone is biting. If we take originalism to require that the original understanding of a constitutional text is dispositive when known, it is an exceedingly unpopular view around the world. Michel Rosenfeld calls originalism “virtually nonexistent” in all of Europe.⁶⁹ The highly influential German Constitutional Court has favored a purposive approach to interpretation that generally privileges *telos* over original intentions.⁷⁰ The high courts of

⁶³ SUJIT CHOUDHURY, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 1 (Sujit Choudhury ed., 2006); see Claire L’Heureux-Dube, *Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 195 (2003).

⁶⁴ See Washington & Lee Univ. Sch. of Law, Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx>.

⁶⁵ See LexisNexis Fast Facts, <http://www.lexisnexis.com/media/fast-facts.aspx>.

⁶⁶ See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

⁶⁷ Locations include Switzerland, Israel, Italy, Ireland, Australia, Turkey, Canada, Japan, the Netherlands, New Zealand, Greece, and France.

⁶⁸ See, e.g., Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 1-2 (2000) (discussing Justice Scalia’s appearance at a 1999 conference on constitutionalism held in Auckland, New Zealand); Kirk Makin, *Senior U.S., Canadian Judges Spar over Judicial Activism*, GLOBE & MAIL, Feb. 17, 2007 (describing a spirited debate over originalism between Justice Scalia and Canadian Justice Ian Binnie at McGill University); John O’Sullivan, *High Court Opposites Dazzling Off the Bench*, CHICAGO SUN-TIMES, Oct. 25, 2005, at 43 (discussing a debate between Justice Scalia and Justice Breyer held in Melbourne, Australia).

⁶⁹ Rosenfeld, *supra* note 11, at 656.

⁷⁰ See Donald P. Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 32, at 161, 197-200.

India, South Africa, and Israel display something approaching open hostility to narrow textualism or static historicism.⁷¹ In Canada, as we shall see, even the most vocal opponents of the Supreme Court's putatively activist decisions infrequently resort to originalist arguments. Australia's appears to be among the world's very few constitutional courts in which arguments from the original understandings of the ratifying generation are taken seriously in the face of contrary teleological arguments grounded in contemporary understandings.

These last two examples are the subject of this Part. In examining in some detail the approaches the Supreme Court of Canada and the High Court of Australia take to interpretation of their national constitutions, I hope to generate hypotheses as to the causes of originalism's particular uses and relative popularity in the United States. Part III.A discusses Canada, in which the "living tree" analogy continues to exert a powerful influence on constitutional discourse in rights and powers cases alike. Part III.B addresses the more complicated case of Australia, whose High Court has traditionally practiced a textual literalism that is relatively strict and historically informed but has recently been receptive to purposivism and to the dynamic influence of contemporary values.

A. Canada's Charter Evolution

Modern Canadian constitutionalism began, with modern Canada, in 1982. Although Canada became a distinct and de facto self-governing legal entity with the enactment of the British North America Act, 1867 (BNA Act), it did not become formally sovereign until the Canada Act, 1982. The Canada Act declared more than 30 documents to constitute Canadian Supreme Law, the most significant of which were the BNA Act (renamed the Constitution Act,

⁷¹ See Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONS. L. 476, 480 (2003); Heinz Klug, *South Africa: From Constitutional Promise to Social Transformation*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 32, at 266, 288-89; Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomena of Judicial Hyperactivism*, 8 ISRAELI AFFAIRS 87 (2002).

1867), the Constitution Act, 1982 (Schedule B of the Canada Act), and the Charter of Rights and Freedoms (the first 35 sections of the Constitution Act, 1982). This Section broadly discusses judicial review by the Judicial Committee of the Privy Council and the Supreme Court of Canada, first under the BNA Act—which principally involved federalism disputes—and more recently under the Constitution Act, 1982, where Charter litigation predominates.

1. Judicial Review Under the BNA Act

The BNA Act merged the three British colonies of Canada, New Brunswick, and Nova Scotia into the nation of Canada. The former colony of Canada, previously subdivided into East and West, was separated into the provinces of Québec and Ontario, giving the original nation of Canada a total of four provincial governments. Canada was given a federal structure with a bicameral parliament and a vertical separation of powers between the national and the provincial governments. Since the BNA Act did not include a Bill of Rights, the Canadian parliament was, like the British parliament, supreme within its legitimate sphere of action.⁷² The content of that sphere was contested from the start, however, as the boundaries between national and provincial power were blurred in the BNA Act.⁷³ Specifically, section 91 of the Act gives the federal government exclusive jurisdiction over several broad areas thought to be of national interest, including “trade and commerce,” and section 92 gives exclusive jurisdiction to provincial governments over other broad areas thought to be locally focused, such as “property and civil

⁷² See *Hodge v. The Queen*, 9 App. Cas. 117, 132 (P.C. 1883) (appeal taken from Ont.).

⁷³ See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 32, at 55, 66-69.

rights.”⁷⁴ It is easy to imagine examples in which these grants of authority cannot be mutually exclusive.⁷⁵

The power of the Canadian national government was initially bounded, moreover, by the superior authority of the Crown. British statutes applied in full force in Canada until the Statute of Westminster, 1931, provided that Canada’s legislature could opt in or out.⁷⁶ Canada did not formally acquire the power to amend its own Supreme Law until 1982. The British place atop Canada’s legal hierarchy was particularly relevant to the practice of judicial review during Canada’s early history. The Supreme Court of Canada is a statutory animal, created by an act of the Canadian Parliament in 1875 and currently authorized not by the Constitution but by the Supreme Court Act.⁷⁷ Until 1949 the Judicial Committee of the Privy Council, sitting on Downing Street, was Canada’s appellate court of last resort, and over a fifty-year period from 1880 to 1930 the Privy Council took a rather heavy-handed approach to its Canadian constitutional duties.⁷⁸

The Privy Council set the interpretive tone early, with Lord Hobhouse declaring in the 1887 case of *Bank of Toronto v. Lambe* that the BNA Act should be treated “by the same methods of construction and exposition that [British courts] apply to other statutes.”⁷⁹ What that meant in theory was that constitutional interpretation was to be guided by literal textual exegesis that relied rigidly on original public meaning coupled with *stare decisis* and that strictly ignored

⁷⁴ Constitution Act, 1867, §§ 91(2), 92(13).

⁷⁵ See, e.g., *Citizens Ins. Co. of Canada v. Parsons*, 7 App. Cas. 96 (P.C. 1881) (appeal taken from Can.) (granting provincial power over insurance regulation). The BNA Act formally assigns to the national government the residual power to legislate “for the Peace, Order, and good Government of Canada.” Constitution Act, 1867, § 91.

⁷⁶ Statute of Westminster, 1931 (UK), 22 & 23 Geo. 5.

⁷⁷ Supreme Court Act, R.S.C., ch. S-26 § 3 (1985).

⁷⁸ See CANADIAN CONSTITUTIONAL LAW 90 (Bakan et al. eds., 3d ed. 2003).

⁷⁹ *Bank of Toronto v. Lambe*, 12 App. Cas. 575, 579 (P.C. 1887) (appeal taken from Can.).

extrinsic sources or reference to the intent of the legislature.⁸⁰ What it meant in practice and in effect was a gradual diminution in national power in relation to provincial governments.⁸¹ From 1880 to 1896 the Privy Council decided twenty issues concerning the separation of powers between the federal and provincial governments, and it ruled in favor of the provinces in fifteen of them.⁸² The strict federalism the Law Lords enforced was arguably consistent with the text of the BNA Act but was very much at odds with the constitutional vision of many of the Act's drafters.⁸³

The Privy Council dramatically and self-consciously departed from static text-bound interpretation in the 1930 case of *Edwards v. Attorney General*, popularly known as the "Person's Case."⁸⁴ The BNA Act provides that the Canadian Senate is to comprise "qualified persons," a term whose original meaning did not, in the unanimous view of the Supreme Court of Canada, include women.⁸⁵ The case might easily have stood as Canada's *Dred Scott v. Sandford*,⁸⁶ but Lord Sankey turned it into Canada's *Brown v. Board of Education*: "the appeal to

⁸⁰ See Hogg, *supra* note 73, at 79; Vincent C. MacDonald, *Judicial Interpretation of the Canadian Constitution*, 1 U. TORONTO L.J. 260, 268 (1936).

⁸¹ See MacDonald, *supra* note 80, at 277-78; see also Ian Binnie, *Constitutional Interpretation and Original Intent*, 23 SUP. CT. L. REV. (2d) 345, 357 (2004) (describing the federalist jurisprudence of Lord Watson and Lord Haldane).

⁸² PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 42 (2004). By contrast, during the four-year period during which it was Canada's court of last resort, the Supreme Court of Canada decided five of its six federalism cases in the national government's favor. See JOHN T. SAYWELL, THE LAWMAKERS: JUDICIAL POWER AND THE SHAPING OF CANADIAN FEDERATION 34 (2002).

⁸³ See RUSSELL, *supra* note 82, at 43; H.E. Smith, *The Residue of Power in Canada*, 4 CAN. BAR REV. 432, ____ (1926) ("By excluding . . . historical evidence and considering the British North America Act without any regard to its historical setting the courts have recently imposed upon us a constitution which is different, not only in detail but in principle, from that designed at Charlottetown and Québec."). There is no consensus among Canadian legal academics as to the intentions of the "framers" of the BNA Act, in part because there is no consensus over who counts as a framer. See Binnie, *supra* note 81, at 275; Peter W. Hogg & Wade K. Wright, *Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism*, 38 U.B.C. L. REV. 329, 331 (2005).

⁸⁴ [1930] A.C. 124 (P.C.) (appeal taken from Can.).

⁸⁵ [1928] S.C.R. 276.

⁸⁶ 60 U.S. 393 (1857) (holding that *Dred Scott* could not be a citizen of the United States because the word "citizen" was not originally understood to include blacks).

history,” he wrote, “is not conclusive.”⁸⁷ Rather, Lord Sankey said that constitutional interpretation requires attention to the “continuous process of evolution” within Canadian society.⁸⁸ In what has become the most famous passage in Canadian constitutional law, he wrote further:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subjected to development through usage and convention. Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be a mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.⁸⁹

In one stroke Lord Sankey’s opinion in *Edwards* effected four reversals, each momentous standing alone.⁹⁰ First, and most immediately, it overturned the Supreme Court and granted women the right to serve in the Senate. Second, in drawing a parallel between the sovereignty retained within the provinces and that retained within the national legislature, the Committee seemed to signal an end to its prior bias in favor of provincial authority. Third, the Privy Council recognized Canada’s autonomy to govern her own internal affairs, a nod to the Statute of Westminster that was already en route to passage and a presage to the formal end to Privy Council jurisdiction over Canadian cases, which would come nineteen years later.⁹¹ Finally, and most significantly for our purposes, the BNA Act would henceforward no longer be interpreted

⁸⁷ *Edwards*, [1930] A.C. at 134; cf. *Brown*, 347 U.S. 483, 489 (1954) (finding evidence of the intent of the framers of the Fourteenth Amendment as to segregated schools “at best . . . inconclusive”).

⁸⁸ *Edwards*, [1930] A.C. at 134.

⁸⁹ *Id.* at 136.

⁹⁰ See SAYWELL, *supra* note 82, at 192 (“In its explicit reasoning and result, *Edwards* was a sharp break with previous Judicial Committee jurisprudence.”).

⁹¹ See, e.g., Reference re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, 312 (P.C.) (appeal taken from Can.) (upholding the national government’s power to pass implementing legislation for an international agreement on radio under the general power to make laws for “peace order and good government” even though “[t]his idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867”).

as an ordinary statute whose meaning is inalterably fixed by the original meaning of its text and judicial interpretation thereof.⁹² Instead, interpretation would be “large and liberal,” with an eye trained not on narrow constructions of statutory text but on constitutional purposes and national growth.

The idea of a constitution as a living entity was not, of course, invented by Lord Sankey. Abbott Lawrence Lowell described a political system as “not a mere machine [but] an organism” as early as 1889, and the notion of fundamental law as essentially organic influenced the likes of Woodrow Wilson and Oliver Wendell Holmes.⁹³ But the metaphor of overtly evolutionary constitutionalism ripened earlier in Canada than in the United States. Although *Edwards* was, in effect, a rights case, the Judicial Committee quickly extended the living tree principle to structural cases. Thus, in *Proprietary Articles Trade Association v. AG Canada*, the Committee affirmed the authority of the national government to enact a statute criminalizing certain anti-competitive behavior even though the offenses were not criminal at the time of Confederation.⁹⁴ And in *British Coal Corporation v. The King*, the Committee upheld a federal statute removing the Privy Council’s criminal appellate jurisdiction and reiterated that “in interpreting a constituent or organic statute such as the [BNA] Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.”⁹⁵ As in the United States during the same period, a rejection of originalism was usually in the service of judicial restraint; the idea

⁹² See, e.g., Reference re the Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, 70 (P.C.) (appeal taken from Can.) (“Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.”)

⁹³ See WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908) (“[G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton.”); *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) (“[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal. It is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”).

⁹⁴ [1931] A.C. 310 (P.C.) (appeal taken from Can.).

⁹⁵ [1935] A.C. 500 (P.C.) (appeal taken from Que.).

was that the Constitution should not be construed so literally as to hamstring a government in responding to the vital issues of the day.⁹⁶

And as in the United States, judicial conservatives went down fighting. In 1935 Lord Sankey, author of *Edwards* and *British Coal*, was replaced as Lord Chancellor, and Lord Atkin became the Judicial Committee's presiding Law Lord and intellectual leader. Atkin, a former commercial lawyer, was sympathetic with the notion of freedom of contract and was known to be a staunch defender of *stare decisis*.⁹⁷ The timing of Lord Sankey's departure could hardly have been worse, then, for Prime Minister R.B. Bennett's New Deal package of labor reforms and social insurance measures. In *Attorney General v. Attorney General Ontario (Labour Conventions)*, the Committee invalidated Bennett's wage and hours measures on the ground that, though the statutes were enacted pursuant to an international treaty under section 132 of the BNA Act, the measures improperly infringed on provincial autonomy over property and civil rights granted by section 92.⁹⁸ Lord Atkin's opinion in the *Labour Conventions* case offered a lyrical rejoinder to the notion that the decision would frustrate Canada's blossoming into a sovereign member of the international community: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."⁹⁹

Unemployment insurance was next, with Lord Atkin dismissing the Dominion's argument that, even if insurance was traditionally within the provincial bailiwick, the legislation creating an unemployment insurance fund fell within its residual power to make laws for the

⁹⁶ See Hogg, *supra* note 73, at 87-88; F.L. Morton and Rainer Knopff, *Permanence and Change in a Written Constitution: The Living Tree Doctrine and the Charter of Rights*, 1 SUP. CT. L. REV. 533 (1990).

⁹⁷ See SAYWELL, *supra* note 82, at 218-19.

⁹⁸ [1937] A.C. 326 (P.C.) (appeal taken from Can.). Recall that the U.S. Supreme Court came out differently in its analogous decision in *Missouri v. Holland*, 252 U.S. 416 (1920).

⁹⁹ *Labour Conventions*, [1937] A.C. at 354.

peace, order, and good government of Canada in a time of emergency.¹⁰⁰ The Judicial Committee also struck down Dominion statutes regulating natural products and unfair competition,¹⁰¹ again on federalism grounds. With the New Deal decisions, “the approach to judicial review, heralded in *Edwards* . . . was not only abandoned but explicitly repudiated.”¹⁰²

Lord Atkin announced all of the New Deal decisions on the same January day in 1937. It is more than a little bit ironic that the decisions came down as the U.S. Supreme Court was deep in deliberation over *West Coast Hotel v. Parrish*.¹⁰³ For while Justice Roberts was engineering the switch in time that saved nine, Lord Atkin was unwittingly laying the groundwork for abolition of appeals to the Privy Council. The local reaction to the Committee’s New Deal decisions was swift and largely negative, in particular from a group of Progressive scholars led by University of Toronto Law School Dean William Paul McClure Kennedy and McGill law professor Francis Reginald Scott.¹⁰⁴ Kennedy had written optimistically during Lord Sankey’s tenure that “the older constitutional law is being handed over to the historians.”¹⁰⁵ Understandably, his optimism did not survive the New Deal decisions. In a symposium in the *Canadian Bar Review* devoted to those decisions, he wrote:

The time has come to abandon tinkering with or twisting the British North America Act—a curiosity belonging to an older age. At long last we can criticize it, as

¹⁰⁰ See *AG Canada v. AG Ontario (The Employment and Social Insurance Act)*, [1937] A.C. 355, 367 (P.C.) (appeal taken from Can.) (“If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.”). The BNA Act was amended in 1940 to add unemployment insurance to the federal domain. See *Constitution Act, 1867*, § 91(2A).

¹⁰¹ See *AG British Columbia v. AG Canada (The Natural Products Marketing Act)*, [1937] A.C. 377 (P.C.) (appeal taken from Can.); *AG Ontario v. AG Canada*, [1937] A.C. 405 (P.C.) (appeal taken from Can.) (invalidating part of the Trade and Industry Commission Act).

¹⁰² SAYWELL, *supra* note 82, at 226.

¹⁰³ 300 U.S. 379 (1937).

¹⁰⁴ See Eric M. Adams, *Canada’s “Newer” Constitutional Law and the Idea of Constitutional Rights*, 51 MCGILL L.J. 435, 437, 459 (2006).

¹⁰⁵ W.P.M. Kennedy, *Three Views of Constitutional Law*, 9 CAN. BAR. REV. 553, 553 (1931).

the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship.¹⁰⁶

Referring to the necessary reliance of Canadian law on English conventions of statutory interpretation, Kennedy virtually seethed, “We would have faced this issue long ago had we not too largely believed that constitutional and legal wisdom never really crossed the Atlantic.”¹⁰⁷

Writing in the same symposium, Scott sounded a similar note: “No alterations to the British North America Act will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary.”¹⁰⁸

Not just the academy bristled. The Senate instructed its counsel, W.F. O’Connor, to prepare a report on the origins of the BNA Act and its interpretation by the Privy Council. The O’Connor Report, as it came to be known, argued that the Privy Council had profoundly misinterpreted the intended division of power between the national and provincial governments, and that (quite unlike in the United States) authority was presumptively to rest with the former.¹⁰⁹ O’Connor’s conclusions remained orthodoxy for three decades,¹¹⁰ during which time Ottawa made its move. In 1939 Tory MP Charles Cahan introduced a bill abolishing all appeals to the Privy Council and Minister of Justice Ernest Lapointe referred the bill to the Supreme Court for a ruling on its constitutionality. The Court found the bill constitutional and the Judicial Committee affirmed on the authority of the Statute of Westminster, 1931.¹¹¹ Appeals to the Privy Council were officially abolished with passage of the bill and British approval in 1949.

¹⁰⁶ W.P.M. Kennedy, *The British North America Act: Past and Future*, 15 CAN. BAR REV. 393, 399 (1937).

¹⁰⁷ *Id.* at 398.

¹⁰⁸ F.R. Scott, *The Consequences of the Privy Council Decisions*, 15 CAN. BAR REV. 485, 494 (1937).

¹⁰⁹ See W.F. O’CONNOR, REPORT TO THE SENATE RELATING TO THE ENACTMENT OF THE BRITISH NORTH AMERICA ACT (1939).

¹¹⁰ See CANADIAN CONSTITUTIONAL LAW, *supra* note 78, at 184.

¹¹¹ See Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No. 9, entitled “An Act to Amend the Supreme Court Act,” [1940] S.C.R. 49; AG Ontario v. AG Canada, [1947] A.C. 127 (P.C.) (appeal taken from Can.).

Once the Supreme Court of Canada officially became Canada's court of last resort in 1949, it not only became far more hospitable to claims of federal authority¹¹² but it also accelerated the judiciary's break from the canons of British statutory interpretation. Thus, although the Court still adheres to *stare decisis* in the ordinary course, it has on occasion refused to follow precedents of the Privy Council.¹¹³ Likewise, the strict ban on reference to parliamentary debate, not relaxed in the House of Lords until *Pepper v. Hart*,¹¹⁴ was lifted in Canadian constitutional cases in the 1970s,¹¹⁵ and the Supreme Court is not mechanically opposed to referring to the legislative history of the BNA Act.¹¹⁶ Indeed, mitigation of the old English exclusionary rule with respect to extrinsic sources has been justified by way of the living tree metaphor. In the *Residential Tenancies Act* reference, the Court permitted admission of various policy reports of the Ontario Law Reform Commission. Wrote Justice Dickson, "A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a 'living tree', in the expressive words of Lord Sankey."¹¹⁷

The Court has used the metaphor regularly since the late 1970s, coinciding roughly with the strength of the patriation movement. Thus, the Court held in 1979 that a Québec law declaring that official publication of statutes was to be in French alone was inconsistent with section 133 of the BNA Act, which requires that provincial legislative acts be published in both English and French.¹¹⁸ In addressing whether "regulations" published in French also fell within the purview of section 133, which refers only to "acts," the Court cited *Edwards* and wrote:

¹¹² See SAYWELL, *supra* note 82, at 247.

¹¹³ See Hogg, *supra* note 73, at 79 (citing cases).

¹¹⁴ [1993] A.C. 593 (H.L.) (appeal taken from Eng.).

¹¹⁵ See Reference Re Anti-Inflation Act, [1976] S.C.R. 373; Stéphane Beaulac, *Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?*, 43 MCGILL L.J. 287 (1998);

¹¹⁶ See Hogg, *supra* note 73, at 78-79.

¹¹⁷ Reference Re Residential Tenancies Act 1971 [1981] S.C.R. 714, 723.

¹¹⁸ See AG Québec v. Blaikie, [1979] S.C.R. 1016.

“Dealing, as this Court is here, with a constitutional guarantee, it would be overly-technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society.”¹¹⁹ The living tree doctrine served provincial rather than federal ends in another pre-Charter federalism case, *AG British Columbia v. Canada Trust Company (Ellet’s Estate)*, in which the Court refused to limit the scope of provincial taxing authority to property even though “direct taxation within the province,” authorized by section 92 of the BNA Act, may not have been understood in 1867 to permit in personam taxes.¹²⁰

The living tree metaphor has had a nebulizing effect in structural cases, freeing both provincial and federal power to spread into domains not originally anticipated. As we shall see, however, the metaphor has expanded most dramatically in rights cases, in which its effect is quite the opposite.¹²¹

2. A Tree Grows in Canada: Judicial Review Under the Charter

The advent of the Constitution Act, 1982 meant that for the first time in its history the Supreme Court of Canada would be constitutionally committed to holding parliamentary and provincial acts invalid on the ground that they violated individual rights.¹²² The Charter of Rights and Freedoms includes an extensive list of enumerated rights, including the “fundamental freedoms” of conscience and religion; thought, belief, opinion and expression, including press

¹¹⁹ *Id.* at 1029.

¹²⁰ [1980] S.C.R. 466.

¹²¹ See Morton & Knopff, *supra* note 96, at 538-39.

¹²² See Charter § 52. The Canadian Parliament enacted a statutory Bill of Rights in 1960. An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960, 8-9 Eliz. II, ch. 44 (Can. Stat.). It remains in effect but it applies only against the national government and has largely been superceded by the Charter. While in force, it was widely viewed as ineffectual. See LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA, *supra* note 83, at 401 (“The Court’s self-restrained and deferential interpretation of the 1960 Bill of Rights effectively prevented that document from having any significant legal or political impact.”).

and other media of communication; peaceful assembly; and association.¹²³ The Charter also guarantees, *inter alia*, the rights to vote, to receive a host of criminal procedural protections, and to be free from unreasonable search or seizure, arbitrary detention, and cruel and unusual punishment.¹²⁴ The Charter studiously avoids the phrase “due process of law,” on which more later, but it does guarantee equality “before and under the law”¹²⁵ and “the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹²⁶

Although the Constitution Act, 1982 contains a Supremacy Clause,¹²⁷ it also subjects constitutional guarantees to two express limitations. First, the enumerated rights and freedoms are pronounced “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²⁸ The Charter, then, makes explicit what in the United States has been left to judicial construction: a decision rule for declaring actionable rights violations.¹²⁹ Second, section 33 of the Charter permits either the national or a provincial legislature to declare that a legislative act remains in force notwithstanding a judicial determination that it violates certain individual rights guaranteed under the Charter.¹³⁰ The declaration lasts five years and is subject to renewal by a second vote of the legislature. Québec, which is bound by but has not ratified the Constitution Act, 1982, retroactively inserted a notwithstanding declaration into all of its domestic laws in 1982, and its national assembly

¹²³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Sch. B to the Canada Act 1982, ch. 11 (U.K.), § 2 (hereinafter Charter of Rights and Freedoms).

¹²⁴ *Id.* §§ 2 (fundamental freedoms); 3 (voting); 8 (search and seizure); 9 (arbitrary detention); 10 (counsel and habeas corpus); 11 (additional criminal procedural protections); 12 (cruel and unusual punishments).

¹²⁵ The Charter expressly shields affirmative-action programs from an equality-based attack. *Id.* § 15.2.

¹²⁶ *Id.* § 7

¹²⁷ Constitution Act, 1982 § 52.

¹²⁸ Charter of Rights and Freedoms § 1.

¹²⁹ See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

¹³⁰ Charter of Rights and Freedoms § 33. Section 33 does not apply to democratic rights, mobility rights, or language rights.

invoked the notwithstanding clause for every piece of legislation passed between 1982 and 1985.¹³¹ Outside of Québec, however, use of the notwithstanding mechanism is rare—it has been invoked remedially only thrice by other provinces and never by the federal parliament.¹³²

The sole remaining official recourse against an unpopular Charter decision is constitutional amendment, but this avenue is only moderately easier than the Article V process under the U.S. Constitution.¹³³ Most Charter amendments require agreement of both the House of Commons and the Senate as well as seven of the ten provincial assemblies. Moreover, an informal norm has developed in Canada of submitting amendments to popular referendum. This process has included some spectacular and politically inopportune defeats, including most prominently the 1992 Charlottetown Accord, which was designed to secure Québec’s ratification of the Constitution. Even though the federal government, all ten provincial assemblies, the leaders of the three leading political parties, and the leaders of four national aboriginal groups supported the accord, it was defeated 54 percent to 46 percent. Says Peter Hogg, “One must conclude that significant amendments to the Constitution of Canada are, at least for the foreseeable future, impossible.”¹³⁴

All of which is to say that judicial interpretations of the Charter are immensely consequential political acts. In light of the Court’s history—two decades earlier Ronald Cheffins had labeled it “the quiet court in an unquiet country”¹³⁵—it was not inevitable that it would shed its customary timidity upon enactment of the Charter, but the Justices took to their new role with

¹³¹ See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255, 281 n.1 (2001).

¹³² See David Johansen, *The Notwithstanding Clause of the Charter*, PARLIAMENTARY INFORMATION AND RESEARCH SERVICE (2005); Stephen L. Newman, *Introduction to CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES* 1, 5 (Stephen L. Newman ed., 2004). Prospective rather than remedial invocation of section 33 has been somewhat more frequent but is far less politically visible. See Kahana, *supra* note 131.

¹³³ Although the Constitution Act, 1982 has been formally amended eight times, none was of national importance.

¹³⁴ Hogg, *supra* note 73, at 57.

¹³⁵ Ronald I. Cheffins, *The Supreme Court of Canada: The Quiet Court in an Unquiet Country*, 4 OSGOODE HALL L.J. 259 (1966).

uncharacteristic verve. So much so that by the Charter's tenth anniversary former Chief Justice Antonio Lamer was prepared to call the Charter "a revolution [on the scale of] introducing the metric system Pasteur's discoveries [and] the invention of penicillin [and] the laser."¹³⁶ In 22 years of adjudication under the 1960 statutory Bill of Rights, only 5 of 35 plaintiffs won their Supreme Court cases and the Court invalidated only one federal statute.¹³⁷ Over the first 24 years of judicial review under the Charter, the Court invalidated 89 laws, including 53 federal statutes.¹³⁸

The range of cases to which the Canadian judicial power has extended is broader than in the United States. Canada has no political question or ripeness doctrine, and mootness and standing rules are lax by comparison.¹³⁹ Moreover, the Supreme Court regards its competence as comprising a broad remedial authority.¹⁴⁰ Thus, in *Vriend v. Alberta*, the Court found unconstitutional the Alberta Individual Rights Protection Act for a sin of omission, that is, for not including sexual orientation as a protected ground from employment discrimination.¹⁴¹ As a remedy, the Court read sexual orientation into the statute despite a deliberate legislative decision

¹³⁶ *How the Charter Changes Justice*, GLOBE & MAIL, Apr. 17, 1992, at A11 (quoted in F.L. MORTON & RAINER KNOPFF, *THE CHARTER REVOLUTION AND THE COURT PARTY* 13 (2000)).

¹³⁷ MORTON & KNOPFF, *supra* note 136, at 14. The statutory provision was section 94(b) of the Indian Act, invalidated in *R. v. Drybones*, [1970] S.C.R. 282.

¹³⁸ Compare Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited—Or “Much Ado About Metaphors”*, 45 OSGOODE HALL L.J. 1, 52 (2007), with Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 76, 97 (1997).

¹³⁹ See *Operation Dismantle v. The Queen*, [1985] S.C.R. 441, 472 (“[I]f a case raises the question of whether executive or legislative action violated the Constitution, then the question has to be answered by the Court, regardless of the political character of the controversy.”); Hogg, *supra* note 73, at 71; cf. Geoffrey Cowper & Lorne Sossin, *Does Canada Need a Political Questions Doctrine?*, 16 SUP. CT. L. REV. 343 (2002).

¹⁴⁰ See MORTON & KNOPFF, *supra* note 136, at 15; Hogg, *supra* note 73, at 71.

¹⁴¹ [1998] S.C.R. 493. Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that application of New Jersey's public accommodations law to require the Boy Scouts to retain a gay scout leader violated the group's associational rights).

to exclude it. Wrote Justice Iacobucci in defense of the aggressive remedy, “by definition, Charter scrutiny will always involve some interference with the legislative will.”¹⁴²

More startling from a U.S. constitutional orientation is the *Québec Secession Reference*, in which the Court was asked to decide whether Québec could unilaterally secede from Canada.¹⁴³ For a court even to answer such a question is, in a manner of speaking, foreign to our constitutional sensibilities.¹⁴⁴ Québec’s as well, I should add—the province refused to participate in the case on political question grounds. The Supreme Court of Canada not only answered the question—in the negative—but it did so without reference to anything so concrete as text or history, the confluence of which forms the core of Our Originalism. Rather, the Court derived its decision from what it identified as four unenumerated but fundamental principles which “breathe life” into the Canadian Constitution: federalism; democracy; constitutionalism and the rule of law; and respect for minorities.¹⁴⁵ The Court wrote in its per curiam opinion: “[O]bservance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a ‘living tree,’ . . .”¹⁴⁶ The Court ultimately decided that while Québec could not secede unilaterally, if the people of Québec were clearly to express a desire to secede, all other parties to Confederation would be obligated to renegotiate the Constitution to give voice to that expression.¹⁴⁷ A judicious decision, to be sure, but not one many Americans would recognize as properly judicial.

¹⁴² *Vriend*, [1998] S.C.R. at 574.

¹⁴³ Reference re Secession of Québec, [1998] S.C.R. 217. Under the Supreme Court Act, the federal Cabinet may refer important legal questions to the Supreme Court for an advisory opinion. Supreme Court Act, R.S.C., ch. S-26 § 53 (1985).

¹⁴⁴ Cf. Mark A. Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMM. 485, 507 (2004) (“Some, but not all, of the political questions associated with efforts to prevent secession and Civil War were resolved into judicial questions.”).

¹⁴⁵ *Reference re Secession of Québec*, [1998] S.C.R. at 248.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 220-21.

The post-Charter Supreme Court of Canada has, with limited exceptions, been at least as hospitable to rights claims as the U.S. Supreme Court. It has found comparable constitutional protections in areas such as criminal procedure, religious freedom, freedom of association and assembly, and privacy rights.¹⁴⁸ As the *Vriend* case suggests, the Supreme Court of Canada has far outpaced its American cousin in prohibiting discrimination on the basis of sexual orientation.¹⁴⁹ Canada's high court is also more receptive to claims that sound in group rights. The Charter specifically protects both affirmative action policies and minority language rights, and any constitutional amendment dealing with language rights requires unanimous support from the provinces.¹⁵⁰ Indeed, among the few individual rights that the Supreme Court of Canada protects less than the U.S. Supreme Court are those that are competitive with group claims. Thus, the Court not only has upheld a national hate speech law¹⁵¹ but has permitted the criminalization of pornography that degrades women, on the theory that it constitutes a form of hate speech.¹⁵²

But the substantive differences between Canadian and American rights jurisprudence are minor by comparison to the methodological and rhetorical gulf separating the two Supreme Courts. The former gulf is, understandably, narrower than the latter. As Part II discusses, the U.S. Supreme Court is methodologically pluralistic, and the bark of the domestic originalism movement has always been worse than its bite. Moreover, the Supreme Court of Canada has never suggested that original understanding, even at a relatively low level of abstraction, is

¹⁴⁸ See Ran Hirschl, *Constitutional Rights Jurisprudence in Canada and the United States: Significant Convergence or Enduring Divergence?*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES, *supra* note 132, at 63, 67-74.

¹⁴⁹ See, e.g., Reference re Same-Sex Marriage, [2004] S.C.R. 698 (upholding federal power to mandate the legality of same-sex marriage); *M. v. H.*, [1999] S.C.R. 3 (invalidating Ontario's exclusion of same-sex couples from marriage benefits); *Egan v. Canada*, [1995] S.C.R. 513 (holding that sexual orientation is a prohibited basis for discrimination under section 15 of the Charter).

¹⁵⁰ Charter of Rights and Freedoms §§ 15(2) (affirmative action); 16-23 (language provisions); Constitution Act, 1982 § 43(b) (amendment provision).

¹⁵¹ See *R. v. Keegstra*, [1990] S.C.R. 697.

¹⁵² See *R. v. Butler*, [1992] S.C.R. 452. Catharine MacKinnon authored an influential amicus brief in the case on behalf of the Woman's Legal Education and Action Fund. See *Factum of the Intervener Women's Legal Education and Action Fund, R. v. Butler*, [1992] S.C.R. 452.

wholly irrelevant.¹⁵³ But it does not overstate things to suggest that a decision like *Heller* is unimaginable in Canada. Among jurists, legal scholars, and (by all indications) the Canadian public, the notion that a court's conclusions as to the expectations of the founding generation should be sufficient to dispose of a present individual rights case is nearly risible.

A couple of examples should set the mood. Consider first the *British Columbia Motor Vehicle Act Reference*.¹⁵⁴ At issue was the constitutionality of a British Columbia law that made driving with a suspended license a strict liability criminal offense with a mandatory jail term. The Supreme Court held, unanimously, that criminal liability and imprisonment without a *mens rea* element violated the Charter-enshrined right not to be deprived of liberty “except in accordance with the principles of fundamental justice.”¹⁵⁵ That language, found in section 7 of the Charter, is deliberately tortured. Prior to adoption of the Charter, the legislative committee tasked with reviewing the draft heard testimony from numerous Department of Justice officials who explained that in composing the text they specifically avoided using the term “due process” so as to avoid the paradoxically substantive connotations of that phrase in United States jurisprudence.¹⁵⁶

That bit of history did not impress the Court. Writing for all of his eight colleagues, Justice Lamer wrote that such testimony was entitled to “minimal weight.”¹⁵⁷ It was impossible, on his view, to locate a general legislative intent, and it would be inappropriate to make

¹⁵³ See Reference re Employment Insurance Act (Can.), [2005] 2 S.C.R. 669, ___ (“While the views of the framers are not conclusive where constitutional interpretation is concerned, the context in which the amendment was made is nonetheless relevant.”); Bradley W. Miller, *Beguiled by Interpretation: The “Living Tree” and Originalist Constitutional Interpretation in Canada* 19-29 (2008), available at <http://ssrn.com/abstract=1272042>

¹⁵⁴ [1985] S.C.R. 486.

¹⁵⁵ Charter of Rights and Freedoms § 7.

¹⁵⁶ See Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution, 1st Sess. of the 32d Parliament, 1980-81, 46:32 (1981) (statement of Strayer, Ass't Dep. Min., Dep't of Justice); Hogg, *supra* note 73, at 83.

¹⁵⁷ [1985] S.C.R. 486, 509.

dispositive in Charter interpretation “the comments of a few federal civil servants.”¹⁵⁸ Moreover, placing any significant weight on the committee proceedings would mean that:

[T]he rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. . . . If the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials . . . do not stunt its growth.¹⁵⁹

Instead, the Court said unequivocally that interpretation under the Charter was to be “purposive;” that is, with reference to the interests a given provision is meant to protect. Quoting Chief Justice Dickson’s earlier statement in *R. v. Big M Drug Mart*, Justice Lamer wrote that any interpretation of Charter rights should be “a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”¹⁶⁰

This approach marks a significant departure from U.S. jurisprudence along several dimensions. First, the Court’s dismissive attitude toward drafting records is not just anti-originalist but is anti-historicist as well. The intentions of the framers of the U.S. Constitution, specific and otherwise, remain a vital source of American constitutional wisdom.¹⁶¹ Justice Stevens’s dissenting opinion in *Heller* sought to rein in Justice Scalia not through an appeal to the living Constitution but through relentless emphasis on the intent of the drafters of the Second Amendment.¹⁶² If the Great Divide in the United States is, as Justice Scalia says, between

¹⁵⁸ *Id.* at 508.

¹⁵⁹ *Id.* at 509.

¹⁶⁰ *Id.* at 500 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] S.C.R. 295, 344).

¹⁶¹ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1198-99 (1987); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 (1981).

¹⁶² See, e.g., *Heller*, 128 S. Ct. at 2822, 2841.

original meaning and current meaning, the Supreme Court of Canada has pledged its allegiance to the latter in the clearest of terms.¹⁶³

Second, even granting a stateside trend away from original-intent originalism,¹⁶⁴ the approach reflected in Justice Lamer's opinion is starkly different from U.S. orthodoxy. Public-meaning originalism does not depend on drafting history to determine constitutional meaning, but as Justice Scalia has acknowledged, such history can provide clues as to the original understanding of the ratifying public.¹⁶⁵ The Supreme Court of Canada could have profitably adopted this approach in the *B.C. Motor Vehicle Act Reference*: Barry Strayer, one of the Charter's principal drafters, testified that he understood "fundamental justice" to be interchangeable with "natural justice,"¹⁶⁶ and indeed the Supreme Court itself had given the terms equivalence in *Duke v. The Queen*, which construed "fundamental justice" under the Canadian Bill of Rights.¹⁶⁷ Natural justice is a familiar common law and administrative law concept in Canada that generally refers to procedural, not substantive, fairness.¹⁶⁸ Justice Lamer's refusal to accord decent respect to the opinions of the Charter's drafters even to clarify

¹⁶³ See *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] S.C.R. 327, 409 ("This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution.").

¹⁶⁴ See *supra* note 20 and accompanying text.

¹⁶⁵ See *Heller*, 128 S. Ct. at 2805; *cf.* *Chan v. Korean Air Lines*, 490 U.S. 122 (1989) (stating that the drafting history of a treaty "may of course be consulted to elucidate a text that is ambiguous").

¹⁶⁶ See note 156, *supra*.

¹⁶⁷ See *Duke v. The Queen*, [1972] S.C.R. 917.

¹⁶⁸ See Martin Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory*, 28 U. TORONTO L.J. 215, 217-18 (1978); see also H.L.A. Hart, *Problems of Philosophy of Law*, in 5 ENCYCLOPEDIA OF PHILOSOPHY 264, 273-74 (Paul Edwards ed., 1967) ("The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred to as rules of natural justice."); Jeremy Waldron, *Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1145 (2008) (referring to Hart's rules of natural justice as "the truly procedural principles").

the original understanding reflects a singular discomfort with turns to history as an interpretive aide.¹⁶⁹

Finally, and perhaps most unusually from a U.S. perspective, the *British Columbia Motor Vehicle Act Reference* committed the Court to a specific and aggressive method of constitutional interpretation. Self-proclaimed and unanimous confidence in the high court's preferred interpretive methodology is unknown this side of the St. Lawrence. Not only is it rare for the U.S. Supreme Court to coalesce around a specific interpretive methodology, but it is relatively uncommon for Court opinions to contain extended discussions of constitutional theory.¹⁷⁰

Not so the Supreme Court of Canada, which with little controversy has invoked the living tree metaphor—an explicit excursion into constitutional theory—in no fewer than nineteen lead opinions since the Charter was enacted.¹⁷¹ Indeed, the Court used the metaphor in its very first case under the Charter, *Law Society of Upper Canada v. Skapinker*, in which it held that an Ontario law limiting bar membership to Canadian citizens did not offend the Charter.¹⁷² In a lengthy discourse on the fundamentals of interpretation of a constitutional instrument, complete

¹⁶⁹ See Hogg, *supra* note 73, at 79, 83. The Court has occasionally resorted to originalism in order to preserve a specific historic compromise, particularly in aboriginal cases. See, e.g., *R. v. Blais*, [2003] S.C.R. 236 (holding based on historical context that the Métis are excluded from the definition of “Indian” in the Manitoba Natural Resources Transfer Agreement); *R. v. Van der Peet*, [1996] S.C.R. 507, 548 (holding it consistent with a purposive approach to interpretation to declare that the aboriginal rights protected in § 35 of the Charter are not dynamic but refer to traditions identifiable prior to aboriginal contact with Europeans); *Adler v. Ontario*, [1996] S.C.R. 609 (refusing to extend state support for minority denominational schools in Ontario and Québec, as established under the BNA Act, to other sectarian schools).

¹⁷⁰ See Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 752 (1992); cf. *Vazquez v. Hillery*, 474 U.S. 254, 266 (1986) (“Our history does not impose any rigid formula to constrain the disposition of cases.”).

¹⁷¹ See Morton & Knopff, *supra* note 96, at 533 (“While the living tree doctrine evolved in the judicial interpretation of the [BNA Act], especially the law of federalism, no one has questioned the appropriateness of transferring it to the Charter.”); cf. Raymond Bazowski, *For the Love of Justice? Judicial Review in Canada and the United States*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES, *supra* note 132, at 223, 231 (“[A]lmost as soon as members of the Supreme Court began to interpret the Charter, they announced their ambition to engage in a purposive analysis of its clauses that would not be limited to an examination of legislative intent. That this gesture earned no stern rebuke from the very legislatures that had just produced the Charter testifies to a legislative acceptance of a noninterpretivist judicial strategy in Canada.”).

¹⁷² [1984] S.C.R. 357.

with quotations of *Marbury v. Madison*¹⁷³ and *McCulloch v. Maryland*,¹⁷⁴ the Court stated that “[n]arrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.”¹⁷⁵

More recently, the Court used the living tree analogy to uphold the constitutionality of a federal law fixing a gender-neutral definition of marriage.¹⁷⁶ Notwithstanding the obvious rights implications of the decision, it arose as a federalism question: with characteristic opacity, the BNA Act places the subject of “Marriage and Divorce” under the head of exclusive federal jurisdiction, while “Solemnization of Marriage in the Province” is an exclusively provincial matter.¹⁷⁷ The Supreme Court found that this gave the federal government domain over marriage capacity and the province domain over marriage performance. But was the meaning of marriage the same as the common law definition circa 1867? We now know enough about the Court to answer this question without even reading the opinion. That is, as the Court wrote, “[t]he ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”¹⁷⁸

3. Critics of Canadian Activism

The Supreme Court’s hostility to constitutional historicism and its repeated incantations of the living tree metaphor do not seem to have damaged its credibility with the public, nor are these significant concerns even of the Court’s academic critics. There is little evidence of widespread Canadian opposition to the Court’s exercise of power under the Charter’s

¹⁷³ 5 U.S. (1 Cranch) 137 (1803).

¹⁷⁴ 17 U.S. (4 Wheaton’s) 316 (1819).

¹⁷⁵ *Skapinker*, [1984] S.C.R. at 366.

¹⁷⁶ *See* Reference re Same-Sex Marriage, [2004] S.C.R. 698.

¹⁷⁷ *See* Constitutional Act, 1867, §§ 91(26); 92(12).

¹⁷⁸ *Reference re Same-Sex Marriage*, [2004] S.C.R. at 710.

auspices.¹⁷⁹ A 2007 survey of 1001 Canadians found that 53.9 percent of respondents thought the Supreme Court was “moving our society in the right direction,” whereas just 37.1 percent thought the Court was moving society in the wrong direction. Remarkably, even among those in the “wrong direction” cohort, opposition to the Court was not framed in terms of judicial activism or the countermajoritarian difficulty familiar to U.S. discourse. Asked the open-ended question of why they believed the Court was moving society in the wrong direction, 25.1 percent expressed general dissatisfaction with the Court’s work, and 25.9 percent suggested that the Court was soft on crime.¹⁸⁰ The sorts of criticisms that tend to recur in books like *Men in Black*, on talk radio, and at congressional hearings—“[o]ut of touch with mainstream society” (4.6 percent); “[t]oo political” (3.5 percent); allowing abortion/same-sex marriage (1.9 percent)—barely registered.¹⁸¹

None of which is to say that the Court is without its critics. The “activism” of the Supreme Court of Canada is a frequent topic of discussion among academics and politicians.¹⁸² But vanishingly few of the Court’s critics insist that its members should be constrained by the historical meaning of the Constitution.¹⁸³ Indeed, the most prominent among them, F.L. Morton and Rainer Knopff, argue that the Court’s incorporation of evolutionary principles into constitutional interpretation is an error only of degree. They write, “We are not opposed to all possible uses of the ‘living tree’ analogy, and our critique of its more extreme version does not

¹⁷⁹ See MORTON & KNOPFF, *supra* note 136, at 17.

¹⁸⁰ The Court’s criminal procedure decisions have been its least popular, but complaints in this area have not typically been originalist in nature. See, e.g., Celeste McGovern, *Benevolent Monarch*, ALBERTA REPORT, Sept. 21, 1998, at 20.

¹⁸¹ SES Research, 2007 Nationstate Omnibus Survey—Views on Supreme Court, <http://www.sesresearch.com/library/polls/POLNAT-W07-T219.pdf>.

¹⁸² See KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 74-80 (2001).

¹⁸³ See Bazowski, *supra* note 171, at 230 (arguing that the American debate between “interpretivists” and “noninterpretivists” does not “translate in the Canadian context quite the same way, even though their political subtext is certainly not unknown in Canada”).

imply the acceptance of similarly extreme (and simplistic) versions of the ‘original intent’ or ‘frozen concepts’ approaches to constitutional interpretation.”¹⁸⁴ Rather, Morton and Knopff invoke the Canadian tradition of parliamentary supremacy to argue for greater deference to the democratic decisionmaking of the whole, as against the narrow interests of aboriginal groups and other minorities. They argue, echoing James Bradley Thayer, that granting courts the power to render inconclusive the results of democratic deliberation weakens the national commitment to robust democracy.¹⁸⁵ Theirs is, in that sense, a critique in the minimalist tradition.

Likewise, when the Supreme Court received an unusual and much-discussed rebuke in a unanimous opinion of the Court of Appeal of Newfoundland and Labrador, Judge Marshall made no reference to the text, history, or structure of the Charter. The case, *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees*, concerned whether the Charter’s equality provision granted female public healthcare workers a right to negotiated retroactive pay equity adjustments notwithstanding a legislative determination that honoring the adjustments would violate a recently enacted fiscal restraint law.¹⁸⁶ Judge Marshall argued that the Supreme Court had not given sufficient attention to the doctrine of separation of powers in its proportionality decisions under section 1 of the Charter: “it cannot be said that s. 1 endows the judiciary with license to stand in the shoes of the other branches of government as ultimate arbitrator of which policy choices were in the best interests of the governed.”¹⁸⁷ The reason Judge Marshall believed that section 1 has been misapplied was not because of how it was

¹⁸⁴ Morton & Knopff, *supra* note 96, at 544.

¹⁸⁵ See MORTON & KNOPFF, *supra* note 136, at 149-166; cf. JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901) (“[The] tendency of common and easy resort to [judicial review is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”).

¹⁸⁶ 220 Nfld. & P.E.I.R. 1 (2002).

¹⁸⁷ *Id.* ¶ 362.

intended or understood in 1982, but rather because he believed the Court was trampling on an *unwritten* constitutional convention.¹⁸⁸

* * *

Legal academics frequently decry that the debate over judicial activism in the United States is hollow. The activist judge, after all, is the one who gets it wrong.¹⁸⁹ There being no shortage of Canadians who think the Supreme Court of Canada gets cases wrong, and frequently so, the charge of judicial activism is a familiar one north of the border. As Sheldon Pollack writes, “There has been a comparable disagreement in Canada over divining and articulating rights under the authority of the Charter.”¹⁹⁰ What has not been comparable is the rhetoric of the Courts’ critics. The substantial movement in the United States that views judicial activism in terms of inattention to the original meaning of the Constitution has no Canadian counterpart. Rather, both the Canadian judiciary and its many critics appear to be “virtually unanimous” in endorsing a “living tree” approach to articulating Charter rights.¹⁹¹ Canadian jurists apply the living tree metaphor not only to changes in fact—as, say, even an American originalist might view the application of the First Amendment to broadcast television¹⁹²—but to changes in the meaning of the Constitution itself.¹⁹³

¹⁸⁸ See *id.* ¶¶ 347-49. The Supreme Court disagreed with Judge Marshall on appeal, stating that “the separation of powers cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the Charter.” *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees*, [2004] S.C.R. 381, ____.

¹⁸⁹ See generally KERMIT ROOSEVELT, *THE MYTH OF JUDICIAL ACTIVISM* (2006).

¹⁹⁰ Sheldon D. Pollack, *Constitutional Interpretation from Two Perspectives: Canada and the United States*, in *CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES*, *supra* note 132, at 35, 37.

¹⁹¹ See DALE GIBSON, *THE LAW OF THE CHARTER—GENERAL PRINCIPLES* 47 (1986); Jackson, *supra* note 32, at 947. As Vicki Jackson observes, the living tree metaphor is not identical to the “living Constitution” idea once more popular in American discourse. The anatomy of a tree as root and branches “suggests that constitutional interpretation is constrained by the past, but not entirely.” Jackson, *supra*, at 926, 943. In that sense, the analogy might compare more favorably with Ronald Dworkin’s well-known chain-novel metaphor. See RONALD DWORKIN, *LAW’S EMPIRE* 228-32 (1986).

¹⁹² See, e.g., SCALIA, *supra* note 11, at 45.

¹⁹³ See Morton & Knopff, *supra* note 96, at 539-40.

B. Australia's Faint-Hearted Originalism

At first blush, the preferred approach of the High Court of Australia to interpretation of its constitution is very nearly the mirror image of that of the Supreme Court of Canada. Both courts began the last century quasi-committed to British sovereignty but deeply committed to British modes of statutory interpretation. In both countries a seminal Progressive Era judicial decision has served as a reference point in most discussions of the degree to which constitutional interpretation should be originalist or evolutionary, intentionalist or purposive, large and liberal or narrow and conservative. But whereas *Edwards* and the living tree metaphor it sprouted represent a departure from Canada's British origins, the case whose principles continue to set the terms of debate in Australia's constitutional law is rather a symbol of British continuity. Thus, in *Amalgamated Society of Engineers v. Adelaide Steamship Company* (the *Engineers Case*), Justice Higgins wrote:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.¹⁹⁴

As I discuss below, the literalist approach taken in the *Engineers Case*, which treats the Australian Constitution like the British statute that it is, was the dominant approach of the High Court until Anthony Mason became Chief Judge in 1987, roughly coinciding with Australian patriation one year earlier. It remains rhetorically potent today. As Brad Selway has written, "In

¹⁹⁴ (1920) 28 C.L.R. 129, 161-62 (Higgins, J.); see generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 47-58 (describing the common law roots of reliance on the authority of "intent of the act").

contrast to the various divergent approaches that exist in United States jurisprudence, all Australian High Court judges are likely to be viewed as being fundamentally textualists.”¹⁹⁵

Part of the reason why Australia would have taken to purposive, value-laden, or evolutionary jurisprudence later than Canada seems obvious. First, Australia lacks a bill of rights. The few enumerated rights in the Australian Constitution generally apply only against the federal government,¹⁹⁶ and so adjudicating constitutional disputes, much less those involving individual rights, is a relatively minor chore for the Court.¹⁹⁷ Second, unlike in Canada, the upshot of High Court literalism was strong deference to the power of the Commonwealth in federalism disputes. Taken in combination, those two considerations suggest a hypothesis: If narrow textualism threatened neither the power of the national government nor the articulation of rights, it is unclear that it ever would have fallen out of favor in either Canada or the United States.

But the case is more complex than that. Australian literalism, “legalism” in its more sophisticated and plenary form, is more broadly practiced but less reactionary and far less historicist than American originalism. As we shall see, legalism is an exercise in judgment, not a salve for it.

¹⁹⁵ Justice B.M. Selway, *Methodologies of Constitutional Interpretation in the High Court of Australia*, 14 PUBLIC L. REV. 234, 239 (2003).

¹⁹⁶ The constitutionally enshrined individual rights are the rights to just terms in the event of a taking of property, AUSTL. CONST. § 51(xxxi); to criminal trial by jury, *id.* § 80; and to freedom of religion, *id.* § 116. The Constitution also guarantees that those qualified to vote in state elections shall also be qualified to vote in Commonwealth elections, *id.* § 41, but the scope of this provision has been limited through judicial interpretation. State governments are forbidden from discriminating against residents of other states. *Id.* § 117.

¹⁹⁷ Constitutional cases rarely comprise more than 10 percent of the Court’s annual docket, *see* Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 70, at 106, 113, and rights cases are not dominant within that category, *see* Sir Anthony Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience*, 16 FED. L. REV. 1, 13 (1986).

1. The Commonwealth of Australia Constitution Act 1900

The Australian Constitution was the product of a domestically convened constitutional convention spanning 1897 to 1899 at which each of the six colonies was represented. The resulting Constitution was submitted for referendum within each colony and was submitted to the Parliament at Westminster for approval in 1900. The final version was little changed by Parliament and went into effect as the Commonwealth of Australia Constitution Act on January 1, 1901. The Constitution established a tripartite federal system of government, with a legislative, executive, and judicial branch, although by convention the executive is under the control of the national legislature. The principal federalism-related provisions are sections 51 and 52, which enumerate the powers of the Parliament, and sections 106-120, which include a supremacy clause and a full faith and credit clause, and which grant certain affirmative powers and impose certain limitations on state governments.

Like the U.S. counterpart on which it was modeled, the Australian Constitution does not expressly provide for judicial review, but there is evidence that the power to review legislation for constitutionality was assumed.¹⁹⁸ The High Court is a constitutional creation, its composition and jurisdiction the subject of Chapter 3 of the Constitution. The Court began to sit in 1903, when Parliament conferred jurisdiction upon it to decide constitutional cases. Its constitutional jurisdiction permits it to hear appeals from both lower federal courts and from state courts (including state-law issues), although today its jurisdiction is limited to discretionary appeals “in cases raising difficult issues of national importance.”¹⁹⁹

¹⁹⁸ See Goldsworthy, *supra* note 197, at 110; see also *Australian Communist Party v. Commonwealth*, (1951) 83 C.L.R. 1, 262 (Fullagar, J.) (“[I]n our system the principle of *Marbury v. Madison* is accepted as axiomatic.”).

¹⁹⁹ Judicial Amendment Act (No. 2), 1984 (Austl.).

The Constitution also provides for the possibility of appeal to the Judicial Committee of the Privy Council.²⁰⁰ Significantly, however, in cases involving an *inter se* federalism question, appeal to the Privy Council originally required certification from the High Court.²⁰¹ The Court certified only one question, in 1913,²⁰² before most appeals to the Privy Council were abolished in 1968.²⁰³ Even before then, the British Parliament had provided in 1907 that all appeals from state courts had to pass through the High Court before reaching the Judicial Committee.²⁰⁴ As a practical matter, then, the Judicial Committee has had very little effect on the development of Australian constitutional law.²⁰⁵

Amendments to the Australian Constitution require passage in Parliament and approval through referendum of the majority of voters nationwide and in a majority of the states.²⁰⁶ Although on paper the amendment process is easier than in either the United States or Canada, constitutional amendment has not in practice been a significant avenue of constitutional revision in Australia.²⁰⁷

2. Legalism at the Bar of the High Court

The interesting question of the extent to which judges should apply the same methods of interpretation to constitutions as to statutes is more interesting still in countries with an ongoing tradition of parliamentary supremacy. It may be that *we* must never forget that it is a Constitution we are expounding, but the question was more complicated early in Australia's constitutional history. The Australian Constitution is a statute, after all, and not even an Australian statute at

²⁰⁰ AUSTL. CONST. § 73.

²⁰¹ *Id.* § 74.

²⁰² *See* Attorney General (Cth.) v. Colonial Sugar Ref. Co. Ltd., [1914] A.C. 237 (P.C.) (appeal taken from Austl.).

²⁰³ Privy Council (Limitation of Appeals) Act, 1968 (Austl.).

²⁰⁴ Amendments to the Judiciary Act, 1903 (Aust.) (No. 8 1907).

²⁰⁵ *See* Goldsworthy, *supra* note 197, at 111.

²⁰⁶ AUSTL. CONST. § 128.

²⁰⁷ *See* Goldsworthy, *supra* note 197, at 109.

that. It would have seemed obvious to many turn of the century Commonwealth jurists that the text, narrowly construed, fixed the intentions of the British MPs whose assent was relevant to the status of the Constitution as law.

And indeed it was obvious to many. In *Tasmania v. Commonwealth*, the High Court was called upon to decide a dispute over customs duties in which it was claimed that an ambiguity in one section of the Constitution should be read in accordance with common sense rather than so as to conform, arguably absurdly, to another section.²⁰⁸ Put another way, by Chief Justice Samuel Griffith,

We were invited by [Tasmania's counsel] to apply, in construing the Constitution, some higher rule of construction; to look beyond the letter of the Constitution; to adopt something which would commend itself to our minds as being a principle of abstract justice, and if possible to read the Constitution in conformity with that principle.²⁰⁹

Griffith's words carry special weight in Australia, as he is often described as the father of its Constitution, but he was careful to describe the document as an Act of Parliament, to which "the same rules of interpretation apply that apply to any other written document."²¹⁰ Namely, the rules were to be those that the House of Lords applies to statutes. First, "they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense."²¹¹

Second, a court tasked with interpreting either a statute or a constitution should not "decide such a question . . . under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the

²⁰⁸ (1904) 1 C.L.R. 329.

²⁰⁹ *Id.* at 338.

²¹⁰ *Id.*

²¹¹ *Id.* at 339 (quoting *Sussex Peerage Case*, (1844) 8 Eng. Rep. 1034, 1057 (H.L.) (Tindal, L.C.J.)).

Statute or Statutes upon which the question depends.”²¹² The other two judges hearing the Tasmania case, writing seriatim, agreed with Griffith. Justice Barton wrote:

It would be an enormity to hold that a Judge who thinks that a certain course, laid down with apparent clearness in an Act of Parliament, is absurd, may use every means to get rid of that literal meaning which, to the minds of responsible legislators, who were in an equal position to judge of its absurdity, appeared to be reasonable.²¹³

Justice O’Connor added that, in his view, “it [cannot] be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State.”²¹⁴

Students of the debate on the modern U.S. Supreme Court over statutory interpretation will recognize the voice of Justice Scalia.²¹⁵ He has also suggested that so far as the text is clear, it is a complete statement of legislative intent, for “[m]en may intend what they will; but it is only the laws that they enact which bind us.”²¹⁶ It has long been thought by most American judges and scholars that such a rigid rule of interpretation has no place in constitutional law.²¹⁷ That suggestion rests on one or both of two assumptions, first, that a constitution meant to endure over time cannot possibly specify in advance how it should apply to unforeseen circumstances,

²¹² *Id.* (quoting *Hardy v. Fothergill*, [1888] 13 App. Cas. 351, 358 (Selborne)).

²¹³ *Id.* at 346-47 (Barton, J.).

²¹⁴ *Id.* at 358 (O’Connor, J.).

²¹⁵ *Compare* *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1549 (2007) (Stevens, J., concurring) (“As long as [the] driving policy [behind policy-driven interpretation] is faithful to the intent of Congress . . . — which it must be if it is to override a strict interpretation of the text—the decision is also a correct performance of the judicial function.”), *with id.* at 1557 (Scalia, J., dissenting) (“Contrary to the Court and Justice Stevens, I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say.”).

²¹⁶ SCALIA, *supra* note 11, at 17.

²¹⁷ The classic statement, of course, is Marshall’s: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Scalia agrees that constitutions are different, but in degree only. *See* SCALIA, *supra* note 11, at 37 (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”)

and second, that a constitution is difficult to amend and so must be tethered to the contemporary will of the people in the course of judicial review. Accepting the first assumption suggests the “large and liberal” interpretation recommended in *Edwards*, and accepting the second means that, *pace* Chief Justice Griffith, constitutional judges should pay some attention to “considerations of policy.” Where the constitution is in fact a statute of a quasi-foreign sovereign, either assumption rests on shakier footing.

The High Court’s abandonment of special rules of interpretation for the Constitution, evidenced in the Tasmania case, was sanctified in the *Engineers Case*. At issue was whether a federal arbitration award could be applied against a state. As in the United States during roughly the same era,²¹⁸ the High Court carefully scrutinized the (porous) boundary between interstate and intrastate authority in a series of cases during the first two decades of the twentieth century. And as in the United States,²¹⁹ the Court’s federalism decisions were difficult to predict in advance. Thus, the Court held in 1904 that the state of Tasmania could not tax the salary of a federal officer even though section 107 of the Constitution grants the power of taxation to the states and does not expressly limit that power.²²⁰ Barely a decade later the Court upheld a Queensland statute taxing leasehold estates in federal land.²²¹ Both decisions employed the structural, purposive, and extratextual reasoning that the *Engineers Case* sought to end. Rather than engage in the guesswork required of such reasoning, Justice Isaacs wrote that the Court’s task in constitutional interpretation was “faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact,

²¹⁸ See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating a federal tax on manufacturing income derived from child labor); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating congressional regulation of interstate commerce in the products of child labor); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (invalidating application of the Sherman Act to consolidation of sugar manufacturing).

²¹⁹ Compare *Hammer*, 247 U.S. 251, with *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal authority over interstate transportation of lottery tickets).

²²⁰ *D’Emden v. Pedder*, (1904) 1 C.L.R. 91.

²²¹ *AG Queensland v. AG Australia*, (1915) 20 C.L.R. 148.

and upholding it throughout precisely as framed, clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express.”²²² The alternative, he said, was “referable to no more definite standard than the personal opinion of the judge who declares it.”²²³

The *Engineers Case* is an immensely important landmark in Australia’s constitutional jurisprudence for two interrelated reasons. First, in upholding the federal arbitration award the Court vanquished the concept of implied intergovernmental immunities.²²⁴ Second, and most germane to our enquiry, the case expressly established that interpretation of the Australian Constitution would follow a British model of statutory interpretation rather than an American model of constitutional interpretation. The High Court would henceforward obey “the settled rules of construction which . . . have been very distinctly enunciated by the highest tribunals of the [British] Empire.”²²⁵ To wit, “[t]he first, and ‘golden rule’ or ‘universal rule’” was that judges interpreting a statute should:

[E]xclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration . . . the only safe course is to read the language of the statute in what seems to be its natural sense.²²⁶

Specifically with respect to interpretation of a written Constitution, the rule would be:

²²² *Engineers Case*, 28 C.L.R. at 147.

²²³ *Id.* at 142; *see also id.* at 145 (saying of the *Queensland* case: “It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which, when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of judges as to hopes and expectations respecting vague external conditions.”).

²²⁴ As it did with respect to Canada, the Privy Council tended to favor provincial over national rights in federalism cases, *see, e.g.*, *Webb v. Outtrim*, [1907] A.C. 81 (P.C.) (appeal taken from Vict.) (holding that Commonwealth officers were subject to state income tax), but disempowered to review *inter se* federalism questions, the Committee’s views on the matter were far less relevant in Australia.

²²⁵ *Engineers Case*, 28 C.L.R. at 148.

²²⁶ *Id.* at 149 (quoting *Vacher’s Case*, [1913] A.C. 107, 113 (H.L.) (appeal taken from Eng. & Wales) (U.K.) (Haldane, L.C.)).

“[I]f the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is *ambiguous*, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.”²²⁷

Put differently, interpretation of the Australian Constitution would be by reference to its plain text, structure, and statutory context. In the service of judicial restraint, any reference to the intentions of the drafters was strictly forbidden.

Variants on this approach to constitutional interpretation go by various names around the world—originalism being one of them—but Australians call it legalism. And it has had a distinguished pedigree since the *Engineers Case*. At his 1952 swearing-in as Chief Justice of the High Court, Owen Dixon said, “It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”²²⁸ From the time of the *Engineers Case* roughly until Australian patriation, it was orthodoxy on the High Court to interpret the Constitution according to the “ordinary or technical meaning” of the text, to refuse to expand or limit that meaning by reference to the purpose of a given provision or of the Constitution as a whole, and to “accept[] that, unless formally amended, the words of the Constitution continue to mean what they meant in 1900.”²²⁹

²²⁷ *Id.* at 150 (quoting *AG Ontario v. AG Canada*, [1912] A.C. 571, 583 (P.C.) (appeal taken from Can.) (Loreburn, L.C.)).

²²⁸ Swearing In of Sir Owen Dixon as Chief Justice of the High Court, 85 C.L.R. xi, xiv (1952). *Cf.* SCALIA, *supra* note 11, at 25 (“Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule of law is *about form*.”).

²²⁹ Goldsworthy, *supra* note 197, at 121-22, 136; *see* Attorney-General v. Commonwealth, (1981) 146 C.L.R. 559, 614-15 (Mason, J.) (“[A] constitutional prohibition must be applied in accordance with the meaning which it had in 1900.”); Commonwealth v. Tasmania (Tasmanian Dam Case), (1983) 158 C.L.R. 1, 127 (“[M]ere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution.”); S. Australia v. Commonwealth (First Uniform Tax Case), (1942) 65 C.L.R. 373 (upholding a federal taxation scheme whose obvious purpose and effect was to deprive states of their constitutionally guaranteed right to impose income taxes); *see also* Craven, *supra* note 6, at 171 (“[T]he dominant interpretative ideology of the Court has been, at least since *Engineers*, some variant of more or less strict legalism.”); David Tucker, *Textualism: An Australian Evaluation of the Debate Between Professor Ronald Dworkin and Justice Antonin Scalia*, 21 SYDNEY L.

That is not to say that the Australian Constitution is wholly impervious to technological innovation or changes in social fact. The Court has held and continues to maintain that “[t]he connotation of words employed in the Constitution does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words.”²³⁰ The High Court has frequently relied upon the distinction between the “connotation” of the Constitution’s text—its meaning as of 1900—and its “denotation”—the category of objects to which that meaning applies.²³¹ Justice Dawson has said that the Court’s idiosyncratic usage derives from that of John Stuart Mill, who in *A System of Logic* described a “connotative term” as “one which denotes a subject, and implies an attribute,” as “white” might denote the color of snow.²³² As used on the High Court, the distinction parallels the more familiar distinction in American constitutional theory between original semantic meaning and original expected application.²³³ So just as an American originalist might allow that the Fourth Amendment forbids wiretapping,²³⁴ the High Court held in 1935 that radio broadcasts constitute “telephonic, telegraphic and other like services” while admitting no embarrassment to its legalist credentials.²³⁵ As if to prove the resiliency of those credentials, however, the Court held in 1972 that section 41 of the Constitution, which guarantees the franchise in federal elections to “adult persons” who may

REV. 567, 579-80 (1991) (“[T]he ‘take-the-accepted-meaning of a term’ rule of interpretation adopted in *Engineers* has proved remarkably resilient in guiding the High Court’s work for most of this century.”).

²³⁰ *King v. Jones*, (1972) 128 C.L.R. 221, 229 (Barwick, C.J.).

²³¹ *See, e.g.*, *Queen v. Commonwealth Conciliation & Arbitration Comm’n; ex parte Prof. Engineers Ass’n*, (1959) 107 C.L.R. 208, 267 (Windeyer, J.) (“The denotations of words becomes enlarged as new things falling within their connotations come into existence or become known.”); *see also* *Street v. Queensl. Bar Ass’n*, (1989) 168 C.L.R. 461, 538 (Dawson, J.) (listing cases).

²³² JOHN STUART MILL, *A SYSTEM OF LOGIC: RACIONATIVE AND INDUCTIVE* 31 (1875); *see Street*, 168 C.L.R. at 537 (Dawson, J.).

²³³ *See* note 18, *supra*; Christopher Birch, *The Connotation/Denotation Distinction in Constitutional Interpretation*, 5 J. APP. PRAC. & PROCESS, 445, 466-67 (2003); Tucker, *supra* note 229, at 585-86; *see also* *In re Wakim; Ex parte McNally*, (1999) 198 C.L.R. 511, 552 (McHugh, J.) (referring to Dworkin’s distinction between concepts and conceptions).

²³⁴ *See, e.g.*, BORK, *supra* note 19, at 168.

²³⁵ *The King v. Brislan; Ex parte Williams*, (1935) 54 C.L.R. 262.

vote in state elections, only applies to those who were considered adults in 1901—*i.e.*, 21-year-olds—not to those who are statutorily of adult age under state law.²³⁶

On its face, then, Australian legalism appears to mirror the form of originalism promoted by Justice Scalia, mapped onto the entire Court.²³⁷ Like Justice Scalia in statutory cases, the pre-patriation High Court refused outright to consult legislative debates either to reveal legislative purpose or as an aid in ascertaining the contemporaneous meaning of the text.²³⁸ Even when the Court finally reversed its blanket rule, it said that it would thereafter refer to legislative debates “not for the purpose of substituting for the meaning of the words used the scope and effect—if such could be established—which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used [and] the subject to which that language was directed.”²³⁹ Likewise, Justice Scalia has suggested that ratification history may assist the originalist judge in ascertaining the original meaning of the Constitution’s text.²⁴⁰

As we shall see, however, the High Court’s consideration of Convention debates, which has increased dramatically in the years since patriation,²⁴¹ is on a different order than Justice Scalia’s use of ratification history to divine original meaning. The Great Divide in Australia is not between original meaning and current meaning but between original meaning and original intent. Use of legislative debates, then, represents a momentous departure from orthodox

²³⁶ King v. Jones, (1972) 128 C.L.R. 221.

²³⁷ See Tucker, *supra* note 229, at 581. One way in which High Court orthodoxy departs dramatically from Justice Scalia is in its regard for *stare decisis*. Prior to the mid-1980s the Court, true to English tradition, regarded even wrongly decided precedent as nearly unimpeachable, whereas Justice Scalia tends to view it as a necessary evil. See JASON L. PIERCE, INSIDE THE MASON COURT REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED 178 (2006); SCALIA, *supra* note 11, at 140.

²³⁸ See Goldsworthy, *supra* note 197, at 123-24; see, e.g., A-G ex rel Black v. Commonwealth, (1981) 146 C.L.R. 559; A-G (Cth); ex rel McKinlay v. Commonwealth, (1975) 135 C.L.R. 1.

²³⁹ Cole v. Whitfield, (1988) 165 C.L.R. 360, 385.

²⁴⁰ See SCALIA, *supra* note 11, at 38; *supra* note 165 and accompanying text.

²⁴¹ See Goldsworthy, *supra* note 197, at 127.

Australian legalism. In combination with other innovations of the Mason Court, the turn to extrinsic evidence has contributed to a palpable tension between the Court's legalist tradition and its potentially purposive future.

3. The Mason Court Revolution

Like Canada and New Zealand, Australia became fully patriated in the 1980s. The Statute of Westminster had liberated the Commonwealth to legislate extraterritorially and ended the repugnancy doctrine, whereby Australian laws would be invalidated if they conflicted with United Kingdom law. But, with consent, the British Parliament still had authority to legislate for Australia, and the states remained bound by the repugnancy and extraterritoriality doctrines. Moreover, as of the 1980s the Privy Council still had the power to adjudicate appeals from the Supreme Courts of the various states. That all ended with the Australia Act 1986. The Act, which comprised joint statutes of the British and Australian Parliaments, effectively severed all remaining legal ties between the United Kingdom and the Commonwealth.²⁴²

Australian patriation nearly perfectly coincided with the ascendancy of Anthony Mason to the position of Chief Justice of the High Court in 1987. Mason had not been thought a particularly reform-minded jurist during his 15 years on the High Court prior to his tenure as Chief Justice, but his impact as Chief is perhaps best expressed by political scientist Jason Pierce's conclusion based on more than 80 interviews with Australian appellate judges: "Australia's appellate judges tend to speak in 'then and now' terms regarding the High Court, such that the 'then' encompassed the years from federation to the mid-1980s, while the 'now'

²⁴² Some nominal ties remain. For example, the Queen of England wields formal executive authority, although that authority is legally independent of her role as head of the British monarchy. Also, the text of the Australian Constitution, § 74, permits appeals to the Privy Council upon certification by the High Court, but that provision has been officially ruled a dead letter. *See Kirmani v. Captain Cook Cruises (No 2)*, (1985) 159 C.L.R. 461.

meant the years since the mid-1980s.”²⁴³ According to Mason’s former colleague Justice McHugh, Mason viewed patriation as more than simply a change in the formal status of the Commonwealth’s relationship with the United Kingdom but rather as a mandate to conceptualize constitutional interpretation and rights-formation in broader terms.²⁴⁴

With the help of relatively reform-minded colleagues such as William Deane, Mary Gaudron, and John Toohey, Mason inaugurated a departure from the strict legalism associated with the *Engineers Case* and with Chief Justice Dixon.²⁴⁵ Mason, Deane, and Gaudron had all been educated at the University of Sydney, where, according to Jeffrey Goldsworthy, they were exposed to “more pragmatic, consequentialist legal theories” than many of their predecessors.²⁴⁶ Accordingly, the Mason Court was more willing to engage in purposive analysis; more willing to find implied rights within the constitutional structure; more willing to allow for constitutional evolution; and increasingly likely to look to transnational sources for constitutional wisdom.

In a speech given one year before he became Chief Justice, Mason announced what he perceived to be an emerging trend in Australian constitutional law, namely a “move[] away from ‘strict and complete legalism’ and toward a more policy oriented constitutional interpretation.”²⁴⁷ Most would agree that the statement was more predictive than descriptive. Two years later, in its unanimous per curiam in *Cole v. Whitfield*, the case in which the Court explicitly abandoned its rule against reference to Convention debates, the Court warned of “the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula.

²⁴³ PIERCE, *supra* note 237, at 42; accord Goldsworthy, *supra* note 197, at 144 (“It is generally agreed that in the late 1980s, the Court took a new direction, adopting a more purposive and even creative approach in constitutional and other cases.”).

²⁴⁴ Michael McHugh, *The Constitutional Jurisprudence of the High Court: 1989-2004*, 30 SYDNEY L. REV. 5, 6 (2008) (“[Mason] regarded Australia’s evolving status as an independent nation as inevitably requiring a change in the approach of High Court justices to judging.”).

²⁴⁵ PIERCE, *supra* note 237, at 208-09.

²⁴⁶ Goldsworthy, *supra* note 197, at 155.

²⁴⁷ Mason, *supra* note 197, at 5.

Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its application.”²⁴⁸ Sophisticated observers recognized the announcement of a more open embrace of policy-balancing and purposive interpretation.²⁴⁹ And indeed the decision itself held that section 92 of the Constitution—providing that “[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, . . . shall be absolutely free”²⁵⁰—does not quite mean what it says. The Court held that Convention debates revealed that the purpose behind the provision was not to allow “anarchy” in trade but to prevent “discriminatory burdens of a protectionist kind.”²⁵¹ In limiting the text of section 92 to the scope consistent with its historical purpose, the Court overruled some 127 cases and, it should be noted, took the Stevens side of the interpretive debate at the heart of *Heller*.²⁵²

There was much more to the Mason Court revolution. As discussed above, Australia’s Constitution guarantees precious few individual rights. But Lionel Murphy’s appointment to the Court in 1975 produced consistent calls for recognizing a variety of implied constitutional rights, most prominently including the right to political communication.²⁵³ The argument, very much in the spirit of Charles Black, was that the Constitution’s provisions for parliamentary elections and representative state governments implied a basic freedom to express political ideas.²⁵⁴ *Miller v.*

TCN Channel Nine, involving a prosecution for a television station’s use of an unauthorized

²⁴⁸ *Cole v. Whitfield*, (1988) 165 C.L.R. 360, 402; cf. BICKEL, *supra* note 9, at 95-96 (arguing that the Supreme Court should not give affirmative sanction to the actions of the political branches except when consistent with principle).

²⁴⁹ See Dan Meagher, *Guided by Voices? Constitutional Interpretation on the Gleeson Court*, 7 DEAKIN L. REV. 261, 262 (2002) (calling *Cole* a “mortal blow” to literalism); Leslie Zines, *Legalism, Realism and Judicial Rhetoric in Constitutional Law*, 5 CONST. L. & POL’Y REV. 21, 24 (2002).

²⁵⁰ AUSTL. CONST. § 92.

²⁵¹ *Cole*, 165 C.L.R. at 394.

²⁵² The number of overruled cases comes from McHugh, *supra* note 244, at 12.

²⁵³ See AUSTRALIAN CONSTITUTIONAL LAW AND THEORY 1159 (Tony Blackshield & George Williams eds., 3d ed., 2002.).

²⁵⁴ See *Ansett Transport Ind. (Operations) Pty Ltd. v. Commonwealth*, (1977) 139 C.L.R. 54, 88 (Murphy, J.); cf. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 39-43 (Ox Bow Press 1983) (1969).

transmitter for an interstate broadcast, presented the Court with an opportunity to declare such an implied right in 1986. Justice Murphy reiterated his view that such a right exists but the other six Justices resolved the case on alternative grounds.²⁵⁵

Six years later, however, following patriation, five Justices were prepared to announce an implied freedom of political communication. Wrote Justice Brennan in *Nationwide News v. Wills*, “Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy.”²⁵⁶ In the companion case of *Australian Capital Television v. Commonwealth*, Chief Justice Mason acknowledged that the founding generation had deliberately omitted judicially enforceable individual rights from the Constitution, preferring to leave rights enforcement to the principle of responsible government.²⁵⁷ Crucially, however, that decision was made before patriation, which “marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.”²⁵⁸ Under the new populist order, parliamentary representatives “are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. . . . Indispensable to that responsibility is freedom of communication, at least in relation to public affairs and political discussion.”²⁵⁹ The implication was that the right did not exist on the day of federation but arose incident to the sort of democracy the Australian nation had become.

²⁵⁵ (1986) 161 C.L.R. 556.

²⁵⁶ (1992) 177 C.L.R. 1, 48 (Brennan, J.); *accord id.* at 72 (Deane & Toohey, JJ.) (“The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person.”).

²⁵⁷ (1992) 177 C.L.R. 106, 135.

²⁵⁸ *Id.* at 138.

²⁵⁹ *Id.*

The cat thus out of the bag, the Court wielded the right of political communication to erect a constitutional defense to defamation in *Theophanous v. Herald & Weekly Times*.²⁶⁰ And in *Leeth v. Commonwealth*, three Justices were of the view that the Constitution contained an implied individual right to equal treatment under the law.²⁶¹ To an American audience the hue and cry the Court's implied freedoms cases sparked in Australian legal circles will seem like much ado about very little. But against the backdrop of Australian legal norms, judicial creativity of this sort was exceptionally rare prior to patriation.

In addition to engaging more frequently in purposive analysis and occasionally finding implied individual rights in the Constitution, the Mason Court was more openly willing to allow that the Constitution may adapt to changed circumstances. The boundary between connotation and denotation has never been airtight, and many Australian court watchers believe that even the committed legalist has often been able to squeeze his way through just fine.²⁶² But in select cases the Mason Court was unusually open about constitutional updating.

Thus, in *Street v. Queensland Bar Association*, the Court had to decide whether the State of Queensland could restrict bar admission to state residents, notwithstanding sections 92 and 117 of the Constitution, which generally prohibit interstate discrimination.²⁶³ The Court had held in a prior case, *Henry v. Boehm*, that those constitutional provisions did not apply because the challenged statute did not require anyone to abandon her domicile.²⁶⁴ Following the pre-Mason

²⁶⁰ (1994) 182 C.L.R. 104; *see also* *Stephens v. W. Austl. Newspapers Ltd.*, (1994) 182 C.L.R. 211 (finding the right within state constitutions as well); *Coleman v. Power*, (2004) 220 C.L.R. 1 (invalidating a conviction for insulting a police officer on the grounds that application of the statute under the circumstances burdened the implied freedom of political communication). The High Court's rule was similar to that announced by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁶¹ (1992) 174 C.L.R. 455.

²⁶² *See* LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 24-32 (2008); Mason, *supra* note 197, at 5; Kirby, *supra* note 5.

²⁶³ (1989) 168 C.L.R. 461. Section 117 has been compared to the privileges and immunities clause of the U.S. Constitution and was drafted with that clause in view. *See id.* at 485 (Mason, C.J.).

²⁶⁴ (1973) 128 C.L.R. 482.

Court preference for formal rules over balancing tests, the *Henry* Court held moreover that the discriminatory character of a state law should be determined by its formal operation rather than by its practical effect.²⁶⁵ The High Court reversed *Henry* outright, with Chief Justice Mason writing *inter alia* that “[i]t would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect.”²⁶⁶ It had long been thought that permitting judges to look beyond the face of a statute to its actual operation would interfere with legislative prerogatives and destabilize constitutional interpretation: a statute thought constitutional at time T_0 could become unconstitutional at time T_1 , solely through judicial assessment of social facts.²⁶⁷ The Court expressed no such concern in *Street*.

More recently, in *Sue v. Hill*, the Court held that British subjects were citizens of a “foreign power” under section 44(i) of the Constitution and therefore could not be members of Parliament.²⁶⁸ The controversy stems from the fact that the United Kingdom was not a foreign power in 1901. The Court’s lead opinion stated that “[w]hilst the text of the Constitution has not changed, its operation has. . . . The Constitution speaks to the present and its interpretation takes account of and moves with these developments.”²⁶⁹ Notably, the Court said so without any reference to its connotation-denotation distinction, which seems a natural fit for the case. This language was sufficiently alarming that Justice Callinan, who voted to dismiss the case on jurisdictional grounds, wrote a concurring opinion in which he called into question the petitioner’s “evolutionary theory” of the case as introducing too much uncertainty into the law.²⁷⁰

²⁶⁵ *See id.*

²⁶⁶ *Street*, 168 C.L.R. at 487-88.

²⁶⁷ *See, e.g., Engineers Case*, 28 C.L.R. at 142, 145. *Cf. The King v. Barger*, (1908) 6 C.L.R. 41, __ (“A statute is only a means to an end, and its validity depends upon whether the legislature is or is not authorized to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences.”).

²⁶⁸ (1999) C.L.R. 462.

²⁶⁹ *Id.* at 496.

²⁷⁰ Justice Callinan wrote: “The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples’ rights, status and obligations as this case shows.” *Id.* at 571-72 (Callinan, J.).

Relying upon *Sue v. Hill* among other cases, Justice Michael Kirby has articulated what he calls a “living force” theory that, as of 2000, he believed was “gradually emerging as the theory proper to the construction of the Constitution.”²⁷¹ Kirby suggests that High Court case law over the last two decades is slowly conforming to the view of constitutional interpretation held by Andrew Inglis Clark, a leader in the Australian federation movement who also happened to be an expert on the American Constitution and a friend of Oliver Wendell Holmes.²⁷² His writings on Australian interpretation resembled Holmes’s later opinion in *Missouri v. Holland*:

The social conditions and the political exigencies of the succeeding generations of every civilized and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead . . . but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.²⁷³

Three different Justices, including Kirby himself, have cited favorably to Clark’s “living force” theory in High Court opinions, although as I discuss below it does not command a majority on the current Court.²⁷⁴

The final piece to the Mason Court’s constitutional law revolution—in addition to purposive analysis, recognition of implied constitutional rights, and explicitly evolutionary jurisprudence—is incorporation of transnational legal sources into Australian constitutional law. Given that Australia was only quasi-sovereign at federation and modeled its Constitution expressly on that of the United States, it is to be expected that reference to foreign law has a long

²⁷¹ Kirby, *supra* note 68, at 11.

²⁷² See PIERCE, *supra* note 237, at 36.

²⁷³ ANDREW INGLIS CLARK, *STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW* 21 (first published 1901, 1997 ed.).

²⁷⁴ See *Eastman v. The Queen*, (2000) 203 C.L.R. 1, ___ (Kirby, J.); *McGinty v. Western Australia*, (1996) 186 C.L.R. 140, ___ (Toohey, J.); *Theophanous*, 182 C.L.R. at 171-73 (Deane, J.).

pedigree in Australian jurisprudence.²⁷⁵ But citations to cases of foreign nations other than the United Kingdom accelerated dramatically in the 1980s. American cases, for example, were cited in 13 percent of High Court decisions in the 1970s, compared to 25 percent in the 1980s and 41 percent in the 1990s. Canadian cases were cited in just 10 percent of High Court decisions in the 1970s, but 21 percent in the 1980s and 37 percent in the 1990s.²⁷⁶ Cases from the constitutional courts of South Africa, New Zealand, and India are also much more frequently cited than in years past, as are international conventions and legal norms.²⁷⁷

American originalists are apt to point out that reference to contemporary foreign and international law to define the substance and scope of constitutional provisions is difficult to reconcile with traditional forms of originalism.²⁷⁸ But in *Australian Capital Television*, for example, several High Court Justices articulated limitations on the implied freedom of political communication by reference to precedents of the United States Supreme Court and the European Court of Human Rights rather than to any original understanding particular to the Australian tradition.²⁷⁹ Where aids to interpretation once could not be extrinsic to the text of the Constitution, they now may be extrinsic to the Commonwealth itself.

4. The Gleeson Counterrevolution

Controversy has attended virtually all of the changes introduced during Chief Justice Mason's tenure. Few would doubt, moreover, that the Court backtracked, arguably a great deal, during the recent tenure of Murray Gleeson as Chief Justice. Gleeson was a classmate of former

²⁷⁵ See Goldsworthy, *supra* note 197, at 135; Brian Opeskin, *Australian Constitutional Law in a Global Era*, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 171, 183-84 (French et al. eds., 2003).

²⁷⁶ PIERCE, *supra* note 237, at 170.

²⁷⁷ See *id.* at 172; Opeskin, *supra* note 275, at 184-85.

²⁷⁸ See, e.g., Antonin Scalia & Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519, 525-526 (2005).

²⁷⁹ 177 C.L.R. at 144 (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 262, 272 (1971) and *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)); *id.* at 241 (citing *Mills v. Alabama*, 384 U.S. 214, 219 (1966)); *id.* at 159 (Brennan, J.) (citing *The Observer & The Guardian v. U.K.*, App. No. 13585/8, 14 Eur. C. H.R. Rep. 153, 178 (1991)).

Liberal Party Prime Minister John Howard's at the University of Sydney, and Howard appointed Gleeson to the Chief Justiceship in 1998. Australia's Liberal Party is misleadingly named, as its liberalism is more Friedman than Rawls: it is associated with laissez faire economics and social conservatism. Gleeson brought that conservatism with him to the High Court. Directly contrary to the themes of the Mason Court, Gleeson has written that "the members of the Court are expected to approach their task by the application of what Sir Owen Dixon described as 'a strict and complete legalism.'"²⁸⁰

Gleeson's perspective is hortatory. The battle for the soul of the High Court over the last decade has been open and notorious. The Court's conservatives, in the persons of Chief Justice Gleeson and Justice Callinan, have sought to curtail much of the discretion inherent in the Mason Court reforms, while more liberal members, Justice Kirby most persistently, have sought instead to broaden it. *Singh v. Commonwealth* is emblematic.²⁸¹ Section 51(xix) of the Constitution empowers Parliament to legislate with respect to "naturalization and aliens."²⁸² Tania Singh was born in Australia to undocumented Indian parents. Although Australia does not confer automatic birthright citizenship, Singh argued that she was nevertheless not an "alien" and therefore could not be deported pursuant to a statute enacted under the authority of section 51(xix).

Chief Justice Gleeson's opinion in *Singh* includes a lengthy discourse, far longer than any in the U.S. Reports, on the nature of constitutional interpretation. It should by now be clear that such discourse is not unusual in High Court opinions, which are issued seriatim and are therefore more personal than the typically antiseptic majority opinions of the U.S. Supreme Court. Gleeson's view is an orthodox originalist one: "Judicial review of the validity of legislative action by reference to the Constitution is conducted upon the hypothesis that the terms, express

²⁸⁰ MURRAY GLEESON, *THE RULE OF LAW AND THE CONSTITUTION* 85 (2000).

²⁸¹ (2004) 222 C.L.R. 322.

²⁸² AUSTL. CONST. § 51(xix).

and implied, of a written instrument, brought into existence more than a century ago, bind present and future parliaments, and courts.”²⁸³ The meaning of those terms would be determined not by modern exigencies but by “the contemporary meaning of the language used in 1900.”²⁸⁴ Here, it was clear to Gleeson that as of 1900 the Parliament had the authority to determine the scope of alienage and not merely of citizenship. Concurring, Justice Callinan warned against overuse of the connotation-denotation distinction: “Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the Constitution.”²⁸⁵

Justice Kirby agreed with Chief Justice Gleeson and Justice Callinan in result but engaged them directly on constitutional interpretation. He referred to the theory that constitutional text should receive “the same meaning and intent with which [the Constitution] spoke when it came from the hands of its framers, and was voted on and adopted by the people,” and placed those words in the mouth of Chief Justice Taney in *Dred Scott v. Sandford*.²⁸⁶ Because a constitution must endure through the ages, Kirby said, “the ambit of the power [of interpretation] is not limited by the wishes, expectations or imagination of the framers. They did not intend, nor did they enjoy the power, to impose their wishes and understanding of the text upon later generations of Australians.”²⁸⁷ Justice Kirby ultimately concluded that Parliament had the power to declare Singh an alien, but he did so by reference to the chameleonic nature of the term “alien;” to international law norms of dual and birthright citizenship; to the Fourteenth Amendment to the U.S. Constitution; to precedent; and to potential policy consequences.²⁸⁸

²⁸³ *Singh*, 222 C.L.R. at ____ (Gleeson, C.J.).

²⁸⁴ *Id.* at ____.

²⁸⁵ *Id.* at ____ (Callinan, J.).

²⁸⁶ *Id.* at ____ (Kirby, J.) (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 426 (1857)).

²⁸⁷ *Id.* at ____.

²⁸⁸ *See id.* at ____-____.

These battle lines recur elsewhere. In *McGinty v. Western Australia*, decided in the brief interregnum between the Mason and Gleeson Courts,²⁸⁹ Justice McHugh and Justice Toohey jostled over whether a freestanding principle of representative democracy underlies the Constitution and may be given dynamic content by judges.²⁹⁰ In *Re Wakim; Ex Parte McNally*, Justice McHugh and Justice Kirby locked horns over the role convenience and policy should play in determining whether Parliament had the power to vest jurisdiction in federal courts to decide issues of state law, a matter on which the Constitution is silent.²⁹¹ In *Eastman v. The Queen* and *Brownlee v. The Queen*, both criminal procedure cases, Justices McHugh and Kirby were at it again, delivering lengthy and detailed opinions on the relative merits of originalism and “living force” constitutionalism.²⁹² In each of those cases, the “living force” view was in dissent, leading most observers to conclude that the Gleeson Court had successfully reinvigorated Australian legalism.²⁹³

Reinvigorated but not reinaugurated. All that is orthodox on the High Court today is that, relative to the past, little is orthodox. The lasting legacy of the Mason Court is not that it made Australian constitutional interpretation purposive but that it made it, like ours, pluralistic. Throughout his battles with Justice Kirby, Justice McHugh maintained that the High Court employs the many tools available to common law judges in its constitutional decisions:

The common law constitutional method is a house of many rooms. It emphasizes text and the drawing of constitutional implications from the text and structure of the Constitution. It relies heavily on previous authorities and the doctrines associated with those authorities. It uses history, particularly for ascertaining the purpose of particular constitutional provisions. But it recognises that none of these tools—including textual analysis—may be decisive. . . .

²⁸⁹ Gerard Brennan was Chief Justice from 1995 to 1998.

²⁹⁰ (1996) 186 C.L.R. 140.

²⁹¹ (1999) 198 C.L.R. 511, 549-53, ___-__.

²⁹² (2000) 203 CLR 1, 44-51, ___-__; (2001) 207 C.L.R. 278, ___-___, ___-___.

²⁹³ See McHugh, *supra* note 244, at 7. By way of example, the Gleeson Court successfully morphed the *ratio decidendi* of *Australian Capital Television* from a natural law basis to a positivist basis. See *Lange v. Australian Broadcasting Corp.*, (1996) 186 C.L.R. 302.

And since the beginning of the Mason Court, where the constitutional text is not compelling, as is often the case, it takes into account conflicting social interests, values and policies in seeking to give the Constitution a construction that accords with the needs of contemporary Australia.²⁹⁴

This approach has become relatively common ground among High Court Justices.²⁹⁵ Recognition of its own pluralism brings the Court into line with much of the world,²⁹⁶ but it represents monumentally different rhetoric from what prevailed two decades ago.²⁹⁷ The Court as a whole remains more enamored of text and original meaning than a typical European, Canadian, or even American jurist, but its originalism is, as Justice McHugh has said, “faint-hearted.”²⁹⁸ It is text-focused but not fetishistic; it is able to accommodate extrinsic evidence and willing openly to consider the policy implications of a too-literal reading of the document.²⁹⁹

* * *

Australian jurists have long been and to a great extent remain “originalist.” The reaction of the Australian bench to the Mason Court revolution has been stark and, in significant respects, negative. Pierce’s study begins with an accounting of some of the colorful adjectives used by the judges he interviewed to describe the Mason Court: “hyperactive,” “adventurous,” “incomparably activist,” “composed of judicial legislators,” “controlled by Jacobins,” “under the influence of left-wing theorists,” “deciding cases as Marx or Freud would have,” and “overcome

²⁹⁴ McHugh, *supra* note 244, at 8-9.

²⁹⁵ *See, e.g., SGH Ltd. v. Comm’r of Taxation*, (2002) 210 C.L.R. 51, 75 (Gummow, J.) (“Questions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened, and the elect.”); Selway, *supra* note 195, at 246.

²⁹⁶ *See* Jackson, *supra* note 32, at 926.

²⁹⁷ *See* McHugh, *supra* note 244, at 6.

²⁹⁸ *Eastman*, 203 C.L.R. at 44; *Cf.* Scalia, *supra* note 19, at 862, 864 (referring to himself and others as “faint-hearted” originalists).

²⁹⁹ *See* Goldsworthy, *supra* note 197, at 159.

with delusions of grandeur.”³⁰⁰ It is my impression as an American constitutional scholar that the rhetoric in U.S. legal circles is less heated, even though the Supreme Court itself is decidedly less text-bound, more creative, and more pluralistic than the High Court of Australia.

As I discussed in Part II.B.2, however, the Great Divide in Australia is different than it is here. American scholars, not to mention the lay public, tend to lump together original intent and original meaning as two different ways of practicing a methodology whose essential features they share: attention to a fixed historical meaning as a tool for restraining judges. History is linked to judicial restraint. But it is recognized (and feared) in Australia that history can do much more than that. It can provide clues as to original purposes and expectations, can alter both the connotation and the denotation of constitutional text, and can even change the holistic purposes of constitutionalism itself. In that sense, history can be generative rather than constraining. As Justice McHugh has written, even the conservative Gleeson Court “has seen constitutional history as an ongoing narrative. On this view, the state of the law in 1900 provides context, but it is not an interpretative straitjacket.”³⁰¹ And even on the orthodox legalist view dominant prior to the Mason Court, restraint was achieved not through a focus on history—which is extrinsic and contestable—but by a focus on text and on existing doctrine.³⁰² *Stare decisis* is not a pragmatic exception to Australian legalism but lies at its core. That is, the view is Burkean, not Scalian.

IV. Six Hypotheses

We have, then, a not insignificant paradox. Many sober and respectable academic theorists, judges, and ordinary citizens of the United States find originalism a tidy, even

³⁰⁰ PIERCE, *supra* note 237, at 3.

³⁰¹ McHugh, *supra* note 244, at 22; *see* Craven, *supra* note 6, at 176 (“[T]here can be little doubt that any theory of original intent stands in flat contradiction to the existing orthodoxy of constitutional interpretation in Australia.”); Selway, *supra* note 195, at 250 (“The [Gleeson Court] approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or ‘tied to the past.’”).

³⁰² *See* AUSTRALIAN CONSTITUTIONAL LAW & THEORY, *supra* note 253, at 322.

compelling response to the countermajoritarian difficulty. Yet hardly any sober or respectable foreign nation, our closest cousins included, boasts a similar mass of opinion in favor of American-style originalism. Even in other democratic nations with long traditions of constitutional judicial review, with deep common law roots, and with difficult processes of constitutional amendment, resistance to judicial activism does not commingle with historical fetishism. The wisdom of crowds is no help here: it damns equally the notions that originalism is either uniquely suited to judicial review of a written constitution in a democracy or is, in short, bunk.³⁰³

The paradox recommends an answer, namely that the measure of originalism's success lies not in originalism but in ourselves. Aspects of our history and political culture are apt to heighten our sensitivity to the historicist appeals that characterize the originalism movement of the last three decades. This Part suggests six hypotheses that help to explain the origins of Our Originalism. First, I argue that the passage of time, in combination with our revolutionary history, indoctrinates a "filiopietistic" attitude toward the founding generation.³⁰⁴ Second, I suggest that our revolutionary political origins also focus constitutional interpretive attention on that era to an extent not possible in Canada or Australia. Third, we remain in the grips of a rights backlash that is directly responsive to the perceived excesses of the Warren Court. Fourth, our public participates more directly in the selection of judges to the constitutional court than either Canada's or Australia's, which can encourage appeals to populism and demagoguery. Fifth, relative to Canada (but not Australia) we tend to emphasize a monolithic vision of the political order that is hospitable to originalism. Finally, a suspicion of evolution and an embrace of the authority of sacred texts is a prominent feature of our religious culture.

³⁰³ See Berman, *supra* note 19.

³⁰⁴ See Siegel, *supra* note 34, at 218; Aviam Soifer, *Full and Equal Rights of Conscience*, 22 HAWAII L. REV. 469, 473 n.15 (2000).

I use the term “origins” guardedly. It is not to be confused with “causes” or “requisites.” It is worth repeating that this is hardly a scientific enquiry, and it is not amenable to the scientific method. The question this Article seeks to answer is one not of causation but of influence and association. Consider by analogy the origins of a cold. We may identify risks—insufficient hand-washing; hanging around toddlers; overexhaustion; and so forth—but the actual operation of the virus may remain elusive.

A. Fixating on the Framers

In November 2008 the American Constitution Society sponsored a conference called “The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union.” The mission statement for the conference observed that “[i]n current legal debates, many invoke ‘the founding’ of the Constitution yet focus only on the eighteenth-century framing, and ignore the significant changes to our country and our Constitution wrought by the Civil War.”³⁰⁵ Less charitably, Canadian Supreme Court Justice Ian Binnie is said to have told a New Zealand conference that “the approach of [his] counterparts in the United States could only be explained by appreciating that Americans were engaged in a ritual of ancestor worship.”³⁰⁶

It is beyond any doubt that Americans revere the Washingtons, Jeffersons, Hamiltons, and Madisons of the founding generation. There are many explanations for this, but one is the passage of time itself.³⁰⁷ That generation created a nation that, nominally at least, has endured for

³⁰⁵ See *The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union*, <http://www.acslaw.org/secondfounding>.

³⁰⁶ Kirby, *supra* note 68, at 2. Justice Binnie has written of his own country:

We do not have a Jefferson or a Madison or a Hamilton whose philosophic writings have entered the national psyche . . . and whose works can be mined for nuggets of shared wisdom. Sir John A. [Macdonald] is deservedly a revered icon, but he considered his political skills to be practical rather than philosophical, his Scottish tastes being libatious rather than literary.

Binnie, *supra* note 81, at 376.

³⁰⁷ Not that the passage of time is strictly necessary. As Jefferson wrote as early as 1816, “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.

more than 230 years and has enabled us to breathe what Charles Black called “the sweet air of legitimacy.”³⁰⁸ Meese began his July 1985 speech to the ABA with the declaration that “[w]e Americans rightly pride ourselves on having produced the greatest political wonder of the world—a government of laws and not of men.”³⁰⁹ Meese’s pride emanates from the durability of the American experiment: The passage of time canonizes the ideas and historical figures of the founding era. So Justice Scalia may say, and indeed may believe, that he so frequently refers to *The Federalist* because it is emblematic of contemporary usage of constitutional text, but it is more significant that he is availing himself of the rhetorical purchase the views of Madison, Hamilton, and Jay confer. As Vicki Jackson writes, “Given the impoverished discourse and absence of visible public virtues of self-restraint in today’s national elected politics, a choice that is expressed as being between the ‘Founding Fathers’ and anyone living today makes it likely that nostalgia will trump.”³¹⁰

There are a number of obstacles to peoples of other nations viewing their framers in this way. For one thing, the constitutions of countries like Germany and Japan were forcibly imposed from without, and in the case of Canada and Australia, the framers were subjects of the British Crown and did not enjoy formal lawmaking authority. But historical distance itself is also of some consequence. Those who promote originalism in the United States were not present at the founding, were not privy to the compromises that generated the Constitution’s text, and did not know the framers personally. By contrast, many of the current Justices on the Canadian Supreme Court are old enough to have had personal relationships with the people who crafted the Charter

They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.” Letter from Thomas Jefferson to Samuel Kercheval (Jul. 12, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816-1826, at 42 (Paul Leicester Ford ed. 1892).

³⁰⁸ CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 34 (1960).

³⁰⁹ Meese, *supra* note 37, at 455.

³¹⁰ Jackson, *supra* note 32, at 942.

and find it “hard to imagine present-day political leaders possessing the unimpeachable political wisdom that some might be disposed to attribute to more ancient constitution-makers.”³¹¹ Recall, for example, the dismissive attitude the Supreme Court of Canada took toward the drafters of the fundamental justice provision of the Charter in the *BC Motor Vehicle Act Reference*.³¹² Canadian Justices are also able to rely on contemporaneous knowledge that the Charter was originally expected, by many at least, to be interpreted progressively.³¹³ It is difficult to make originalist arguments when there is persuasive evidence that the framers were not originalists.³¹⁴

It is furthermore difficult to discern, even in principle, who constitute the framers of the Constitution Act, 1982. Although it is fair to call Prime Minister Pierre Trudeau the most significant motivating force behind Canadian patriation, the Constitution Act, 1982 itself owes its present form to a series of negotiations among numerous federal and provincial ministers, a parliamentary committee, and numerous interest groups. “The interests represented covered a wide spectrum,” Peter Russell writes of this last category. It included “native peoples, the multicultural community, women, religions, business, labor, the disabled, gays and lesbians, trees, and a number of civil liberties organizations. Most of those who appeared pressed for a stronger Charter of Rights, and a number of them actually saw their ideas adopted.”³¹⁵ The fiction that all of these disparate groups aligned on a single understanding of much of anything in the Charter is too fantastic for most judges to entertain, much less those who lived through the drafting process.

³¹¹ Bazowski, *supra* note 171, at 231.

³¹² See notes 157-158, *supra*.

³¹³ See PATRICK MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM, AND THE SUPREME COURT OF CANADA 78-82 (1987); Hogg, *supra* note 73, at 87.

³¹⁴ Cf. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 889 (1985).

³¹⁵ RUSSELL, *supra* note 82, at 114.

The outright hostility of early Australian justices to references to the Convention debates might also be explained in part by the fact that they themselves were participants in those debates. Justice Kirby writes: “They remembered. They did not need to be reminded, least of all of the words of other delegates, some of whom they may have held in low regard.”³¹⁶ Former Chief Justice Mason observed on the eve of patriation that criticizing the Constitution as anachronistic—“as a product of the horse and buggy age”—was a vibrant political strategy in Australia but not in the United States.³¹⁷ As I discuss below, that sentiment is no doubt related to the fact that the Australian Constitution was, in meaningful ways, not fully Australian. But it is also the product of a particular moment in Australia’s political time.

Our own reverence for the eighteenth-century founding is likewise temporally contingent. It is worth remembering that much of the twentieth century was hardly the best of times for the framers of the U.S. Constitution. Scholars such as Charles Beard and Arthur Schlesinger sought to dismantle the idea that the framers deserved particular reverence.³¹⁸ As Martin Flaherty writes, “For the Progressives, American constitutional claims were more than erroneous or even irrelevant. They were deceitful.”³¹⁹ Reframing the framers as fundamentally committed to popular sovereignty and classical liberalism, achieved in part through the efforts of scholars like Bernard Bailyn, Gordon Wood and Akhil Amar, was no doubt helpful to the revitalization of American originalism.³²⁰

³¹⁶ Kirby, *supra* note 68, at 9.

³¹⁷ Mason, *supra* note 197, at 1.

³¹⁸ See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913); Arthur M. Schlesinger, *The American Revolution Reconsidered*, 34 POL. SCI. Q. 61 (1919).

³¹⁹ Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 532 (1995).

³²⁰ See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (2005).

B. Revolution vs. Evolution

The prime location of the founding generation within the American ethos has been consecrated not only by time but, of course, by deeds. The dominant and most respectable narrative of American constitutionalism is that the sovereignty of the American people was established through force of arms during the American Revolution and was consummated through the drafting of an enduring Constitution. That Constitution is, moreover, both a locus for popular sovereignty and a distinctly political site for American identity. Jed Rubenfeld has contrasted the “democratic constitutionalism” of the United States with the “international constitutionalism” of many European states.³²¹ American sovereignty is bound up with its Constitution, and its national identity is notionally stated in political rather than ancestral terms. The revolution that produced that sovereignty and that political identity is dated.

The absence of a comparable moment of sovereignty has been a source of considerable angst in Canadian and Australian political and legal circles. Canadian legal scholar Peter Russell’s book, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, was written in 2004, more than two decades after, by all appearances, Canada became formally sovereign. Canadian sovereignty is an ongoing process that began before 1867 and continues to this day. Russell begins his book with a quote from a letter written by three of the fathers of the BNA Act: “It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus remedying any defect.”³²² Russell later observes that the constitutional vision underlying the BNA Act was Burkean rather than Lockean. It was conceived “not as a single foundational document drawn up

³²¹ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NYU L. REV. 1971 (2004).

³²² RUSSELL, *supra* note 82, at 3.

at a particular point in time containing all of a society's rules and principles of government, but as a collection of laws, institutions, and political practices that have passed the test of time and which have been found to serve the society's interests tolerably well."³²³ It was sober rather than airy; practical rather than aspirational; secular rather than mystical; thick rather than thin, in the parlance of Mark Tushnet.³²⁴ Moreover it was, formally speaking, British rather than Canadian.³²⁵ Such a document is hardly likely to inspire a popular politics of originalism.³²⁶

Quite the opposite in fact. The living tree analogy was part of Lord Sankey's project of freeing the Canadian Parliament from the vise of the Privy Council. Canadian sovereignty has long been identified with a metaphor of evolution and growth, as opposed to the "frozen concepts" approach of Lord Atkin. The Charter continues to be understood in that spirit.

One could tell a similar story about Australia. Its Constitution, though inspired by a domestic political movement, was negotiated in London and was formally enacted by the British Parliament. Justice Kirby has said that "[t]wenty or 30 years ago, especially in legal circles, the ultimate foundation of the legitimacy and binding force of the Constitution was given, virtually without dissent, as the Act of the Imperial Parliament at Westminster."³²⁷ It should not be surprising, then, that the Mason Court's impatience with originalism coincided with Australian patriation. Writes Mason himself, "[T]he legislation that terminated Australia's residual constitutional links with the United Kingdom . . . now provides a firmer foundation for the view

³²³ *Id.* at 247.

³²⁴ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9-14 (1999) (distinguishing between the "thick" Constitution—the rules and structural provisions of the Constitution—from the "thin" Constitution—the hoary principles enshrined most prominently within the Declaration of Independence).

³²⁵ Even if the BNA Act had had an entirely Canadian imprimatur, one would have to ask whether it was English Canadian or Québécois. See Part IV.E, *infra*.

³²⁶ See Bazowski, *supra* note 171, at 230.

³²⁷ Kirby, *supra* note 68, at 7; see also *Engineers Case*, (1920) 28 C.L.R. 129 (rejecting the idea that the Constitution is a compact between sovereign states); Mason, *supra* note 197, at 24 ("The point has been forcefully made that, whereas the United States Constitution, having been adopted by the people at state conventions, reflects the sovereign will of the American people, the Australian Constitution derives its authority from the sovereignty of the Imperial Parliament and the supremacy of its statutes.") (citing Owen Dixon, *The Law and the Constitution*, 51 L.Q. Rev. 590, 597 (1935)).

that the status of the Constitution as a fundamental law springs from the authority of the Australian people.”³²⁸

Australia’s rejection of originalism came far later in time and in far milder form, of course, than that of the Supreme Court of Canada. For this it is tempting to blame, *inter alia*, the relatively diminished role of the Privy Council in Australia’s *inter se* affairs, but the story may be more complicated. The historical Australian Constitution is not wholly without democratic purchase in Australia. It was drafted and de facto ratified by Australians and, unlike the BNA Act, was designed to serve as a popular Constitution.³²⁹ Its preamble refers to “the people” of its various states and describes the Commonwealth as “indissoluble.”³³⁰ Like the U.S. Constitution, it was “not merely a text but a deed—a *constituting*.”³³¹ It might be useful to describe Australia as having not one but two moments of sovereignty, the first at federation and the second at patriation. The competing narratives of the Gleeson Court were a struggle over which of these moments deserved the High Court’s fidelity.

C. Rights and the Right

As Part II discusses, the to-do in the United States over originalism is a temporally-sensitive feature of our politics, raging at opportune moments and fading away when no longer useful. The present moment arose in part because many of the politically salient opinions of the Warren and Burger Courts were individual-rights cases susceptible to critique on originalist grounds. It is difficult to imagine Justice Scalia and all he represents existing in the absence of

³²⁸ Mason, *supra* note 197, at 24.

³²⁹ See Craven, *supra* note 6, at 180-81.

³³⁰ AUSTL. CONST. pmb1.

³³¹ AMAR, *supra* note 320, at 5; see Goldsworthy, *supra* note 197, at 106-07 (“Given [its] history and [its] words, it was accepted from the beginning that, although [the Constitution’s] legal authority derived solely from the sovereignty of the United Kingdom Parliament, its political authority and legitimacy were equally due to its having been agreed upon by representatives, and assented to by a majority of the voters, of each colony.”).

Roe v. Wade, *Miranda v. Arizona*, *Mapp v. Ohio*, *New York Times v. Sullivan*, and like opinions. These opinions enable him as Claudius enables Hamlet.

It is also difficult to imagine a comparable movement developing within a culture like Australia's, whose Constitution lacks a bill of rights. Individual rights cases acquire a certain visibility that seems less likely to attach to disputes over, say, the vesting of state law jurisdiction in federal courts.³³² Protection of individual social and political rights also enjoys an obvious compatibility with theories of constitutional evolution and stands in obvious tension—here, “incompatibility” would be too strong³³³—with a commitment to parliamentary supremacy.

Australia's constitutional structure does not, then, encourage a rights revolution at all, much less an anti-rights backlash. It is nevertheless worth noting that the most prominent reaffirmations of Australian legalism arose in a posture of opposition. The *Engineers Case* was an effort by Justices Isaacs and Higgins to repudiate decisively the reserved state powers doctrine and the putatively loose interpretive principles that generated it. And most observers consider the Gleeson Court a deliberate foil for the perceived excesses of the Mason Court.

Canada's rights revolution, on the other hand, is more than competitive with that of the Warren Court.³³⁴ Negative rights cases brought under the Charter had a 41 percent success rate from 1982 to 2002 and positive and group rights cases had a 27 percent success rate.³³⁵ And although there is evidence within the Canadian legal academy of nascent unease with living tree interpretation, there is nothing approaching a serious suggestion of originalism.³³⁶ There are at least three possible reasons for the relative lack of embrace of originalism by an anti-rights

³³² See *In re Wakim; Ex parte McNally*, (1999) 198 C.L.R. 511.

³³³ Australians, like the British, do not perceive an inherent incommensurability between taking rights seriously and vesting rights-protection in Parliament. See, e.g., Mason, *supra* note 197, at 11.

³³⁴ See Part III.A.2, *supra*.

³³⁵ Hirschl, *supra* note 148, at 66. In the United States from 1975 to 2002 negative rights cases had a 39 percent success rate and positive rights cases had a 16 percent success rate. *Id.*

³³⁶ See Part III.A.3, *supra*; see also Grant Huscroft, *The Trouble with Living Tree Interpretation* (2008), available at <http://ssrn.com/abstract=1158542>; Miller, *supra* note 153.

backlash movement in Canada. First, the Canadian experience with aggressive rights protection is more recent than that of the United States. It takes time for a political movement to mobilize, and it takes considerable effort and imagination for such a movement to mobilize around a set of interpretive principles.³³⁷ As Morton and Knopff write, “The Charter revolution has unfolded so quickly that it is hard to gain perspective on it.”³³⁸ It does not help that the Liberal Party, which unlike its Australian namesake is politically aligned with the U.S. Democratic Party, controlled the Canadian government and Canadian judicial appointments from 1993 to 2006, when many of the most controversial Charter opinions issued. Second, much of Charter interpretation toils in the vast fields left open by section 1, the limitations clause.³³⁹ That section’s text refers to “such limitations as are justified in a free and democratic society,” not those that are, say, “consistent with our history and traditions.” An originalist construction of section 1 would therefore be violently atextual.³⁴⁰ Third, as discussed, the Charter’s drafting history itself suggests an expectation of progressive interpretation.³⁴¹

It bears mention, finally, that the anti-rights orientation of American originalism also relates significantly to its aggrandizement of the American Founding. A constitutional jurisprudence whose essential point of reference post-dates World War II is more likely to view excessive positivism with suspicion.³⁴² More subtly, proponents of that jurisprudence are more likely to express discomfort with, and to be suspicious of, the perceived failure of American originalists to recognize the limitations of positivism confirmed by the European experience.

³³⁷ See Greene, *supra* note 1, at ___ - ___; Post & Siegel, *supra* note 23.

³³⁸ MORTON & KNOPFF, *supra* note 136, at 21.

³³⁹ See Hogg, *supra* note 73, at 70 (“Section 1 is . . . an issue in nearly every case where a law is challenged on Charter grounds.”).

³⁴⁰ The test for whether a challenged statute passes muster under § 1 is provided in *R. v. Oakes*, [1986] S.C.R. 103.

³⁴¹ See *supra* note 313 and accompanying text.

³⁴² See Rubinfeld, *supra* note 321, at 1985-86.

Originalism is associated with the American right and with a constitutionalism that much of the world has no desire to emulate.³⁴³

D. The Politics of Judicial Nominations

The entry for *Bork, v.*—“to defame or vilify (a person) systematically, esp. in the mass media, usually with the aim of preventing his or her appointment to public office; to obstruct or thwart (a person) in this way”—first appeared in the Oxford English Dictionary in 2002.³⁴⁴ Robert Bork’s 1987 Supreme Court confirmation hearing was a media and interest-group frenzy the likes of which the United States had not known before but has known several times since. The ritual wherein Court nominees are meticulously demolished by partisans over several months, brought before television cameras to parry the stylized soliloquies of Judiciary Committee members, and condemned or praised by literally hundreds of interest groups is a familiar feature of our judicial politics.³⁴⁵ It has become typical for the public interrogation of a Supreme Court nominee to include extensive discussion of his or her “judicial philosophy.”³⁴⁶ Abetted by this process, constitutional methodology, and originalism in particular, has become a site for popular political mobilization.³⁴⁷

This rite is unknown to Canada or Australia. In neither country does the national Parliament have any formal role in the nomination of high court justices and in neither country

³⁴³ When discussed in Canada and Australian articles, American originalism is almost invariably associated with Justice Scalia. Cf. VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA: INTERPRETING CONSTITUTIONS IN AN EXPANDING UNIVERSE OF LAW 17 (Sept. 15, 2008) (unpublished manuscript); Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1.

³⁴⁴ OXFORD ENGLISH DICTIONARY, available at http://dictionary.oed.com/cgi/entry/00308951?single=1&query_type=word&queryword=Bork&first=1&max_to_show=10.

³⁴⁵ See generally RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005); CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 98 (2007).

³⁴⁶ See Greene, *supra* note 1, at ____.

³⁴⁷ See *id.* at ____; Post & Siegel, *supra* note 23, at 554. More than 400 interest groups weighed in on the Bork nomination. See JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 7 (1995).

has the nomination process been remotely as politicized as it is in the United States. By comparison to the United States, nominations are low-visibility events in both countries. Justices are selected by the ruling government against background norms of qualification for the position.³⁴⁸ Writes Peter Hogg of the situation in Canada, “[S]uccessive governments have evidently concluded that it is good politics to make good appointments, and the quality of appointments is generally agreed to be high. There has never been any serious suggestion that Canadian governments have attempted to ‘pack’ the court with judges of a particular approach or ideology.”³⁴⁹

There have been intermittent calls for a broader public discussion of Supreme Court nominees in Canada, and the 2006 appointment of Marshall Rothstein to the Court featured the first public interview process for a high court nominee in Canada. Even then, though, Justice Rothstein’s hearing before an ad hoc parliamentary committee was barely three hours long and betrayed not a hint of acrimony.³⁵⁰ The future of even this low level of public participation in the nomination process is unclear. When Justice Bastarache’s resignation created a vacancy on the Court in 2008, Prime Minister Harper unceremoniously selected Thomas Cromwell without adhering to the quasi-public process Harper himself had earlier endorsed.³⁵¹ As one columnist writes, “[w]henver someone suggests that . . . we ought to have some kind of a public discussion about the kinds of views and philosophies we want on the bench, the idea is immediately batted down. Too American.”³⁵²

³⁴⁸ In Australia the government is statutorily required to consult with the state attorneys-general, but it is not bound by their views. High Court of Australia Act, 1979, § 6 (Austl.).

³⁴⁹ Hogg, *supra* note 73, at 59.

³⁵⁰ See Peter W. Hogg, *Appointment of Justice Marshall Rothstein to the Supreme Court of Canada*, 44 OSGOODE HALL L.J. 527, 530-31 (2006).

³⁵¹ See Philip Slayton, *Ottawa’s Best-Kept Secret?*, MACLEAN’S, Feb. 2, 2009, at 20.

³⁵² Anthony Keller, *Wanted: A Public Word with the Would-be Judges*, GLOBE & MAIL, Dec. 1, 1997, at A17; see also MORTON & KNOPFF, *supra* note 136, at 17 n.22 (collecting sources discussing the need for greater public involvement in the selection of justices to the Supreme Court of Canada).

In Australia, too, there have long been calls to bring more “transparency” and “accountability” to the judicial nomination process, but even critics of the process concede that “governments have usually exercised this power with due care and regard for the Court, including that it be composed of the best legal talent and that it be able to maintain public confidence in the administration of justice.”³⁵³ The grass is always greener indeed.

I have argued elsewhere that the originalism movement is a populist one. It flaunts originalism’s elegance; the simplicity with which it may be explained to non-professional audiences; its neutering of the decisionmaking authority of legal elites; and its fundamentally nationalist orientation.³⁵⁴ In the United States, the judicial nomination process is the most prominent site at which that set of ethical values is transcribed onto judicial practice.³⁵⁵ Even if the same set of ethical values has purchase in Canada or Australia, the absence of public involvement in judicial selection deprives domestic politics of a prime opportunity to tie those values to originalism.

E. Pluralism and *Nomos*

American originalism is radically jurispathic. The term is Robert Cover’s, and he used it to refer to the role of the court as a suppressant of law. Law in this sense is not, or rather is not only, the rules that the state is prepared to enforce through violence, but refers to a legal meaning particular to a community’s normative universe, or *nomos*.³⁵⁶ Cover said that courts arise out of “the need to suppress law, to choose between two or more laws, to impose upon laws a

³⁵³ George Williams, *High Court Appointments: The Need for Reform*, 30 SYDNEY L. REV. 161, 161 (2008); cf. Goldsworthy, *supra* note 70, at 112 (“Although a few appointments suspected of being based more on political than legal criteria have aroused controversy in the legal profession, the process has usually been uneventful.”).

³⁵⁴ See Greene, *supra* note 1, at ___-___.

³⁵⁵ See *id.* at ___.

³⁵⁶ See Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”³⁵⁷

Constitutional interpretation, even as judicially enforced, can seek to preserve a space for multiple *nomoi* to coexist. Constitutional principles may be understood to have meanings that are not fixed in time but evolve through higher-order social and political competition.³⁵⁸ Constitutional law as enforced by the state may be understood, then, as distinct from what the Constitution *means*. In other work I have referred to this distinction as “thin” versus “thick” constitutional law: because not all constitutional law is equally shared, not all constitutional law is equally stable.³⁵⁹ A little instability in constitutional law preserves a space for competing constitutional narratives to breathe that sweet air of legitimacy.

Originalism generally rejects all I have just said. Indeed, it is chiefly promoted as the most effective means of establishing the falsity of competing narratives. Original understanding is a criterion for what the law *is* that is thought to frustrate the social and political capture of judges. The chief lament of many of the Australian judges in Pierce’s study is telling: “[T]here was a certainty about law fifty years ago which most practitioners would tell you is now absent.” “There was a conscious jettisoning [by the Mason Court] of the notion that certainty is the object of the legal system.” “The High Court itself has been very active in recent years . . . some would say overactive to the extent there has been an element of instability infused in some areas of the law which is perhaps felt to be undesirable.”³⁶⁰ For law to hold out the possibility of capture is

³⁵⁷ *Id.*

³⁵⁸ See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

³⁵⁹ See Greene, *supra* note 1, at ____-____.

³⁶⁰ PIERCE, *supra* note 237, at 48.

bound to create uncertainty and instability, but for many marginalized communities it is what makes the legal language game worth playing.³⁶¹

A constitutional interpretive methodology designed to suppress competing narratives is a poor fit for Charter interpretation and for Canada's national ethos more generally. In particular, accommodation of the interests of the Québécois was a precondition to federation and is expressed in numerous Charter provisions, and the ongoing tension surrounding Canada's fundamental heterogeneity has produced several constitutional moments over the last three decades. The Charter itself guarantees a number of express rights to language minorities;³⁶² guarantees the right to travel;³⁶³ protects the rights of aboriginal peoples, including treaty rights;³⁶⁴ grants rights to sectarian schools;³⁶⁵ and requires that the Charter "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."³⁶⁶ The very existence of the federal Department of Canadian Heritage suggests a certain insecurity about Canada's cultural unity, and as to assuage any suggested affinity for hegemony, the Department states its "strategic outcomes" in full as "Canadians express and share their diverse cultural experiences with each other and the world," and "Canadians live in an inclusive society built on intercultural understanding and citizen participation."³⁶⁷ Québec in fact still has not ratified the Charter, and efforts to institute reforms that would bring Québec fully

³⁶¹ See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401 (1987).

³⁶² Charter of Rights and Freedoms §§ 16-23.

³⁶³ *Id.* § 6.

³⁶⁴ *Id.* §§ 25, 35.

³⁶⁵ *Id.* § 29.

³⁶⁶ *Id.* § 27.

³⁶⁷ Department of Canadian Heritage Mission and Strategic Outcomes, <http://www.pch.gc.ca/pc-ch/org/missn/index-eng.cfm>.

into the national fold have failed.³⁶⁸ Canadians have never quite been one people, and the Charter has not succeeded in its lofty ambition to make them so.³⁶⁹

To be sure, the same could be said of Americans, but not so fast. The United States has no significant separatist movement, its aboriginal population is much smaller than Canada's,³⁷⁰ and its minority populations are, ironically perhaps, insufficiently insular to enjoy political power comparable to that of the Québécois.³⁷¹ It is far easier for an assimilationist ethic to flourish in the United States—or in Australia, for that matter³⁷²—than in Canada. The U.S. Constitution, moreover, is an important conduit for American assimilation: the dominant domestic narrative, part of the legacy of *Brown v. Board of Education*, remains that separate is inherently unequal.³⁷³

The ethic extends beyond race, of course. Justice Scalia is conspicuously fond of relying upon it in constitutional cases. His spirited dissent in the *VMI* case quoted approvingly the school's Code of a Gentleman and praised the “manly ‘honor’” the school instilled in students through its single-sex, military-style indoctrination.³⁷⁴ In a recent case considering whether the Ten Commandments could be posted in a courthouse, Justice Scalia suggested that public acknowledgement of the Ten Commandments is distinguishable from government endorsement

³⁶⁸ I refer here to the Meech Lake Accord, negotiated in 1987 and abandoned in 1990, and the Charlottetown Accord, referenced at *supra* text accompanying note 134.

³⁶⁹ See generally RUSSELL, *supra* note 82. Peter Hogg and Wade Wright have concluded that the BNA Act was deliberately vague in order to permit mutual accommodation of the conflicting goals of its drafters—“a desire for a strong central government (English-Canada) and the desire to protect local languages, cultures, and institutions (French-Canada and the Maritimes).” See Hogg & Wright, *supra* note 83, at 338.

³⁷⁰ Aboriginal peoples represented 3.8 percent of Canada's population as of 2006, compared to 1.0 percent of the U.S. population.

³⁷¹ See Hogg, *supra* note 73, at 94; cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985) (“Other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.”).

³⁷² See Goldsworthy, *supra* note 70, at 156-57 (observing that Australia is “much more culturally homogenous” than either Canada or the United States).

³⁷³ See Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944 (2004).

³⁷⁴ See *United States v. Virginia*, 518 U.S. 515, 601-03 (1996).

of religion on the grounds, in part, that 97.7 percent of Americans practice monotheistic faiths.³⁷⁵

It was the very commitment to equality as against appreciation of difference that Justice Scalia cited in rejecting the claim of a Native American to constitutional protection of his peyote use in *Employment Division v. Smith*.³⁷⁶

Consider also Justice Scalia's plurality opinion in *Michael H. v. Gerard D.*, in which the Court refused to extend visitation rights to the biological father of a child born to a woman married to another man.³⁷⁷ Justice Scalia denied the claim to constitutional protection of the out-of-wedlock relationship between the petitioner and the mother in part on the ground that it has not "been treated as a protected family unit under the historical practices of our society."³⁷⁸ Criticizing Justice Scalia's reliance on tradition, Justice Brennan wrote in dissent:

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, . . . the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies.³⁷⁹

Justice Brennan identified a set of fault lines often neglected in interpretive debates. Originalism disfavors particularized claims of right and seeks to conform our constitutional history to that posture.

F. Constitutional Faith

The living tree metaphor is not unique to Canadian law. Elliot Dorf and Arthur Rosett have emphasized that Jewish law is distinct from Biblical law insofar as, although based on the

³⁷⁵ *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

³⁷⁶ 494 U.S. 872, 888 (1990) ("Any society adopting [a strict scrutiny test for religious exemption claims] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

³⁷⁷ 491 U.S. 110 (1989).

³⁷⁸ *Id.* at 124.

³⁷⁹ *Id.* at 141 (Brennan, J., dissenting).

Bible, it has evolved “through interpretation, legislation, and custom.”³⁸⁰ They write: “The rabbis of the classical tradition claimed that their interpretations were the new form of God’s revelation, replacing visions and voices. Those features of Jewish law proclaim loudly that it is intended to be a law for all generations, and so Jews have lived it.”³⁸¹ It is in part for this reason that Jewish law has been compared within that classical tradition to a “living tree.”³⁸² The analogy derives from the Book of Proverbs:

I give you good instruction; never forsake My Torah.
It is a tree of life, for those who hold fast to it, and those who uphold
it are happy.
Its ways are pleasant, and all its paths are peace.³⁸³

As we have seen, the dichotomy between revelation and interpretation recurs in debates over the authority of statutory and constitutional text as originally enacted and understood. Justice Kirby equates British statutory interpretation with the notion that judges “had to find their authority in a text of the law, just as the new bishops after the Reformation were expected to find theirs in the text of Scripture.”³⁸⁴ It was not only “very English” but “very Protestant” to “demand fidelity to the text so as to curb the inventions and pretensions to unwarranted power.”³⁸⁵

There are numerous reasons to think this dichotomy liable to concretize within the American imagination. The American attitude toward the Constitution is frequently described in terms of worship, reverence, and fidelity.³⁸⁶ Max Lerner once described the Constitution as America’s “totem and its fetish.” He wrote:

³⁸⁰ ELLIOT N. DORFF & ARTHUR I. ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 13 (1988).

³⁸¹ *Id.* at 14.

³⁸² *Id.*

³⁸³ *Proverbs* 3:18.

³⁸⁴ Kirby, *supra* note 5, at 6.

³⁸⁵ *Id.* at 6-7.

³⁸⁶ MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 225 (1986); J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703 (1997);

In fact the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a “higher law;” and a country like America, in which its early tradition had prohibited a state church, ends by getting a state church after all, although in a secular form.³⁸⁷

On this conception the difficulty of constitutional amendment through Article V, which could theoretically argue in favor of evolutionary interpretation by judges, instead facilitates the iconography of the Constitution as a sacred text. Add to this broth the evangelical movement, which generally favors literal interpretation of the Bible—that is, according to the author’s original semantic intention³⁸⁸—and which is, relatedly or not, suspicious of metaphors of evolution, and the relative popularity of originalism in the United States begins to look less mysterious.

Consider the religious makeup of each of the countries we have studied. Roughly half of all Americans self-identify as Protestant, roughly half of that number self-identifies as evangelical Protestant, and roughly four in ten Americans say they attend church weekly.³⁸⁹ Half of American evangelicals—the most of any religious group surveyed—believe that there is “only one true way to interpret the teachings of my religion.”³⁹⁰ Evangelicalism is far less prevalent in Canada and Australia. Less than a quarter of the population of either country is Protestant, only eight percent of Canadians identify as evangelical, and more than 15 percent of the population of each country has no religious belief at all.³⁹¹ By contrast only five percent of U.S. adults report

Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 6 AM. POLIT. SCI. REV. 1071 (1936); See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

³⁸⁷ Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-95 (1937).

³⁸⁸ See J.I. Packer, *How Evangelicals Read the Bible*, MISSION & MINISTRY, Jan. 1, 2000.

³⁸⁹ See Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey: Religious Composition of the U.S., <http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf>.

³⁹⁰ *Id.* By comparison, only one in ten American Jews holds this view. *Id.*

³⁹¹ Cent. Intelligence Agency, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html> (Austl.), <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (Can.).

that they are atheist or agnostic.³⁹² Although both Canada and Australia have larger Roman Catholic populations than the United States, Catholic Biblical interpretation is traditionally eclectic and purposive rather than dogmatic and strictly textualist.³⁹³

Restoration and redemption are, as Jack Balkin writes, “the key tropes of constitutional interpretation by social movements and political parties.”³⁹⁴ Successful claims on the meaning of the Constitution call for either a “return to the enduring principles of the Constitution” or “fulfillment of those principles.”³⁹⁵ As a traditionally restorative modality, originalism might be viewed as a secular corollary to “the fall” in Christian theology. In the originalist narrative the founding era is a prelapsarian state, a pure source of constitutional meaning and legal authority. Originalism promises a return to this state and a cleansing of the corrupting influence of unelected judges on constitutional meaning.

* * *

The six hypotheses just sketched are interrelated. One could as easily state them as a single hypothesis with multiple elements: The United States is a country with a large evangelical population and in which much of the population holds a reverential attitude toward the Constitution and toward the war heroes who forged it. That Constitution is a source of political identity for many Americans, and as a symbol of American sovereignty it is a potent reference for narratives of *both* restoration and redemption.³⁹⁶ The rights revolution of the Warren and Burger Courts led to a conservative backlash that, owing in part to the public nature of the judicial nomination process, was able to frame its critique through the medium of constitutional

³⁹² *Id.* at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>.

³⁹³ See Pontifical Biblical Commission, *Interpretation of the Bible* (1994); see generally Powell, *supra* note 314, at 889-94 (describing the intellectual origins of revolutionary American ideas about interpretation within British Protestantism and its opposition to papal corruption of Biblical authority).

³⁹⁴ Balkin, *supra* note 18, at 301.

³⁹⁵ *Id.*

³⁹⁶ See Balkin, *supra* note 8; Post & Siegel, *supra* note 23.

interpretive methodology. Thus a particular orientation combined with a particular objective and an opportunity to create an originalism “movement” that has no parallel in either Canada or Australia.

The direction of causation in this story is concededly enigmatic. Sustained glorification of originalist interpretive methods might well have backwash effects that serve to reinforce our reverence for the founding generation or even perhaps our affinity for literalism in biblical exegesis. I do not, moreover, wish to minimize the significance and the agency of a motivated social and political movement in the proliferation of originalism in the United States. I may have identified factors that have led us to the waters of originalism, but only a committed movement can force us to drink.

What I do wish to deny is that the failure of originalism to spread to Canada, or of more historicist originalism to spread to Australia, is or can be attributed to simple lack of effort or internal persuasiveness. Originalism and historicism are socially embedded and culturally contingent.³⁹⁷ Their success requires not just an argument, or even one coupled with a movement, but also an audience sensitized by culture and by history.

V. Originalism as Ethical Argument

When Justice Hugo Black delivered the inaugural James Madison lectures at New York University School of Law in 1960, he began his speech by recounting Madison’s role in the founding of the nation. Madison, he said, “lived in the stirring times between 1750 and 1836, during which the Colonies declared, fought for, and won their independence from England.” Black said that the government those colonists set up was “dedicated to Liberty and Justice” and

³⁹⁷ See Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 L. & SOC. INQUIRY 105 (2004).

said that because of Madison's outsized role as "the Father of our Constitution," his words "are an authentic source to help us understand the Constitution and its Bill of Rights."³⁹⁸

In the lecture that followed that eulogistic introduction, Black offered his well-known theory on the first ten amendments to the Constitution, that "there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"³⁹⁹ As Charles Black has observed, it seems that Justice Black cannot have meant what he said.⁴⁰⁰ It cannot be that Congress truly can make *no* law abridging the freedom of speech, and Justice Black, a deceptively learned man, must have known that. Professor Black seeks to rescue his eponymous contemporary with something of a lawyer's trick: even on Justice Black's view, freedom of speech remains to be defined, and the same sort of balancing Justice Black criticizes in his opponents he himself may employ in deciding in the first instance what that freedom entails.⁴⁰¹ The difference, then, between Justice Black and his adversaries is not in their relative commitments to the Constitution but in what Professor Black calls "attitude."⁴⁰² A posture of absolutism is a prophylaxis against dilution of our constitutional rights.

In Justice Black's hands, originalist argument was, *sub silentio*, an argument about the sort of attitude judges should take toward the Constitution. For Justice Black, that attitude was deeply informed by the lessons of American history. In the Madison lectures he articulated his own version of the fall:

³⁹⁸ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

³⁹⁹ *Id.* at 867.

⁴⁰⁰ See Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, February 1961, at 63, 65; BICKEL, *supra* note 9, at 97.

⁴⁰¹ Black, *supra* note 400, at 65-66.

⁴⁰² See *id.* at 66.

Today most Americans seem to have forgotten the ancient evils which forced their ancestors to flee to this new country and to form a government stripped of old powers used to oppress them. But the Americans who supported the Revolution and the adoption of our Constitution knew firsthand the dangers of tyrannical governments. They were familiar with the long existing practice of English persecutions of people wholly because of their religious or political beliefs. They knew that many accused of such offenses had stood, helpless to defend themselves, before biased legislators and judges.⁴⁰³

Black is storytelling. He is using anecdote to evoke feelings of nostalgia, patriotism, and pride in favor of an attitude of caution and prophylaxis toward judicial authority to determine the scope of constitutional rights. This way of arguing about methodology is available to him because of the passage of time and the historical and cultural moment the Revolution represents in the American imagination. Writing at the height of the Cold War and less than a generation removed from World War II, Black's narrative is less populist than Justice Scalia's—it instead is anti-tyrannical, rights-friendly, less suspicious of difference, and focused on concepts like liberty and justice—but it is no less American.

Constitutional theory has a name for this style of argument, and it isn't originalism. In 1982 Philip Bobbitt articulated a typology of constitutional argument that has become familiar to legal academics. Bobbitt divided constitutional argument into six modalities: historical, textual, structural, prudential, doctrinal, and ethical.⁴⁰⁴ Originalism is typically associated with his first kind of argument, historical, but this Article suggests that it is also associated with his last kind, ethical. Ethical argument represents “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.” On Bobbitt's account, such arguments advance “the character, or *ethos*, of the American polity” as legal authority.⁴⁰⁵ Bobbitt concluded that a surprising range of decisions employ primarily

⁴⁰³ Black, *supra* note 398, at 867.

⁴⁰⁴ See BOBBITT, *supra* note 15.

⁴⁰⁵ *Id.* at 94.

ethical argument—from the *Cherokee Cases* to *Trop v. Dulles* to the *Pentagon Papers Case*, among others.⁴⁰⁶

More interestingly for our purposes, Bobbitt also seemed to recognize implicitly that historical argument is, in important ways, ethical. In critiquing an originalist position, Bobbitt relied on the familiar argument that it is difficult to imagine what members of the founding generation would have thought about how to apply the general principles of the Constitution to modern issues. Such imagining, he says:

depends also on assumptions about intention, but in a peculiar way: that the whole life of an eighteenth-century agrarian society should govern us since the Founders were of that special day and that we, from our very different lives, can know what those people would have thought in situations within which they would have been, of course, very different people. It is easy to see that such arguments are better for dissent than for the Court because . . . they express a particular moral point and are therefore more effective as rhetoric than as decision procedure.⁴⁰⁷

Though Bobbitt does not say so, he is describing a form of ethical argument. The rhetoric upon which originalist arguments rely, often successfully, is driven by a narrative about the American ethos.⁴⁰⁸ Originalist arguments help to construct and then embed themselves within “the community’s self-conception of its values and commitments, and the stories that it tells about itself to itself.”⁴⁰⁹ Much more than textual, structural, doctrinal, or prudential argument, historical argument in the United States is about storytelling.

That was difficult to recognize—if it was true at all—before historical argument in the United States became self-referential. As Bork and Scalia have noted, there was a time when it

⁴⁰⁶ See *id.* at 93-119.

⁴⁰⁷ *Id.* at 24.

⁴⁰⁸ See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 29 (1990) (observing that the claim that the framers or ratifiers meaningfully speak for present generations “is neither more nor less than a characterization of the national ethos”).

⁴⁰⁹ Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 706-77 (2005).

was unusual for American judges to suggest any alternative to originalism.⁴¹⁰ But in the great battles between Black and Frankfurter and Breyer and Scalia, the originalist position has become as much rhetoric as decision procedure. When multiple modalities are made available and become the subject of judicial discussion, there develop conventions for choosing among them. Put differently, there are modalities for choosing modalities.

The scope of conventional argument about modality is easier to see in Canada and Australia, the high courts of which are more self-conscious about interpretation than is our own. The argument for living tree interpretation in Canada is partly doctrinal, relying expressly on the *Persons Case*. One could advance a persuasive textual argument that the Supreme Court of Canada should interpret section 1 of the Charter through an evolutionary modality. The argument for legalism in Australia was doctrinal prior to the Mason Court, based on the *Engineers Case*, but under the Gleeson Court it is perhaps better characterized as prudential, designed to impart needed certainty upon judicial decisionmaking. The practice of constitutional law is the practice of making arguments, but it is as much the practice of arguing about how to choose among those arguments.

Recognizing that originalist argument in the United States is ultimately ethical should give pause both to originalists and to their detractors. For some originalists, the recognition is self-defeating. Originalism is valuable to many originalists precisely because its source of legal authority is not *inherently* contested. Ethical argument is an ideological approach to interpretation, not in the sense that it is partisan but in the sense that it is socially constructed; originalists generally reject ideological approaches in either sense. The narratives originalists

⁴¹⁰ See Greene, *supra* note 1, at ____.

rely upon are imagined to emerge from analysis rather than advocacy.⁴¹¹ But if the choice of a historical modality is culturally dependent, conventional legal analysis cannot be authoritative on its own; it must always be connected to a story about what kind of people we are.

Nonoriginalists have been on the defensive of late. This Article's observations are reason for optimism and caution alike. Recall, from Part IV, the framing of originalism's template in terms of three "o's": orientation, objective, and opportunity.⁴¹² It will be fruitful to discuss them in reverse. The opportunity for political progressives to construct an alternative program framed in methodological terms is riper than it has been in some time. Barack Obama was elected with a larger popular vote share than any first-term Democrat since Franklin Delano Roosevelt in 1932, and he began his presidency with large majorities in both houses of Congress. The judicial nomination process remains vulnerable to populist appeals, but in an era of deep economic uncertainty it is far from clear that such appeals still align comfortably with conservative politics.

The notes of caution relate to the other two "o's": objective and orientation. The originalism movement is connected to a set of political commitments. We need not guess at what those commitments are. The Reagan Justice Department's Office of Legal Policy produced a document in 1988 entitled "The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation." The document proclaimed itself designed to identify the stakes of the "judicial philosophies" of the judges appointed to the Supreme Court. The claimed results dictated by an originalist view of the Constitution aligned nicely with the Republican political program of the 1980s: restrictions on abortion rights, gay rights, immigrant rights, and affirmative action, and

⁴¹¹ See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

⁴¹² See *supra* text following note 396.

protections for private discrimination, school prayer, state autonomy, and property rights.⁴¹³ We can now add gun rights to that program, although resurrection of the Second Amendment was not a mainstream view in the 1980s.⁴¹⁴ Originalism does not obviously produce some of those positions—restrictions on affirmative action, for example—but originalism was a means of casting many of them in putatively neutral terms and therefore branding the agenda as a whole as consistent with constitutional fidelity.⁴¹⁵ No similarly coherent political program has emerged from the left. It will be difficult for progressives to formulate an effective response to originalism without reaching general consensus on a policy agenda that the response is designed to promote.

More attention will have to be paid, moreover, to the first “o”, orientation. This Article has sought to demonstrate that originalism is attractive to Americans in part because of our orientation toward the founding generation, toward assimilation and individualized claims of right, and toward secular approaches to interpretation of sacred texts. These orientations are slow to evolve, and seem to accommodate originalism better than some of its more dynamic competitors. As I have emphasized, however, orientations lie dormant without a corresponding narrative, and the narratives that connect to these originalism-friendly orientations are contestable.

Significantly, the American polity may be increasingly susceptible to a pluralist narrative. If current immigration and demographic patterns hold, the U.S. Census Bureau projects that the United States will be majority-minority by the year 2042.⁴¹⁶ As the nation diversifies culturally, narratives of assimilation may become less fecund and the unifying potential of founding era

⁴¹³ Office of Legal Policy, Dep’t of Justice, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988).

⁴¹⁴ See Siegel, *supra* note 34, at 224-25; *supra* notes 33-34 and accompanying text.

⁴¹⁵ See Greene, *supra* note 1.

⁴¹⁶ See Press Release, *An Older and More Diverse Nation by Midcentury*, U.S. Census Bureau, Aug. 14, 2008, available at <http://www.census.gov/Press-Release/www/releases/archives/population/012496.html>.

mythology may diminish. The symbolism of that era may not resonate equally across a range of communities, and to the extent that it does resonate, it may do so increasingly as a source of redemption rather than restoration. Claims that extend beyond equal status to equal respect or even affirmative appreciation of difference may become more prevalent and politically powerful.⁴¹⁷

Technological change, which allows communities of interest to form across geographic space, also may facilitate a relative shift in favor of pluralist narratives. Immigrant rights, rights for gay, lesbian, and transgendered individuals, rights for the disabled, and less punitive approaches to criminal behavior might all benefit from a renewed emphasis on the American orientation towards accommodation of difference.⁴¹⁸ Jurispathic certitude in law may become relatively disfavored as a result; the most potent constitutional metaphor may trend away from the tablets of the covenant and toward, say, open-source software.

A second possibility is that the financial crisis of 2008 could, with sufficient emphasis, prompt a revitalization of a welfare-oriented constitutionalism.⁴¹⁹ Comparisons between Obama and Roosevelt should not be lost on those who seek to shift the focus of originalism away from the founding generation, for the appropriate era to mine for inspiration may be the New Deal rather than Reconstruction.⁴²⁰ Freedom from want remains the most neglected of Roosevelt's four freedoms; the time may be ripe to resurrect Roosevelt's Second Bill of Rights, which called for a fierce political commitment to a living wage, freedom from unfair competition, home ownership, health care, education, and recreation. That is a remarkably plausible progressive

⁴¹⁷ Cf. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 184-96 (2006) (advocating a shift in the civil rights paradigm from an equality model allied with assimilation to a liberty model allied with accommodation).

⁴¹⁸ Cf. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 *YALE L.J.* 1862 (2006).

⁴¹⁹ See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *STAN. L. REV.* ____ (forthcoming 2009); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969).

⁴²⁰ Cf. *supra* note 305 and accompanying text.

policy platform for the current time. It is, moreover, a platform easily adaptable to representation reinforcement, the Reconstruction-oriented originalism of Justice Black, or even, in this Democratic era, a minimalist or prudentialist approach to constitutional interpretation. What is needed are storytellers; simply mouthing the words “living this” or “living that” will not do. Too Canadian.

VI. Conclusion

Originalism, like any other species of legal practice, is environmentally adaptive. The variations in practices of constitutional interpretation that we observe across space and time may be explained by variations in the political, cultural, and historical landscape in which those practices are situated. That may seem obvious, but it is in tension with the view that originalism follows inevitably from the act of judicial interpretation of a written constitution. I hope to have demonstrated not only that that view is unlikely to be true but also that a long tradition of judicial review, difficulty of constitutional amendment, a familiarity with common law adjudication, and a desire to avoid judicial activism do not add up to an affinity for originalism. We share those conditions with Canada and with Australia, and in both countries the sorts of interpretive moves that enjoy rhetorical potency are quite different from here. That is not for lack of exposure to the originalist argument as it has been expressed in the United States; rather, it results, I suggest, from a different historical orientation toward the Constitution, a different place in domestic political time, a different approach to judicial selection, and a different set of cultural and religious predicates.

In exposing these variations in practice and proposing a set of explanatory influences I hope not only to have demystified originalism but also to have gestured at a different frame of mind in constitutional interpretive discourse. Originalism has been relatively successful in the

On the Origins of Originalism

United States because its proponents have related it to an account of constitutional authority that resonates with the American people. It has not been successful in Canada because no comparable narrative is available. It has taken a different form in Australia because Australians necessarily tell a different set of stories about their constitutional history and the role of the judiciary in enforcing constitutional mandates. Interpretive constitutional arguments, like substantive ones, are arguments about democratic culture. The effectiveness of arguments for or against one or another method of interpretation will depend not on whether the arguments are logically coherent but on whether they are ours.