On the Origins of Originalism

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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 adjudicative norm, but whose political and legal cultures less readily assimilate judicial restraint to constitutional historicism. I offer six hypotheses as to the influences that sensitize our own culture to such historicism: 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; 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.

I. Introduction .............................................................. 2
II. Our Originalism .......................................................... 8
III. The Lives of Others: The Cases of Canada and Australia .............. 18
   A. Canada’s Charter Evolution .............................................. 20
      1. Judicial Review Under the BNA Act ................................. 20
      2. A Tree Grows in Canada: Judicial Review Under the Charter .... 28
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 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. As others have remarked, the Court’s recent decision in District of Columbia v. Heller 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. As Part II of

2. 128 S. Ct. 2783 (2008) (establishing an individual constitutional right to keep a loaded handgun in one’s home).
3. See id. at 2822–47 (Stevens, J., dissenting) (substantiating his claim that the Second Amendment was originally adopted to protect the right of the people of each of the several States to maintain a well-regulated militia but not to curtail the legislature’s power to regulate private civilian uses of firearms); Cass R. Sunstein, Second Amendment Minimalism: Heller as Griswold, 122 HARV. L. REV. 246, 256–57 (2008) (faulting both judges as historians but noting that both the majority and Stevens’s dissent were “impressively detailed” in their compilations of historical evidence); Heller on a First Read, Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/posts/1214314180.shtml (June 26, 2008, 17:03 EST) (“Stevens might not be a very accomplished originalist, or you might think he was wrong in this instance, but the mere fact
this Article details, originalism is a recurring topic of discussion in newspaper editorials, on blogs, on talk radio, and at 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.\(^4\)

In light of the claims to singular democratic legitimacy made on originalism’s behalf, and given the evident sympathy 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, in any practical sense, fixed at some point in the past and 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 has been ascendant in recent years in the United States 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 to 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. Few constitutional

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\(^4\) Greene, supra note 1, at 695–96.

\(^5\) See, e.g., Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue? 3–6 (2001) (discussing concerns voiced by Canadians regarding alleged activism by the Supreme Court of Canada); Luise Barnstedt, Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?, 13 Juridica Int’l 38, 41–42 (2007) (describing the German Federal Constitutional Court’s judicial self-restraint); Michael Kirby, “Judicial Activism?” A Riposte to the Counter-Reformation, 11 Otago L. Rev. 1, 8–10 (cataloging attacks on the purported activism of the Australian High Court).

\(^6\) See infra note 102 and accompanying text; cf. Greg Craven, Original Intent and the Australian Constitution—Coming Soon to a Court Near You?, 1 Pub. L. Rev. 166, 166 (1990) (Austl.) (“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.”).
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 U.S. Constitution that its text so graciously adapts to changing circumstances, but it is a genius that many originalists conspicuously refuse to recognize.

Our relative embrace of originalism is not easily explained as a corollary to either 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 to which the originalist movement is responsive have proceeded more quickly and more dramatically elsewhere, and yet opposition movements in those societies have not turned to historical meaning as a source of constitutional restoration. 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.”

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. Recognizing 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 inheres in 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 most relevant variables, save persuasive normative arguments for originalism, are held constant. Nonetheless, we do have, in Canada and Australia, two foreign legal regimes that are in many key respects comparable to our own. Like the

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7. See McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 415 (1819) (“This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”).


9. See generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (1962) (discussing the merits of judicial resort to “the passive virtues,” such as denial of certiorari and the political question doctrine, in deciding how and whether to adjudicate difficult cases).

10. See, e.g., Herbert Wechsler, Toward Neutral Principles in Constitutional Law, 73 HARV. L. REV. 1, 19 (1959) (arguing that judicial review should be grounded in “reasons that in their generality and their neutrality transcend any immediate result that is involved”).

11. Here 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, 133–34 (2005) (describing the origins and methodology of this approach, which entails
United States, Canada and Australia are stable, liberal, federal democracies with independent judiciaries, well-established traditions of judicial review, and written constitutions of long standing relative to most of the world's. Moreover, all three countries have common law legal regimes derived from British practice and so seem more likely than civil law countries to approach constitutional interpretation using the evolutionary and judge-empowering methods generally disfavored by originalists. 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 that 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, 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, lawyers, and theorists are less likely than their American counterparts to marry constitutional historicism to judicial restraint. Rather, Australian originalism has for many years been aggressively textualist. In many cases, that entails serious attention to the original understanding of constitutional provisions. History is not, however, understood as competing with stare decisis. Rather, in the nature of a common law judge, the typical Australian textualist views the evolving body of precedents as authoritative rather than aberrational. Australian jurists are also generally comfortable incorporating contemporary norms, even those given definitive 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 not peculiar to the
United States, the historicist appeals that support American originalism have
a potency here that is found in few foreign constitutional courts, not 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, some invisible to casual
inspection, 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 obser-
vation of political histories. It is equally obvious, however, that such
observation strongly recommends a set of hypotheses that usefully informs
the American debate over originalism.

Part IV considers six such hypotheses. First is the effect that the
passage of time has on our tendency 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 perceived as
revolutionary rather than evolutionary. The United States announced its
sovereignty quickly, painfully, and without sympathy to its former coloniz-
ers. 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,13 Canada's could not be amended domestically until 1982,14 and
both countries were to varying degrees formally bound by the British Crown
well into the 1980s.15

Third, American originalism is an instrument through which a domestic,
sociopolitical movement seeks to validate its political commitments and to
influence our courts. If that movement is a backlash against the rights affin-
ity of the Warren and Burger Courts,16 there is little reason to expect a
counterpart to emerge organically from different political conditions in other

13. See infra sections III(A)(1), (B)(1).
(U.K.) (enacting the procedures for domestically amending the Canadian constitution).
15. PETER BOYCE, THE QUEEN'S OTHER REALMS: THE CROWN AND ITS LEGACY IN
AUSTRALIA, CANADA AND NEW ZEALAND 3-4 (2008).
16. See Greene, supra note 1, at 674–82 (discussing the history of originalism and describing
reactive originalism as born of "an obsession with the perceived pathologies of living
constitutionalism"); Edwin Meese, III, The Supreme Court of the United States: Bulwark of a
Limited Constitution, 27 S. TEX. L. REV. 455, 464 (1986) (warning of "a drift back toward the
radical egalitarianism and expansive civil libertarianism of the Warren Court").
countries. Australia’s constitution lacks a bill of rights,\textsuperscript{17} 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,\textsuperscript{18} and its Supreme Court aggressively polices it,\textsuperscript{19} but the Court might have done so too recently to generate an effectively mobilized backlash. The availability of parliamentary override of certain Canadian Supreme Court decisions may also tend to deflect potential criticism away from the Court and towards the legislature.

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 sociopolitical movement behind originalism has invited 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\textsuperscript{20} and convention dictates that the selection be informed by some combination of expertise and ordinary political patronage rather than by ideological considerations.\textsuperscript{21}

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. The notion that interpretation should be open-ended, not because the Constitution is vague but because the Constitution is indeterminate, gains far more traction in Canadian legal discourse than in that of Australia or 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,\textsuperscript{22} and the originalism movement that so glorifies the Constitution’s original understanding is conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God’s word. The United States is the world’s most religious developed democracy,\textsuperscript{23} and a substantial number of Americans are at best ambivalent toward the use of reason and creativity in exegesis of sacred

\textsuperscript{17} See infra note 276 and accompanying text.
\textsuperscript{18} Part I of the Constitution Act, 1982.
\textsuperscript{19} See infra section III(A)(2).
\textsuperscript{20} See infra notes 506–07 and accompanying text.
\textsuperscript{21} Id.
\textsuperscript{22} See, e.g., Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 HARV. L. REV. 431, 467 (2005) (“America has what amounts to a civil religion of constitutionalism.”); Sanford Levinson, “The Constitution” in American Civil Religion, 1979 SUP. CT. REV. 123, 136 (“Constitutionalism, like religion, represents an attempt to render an otherwise chaotic order coherent, to supply a set of beliefs capable of channeling our conduct.”); Christopher Wolfe, Public Morality and the Modern Supreme Court, 45 AM. J. JURIS. 65, 85 (2000) (“Over time, the Constitution... became the fundamental ‘sacred scripture’ of American politics, the outstanding document of American civil religion.”).
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 nonoriginalist fashion, it answers not to the canon of *expressio 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 interpretation nor, wholly, in its success as a political practice. 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, historical argument is itself a form of ethical argument. Taken seriously, that realization is potentially self-defeating for originalists, and for nonoriginalists it recommends foregoing the debater’s points so common in legal academic literature in favor of an aggressive emphasis on a contrary, more sympathetic ethos.

II. Our Originalism

It is frequently said that all constitutional interpretation is originalist. 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. To assign some other meaning to a text—some contemporary meaning wholly unmoored from the original, 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.30 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 organic 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.31 Originalists generally are either, by degrees, less sanguine about these alternative sources of constitutional meaning or believe them irrelevant to constitutional meaning but, for prudential reasons, appropriate in limited ways to the crafting of judicial decision rules.32

My use of the term "original understanding" is deliberate. As I use it, it can refer either to the original 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.33 Here is not the place to examine the interesting

30. That is not to say that fidelity requires a principle embodied within a text to be applied consistently across generations. See Jack M. Balkin, Abortion and Original Meaning, 24 CONST. COMMENT 291, 293 (2007) (distinguishing between the expected application of constitutional texts, which is not binding law, and those texts' original meaning, which is, and arguing that fidelity to the text does not mean fidelity to original expected application); Ronald Dworkin, Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, supra note 12, at 115, 119–20 (distinguishing between “semantic” originalism, which insists that constitutional texts be interpreted in light of the drafters’ intent, and “expectation” originalism, which advocates that texts be interpreted in light of the consequences anticipated by the drafters).


33. See Randy E. Barnett, An Originalism for Nonoriginalists, 45 LOY. L. REV. 611, 620 (1999) (“[O]riginalism has itself changed—from original intention to original meaning. No longer do originalists claim to be seeking the subjective intentions of the framers.”); Keith E. Whittington, The New Originalism, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (explaining that the focus of new originalism has been on “the public meaning of the text” rather than on “the concrete intentions of individual drafters”).
arguments in favor of one or the other, except to note that one’s intent as to
the scope of a provision and one’s reasonable expectation as to its application
are theoretically distinct both from each other and from the original meaning
of the provision’s text, but in practice they may be difficult to disentangle.
Justice Scalia, for example, is notionally committed to the authority of origi-
nal meaning but nonetheless cannot accept that the original meaning of
“cruel and unusual” may in later years come to apply to capital punishment.34
Persuasive evidence as to original expected application, such as the refer-
ences to capital punishment in the Fifth Amendment, seems in practice to
drive Scalia’s assessment of original meaning.35 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.36

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 interstices of
constitutional text.37 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.38

It is perhaps obvious, but too little recognized, that discussion of
originalism is not confined to the academy.39 Originalism is a term that,

34. See Scalia, supra note 32, at 861–62 (arguing that even if the Constitution’s “cruel and
unusual” language suggests an evolutionary intent, such intent finds no support in historical
evidence).

35. See Scalia, supra note 12, at 46 (expressing frustration that, despite explicit contempla-
tion of the death penalty in the Constitution, some still maintain that the practice is unconstitutional).

36. See, e.g., sources cited supra note 30.

37. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION
OF LIBERTY 99 (2004) (distinguishing interpretation, which determines the meaning of words, from
construction, which “fills the inevitable gaps created by the vagueness of these words when applied
to particular circumstances”); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION:
TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7–11 (1999) (characterizing
constitutional interpretation as “essentially legalistic” and constitutional construction as “essentially
political”).

38. See Berman, supra note 32, at 38 n.100 (providing various examples of scholarly
explorations of the relationship between constitutional interpretation and construction, but noting
that “courts rarely expressly distinguish the two in the course of their opinions”); Todd E. Pettys,
The Myth of the Written Constitution, 84 NOTRE DAME L. REV. 991, 1011 (2009) (suggesting that
popular conceptions of originalism have not kept pace with this development in constitutional
scholarship).

39. See Greene, supra note 1, at 60–61 (tracing the increased prominence of originalism in the
American popular and political discourse, particularly following the Reagan Administration);
Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitution, 75
FORDHAM L. REV. 545, 554 (2006) (“Since the 1980s, originalism has primarily served as an
ideology that inspires political mobilization and engagement.”).
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. A significant segment of the population associates originalism with the values Limbaugh specifies. 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 consistently found that roughly 4 in 10 Americans agreed that “[i]n making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution” as opposed to “consider[ing] changing times and current realities in applying the principles of the Constitution.” These polls perhaps suggest that much of the American public finds the distinction between original intent and original meaning 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 original meaning versus original purpose, much of the public response to the decision assimilated both opinions to a single interpretive modality: original intent. In the great debates of American constitutional theory, this error is a

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43. Greene, supra note 1, at 685 n.163.

44. *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
technical one only. As Scalia has written, "[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between original meaning (whether derived from Framers' intent or not) and current meaning."\(^\text{45}\)

*Heller* demonstrates the elevated space originalism occupies within American legal and political culture. The decision overruled the opinions of dozens if not hundreds of federal court judges,\(^\text{46}\) read a sixty-nine-year-old Supreme Court precedent into oblivion,\(^\text{47}\) 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.\(^\text{48}\) The Court did so over the stated objections of four Justices, the nation's capital, and the cities of Baltimore, Chicago, Cleveland, Los Angeles, Milwaukee, New York, Oakland, Philadelphia, Sacramento, San Francisco, Seattle, and Trenton.\(^\text{49}\) 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"\(^\text{50}\) is not limited to the militia-related purpose that concededly animated the right's codification.\(^\text{51}\)

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\(^{45}\) Scalia, *supra* note 12, at 38.

\(^{46}\) See District of Columbia v. Heller, 128 S. Ct. 2783, 2823 (2008) (Stevens, J., dissenting) ("Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there . . . .").

\(^{47}\) See *id.* at 2813–16 (majority opinion) (describing United States v. *Miller*, 307 U.S. 174 (1939), as a limited case about only one particular type of weapon).

\(^{48}\) *Id.* at 2817–22.

\(^{49}\) See *id.* at 2822 (Stevens, J., dissenting) (arguing that the Supreme Court should have focused on the scope of individual gun rights rather than the existence of such rights); *id.* at 2847 (Breyer, J., dissenting) (claiming that the District's law should fall within the scope of regulation left open to legislatures by the Second Amendment); Brief for Petitioners at 8–9, *Heller*, 128 S. Ct. 2783 (No. 07-290) (contending that the District's law banning the possession of especially dangerous types of weapons is not prohibited by the Second Amendment and does not disturb the purpose of the Second Amendment); Brief of Amici Curiae Major American Cities et al. in Support of Petitioners at 2–4, *Heller*, 128 S. Ct. 2783 (No. 07-290) (pleading for the law to be upheld to protect cities' ability to fight gun violence); Brief of the City of Chicago & the Board of Education of the City of Chicago as Amici Curiae in Support of Petitioners at 2, *Heller*, 128 S. Ct. 2783 (No. 07-290) (agreeing with the District but arguing in the alternative that the Second Amendment should not be incorporated against the states).

\(^{50}\) U.S. CONST. amend. II.

\(^{51}\) *Heller*, 128 S. Ct. at 2801.
Virtually every constitutional court engages in pluralistic interpretation, but in very few would an opinion like *Heller* be 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 of which I am aware 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." 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 laws were "probably constitutional." Yet in the immediate aftermath of *Heller* both John McCain, strongly, and Barack Obama, tepidly, endorsed the Court’s decision.

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. The rhetorical core of the campaign

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53. See Jackson, supra note 52, at 925–26 (declaring that courts that exercise judicial review and adjudicate within rights-protecting constitutional regimes typically are more open to modifying prior interpretations of the constitution to fit modern circumstances).


57. See Greene, supra note 1, at 680–81 (discussing Meese’s characterization of originalism as the only reliable method to induce judicial restraint); Siegel, supra note 55, at 220–22 (chronicling the Reagan administration’s systematic program to institute constitutional conservatism nationwide).
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." 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 *Ogden v. Saunders*, to Chief Justice Taney’s opinion in *Dred Scott v. Sandford*, to Chief Justice Fuller’s opinion in *Pollock v. Farmers’ Loan & Trust Co*., *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."

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 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.

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 even 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." The Court's progressives "won" in *West Coast Hotel v. Parrish* when Justice Roberts embraced progressive interpretation over Justice Sutherland's originalist dissent, and in the forty-five years between Sutherland's retirement in 1941 and Justice Scalia's appointment in 1986, Hugo Black was the Court's only self-avowed originalist.

66. 252 U.S. 416 (1920).
67. Id. at 433.
68. 277 U.S. 438 (1928).
69. Id. at 471 (Brandeis, J., dissenting).
70. Id. at 472 (internal citations omitted).
71. Id.
72. 300 U.S. 379 (1937).
73. Compare id. at 390, 399–400 (upholding, thanks to Justice Roberts's deciding vote, a state law that established a minimum wage for women and thereby overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), based in part on "the economic conditions which have supervened, and in light of which the reasonableness of the exercise of the protective power of the State must be considered"), with id. at 402 (Sutherland, J., dissenting) ("[T]he meaning of the Constitution does not change with the ebb and flow of economic events.").
74. *See Johnathan O'Neill, Originalism in American Law and Politics: A Constitutional History* 36 (2005) (explaining that Supreme Court decision making under the Warren and early Burger Courts was characterized by a "revolt against formalism" and that "the text and original meaning of the Constitution receded into the jurisprudential background"). Black defined his own interpretive approach in originalist terms that sharply contrasted with most of his contemporaries:

I strongly believe that the public welfare demands that constitutional cases must be decided according to the terms of our Constitution itself and not according to the judges' views of fairness, reasonableness, or justice.... I have no fear of
Meese and his allies’ frequent resort to metaphors of restoration—his use of the word “resurrect” was 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,* 75 *Mapp v. Ohio,* 76 *Miranda v. Arizona,* 77 *Reynolds v. Sims,* 78 and *Roe v. Wade* 79 are among the usual suspects, and we could add *Brown v. Board of Education* 80 to the list were that case not preternaturally immune from judicial critique. Bork and Scalia alike have suggested that the Warren Court’s abandonment of originalism is a historical anomaly and that it is the duty of the Court’s conservatives to right the ship. 81 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.” 82 Justice Sutherland’s originalism emphatically did not emphasize judicial restraint, which Sutherland said “belongs in the domain of will and not of judgment.” 83

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, 84 and Justice Scalia, who has called himself a constitutional amendments properly adopted, but I do fear the rewriting of the Constitution by judges under the guise of interpretation.

HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 14 (1968). In considering recent originalist Justices, we might also include William Rehnquist, who memorably bashed living constitutionalism in these pages. See William Rehnquist, *The Notion of a Living Constitution,* 54 Texas L. Rev. 693, 696–97 (1976) (“A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution.”). As Chief Justice, however, Rehnquist was not a vocal or consistent defender of originalism, particularly in his later years. See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court,* 74 Geo. Wash. L. Rev. 1043, 1047 (2006) (“Chief Justice Rehnquist, although an occasional adherent to originalism, is more fairly characterized as a pragmatist who took into account a variety of arguments in resolving a case.”).

75. 381 U.S. 479 (1965).
81. See BORK, supra note 32, at 143 (“What was once the dominant view of constitutional law—that a judge is to apply the Constitution according to the principles intended by those who ratified the document—is now very much out of favor among the theorists of the field.”); Scalia, supra note 32, at 852–54 (describing what he calls a recent and unprecedented trend of constitutional scholars openly rejecting originalism).
82. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting); see also Greene, supra note 1, at 680 (indicating that Meese argued originalism is essential to judicial restraint); Limbaugh, supra note 40, at 12 (claiming originalism to be the “only antidote” to judicial activism).
“faint-hearted originalist,” 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.” Heller was blithely dismissive of the Court’s Second Amendment decision in United States v. Miller, and Justice Scalia has advocated abandoning prior precedent in favor of original understanding in Eighth Amendment, campaign finance, and abortion cases, among others. By contrast, there was no significant tension articulated between originalism and stare decisis before Justice Black’s tenure on the Court.

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. But it has proven

85. Scalia, supra note 32, at 864.
86. Scalia, supra note 29, at 140.
87. 307 U.S. 174 (1939). Although it makes some attempt to salvage Miller as a case driven entirely by the type of weapon involved, the majority opinion in Heller disparages Miller’s precedential weight because of its brevity, the fact that the government was essentially unopposed on appeal, and the absence of discussion on the history of the Second Amendment. District of Columbia v. Heller, 128 S. Ct. 2783, 2814–15 (2008). In short, according to Scalia, “the case did not even purport to be a thorough examination of the Second Amendment.” Id. at 2814.
92. 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) (arguing that both Justice Black and Justice Scalia “have largely rejected precedent as a legitimate source of constitutional decision making”).
93. Id. at 56–57 (contrasting Black’s version of originalism, which was “clearly influenced by his personal and professional experiences” and “not shaped in the abstract,” with Scalia’s, which was derived “from a conservative movement that developed in the 1960s and grew in the 1970s in opposition to what it perceived as rampant judicial activism in the twentieth century”).
persuasive in a nontrivial number of cases, it lies squarely at the center of academic conversation in constitutional theory, and it is an important 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 Choudhry has called the “migration” of constitutional ideas. Since the start of 2007 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, more than 100 of which are located outside the United States, and LexisNexis currently serves customers in more than 100 countries. Judges around the world also interact in person in a wide range of settings, and Justice Scalia

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95. See, e.g., District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008) (relying on the original understanding of the text of the Second Amendment in establishing an individual right to possess a loaded handgun in the home); Crawford, 541 U.S. at 68 (examining the historical background of the Sixth Amendment to determine that the admission of certain testimony violated the Confrontation Clause); Apprendi v. New Jersey, 530 U.S. 466, 492 (2000) (appealing to the original understanding of statutory text in determining whether the law demands an examination of the defendant’s state of mind); Alden v. Maine, 527 U.S. 706, 712 (1999) (arguing that the Constitution was not originally understood to permit Congress to subject nonconsenting states to private damage suits in state courts); Printz v. United States, 521 U.S. 898, 905–18 (1997) (concluding that the Constitution was not originally understood to allow Congress to compel state officers to enforce federal law).


97. A search on LexisNexis’s database for law review articles published since January 1, 2007 that contain the word “originalism” in their title returns more than 100 sources.


Originalism is a frequent topic of conversation at those appearances.\footnote{See, e.g., Michael 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 Malkin, Senior U.S., Canadian Judges Spar over Judicial Activism, GLOBE & MAIL, Feb. 17, 2007, at A2 (describing a spirited debate over originalism between Justice Scalia and Canadian Justice Ian Binnie at McGill University); John O’Sullivan, High Court Opposes Dazzling Off the Bench, CHI. SUN-TIMES, Oct. 25, 2005, at 43 (discussing a debate between Justice Scalia and Justice Breyer held in Melbourne, Australia).}

The trouble is, hardly anyone is biting. If we take originalism to require that the original understanding of a constitutional text is presumptively dispositive when known, it is an exceedingly unpopular view around the world. Michel Rosenfeld calls originalism “virtually nonexistent” in all of Europe.\footnote{Rosenfeld, supra note 12, at 656.} The highly influential German Constitutional Court has favored a purposive approach to interpretation that generally privileges telos over original intentions narrowly conceived.\footnote{Donald P. Kommers, Germany: Balancing Rights and Duties, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, supra note 52, at 161, 200–01.} The high courts of India, South Africa, and Israel display something approaching open hostility to narrow textualism or static historicism.\footnote{See Yoav Dotan, Judicial Accountability in Israel: The High Court of Justice and the Phenomena of Judicial Hyperactivism, in DEVELOPMENTS IN ISRAELI PUBLIC ADMINISTRATION 87, 95–96 (Moshe Maoz ed., 2002) (noting a rise in judicial activism by the Israeli High Court of Justice, including an increased focus by the Court on broad principles of law, morality, and policy); Heinz Klug, South Africa: From Constitutional Promise to Social Transformation, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, supra note 52, at 266, 288–89 (noting that the South African Constitutional Court employs a jurisprudence that tracks “evolving standards of civilization”); Burt Neuborne, The Supreme Court of India, 1 INT’L J. CONST. L. 476, 480 (2003) (describing how a reaction to contemporary human rights violations caused the Supreme Court of India to adopt a broad reading of fundamental constitutional rights).} 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 established 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 the 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. Subpart 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. Subpart III(B) addresses the more complicated case of Australia, whose High Court has traditionally espoused 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),\(^{106}\) it did not become formally sovereign until the Canada Act, 1982.\(^ {107}\) The Canada Act declared more than thirty documents to constitute Canadian Supreme Law, the most significant of which were the BNA Act (renamed the Constitution Act, 1867),\(^ {108}\) 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).\(^ {109}\) 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.\(^ {110}\) The former colony of Canada, previously subdivided into East and West, was formally separated into the provinces of Québec and Ontario, giving the original nation of Canada a total of four provincial governments.\(^ {111}\) Canada was given a federal structure with a bicameral parliament and a vertical separation of powers between the national and the provincial governments.\(^ {112}\) Since the BNA Act did not include a bill of rights, the Canadian Parliament was, like the British Parliament, supreme

\(^{106}\) British North America Act, 1867, 30 & 31 Vict., ch. 3 (U.K.).
\(^{107}\) See Canada Act, 1982, ch. 11, § 2 (U.K.) (declaring Canada's sovereignty and formally divorcing its lawmaking functions from British control).
\(^{109}\) Canada Act, 1982, § 1.
\(^{110}\) British North America Act, 1867, § 3.
\(^{111}\) Id. §§ 5–6.
\(^{112}\) Id. §§ 18, 58.
within its legitimate sphere of action. 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. 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 Rights.” It is easy to imagine examples in which these grants of authority cannot be mutually exclusive.

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. 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. 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 beginning in the late nineteenth century the Privy Council took a rather heavy-handed approach to its Canadian constitutional duties.

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 which [British courts] apply to other statutes.”

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113. See Hodge v. The Queen, (1883) 9 App. Cas. 117, 132 (P.C.) (appeal taken from Ont.) (U.K.) (declaring that both the national and provincial Canadian legislatures have plenary power within the limits imposed by their jurisdictional provisions).

114. See Peter W. Hogg, Canada: From Privy Council to Supreme Court, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, supra note 52, at 55, 66–69 (describing conflicts that arose from the federal and provincial governments being granted exclusive, but overlapping, powers).


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

120. See THE CONSTITUTIONAL LAW GROUP, CANADIAN CONSTITUTIONAL LAW 90 (Bakan et al. eds., 3d ed. 2003) (characterizing the Privy Council as dominant during the late 1800s and early 1900s in that it established doctrine with little reference to the Canadian courts).

121. (1887) 12 App. Cas. 575 (P.C.) (appeal taken from Que.) (U.K.).

122. Id. at 579.
that constitutional interpretation was to be guided by literal, textual exegesis that rigidly relied on original public meaning coupled with stare decisis and strictly ignored extrinsic sources or reference to the intent of the legislature. What it meant in practice and in effect was a gradual diminution in national power in relation to provincial governments. 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. The strict federalism the Law Lords enforced was arguably consistent with the text of the BNA Act but was at odds with the constitutional vision of many of the Act’s drafters.

The Privy Council dramatically and self-consciously departed from static text-bound interpretation in the 1930 case of Edwards v. Attorney-General for Canada, popularly known as the Persons Case. The BNA Act provides that the Canadian Senate is to comprise “qualified Persons,” a term whose original meaning, in the unanimous view of the Supreme Court of Canada, did not include women. The case might easily have stood as Canada’s Dred Scott v. Sandford, but Lord Sankey turned it into Canada’s

123. See Hogg, supra note 114, at 79 (remarking that the Privy Council rigidly abided by stare decisis when interpreting the BNA Act); Vincent C. MacDonald, Judicial Interpretation of the Canadian Constitution, 1 U. TORONTO L.J. 260, 268 (1936) (stressing that the canons of statutory construction used by the Privy Council to interpret the BNA Act effectively excluded contemplation of extraneous, nontextual matters).

124. See MacDonald, supra note 123, at 277–78 (documenting how the literalistic approach combined with an underlying “instinct to protect provincial jurisdiction” to reduce the power of the central government); see also Ian Binnie, Constitutional Interpretation and Original Intent, 23 SUP. CT. L. REV. 2d 345, 357 (2004) (“The jurisprudence of the Judicial Committee of the Privy Council, led by Lords Watson and Haldane, narrowed the already truncated scope of federal powers in a series of cases.”).

125. PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 42 (3d ed. 2004). By contrast, during the four-year period prior to 1880 in 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. JOHN T. SAYWELL, THE MAKERS: JUDICIAL POWER AND THE SHAPING OF CANADIAN FEDERALISM 34 (2002).

126. See RUSSELL, supra note 125, at 42–43 (arguing that the Judicial Committee articulated a “classical federalism” model for Canada rather than one in which the provinces were subordinate); H.E. Smith, The Residue of Power in Canada, 4 CAN. B. REV. 432, 433 (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. Binnie, supra note 124, at 375; 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).


130. 60 U.S. 393, 413 (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).
Brown v. Board of Education: "[T]he appeal to history," he wrote, "is not conclusive."131 Rather, Lord Sankey said that constitutional interpretation requires attention to the "continuous process of evolution" within Canadian society.132 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.133

In one stroke, Lord Sankey’s opinion in Edwards effected four reversals, each momentous standing alone.134 First, and most immediately, it overturned the Supreme Court and granted women the right to serve in the Senate.135 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,136 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.137 Finally, and most significantly for our purposes, the BNA Act would thenceforth no longer be interpreted as an ordinary statute whose meaning is inalterably fixed by the original meaning of its text and judicial interpretation thereof.138 Instead, interpretation would be “large and liberal,” with an eye

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133. Id. at 136 (internal quotations omitted).
134. See SAYWELL, supra note 125, at 192 (“In its explicit reasoning and result, Edwards was a sharp break with previous Judicial Committee jurisprudence.”).
136. Id. at 136.
137. See, e.g., In re Regulation & Control of Radio Commc’n in Can., [1932] A.C. 304, 312 (P.C.) (appeal taken from Can.) (U.K.) (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”).
138. See, e.g., In re Regulation & Control of Aeronautics in Can., [1932] A.C. 54, 70 (P.C.) (appeal taken from Can.) (U.K.) (referring to the BNA Act as “a great constitutional charter” and
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,\(^ {139} \) and the notion of fundamental law as essentially organic influenced the likes of Woodrow Wilson and Oliver Wendell Holmes.\(^ {140} \) But the metaphor of constitutional evolution 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 Ass'n v. Attorney-General for Canada,\(^ {141} \) the Committee affirmed the authority of the national government to enact a statute criminalizing certain anticompetitive practices even though the offenses were not criminal at the time of confederation.\(^ {142} \) And in British Coal Corp. v. The King,\(^ {143} \) 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."\(^ {144} \) As in the United States during the same period, a rejection of originalism was usually in the service of judicial restraint; the idea was that the Constitution should not be construed so literally as to hamstring a government in responding to the vital issues of the day.\(^ {145} \)

And as in the United States during the same period, judicial conservatives went down fighting. In 1935 Lord Sankey, author of Edwards and British Coal, was replaced as Lord Chancellor, and Lord Atkin became counseling that, "[u]seful 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").

139. A. LAWRENCE LOWELL, ESSAYS ON GOVERNMENT 2–3 (Boston, Houghton Mifflin & Co. 1889).

140. 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.").


142. Id. at 323–24.


144. Id. at 518, 522.

145. See Hogg, supra note 114, at 87–88 (describing the generally liberal interpretation of power-allocation provisions, which tended to result in upholding the constitutionality of legislation challenged on federalism grounds); F.L. Morton & Rainer Knopff, Permanence and Change in a Written Constitution. The "Living Tree" Doctrine and the Charter of Rights, 1 Sup. Ct. L. Rev. 2d 533, 538 (1990) ("The original purpose of the 'living tree' doctrine in BNA Act jurisprudence was to expand enumerated legislative powers.").
On the Origins of Originalism

the Judicial Committee’s presiding Law Lord and intellectual leader.\textsuperscript{146} 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.\textsuperscript{147} 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 \textit{Attorney General v. Attorney–General Ontario (The Labour Conventions Case)},\textsuperscript{148} 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.\textsuperscript{149} Lord Atkin’s opinion in the \textit{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.”\textsuperscript{150}

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 peace, order, and good government of Canada in a time of emergency.\textsuperscript{151} The Judicial Committee also struck down Dominion statutes regulating natural products and unfair competition,\textsuperscript{152} again on federalism grounds. With the New Deal decisions, “[t]he approach to judicial review, heralded in \textit{Edwards} . . . was not only abandoned but explicitly repudiated.”\textsuperscript{153}

\textsuperscript{146} See ROBERT STEVENS, \textit{THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION} 26 (2d ed. 2002) (stating that, because Lord Sankey would not preside over the Judicial Committee after Lord Hailsham replaced him as Chancellor in 1935, Lord Atkin assumed the role).

\textsuperscript{147} See SAYWELL, \textit{supra} note 125, at 218–19 (describing Atkin’s natural hostility towards central government control, his protectiveness of business freedom, and his reverence for precedent).

\textsuperscript{148} [1937] A.C. 326 (P.C.) (appeal taken from Can.).

\textsuperscript{149} \textit{Id.} at 350–54. Recall that the U.S. Supreme Court came out differently in the analogous case of \textit{Missouri v. Holland}, 252 U.S. 416 (1920).

\textsuperscript{150} [1937] A.C. at 354.

\textsuperscript{151} AG Can. v. AG Ont. (The Employment and Social Insurance Act), [1937] A.C. 355, 367 (P.C.) (appeal taken from Can.). The BNA Act was amended in 1940 to add unemployment insurance to the federal domain. British North America Act, 1940, 3 & 4 Geo. 6, ch. 36, § 1 (U.K.).

\textsuperscript{152} See AG Ont. v. AG Can. (The Dominion Trade and Industry Commission Act), [1937] A.C. 405, 416 (P.C.) (appeal taken from Can.) (U.K.) (agreeing with the Canadian Supreme Court that parts of the Act were invalid as ultra vires); AG B.C. v. AG Can. (The Natural Products Marketing Act), [1937] A.C. 377, 386–87 (P.C.) (appeal taken from Can.) (U.K.) (“There can be no doubt that the provisions of the Act cover transactions [that] . . . have no connection with the inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and . . . must be beyond the competence of the Dominion Legislature.”).

\textsuperscript{153} SAYWELL, \textit{supra} note 125, at 226.
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.* 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 his own court. 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. Kennedy had written optimistically during Lord Sankey's tenure that "the older constitutional law is being handed over to the historians." 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 elder age. At long last we can criticize it, as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship.

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." 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."

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 in-

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154. The decisions were handed down on January 28, 1937. *Id.*
155. *West Coast Hotel* was argued on December 16 and 17, 1936. 300 U.S. 379, 379 (1937). According to a memo written by Justice Roberts and given to Justice Frankfurter some years later, there were two conference votes on the case, first on December 19 and then again on February 6, 1937, barely a week after Atkin's New Deal decisions. Felix Frankfurter, *Mr. Justice Roberts,* 104 U. PA. L. REV. 311, 315 (1955).
159. *Id.* at 398.
tended division of power between the national and provincial governments, and that (unlike in the United States) authority was presumptively to rest with the former.\textsuperscript{162} O'Connor's conclusions remained orthodoxy for three decades,\textsuperscript{163} 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.\textsuperscript{164} The Court found the bill constitutional and the Judicial Committee affirmed on the authority of the Statute of Westminster, 1931.\textsuperscript{165} Appeals to the Privy Council were officially abolished with passage of the bill and British approval in 1949.\textsuperscript{166}

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 national authority,\textsuperscript{167} 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.\textsuperscript{168} Likewise, the strict ban on reference to parliamentary debate, not relaxed in the House of Lords until 1993,\textsuperscript{169} was lifted in Canadian constitutional cases in the 1970s,\textsuperscript{170} and the Supreme Court is not mechanically opposed to referring to the legislative history of the BNA Act.\textsuperscript{171} 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 \textit{Residential Tenancies Act 1979}\textsuperscript{172} reference, the Court

\begin{footnotes}
\footnotetext{162}{See \textit{William F. O'Connor, Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel: Relating to the Enactment of the British North America Act, 1867}, annex 1, at 42 (Ottawa, Queen's Printer 1961) (1939) ("The legislative authority that the Imperial Parliament 'meant' the Parliament of Canada to have was not that emasculated authority which [the Privy Council has invented]. It was, instead, that unrestricted and exclusive authority to make laws . . . ").}
\footnotetext{163}{\textit{The Constitutional Law Group, supra} note 120, at 183–84.}
\footnotetext{164}{\textit{Saywell, supra} note 125, at 229.}
\footnotetext{166}{See \textit{Saywell, supra} note 125, at 238 ("In 1949 the only certainty was that, as the court of last resort, the Supreme Court would be free of the threat of review.").}
\footnotetext{167}{\textit{Id.} at 247.}
\footnotetext{168}{See Hogg, \textit{supra} note 114, at 79 (citing three constitutional cases where the Court has explicitly refused to follow the Privy Council's precedent: \textit{Re Agricultural Products Marketing Act, 1978} 2 S.C.R. 1198 (Can.); \textit{Reference re Bill 30 (Ontario Separate School Funding), 1987} 1 S.C.R. 1148 (Can.); \textit{Wells v. Newfoundland, 1999} 3 S.C.R. 199 (Can.).}
\footnotetext{169}{\textit{Pepper v. Hart, 1993} A.C. 593, 594 (H.L.) (appeal taken from Eng.) (U.K.).}
\footnotetext{171}{Hogg, \textit{supra} note 114, at 78–79.}
\footnotetext{172}{\textit{[1981] 1 S.C.R. 714} (Can.).}
\end{footnotes}
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.”

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. 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: “Dealing, a[s] 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 . . . .” The living-tree doctrine served provincial rather than federal ends in another pre-Charter federalism case, Attorney-General British Columbia v. Canada Trust Co., 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.

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 been most fertile in rights cases, in which its effect is quite the opposite.

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. The Charter of Rights and Freedoms includes an exten-
sive list of enumerated rights, including the "fundamental freedoms" of conscience and religion; thought, belief, opinion and expression, including press and other media of communication; peaceful assembly; and association.\textsuperscript{181} The Charter also guarantees, among other things, 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.\textsuperscript{182} The Charter studiously avoids the phrase "due process of law," on which more later, but it does guarantee equality "before and under the law,"\textsuperscript{183} 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."\textsuperscript{184}

Although the Constitution Act, 1982 contains a Supremacy Clause,\textsuperscript{185} 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."\textsuperscript{186} The Charter, then, makes explicit what in the United States has been left to judicial construction: a decision rule for declaring actionable rights violations.\textsuperscript{187} 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.\textsuperscript{188} The declaration lasts five years and is subject to renewal by a second vote of the legislature.\textsuperscript{189} 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 invoked the notwithstanding clause for every piece of legislation passed between 1982

\textsuperscript{182} Id. § 2 (fundamental freedoms); id. § 3 (voting); id. § 8 (search and seizure); id. § 9 (arbitrary detention); id. § 10 (counsel and habeas corpus); id. § 11 (additional criminal procedural protections); id. § 12 (cruel and unusual punishments).
\textsuperscript{183} The Charter expressly shields affirmative-action programs from an equality-based attack. Id. § 15.2.
\textsuperscript{184} Id. § 7.
\textsuperscript{185} Part VII of the Constitution Act, 1982, § 52.
\textsuperscript{186} Charter of Rights and Freedoms § 1.
\textsuperscript{188} Charter of Rights and Freedoms § 33. Section 33 does not apply to democratic rights, mobility rights, or language rights. Id.
\textsuperscript{189} Id.
and 1985. 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.

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. 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 most powerful political parties, and the leaders of four national aboriginal groups supported the Accord, it was defeated 54% to 46%. Says Peter Hogg, “One must conclude that significant amendments to the Constitution of Canada are, at least for the foreseeable future, impossible.”

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”—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 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 the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin

191. DAVID JOHANSEN & PHILIP, ROSEN, PARLIAMENTARY INFO. & RESEARCH SERV., THE NOTWITHSTANDING CLAUSE OF THE CHARTER 11-12 (2008), http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.pdf. Prospective rather than remedial invocation of Section 33 has been somewhat more frequent but is far less politically visible. See Kahana, supra note 190, at 274 (explaining that prospective uses of the notwithstanding clause “were invisible because they dealt with issues that were not on the public’s agenda prior to their enactments”).
192. Although the Constitution Act, 1982 has been formally amended eight times, none was of national importance. Hogg, supra note 114, at 57 n.9.
193. Id. at 57.
194. See id. (stating that the failure of the Meech Lake and Charlottetown Accords “have persuaded Canadian politicians that constitutional amendment is not a career-enhancing opportunity”).
195. See RUSSELL, supra note 125, at 192–93, 227 tbl.2 (discussing the multilateral nature of the negotiations that produced the Charlottetown Accord and documenting the results of the referendum).
196. Hogg, supra note 114, at 57.
and the laser." In twenty-two 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. Over the first twenty-four years of judicial review under the Charter, the Court invalidated 89 laws, including 53 federal statutes.

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 doctrines, and its mootness and standing rules are lax by comparison. Moreover, the Supreme Court of Canada regards its competence as comprising a broad remedial authority. 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. As a remedy, the Court read sexual orientation into the statute despite a deliberate legislative decision to exclude it. In defense of the aggressive remedy, Justice Iacobucci wrote, “By definition, Charter scrutiny will always involve some interference with the legislative will.”

More startling from a U.S. constitutional orientation is Reference re Secession of Québec, in which the Court was asked to decide whether Québec could unilaterally secede from Canada. For a court even to answer such a question is, in a manner of speaking, foreign to our constitutional

199. Id. at 14. The statutory provision was Section 94(b) of the Indian Act, invalidated in R. v. Drybones, [1970] S.C.R. 282, 283 (Can.).
200. See Peter W. Hogg & Allison A. 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. 75, 97 tbl.1 (1997) (indicating that, by 1997, the Court had invalidated sixty-six laws, forty-three of which were federal statutes); Peter W. Hogg et al., Charter Dialogue Revisited—Or “Much Ado About Metaphors,” 45 OSGOODE HALL L.J. 1, 51, 52 tbl.1 (2007) (noting that since 1997 the Court invalidated another twenty-three laws, ten of which were federal statutes).
201. Hogg, supra note 114, at 71; cf. Geoffrey Cowper & Lorne Sossin, Does Canada Need a Political Questions Doctrine?, 16 SUP. CT. L. REV. 2d 343, 344 (2002) (arguing that the role of the Supreme Court of Canada with respect to the legislature has not been clearly established).
202. Hogg, supra note 114, at 71; see also MORTON & KNOPFF, supra note 198, at 15 (“Under the Charter, the Supreme Court has sanctioned judicially ordered affirmative remedies. That is, they no longer just tell policymakers what they may not do but also what they must do.”).
204. Id. at 498; cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts’ associational rights were violated by the application of New Jersey’s public-accommodations law, which required the Boy Scouts to retain an openly gay scout leader).
206. Id.
208. Id. at 228. 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) (Can.).
sensibilities. Quèbec’s as well, I should add—the province refused to participate in the case on political-question grounds.210 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 that “breathe life” into the Canadian Constitution: federalism; democracy; constitutionalism and the rule of law; and respect for minorities.211 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’ . . . .”212 The Court ultimately decided that while Quèbec could not secede unilaterally, if the people of Quèbec 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.213 A judicious decision, to be sure, but not one many Americans would recognize as properly judicial.

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.214 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.215 Canada’s high court is also more receptive to claims that sound in group rights. The Charter specifically protects both affirmative-action policies216 and minority-language rights,217 and any

209. Cf. Mark A. Graber, Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited, 21 CONST. COMMENT. 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.”).


211. Secession of Québec, [1998] 2 S.C.R. at 248. The Quèbec Secession reference is not the first time the Supreme Court of Canada has rested a decision on the authority of unwritten constitutional principles. See, e.g., Reference re Remuneration of Judges of the Provincial Court of P.E.I., [1997] 3 S.C.R. 3, 13–14 (Can.) (applying unwritten principles to hold that provinces cannot reduce the salaries of provincial court judges without first consulting an independent commission).


213. Id. at 220–21.


216. See Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 15(2) (U.K.) (providing that the Charter’s guarantee of equality rights “does not preclude any law,
constitutional amendment dealing with language rights requires unanimous support from the provinces. 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 law but also has permitted the criminalization of pornography that degrades women, on the theory that it harms the community in a manner similar to hate speech.

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 discussed, 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 wholly irrelevant. 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 ratifying 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 *Reference re Section 94(2) of the Motor Vehicle Act*. 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 of Canada held, unanimously, that criminal liability and imprisonment without a mens rea element violated the Charter-enshrined right not to be

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217. *Id.* §§ 16–23.
221. *See Reference re Employment Insurance Act*, [2005] 2 S.C.R. 669, 690, 2005 SCC 56 (Can.) (“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 Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada*, 22 CAN. J.L. & JURISPRUDENCE 331, 344–45 (2009) (categorizing the Court’s appeals to originalism into three types: “gratuitous reference” cases, “confederation bargain” cases, and cases that employ originalism as a justification for dissent or for overturning precedent).
222. [1985] 2 S.C.R. 486 (Can.).
223. *Id.* at 493–94.
deprived of liberty “except in accordance with the principles of fundamental justice.” 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 Canada officials who explained that in composing the text they specifically refrained from using the term “due process” so as to avoid the paradoxically substantive connotations of that phrase in U.S. jurisprudence.

That bit of history did not impress the Court. Writing for himself and four of his colleagues, Justice Lamer wrote that such testimony was entitled to “minimal weight.” It was impossible, in his view, to locate a general legislative intent, and it would be inappropriate to make dispositive in Charter interpretation “the comments of a few federal civil servants.” 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.

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, Ltd., 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.”

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 more broadly anti-historicist. The intentions of the framers of the U.S. Constitution, specific and otherwise,
remain a vital source of American constitutional wisdom. Justice Stevens’s dissenting opinion in *Heller* sought to counter Justice Scalia not through an appeal to the living Constitution but through relentless emphasis on the intent of the drafters of the Second Amendment. If the Great Divide in the United States is, as Justice Scalia says, between original meaning and current meaning, the Supreme Court of Canada has pledged its allegiance to the latter in the clearest of terms.

Second, even granting a stateside trend away from original-intent originalism, 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, debating history can provide clues as to the original understanding of the ratifying public. The Supreme Court of Canada could have profitably adopted this approach in the *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,” 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. Natural justice is a familiar common law and administrative law concept in Canada that generally refers to procedural, not

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232. See Fallon, supra note 31, at 1198–99 (documenting the usage of both specific and general forms of original intent on the U.S. Supreme Court); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 (1981) (“Judicial opinions at least purport to take original intent seriously, apparently reflecting the belief that the original intent mode is not simply a matter of expository style in opinion writing. It is, rather, a way of thinking about constitutional ‘meaning’ that follows from the basic concepts that legitimate judicial review . . . .” (footnote omitted)).

233. See District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting) (asserting that the original intent of the Second Amendment was to protect state militias, not private civilian use).

234. See Ont. Hydro v. Ontario (Labour Relations Bd.), [1993] 3 S.C.R. 327, 409 (Can.) (“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.”).

235. See supra note 33 and accompanying text.

236. See Scalia, supra note 12, at 38 (explaining that he refers to the writings of some Constitutional Convention delegates because their writings indicate how the constitutional text was originally understood by “intelligent and informed people”); cf. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (acknowledging that the drafting history of a treaty “may of course be consulted to elucidate a text that is ambiguous”).


239. See id. at 923 (explaining that, to adhere to the principles of “fundamental justice,” a court must “act fairly, in good faith, without bias and in a judicial temper, and must give to [the appellant] the opportunity adequately to state his case”).
substantive, fairness.\footnote{240} Justice Lamer’s refusal to accord decent respect to the opinions of the Charter’s drafters even to clarify the original understanding reflects a singular discomfort with turns to history as an interpretive aide.\footnote{241}

Finally, and perhaps most unusually from a U.S. perspective, the \textit{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 approach, but it is relatively uncommon for Court opinions to contain extended discussions of constitutional theory.\footnote{242}

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.\footnote{243} Indeed, the Court used the metaphor in its very first case under the Charter, \textit{Law Society of Upper Canada v. Skapinker},\footnote{244} in which it held that an Ontario law limiting bar membership to Canadian citizens did not


\footnote{241. See Hogg, supra note 114, at 79, 83. The Court has occasionally resorted to originalism in order to preserve a specific historic compromise, particularly in aboriginal cases. \textit{See, e.g.}, R. v. Blais, [2003] 2 S.C.R. 236, 237, 2003 SCC 44 (Can.) (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] 2 S.C.R. 507, 548 (Can.) (holding it consistent with a purposive interpretive approach to declare that the aboriginal rights protected in Section 35 of the Charter are not dynamic but instead include only traditions identifiable prior to aboriginal contact with Europeans); Adler v. Ontario, [1996] 3 S.C.R. 609, 611 (Can.) (refusing to extend state support for minority denominational schools in Ontario and Québec, as established under the BNA Act, to other sectarian schools).


\footnote{243. See Morton & Knopff, supra note 145, 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.”); \textit{cf.} Raymond Bazowski, \textit{For the Love of Justice? Judicial Review in Canada and the United States}, in \textit{CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES}, supra note 214, at 223, 231 (concluding that the legislatures’ silence after the Canadian Supreme Court announced its intention to engage in broad purposive analysis almost immediately after the Charter’s passage demonstrates their acceptance of that interpretive approach).

\footnote{244. [1984] 1 S.C.R. 357 (Can.).}
offend the Charter. In a lengthy discourse on the fundamentals of interpretation of a constitutional instrument, complete with quotations from *Marbury v. Madison* and *McCulloch v. Maryland*, 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.”

More recently, the Court used the living-tree analogy to uphold the constitutionality of a federal law fixing a gender-neutral definition of marriage. 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. The Supreme Court found that this gave the federal government domain over marriage capacity and the provinces 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.”

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 auspices. A 2007 survey of Canadians found that 54% of respondents thought the Supreme Court was “moving our[r] society in the right direction,” whereas 37% 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.

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245. *Id.* at 382–83.
246. 5 U.S. (1 Cranch) 137 (1803).
252. *Id.* at 710.
253. See MORTON & KNOFF, *supra* note 198, at 17 (observing that a majority of the Canadian public has greater confidence in courts and judges than in legislatures and politicians, despite the increasing influence of the courts over policy and the rise of “court bashing” in the press).
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% expressed general dissatisfaction with the Court's work, and 26% suggested that the Court was soft on crime. The sorts of criticisms that tend to recur in books like Mark Levin's *Men in Black*, on talk radio, and at congressional hearings—"out of touch with mainstream society" (4.6%); "too political" (3.5%); "allowing abortion/same-sex marriage" (2.2%)—barely registered.

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. But vanishingly few of the Court's critics insist that its members should be constrained by the historical meaning of the Constitution. Indeed, two of 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 imply the acceptance of similarly extreme (and simplistic) versions of the 'original intent' or 'frozen concepts' approaches to constitutional interpretation." Rather, Morton and Knopff invoke the Canadian tradition of parliamentary supremacy to argue for greater deference to the democratic decision making 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. Theirs is, in that sense, a critique in the minimalist tradition.

255. Id. at 2. 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*, ALTA. REP., Sept. 21, 1998, at 20 (using a case in which an alleged murderer was freed due to excluded evidence as a paradigmatic example of Supreme Court activism under the Charter).

256. See generally *LEVIN*, supra note 41 (asserting that activist judges have improperly used the concept of a living constitution to advance certain moral or political aims at odds with the original intentions of the founders).

257. SES RESEARCH, supra note 254, at 2.


259. See *Bazowski*, supra note 243, 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").


261. See *MORTON & KNOPFF*, supra note 198, at 157 (arguing that the institutional transfer of power over policy matters to the courts is "a way of substituting coercion for government by discussion").

262. See id. at 149 (explaining that their primary objection to the Charter Revolution is that "it is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of
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, Justice William Marshall made no reference to the text, history, or structure of the Charter. The case, *Newfoundland (Treasury Board) v. Newfoundland Ass'n 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. Justice 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: "[I]t cannot be said that s. 1 endows the judiciary with license to stand in the shoes of the other branches of government as ultimate arbiter of which policy choices were in the best interests of the governed." The reason Justice Marshall believed that Section 1 had been misapplied was not because of how it was intended or understood in 1982 but rather because he believed the Court was trampling on an *unwritten* constitutional convention.

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Legal academics frequently argue that the debate over judicial activism in the United States is hollow. The activist judge, after all, is the one who gets it wrong. 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 comparable disagreement in Canada over how active a role, and to what purpose, the Supreme Court should play in divining and articulating rights under the authority of the Charter." 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 have, for much of the Charter's history, been "virtually unanimous" in endorsing a "living tree" approach to articulating Charter rights.\textsuperscript{269} 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 television\textsuperscript{270}—but to changes in the meaning of the Constitution itself.\textsuperscript{271}

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; textualist 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,\textsuperscript{272} the case whose principles continue to set the terms of debate in Australian constitutional law is instead a symbol of British continuity. Thus, in \textit{Amalgamated Society of Engineers v. Adelaide Steamship Co. (The Engineers Case)},\textsuperscript{273} 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 the 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.\textsuperscript{274}

\textsuperscript{269.} Jackson, \textit{supra} note 52, at 947. As Vicki Jackson observes, the living-tree metaphor is not conceptually identical to the "living constitution" idea that was once more popular in American discourse. \textit{Id.} at 943. The anatomy of a tree as root and branches "suggests that constitutional interpretation is constrained by the past, but not entirely." \textit{Id.} at 926. In that sense, the analogy might compare more favorably with Ronald Dworkin's well-known chain-novel metaphor. \textit{See} RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986) (describing judicial interpretation as analogous to a novel produced serially by authors, each one drawing on and interpreting the chapters of earlier authors in the chain).

\textsuperscript{270.} \textit{See}, e.g., Scalia, \textit{supra} note 12, at 45 (allowing that an originalist might still need to apply constitutional text to "new and unforeseen phenomena").

\textsuperscript{271.} \textit{Cf.} Morton & Knopff, \textit{supra} note 145, at 539–40 (distinguishing changes in fact from changes in meaning and arguing that the latter represents a problematic exercise of "judicial veto").

\textsuperscript{272.} \textit{See supra} notes 127–38 and accompanying text.

\textsuperscript{273.} (1920) 28 C.L.R. 129 (Austl.).

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 constitutional sovereignty one year earlier. It remains rhetorically potent today. As Brad Selway has written, “In 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.’”

Part of the reason why Australia would have taken to purposive, value-laden, or evolutionary jurisprudence much 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; adjudicating constitutional disputes, much less those involving individual rights, is a relatively minor chore for the Court. 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, often called legalism in its more sophisticated and plenary form, is more broadly practiced but less reactionary and less historicist than American originalism. As we shall see, legalism is an exercise in judgment, not a salve for it.

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


276. The constitutionally enshrined individual rights are the rights to just terms in the event of a taking of property, AUSTL. CONST. ch. I, pt. 5, § 51(xxxi); to criminal trial by jury, id. ch. III, § 80; and to freedom of religion, id. ch. V, § 116. The Constitution also guarantees that those qualified to vote in state elections shall be qualified to vote in Commonwealth elections, id. ch. IV, § 41, but the scope of this provision has been limited through judicial interpretation. See GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 103 (1999) (explaining that Section 41 of the Australian Constitution is so infrequently applicable that the Australian Constitutional Commission recommended its removal in 1998). State governments are forbidden from discriminating against residents of other states. AUSTL. CONST. ch. V, § 117.

277. Constitutional cases rarely form more than 10% of the Court’s annual docket. Jeffrey Goldsworthy, Australia: Devotion to Legalism, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, supra note 52, at 106, 113. Rights cases are not dominant within that category. See 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) (asserting that the significant constitutional issue facing the Australian High Court has been separation of powers, not individual rights).

278. See Goldsworthy, supra note 277, at 136–41 (claiming that the judiciary’s emphasis on legalism allowed a massive expansion of Commonwealth power).
colonies was represented.279 The resulting Constitution was submitted for referendum within five of the six colonies and was submitted to the Parliament at Westminster for approval in 1900.280 The final version was little changed by Parliament and went into effect as the Commonwealth of Australia Constitution Act on January 1, 1901.281 The Constitution established a tripartite federal system of government, with a legislative, executive, and judicial branch,282 although by convention the executive is under the control of the national legislature.283 The principal federalism-related provisions are Sections 51 and 52, which enumerate the powers of the Parliament,284 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.285

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.286 The High Court is a constitutional creation, its composition and jurisdiction the subject of Chapter 3 of the Constitution.287 The Court began to sit in 1903, when Parliament conferred jurisdiction upon it to decide constitutional cases.288 Its constitutional jurisdiction permits it to hear appeals


280. Id. at 12–13. The final colony, Western Australia, approved the Constitution by referendum after the passage of the bill in Parliament. Id. at 14.

281. See id. at 14 (describing the January 1, 1901 ceremony in Sydney that marked the inauguration of the new Commonwealth). The Australian Constitution is contained within the final clause of a nine-clause act of the British Parliament. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12, § 9 (U.K.).

282. AUSTL. CONST. chs. I–III.

283. See W.G. McMinn, A CONSTITUTIONAL HISTORY OF AUSTRALIA 59 (1979) (asserting that at the time of the colonial constitutions, the Governor’s executive power was contingent on the advice of ministers responsible to the legislature); Geoffrey Sawer, The Australian Constitution 26–27 (2d ed. 1988) (explaining that the members of the main body of Australia’s executive branch, the Cabinet, must all either be members of Parliament or become members within three months of appointment). But see Christos Mantziaris, The Executive—A Common Law Understanding of Legal Form and Responsibility, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 125, 130–35 (French et al. eds., 2003) (observing that, while almost all executive actions are ostensibly under parliamentary scrutiny, judicial expansion of executive power and the executive’s progressively greater dominance of Parliament in fact shield the executive branch from a large measure of legislative scrutiny and control).


285. Id. ch. V, §§ 106–120.

286. Goldsworthy, supra note 277, at 110; see also Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 262 (Austl.) (Fullagar, J.) ("[I]n our system the principle of Marbury v. Madison is accepted as axiomatic.").

287. See AUSTL. CONST. ch. III, § 72 ("The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia . . . ."); id. § 73 (establishing the High Court’s jurisdictional limits).

288. See Judiciary Act, 1903, ch. 6, pt. 4, § 30 (Austl.) (giving the High Court jurisdiction over "all matters arising under the Constitution or involving its interpretation").
from both lower federal courts and from state courts (including on state-law issues), although today its jurisdiction is limited by statute to discretionary appeals in cases involving divisions of authority in the lower courts or raising issues of national importance. The Constitution also provides for the possibility of appeal to the Judicial Committee of the Privy Council. Significantly, however, in cases involving an inter se federalism question, appeal to the Privy Council from High Court decisions originally required certification from the High Court itself. The Court certified only one question, in 1913, before most appeals to the Privy Council were abolished in 1968. Direct appeals from state courts were not constitutionally barred, but the High Court ruled in 1907 that it was not bound by any Privy Council decisions on inter se affairs, even when the Committee properly had jurisdiction. The state-court loophole was subsequently closed later that same year when the Australian Parliament provided that the High Court’s jurisdiction over inter se matters was exclusive of the state supreme courts' As a practical matter, then, the Privy Council has had very little effect on the development of Australian constitutional law.

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. 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.

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

289. Id. § 73(ii).
290. Judiciary Amendment Act (No. 2), 1984, ch. 12, § 4 (Austl.).
291. AUSTL. CONST. ch. III, § 73.
292. Id. § 74.
294. See Privy Council (Limitations of Appeals) Act, 1968, ch. 32, § 3 (Austl.) (barring appeals from High Court decisions if they involved “application or interpretation” of the Constitution or an instrument of the Parliament).
297. See Goldsworthy, supra note 277, at 111 (observing that the Privy Council has rarely been involved in constitutional cases since the 1907 Judiciary Act).
298. AUSTL. CONST., ch. VIII, § 128.
299. See Goldsworthy, supra note 277, at 111 (“The Privy Council became involved only intermittently ... and even then it often merely affirmed the views of either the majority or minority in the High Court. It therefore had a much less substantial impact on the development of Australian constitutional law than on that of Canada.”).
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 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. 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.

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 "[t]he same rules of interpretation apply that apply to any other written document." 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."

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 Statute or Statutes upon which the question depends."

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

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300. See supra note 281.
301. (1904) 1 C.L.R. 329 (Austl.).
302. Id. at 334.
303. Id. at 338 (Griffith, C.J.).
304. Id.
305. Id. at 339 (quoting The Sussex Peerage, (1844) 8 Eng. Rep. 1034, 1057 (H.L.) (appeal taken from Eng.) (Tindal, L.C.J.)).
306. Id. (quoting Hardy v. Fothergill, [1888] 13 App. Cas. 351, 358 (H.L.) (appeal taken from Eng.) (Selborne, Earl)).
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. 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."

Students of the debate on the modern U.S. Supreme Court over statutory interpretation will recognize the voice of Justice Scalia. 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." It has long been thought by most American judges and scholars that such a rigid rule of interpretation has no place in constitutional law. 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, 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, with due respect to 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. A constitution that doubles as ordinary legislation might be presumed to lack the intransigence of a higher-law document, and one tethered from the beginning to the will of foreigners challenges the democratic premise of the two assumptions. What a foreign sovereign gives it conceivably may take away.

307. Id. at 346–47 (Barton, J.).
308. Id. at 358 (O'Connor, J.).
309. Compare Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 105 (2007) (Stevens, J., concurring) ("As long as [the] driving policy [behind a purposive 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 114 (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.").
310. Scalia, supra note 12, at 17.
311. The classic statement is John 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 12, 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.").
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.\(^{312}\) As in the United States during roughly the same era,\(^{313}\) 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,\(^{314}\) 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.\(^{315}\) Barely a decade later, the Court upheld a Queensland statute taxing leasehold estates in federal land.\(^{316}\) 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, and upholding it throughout precisely as framed.”\(^{317}\) Isaacs further explained that the Court should undertake this interpretation “clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express.”\(^{318}\) The alternative, he said, was “referred to no more definite standard than the personal opinion of the Judge who declares it.”\(^{319}\)

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.\(^{320}\) Second, and most germane to our inquiry,
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 "[t]he settled rules of construction which . . . have been very distinctly enunciated by the highest tribunals of the [British] Empire." 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.

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

> [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.

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." From the time of the *Engineers Case* roughly until Australian constitutional sovereignty, it was orthodox on the High Court to interpret the Constitution

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322. Id.

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

324. Id. at 150 (quoting AG Ont. v. AG Can., [1912] A.C. 571, 583 (P.C.) (appeal taken from Can.) (U.K.) (Loreburn, L.C.)).

325. Owen Dixon, Swearing In of Sir Owen Dixon as Chief Justice (Apr. 12, 1952), in (1952) 85 C.L.R. xi, xiv (Austl.); cf. Scalia, *supra* note 12, 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.").
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.”

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.” 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. 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. As used on the High Court, the distinction parallels the familiar distinction in American constitutional theory between original semantic meaning and original expected application. So just as an American originalist might allow that the Fourth

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326. Goldsworthy, *supra* note 277, at 121–22, 136; see, e.g., Commonwealth v. Tasmania (The Tasmanian Dam Case) (1983) 158 C.L.R. 1, 127 (Austl.) (“[M]ere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution.”); AG Vict. v. Commonwealth (1981) 146 C.L.R. 559, 614–15 (Austl.) (Mason, J.) (“[A] constitutional prohibition must be applied in accordance with the meaning which it had in 1900.”); South Australia v. Commonwealth (The First Uniform Tax Case) (1942) 65 C.L.R. 373, 422 (Austl.) (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 literalism.”); David Tucker, *Textualism: An Australian Evaluation of the Debate Between Professor Ronald Dworkin and Justice Antonin Scalia,* 21 SYDNEY L. REV. 567, 579–80 (1999) (stressing the continued importance of the “take-the-accepted-meaning of a term” rule of interpretation from the *Engineers Case* in guiding the High Court’s work).


328. See, e.g., R. v. Commonwealth Conciliation & Arbitration Comm’n; *Ex parte Prof’l Eng’rs Ass’n* (1959) 107 C.L.R. 208, 267 (Austl.) (Windeyer, J.) (“The denotation 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 (Austl.) (Dawson, J.) (listing cases in which the Court relied on the distinction between “connotation” and “denotation”).

329. *Street,* 168 C.L.R. at 537 (Dawson, J.).


Amendment extends to wiretapping, the High Court held in 1935 that radio broadcasts constitute "telegraphic, telephonic, and other like services" while admitting no embarrassment to its legalist credentials. 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 person[s]" who may vote in state elections, only applies to those who were considered adults in 1901—i.e., twenty-one-year-olds—not to those who are of adult age under current state law.

On its face, then, Australian legalism appears to mirror the form of originalism promoted by Justice Scalia, mapped onto the entire Court. Like Justice Scalia in statutory cases, the pre-1986 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. Even when the Court finally reversed its blanket rule, it said it would restrict the usage of such debates to narrowly defined circumstances:

Reference to [legislative history] may be made, 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 . . . .

198 C.L.R. 511, 552 (Austl.) (McHugh, J.) (suggesting that Dworkin's distinction between concepts and conceptions is consistent with High Court precedent).

332. See, e.g., Bork, supra note 32, at 168 (arguing that the fact that the Fourth Amendment "was framed by men who did not foresee electronic surveillance" does not mean that judges are wrong to apply the Amendment's provisions to electronic invasions of privacy).


335. See Tucker, supra note 326, at 581 (analogizing the High Court's textualism in the Engineers Case to Justice Scalia's views). 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) (summarizing the historic progression of the treatment of precedent in the High Court); Scalia, supra note 12, at 140 (incorporating stare decisis as a pragmatic exception to Justice Scalia's "originalist philosophy").

336. Goldsworthy, supra note 277, at 124; see, e.g., AG Vict. ex rel. Black v. Commonwealth (1981) 146 C.L.R. 559, 578 (Austl.) (claiming that legislative history merely distracts the Court from the plain meaning of the text); AG ex rel. McKinlay v. Commonwealth (1975) 135 C.L.R. 1, 17 (Austl.) ("[I]t is settled doctrine in Australia that the records of the discussions in the Conventions and in the legislatures of the colonies will not be used as an aid to the construction of the Constitution.").

 Likewise, Justice Scalia has suggested that certain aspects of ratification history may assist the originalist judge in determining the original meaning of the Constitution’s text.\textsuperscript{338}

As we shall see, however, the High Court’s consideration of Convention debates, which has increased dramatically in the years since constitutional sovereignty, carries a different import 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 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 legalistic 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, 1931 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.\textsuperscript{339} But with consent the British Parliament still had authority to legislate for Australia, and the states remained bound by the repugnancy and extraterritoriality doctrines.\textsuperscript{340} Moreover, as of the 1980s, the Privy Council still had the constitutional power to adjudicate appeals from the supreme courts of the various states.\textsuperscript{341} 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.\textsuperscript{342}

Australian constitutional independence 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 fifteen years on the High Court prior to his tenure as

\textsuperscript{338} Scalia, supra note 12, at 38; see also supra note 236 and accompanying text.
\textsuperscript{339} MCMINN, supra note 283, at 160.
\textsuperscript{341} MCMINN, supra note 283, at 106.
\textsuperscript{342} See Australia Act, 1986, ch. 2, § 1 (U.K. & Austl.) (“No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.’’). 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. See AUSTL. CONST. ch. II, § 61 (noting that the executive power of the Commonwealth is vested in the Queen); David Estep, Losing Jewels from the Crown: Considering the Future of the Monarchy in Australia and Canada, 7 TEMP. INT’L & COMP. L.J. 217, 217 n.3 (1993) (remarking that the Queen is the sovereign of nine countries independent of her role as the Queen of Great Britain). Also, the text of Section 74 of the Australian Constitution still permits appeals to the Privy Council upon certification by the High Court, but that provision was officially ruled a dead letter in Kirmani v. Captain Cook Cruises (No. 2), (1985) 159 C.L.R. 461, 465 (Austl).
Chief Justice, but his impact as Chief is perhaps best expressed by political scientist Jason Pierce’s conclusion based on more than eighty 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’ meant the years since the mid-1980s.”

According to Mason’s former colleague Justice McHugh, Mason viewed constitutional sovereignty not simply as 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.

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. 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. 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.” Most would agree that the statement was more predictive than descriptive. Two years later, in its unanimous per curiam decision in Cole v. Whitfield, the same 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. 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.”

343. PIERCE, supra note 335, at 204.
344. Id. at 42; accord Goldsworthy, supra note 277, 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.”).
346. PIERCE, supra note 335, at 208–11.
347. Goldsworthy, supra note 277, at 155.
348. Mason, supra note 277, at 5.
350. Id. at 402; cf. BICKEL, supra note 9, at 95–96 (arguing that the U.S. Supreme Court should not give sanction to the actions of the political branches except when consistent with principle).
Sophisticated observers recognized the announcement of a more open embrace of policy balancing and purposive interpretation. And indeed the decision itself held that Section 92 of the Constitution—providing that “the imposition of uniform duties of customs, trade, commerce, and intercourse among the States . . . shall be absolutely free”—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.” 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 Justice Stevens’s side of the interpretive debate at the heart of *Heller*.

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. 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. *Miller v. TCN Channel Nine Pty.*, involving a prosecution for a television station’s use of an unauthorized 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.


352. AUSTL. CONST. ch. IV, § 92.


354. The number of overruled cases comes from McHugh, supra note 345, at 12.

355. See supra note 276 and accompanying text.


358. (1986) 161 C.L.R. 556 (Austl.).

359. Id. at 557.

360. Id. at 556, 581–85.
Six years later, however, following constitutional sovereignty, five Justices were prepared to announce an implied freedom of political communication. Wrote Justice Brennan in *Nationwide News Pty. 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." In the companion case of *Australian Capital Television Pty. 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. Crucially, however, that decision was made before 1986, which "marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people." 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 accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion." 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.

The cat thus out of the bag, in *Theophanous v. Herald & Weekly Times Ltd.*, the Court wielded the right of political communication to erect a constitutional defense to defamation. 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. To an American audience, the hue and cry the Court's implied-freedoms cases sparked in Australian legal

361. (1992) 177 C.L.R. 1 (Austl.).
362. *Id.* at 48 (Brennan, J.); *accord id.* at 72 ("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.").
364. *See id.* at 135 (noting that the principle of responsible government is "an assumption upon which the actual provisions [of the Constitution] are based," and that "the founders assumed that the Senate would protect the States").
365. *Id.* at 138.
366. *Id.*
368. *Id.* at 130; *see also* Stephens v. W. Austl. Newspapers Ltd. (1994) 182 C.L.R. 211, 232 (finding the right of political communication within state constitutions as well); Coleman v. Power (2004) 220 C.L.R. 1, 33 (Austl.) (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), which requires a public official to prove "actual malice" to recover damages for defamation. *Id.* at 279–80.
370. *Id.* at 485 (Deane & Toohey, JJ., dissenting); *id.* at 502 (Gaudron, J., dissenting).
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 constitutional independence.

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.\textsuperscript{371} But in select cases the Mason Court was unusually open about constitutional updating.

Thus, in \textit{Street v. Queensland Bar Ass'n},\textsuperscript{372} 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.\textsuperscript{373} The Court had held in a prior case, \textit{Henry v. Boehm},\textsuperscript{374} that those constitutional provisions did not apply because the challenged statute did not require anyone to abandon his or her domicile.\textsuperscript{375} Following the pre-Mason Court preference for formal rules over balancing tests, the \textit{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.\textsuperscript{376} The High Court reversed \textit{Henry} outright, with Chief Justice Mason writing 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."\textsuperscript{377} 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.\textsuperscript{378} The Court expressed no such concern in \textit{Street}.

\textsuperscript{371} \textit{See, e.g., LESLIE ZINES, THE HIGH COURT AND THE CONSTITUTION 25--29 (2008) (arguing that drawing the connotation–denotation distinction is in practice a purposive rather than a logical inquiry); Kirby, supra note 5, at 1 (arguing that judges inevitably make law rather than merely declare it); Mason, supra note 277, at 5 (disputing the notion that judges can interpret a constitution divorced from values).}
\textsuperscript{372} (1989) 168 C.L.R. 461 (Austl.).
\textsuperscript{373} \textit{Id.} at 485. Section 117 has been compared to the Privileges and Immunities Clause of the U.S. Constitution and was drafted with that Clause in view. \textit{Id.}
\textsuperscript{374} (1973) 128 C.L.R. 482 (Austl.).
\textsuperscript{375} \textit{Id.} at 490.
\textsuperscript{376} \textit{See id.} at 487 ("We are here concerned only with the application of the actual words of the Constitution . . . ").
\textsuperscript{377} \textit{Street}, 168 C.L.R. at 487--88.
\textsuperscript{378} \textit{See, e.g., Amalgamated Soc'y of Eng'rs v. Adelaide S.S. Co. (The Engineers Case) (1920) 28 C.L.R. 129, 142, 145 (Austl.) (declaring that the High Court can interpret only the language of the Constitution and may not look to policy or vague notions concerning the spirit of the document); cf. R. v. Barger (1908) 6 C.L.R. 41, 67 (Austl.) ("A statute is only a means to an end, and its validity
More recently, in Sue v. Hill\textsuperscript{379} 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.\textsuperscript{380} The controversy stemmed 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."\textsuperscript{381} 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.\textsuperscript{382}

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."\textsuperscript{383} Kirby suggests that High Court case law over the last two decades has been slowly conforming to the view of constitutional interpretation held by Andrew Inglis Clark,\textsuperscript{384} a leader in the Australian federation movement who also happened to be an expert on the U.S. Constitution and a friend of Oliver Wendell Holmes.\textsuperscript{385} His writings on Australian interpretation resembled Holmes's later opinion in Missouri v. Holland:

> [T]he 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.\textsuperscript{386}
Three different Justices, including Kirby himself, have cited favorably to Clark’s “living force” theory in High Court opinions,\textsuperscript{387} although as I discuss below, it does not command a majority on the current Court.

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 pedigree in Australian jurisprudence.\textsuperscript{388} 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% of High Court decisions in the 1970s, as compared to 25% in the 1980s and 41% in the 1990s.\textsuperscript{389} Canadian cases were cited in just 10% of High Court decisions in the 1970s, but 21% in the 1980s and 37% in the 1990s.\textsuperscript{390} Cases from the constitutional courts of South Africa, New Zealand, and India are also more frequently cited than in years past,\textsuperscript{391} as are international conventions and legal norms.\textsuperscript{392}

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.\textsuperscript{393} 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 U.S. Supreme Court and the European Court of Human Rights rather than to any original understanding particular to the Australian tradition.\textsuperscript{394} Where aids to interpretation once

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388. \textit{See} Goldsworthy, supra note 277, at 135 (noting that the High Court has always heavily relied on American, British, and Canadian cases); Brian Opeskin, \textit{Australian Constitutional Law in a Global Era}, in \textit{REFLECTIONS ON THE AUSTRALIAN CONSTITUTION}, supra note 283, at 171, 183–84 (describing an increase in the percentage of foreign citations in Australian constitutional cases from 1900 to 2000).


390. \textit{Id.}

391. \textit{See} Opeskin, supra note 388, at 184–85 (observing an increase in references to decisions from New Zealand (4%), India (1%), and South Africa (5%)).

392. \textit{See} PIERCE, supra note 335, at 172–75 (giving examples of Australian court opinions relying on international treaties, conventions, and obligations).

393. \textit{See}, \textit{e.g.}, Antonin Scalia & Stephen Breyer, \textit{A Conversation Between U.S. Supreme Court Justices}, 3 INT’L J. CONST. L. 519, 525–26 (2005) (recording Scalia’s argument that, with the exception of old English law, foreign law is irrelevant in determining what the Constitution meant to the society that adopted it).

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 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 from an American perspective. 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.’”

Gleeson’s account 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. Section 51(xix) of the Constitution empowers Parliament to legislate with respect to “naturalization and aliens.” 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 inter-
pretation. 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 and implied, of a written instrument, brought into existence more than a century ago, bind present and future parliaments, and courts.”

The meaning of those terms would be determined not by modern exigencies but by “the contemporary meaning of the language used in 1900.” 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.”

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*.

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.” 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

403. Id. at 330 (Gleeson, C.J.).
404. Id. at 338.
405. Id. at 341.
406. Id. at 424 (Callinan, J.).
407. Id. at 420 (Kirby, J.).
408. Id. at 412 (quoting Dred Scott v. Sandford, 60 U.S. 393, 426 (1857)).
409. Id. at 412–13.
410. See id. at 413 (describing how the High Court has frequently departed from the original, generally accepted meaning of a term to accommodate changes in the world).
411. See id. at 413–14 (arguing that the existence of competing civil and common law approaches to citizenship suggests the appropriateness of allowing Parliament to define the term “alien”).
the U.S. Constitution;\textsuperscript{412} to precedent;\textsuperscript{413} and to potential policy consequences.\textsuperscript{414}

These battle lines recur elsewhere. In \textit{McGinty v. Western Australia},\textsuperscript{415} decided in the brief interregnum between the Mason and Gleeson Courts,\textsuperscript{416} Justice McHugh and Justice Toohey jousted over whether a freestanding principle of representative democracy underlies the Constitution and may be given dynamic content by judges.\textsuperscript{417} In the case \textit{Re Wakim; Ex parte McNally},\textsuperscript{418} 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.\textsuperscript{419} In \textit{Eastman v. The Queen}\textsuperscript{420} and \textit{Brownlee v. The Queen},\textsuperscript{421} 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.\textsuperscript{422} In each of those cases, the “living force” view was in dissent, leading many observ-

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\item \textsuperscript{412} See id. at 416 (noting that the drafters of the Australian Constitution could have followed the U.S. Constitution’s Fourteenth Amendment and enshrined birthright citizenship into the constitutional text, but deliberately chose not to do so).
\item \textsuperscript{413} See id. at 417–18 (suggesting that recent High Court decisions have implied that the word “alien” is not fixed in its meaning).
\item \textsuperscript{414} See id. at 418 (stressing that the judiciary can and should check an overbroad meaning of “alien” if it leads to legislative abuse).
\item \textsuperscript{415} (1996) 186 C.L.R. 140 (Austl.).
\item \textsuperscript{416} Gerard Brennan was Chief Justice from 1995 to 1998. PIERCE, supra note 335, at 245.
\item \textsuperscript{417} Compare \textit{McGinty}, 186 C.L.R. at 200 (Toohey, J.) (arguing that the Constitution must be treated as a living document because democracy is inherently dynamic), with id. at 231–32 (McHugh, J.) (countering that the principle of representative democracy is not an independent source of law and cannot be used to derive constitutional meaning not expressly stated in the text).
\item \textsuperscript{418} (1999) 198 C.L.R. 511 (Austl.).
\item \textsuperscript{419} Compare id. at 548–49 (McHugh, J.) (arguing that while the public interest requires that federal courts have jurisdiction over questions of state law, “the function of the judiciary . . . is to give effect to the intention of the makers” and it “has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest”), with id. at 599–600 (Kirby, J.) (insisting that once the Constitution was enacted by the electors of Australia, “it took upon itself its own existence and character” separate from the wishes and expectations of its makers).
\item \textsuperscript{420} (2000) 203 C.L.R. 1 (Austl.).
\item \textsuperscript{421} (2001) 207 C.L.R. 278 (Austl.).
\item \textsuperscript{422} Compare \textit{Eastman}, 203 C.L.R. at 49–50 (McHugh, J.) (arguing that because the makers’ objective intent as expressed in the text, as opposed to their subjective or actual intent, is relevant to constitutional interpretation, the application of constitutional concepts may be informed by contemporary circumstances), and \textit{Brownlee}, 207 C.L.R. at 284–85 (Gleeson, C.J.) (explaining, along with Justice McHugh, that the significance of the historical context of the drafting of the Constitution may vary based on the problem at hand, but a provision nonetheless has a meaning that is “not tied to current practice”), with \textit{Eastman}, 203 C.L.R. at 79–81 (Kirby, J.) (arguing that the Constitution’s words must be read in accordance with contemporary meanings in order to allow the government to meet the needs of its citizens), and \textit{Brownlee}, 207 C.L.R. at 322 (Kirby, J.) (arguing that reading the Constitution according to modern meanings also allows a judge to apply the Constitution’s provisions to contemporary institutional settings in accordance with accepted modern democratic standards).
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ers to conclude that the Gleeson Court had successfully reinvigorated Australian legalism.\textsuperscript{423}

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\ldots 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.\textsuperscript{424}

This approach has become relatively common ground among High Court Justices.\textsuperscript{425} Recognition of its own pluralism brings the Court into line with much of the world,\textsuperscript{426} but it represents monumentally different rhetoric from what prevailed two decades ago.\textsuperscript{427} 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."\textsuperscript{428} It is text-focused but not fetishistic; it is able to accommo-

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  \item \textsuperscript{423} See McHugh, supra note 345, at 7 ("[B]y 2003, commentators were contending that the emphasis of the majority of the Gleeson Court was legalism.").
  \item \textsuperscript{424} McHugh, supra note 345, at 8–9.
  \item \textsuperscript{425} See, e.g., SGH Ltd. v. Comm’r of Taxation (2002) 210 C.L.R. 51, 75 (Austl.) (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 275, at 246 (noting that a number of the High Court Justices decline to rely on only one method of constitutional interpretation).
  \item \textsuperscript{426} See Jackson, supra note 52, at 925–26 (referring to the "ubiquity" of "multi-sourced methods of interpretation" in countries with well-established traditions of judicial review).
  \item \textsuperscript{427} See McHugh, supra note 345, at 6 (quoting State Gov’t Ins. Comm’n v. Trigwell (1979) 142 C.L.R. 617, 633 (Austl.) (Mason, J.)) (remarking upon the dramatic shift in Mason’s own view of the proper role of a judge under the Australian Constitution).
  \item \textsuperscript{428} Eastman v. The Queen (2000) 203 C.L.R. 1, 44 (Austl.); cf. Scalia, supra note 32, at 862, 864 (referring to himself and others as "faint-hearted" originalists).
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date extrinsic evidence and is willing openly to consider the policy implications of a too-literal reading of the document.\textsuperscript{429}

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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 with delusions of grandeur.”\textsuperscript{430} 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 less text-bound, more creative, and more pluralistic than the High Court of Australia.

As I discussed in section 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[;] . . . [o]n this view, the state of the law in 1900 provides context, but it is not an interpretative straitjacket.”\textsuperscript{431} And even on the orthodox legalistic 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.\textsuperscript{432} Stare decisis is not a pragmatic exception to Australian legalism but lies at its core. That is, the view is Burkean, not Scalian.

\textsuperscript{429} Goldsworthy, supra note 277, at 159. The methodological direction of the High Court under Chief Justice Robert French, who succeeded Gleeson in 2008, is not yet clear.

\textsuperscript{430} PIERCE, supra note 335, at 3.

\textsuperscript{431} McHugh, supra note 345, at 22; see also 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 275, 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.’”).

\textsuperscript{432} See AUSTRALIAN CONSTITUTIONAL LAW & THEORY, supra note 356, at 322 (describing the legalist view regarding constitutional text and related precedents as sufficient to dispose of any interpretive question).
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 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 damned equally the notions that originalism either is uniquely suited to judicial review of a written constitution in a democracy or is, in short, “bunk.”

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. 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 an anti-rights backlash that is directly responsive to the perceived excesses of the Warren Court. Fourth, our public participates more intimately in the selection of judges to the constitutional court than either Canada’s or Australia’s, which can introduce populist appeals into constitutional politics. Fifth, relative to Canada (but not Australia) we tend to emphasize a monolithic vision of the legal and political order that is hospitable to originalism. Finally, a suspicion of evolution and an embrace of the binding authority of sacred texts features prominently in our religious culture.

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

434. See Siegel, supra note 55, at 218 (recounting President Reagan’s use of filiopietistic appeal to legitimize the New Right’s interpretation of the Constitution); Aviam Soifer, Full and Equal Rights of Conscience, 22 U. HAW. L. REV. 469, 473 n.15 (2000) (contrasting the filiopietistic attitude towards the framers’ interpretation of the Constitution that exists today with the lack of reverence for authority that characterized American society at the time of the Revolution).
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.” 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.”

It is beyond any doubt that Americans revere the Washingtons, Jeffersons, Hamiltons, and Madison’s of the founding generation. There are many explanations for this, but one is the passage of time itself. That generation created a nation that, nominally at least, has endured for more than 230 years and has enabled us to breathe what Charles Black called “the sweet air of legitimacy.” 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.” 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 Papers because they are emblematic of contemporaneous usage of constitutional text, but it is more

436. Id.
437. Kirby, supra note 102, 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 libidious rather than literary.
Binnie, supra note 124, at 375–76.
438. 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 ark[K] of the covenant, too sacred to be touched. 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 (July 12, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, at 37, 42 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899).
441. See Scalia, supra note 12, at 38 (defending his reliance on Hamilton’s and Madison’s writings in the Federalist Papers “because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood”).
significant that he is availing himself of the rhetorical purchase the views of Madison, Hamilton, and Jay confer.

As the mission of the Second Founding Conference suggests, American jurists often emphasize narratives of continuity with the Founding Era even when Reconstruction narratives of conflict are more compelling. In New York Times v. Sullivan, for example, the allegedly libelous statements at issue targeted Southern resistance against the efforts of the civil rights movement to redeem the promise of the Reconstruction Amendments, and the Fourteenth Amendment is the vehicle through which the First Amendment applies to the states. Yet the Court made no reference to Reconstruction, instead resting its historical argument for a heightened standard for libel of public officials on Madison’s and Jefferson’s opposition to the Sedition Acts. Grounding the authority of originalism in a conception of the framers as uniquely “wise and farsighted”—what Michael Dorf has labeled “heroic originalism”—evokes a certain sense of national pride. 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.”

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 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.”

Recall, for example, the

443. Id. at 264 n.4.
444. See id. at 273–77 (stating that the lesson to be drawn from the Sedition Act controversy—and Madison’s and Jefferson’s opposition to the Act—is that factual error and defamatory content are insufficient to strip criticisms of official conduct of their constitutional protection).
446. Jackson, supra note 52, at 942.
447. The Allies gave the Germans some latitude in drafting the Basic Law. Kommers, supra note 104, at 162. Latitude, however, is not autonomy.
448. Bazowski, supra note 243, at 231. Moreover, the federalism disputes that have featured so prominently in Canadian constitutional law and gave birth to the living-tree metaphor lend themselves to judicial invention. The overlapping provincial and national heads of jurisdiction bespeak a fundamental indeterminacy that presents little occasion for reverence.
dismissive attitude the Supreme Court of Canada took toward the drafters of the fundamental justice provision of the Charter in the Motor Vehicle Act reference.\textsuperscript{449} Canadian Justices are also able to rely on contemporaneous knowledge that the Charter was originally expected, by many at least, to be interpreted progressively.\textsuperscript{450} It is more difficult to make originalist arguments when there is persuasive evidence that the framers were not originalists.\textsuperscript{451}

It is furthermore difficult to discern, even in principle, who constitutes 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 a multitude of interest groups.\textsuperscript{452} “The interests represented covered a wide spectrum,” Canadian legal scholar Peter Russell writes of this last category.\textsuperscript{453} It included “native peoples, the multicultural community, women, religions, business, labour, 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.”\textsuperscript{454} 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.

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.”\textsuperscript{455} Former Chief Justice Mason observed on the eve of constitutional sovereignty 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.\textsuperscript{456} As I discuss below, that sentiment is no doubt related to the fact that the Australian Constitution was, in meaningful ways,

\textsuperscript{449} See supra notes 235–41 and accompanying text.

\textsuperscript{450} See Patrick Monahan, Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada 78–88 (1987) (explaining the drafters’ presumption that the Canadian constitutional tradition would confront ambiguous Charter language without deference to the framers’ intent); Hogg, supra note 114, at 87 (noting ample evidence that the Charter’s drafters and adopters expected courts to interpret the text independently).

\textsuperscript{451} Cf. H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 888–89 (1985) (arguing that the framers of the U.S. Constitution did not view their subjective intent as binding future generations).

\textsuperscript{452} Russell, supra note 125, at 114.

\textsuperscript{453} Id.

\textsuperscript{454} Id.

\textsuperscript{455} Kirby, supra note 102, at 9.

\textsuperscript{456} Mason, supra note 277, at 1.
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. As Martin Flaherty writes, "For the Progressives, American constitutional claims were more than erroneous or even irrelevant. They were deceitful." 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.

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 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

457. See Charles Beard, An Economic Interpretation of the Constitution of the United States 9–12 (1913) (criticizing prior analyses of the founding as too reverential and arguing that economic concerns drove the drafting of the Constitution); Arthur M. Schlesinger, The American Revolution Reconsidered, 34 Pol. Sci. Q. 61, 74–78 (1919) (arguing that the American Revolution was born of an uneasy alliance between self-interested merchants and southern plantation farmers, and was overtaken by radical and intransigent egalitarians).


459. See Akhil Reed Amar, America's Constitution: A Biography 279–80 (2005) ("True... Philadelphians said antidemocratic and antirepublican things behind closed doors.... But what do such quotations prove? Many of the statements were made on behalf of proposals that the Convention ultimately voted down—a point rarely noted by Beardians."); Bernard Bailyn, The Ideological Origins of the American Revolution, at vi–vii (1967) ("[T]he American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy."); Gordon S. Wood, The Creation of the American Republic 383 (1969) ("[D]evelopments in America since 1776 had infused an extraordinary meaning into the idea of the sovereignty of the people. The Americans were not simply making the people a nebulous and unsubstantial source of all political authority.").

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. Russell’s book, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, was written in 2004, more than two decades after, by all outward appearances, Canada became sovereign. Yet, 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.” 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 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.”

It was sober rather than airy; practical rather than aspirational; secular rather than mystical; “thick” rather than “thin,” in the parlance of Mark Tushnet. Moreover, it was, formally speaking, British rather than Canadian. Such a document is hardly likely to inspire a popular politics of originalism. 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 meta-
phor of evolution and growth,\textsuperscript{470} as opposed to the “frozen concepts” approach of Lord Atkin.\textsuperscript{471} The Charter, though rights oriented, continues to be understood in that spirit. More than just progressive constitutional doctrine, the living tree, rhetorically, holds out the promise of self-government.

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.\textsuperscript{472} 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.”\textsuperscript{473} It should not be surprising, then, that the Mason Court’s impatience with originalism coincided with Australian constitutional independence. 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 that the status of the Constitution as a fundamental law springs from the authority of the Australian people.”\textsuperscript{474}

Australia’s discomfort with 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 internal affairs,\textsuperscript{475} 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.\textsuperscript{476} Its preamble refers to “the people” of its various states and describes the Commonwealth as “indissoluble.”\textsuperscript{477} Like the U.S.
Constitution, it was "not merely a text but a deed—a constituting." It might be useful to describe Australia as having not one but two moments of sovereignty, the first in 1900 and the second in 1986. The competing narratives of the Gleeson Court reflected 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 *Roe v. Wade*, *Miranda v. Arizona*, *Mapp v. Ohio*, and like opinions. These opinions enable him, as Claudius enables Hamlet.

It is also difficult to imagine a comparable movement developing within a legal 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. 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 strong—with a commitment to parliamentary supremacy.

Australia's constitutional structure does not, then, encourage a rights revolution at all, much less an antirights 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 ob-

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478. AMAR, supra note 459, at 5; see also Goldsworthy, supra note 277, 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.").

479. See supra section III(B)(4).

480. See *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, 539–40 (Austl.) (invalidating legislation that authorized states to vest jurisdiction in federal courts to decide certain state law questions).

481. 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 277, at 11 (explaining that Australians do not see "legislative supremacy . . . as an instrument by which the majority will . . . oppress a minority and threaten their fundamental rights").

482. See supra notes 273–76, 320–26 and accompanying text.
servers consider the Gleeson Court a deliberate foil for the perceived excesses of the Mason Court. 483

Canada's rights revolution, on the other hand, is more than competitive with that of the Warren Court. 484 Negative-rights cases brought under the Charter had a 39% success rate from 1982 to 2002, and positive- and group-rights cases had a 27% success rate. 485 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. 486

There are at least four possible reasons for the relative lack of embrace of originalism by an antirights backlash movement in Canada. First, the Canadian experience with aggressive rights protection is more recent than that of the United States. 487 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. 488 As Morton and Knopff write, "The Charter revolution has unfolded so quickly that it is hard to gain perspective on it." 489 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, 490 when many of the most controversial Charter opinions issued. This era of Liberal Party dominance both stocked the judicial bench with like-minded judges and may have sapped conservative politics of the intellectual vitality needed to coalesce around an effective foil to living-tree interpretation.

Second, the availability of legislative override under Section 33, 491 though rarely invoked, both removes a rhetorical arrow from the quiver of the Court's opponents and raises the stakes of political success. That is, the

483. See Pierce, supra note 335, at 257–61 (describing the Gleeson Court's putative departure from the politicized role that had previously been ascribed to the Mason Court).
484. See supra section III(A)(2).
485. Hirschl, supra note 214, at 66. In the United States from 1975 to 2002, negative-rights cases had a 41% success rate and positive-rights cases had a 16% success rate. Id.
486. See supra section III(A)(3); see also Grant Huscroft, The Trouble with Living Tree Interpretation, 25 U. QUEENSLAND L.J. 3, 4–5 (2006) (suggesting the false dichotomy between living-tree interpretation versus originalism); Miller, supra note 221, at 331–32 (describing the Canadian legal academy's neglect of originalist scholarship and the concurrent lack of advances in living-tree constitutional doctrine).
487. See supra notes 197–220 and accompanying text.
488. See, e.g., Greene, supra note 1, at 679–82 (recounting conservative efforts in the 1970s and 1980s to frame an attack on the Warren Court in methodological terms); Post & Siegel, supra note 39, at 554–61 (suggesting a disconnect between originalism as a methodology and originalism as a political practice).
491. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33 (U.K.); see supra notes 188–91 and accompanying text.
possibility of legislative correction may channel criticism of the Court’s work away from judicial methodology and into the political arena. The gravitational pull of the override mechanism towards the political process may be strengthened further by Canada’s majoritarian parliamentary structure, which rewards political victory with a realistic prospect of agenda setting.  

Third, much of Charter interpretation toils in the vast fields left open by Section 1, the Limitations Clause. That Section’s text refers to “such reasonable limits prescribed by law as can be demonstrably 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. Fourth, as discussed, the Charter’s drafting history itself suggests an expectation of progressive interpretation.

It bears mention, finally, that the antirights orientation of American originalism also relates significantly to its aggrandizement of the American founding. A constitutional jurisprudence whose essential point of reference postdates World War II is more likely to view excessive positivism with suspicion. Proponents of that jurisprudence are also 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. Originalism is associated with the American right and with a constitutionalism that much of the world has no desire to emulate.

492. See G. Bingham Powell, Jr., Contemporary Democracies: Participation, Stability, and Violence, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT 223, 228 (Arend Lijphart ed., 1992) (confirming that majoritarian parliamentary systems are substantially less likely than presidential systems to have minority-party executives).

493. See Hogg, supra note 114, at 70 (“Section 1 is . . . an issue in nearly every case where a law is challenged on Charter grounds.”).


495. The test for whether a challenged statute passes muster under Section 1 is provided in R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.). A limitation’s objective must relate to “pressing” societal concerns and the means employed must be “reasonable and demonstrably justified.” Id.

496. See supra note 450 and accompanying text.

497. See Rubenfeld, supra note 461, at 1985–86 (contrasting the postwar American surge in nationalism with the European abhorrence of it due to its association with the populist Nazi and Fascist movements).

498. When discussed in Canadian and Australian articles, American originalism is almost invariably associated with Justice Scalia. See, e.g., Kirby, supra note 102, at 4–6 (discussing a debate between Justice Scalia and Canada’s Justice Binnie); Miller, supra note 221, at 338 (using Justice Scalia as an originalist prototype).

499. See Adam Liptak, U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations, N.Y. TIMES, Sept. 18, 2008, at A1 (explaining that foreign courts in recent years have been increasingly willing to follow American jurisprudence).
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. 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. It has become typical for the public interrogation of a Supreme Court nominee to include extensive discussion of the nominee's "judicial philosophy." Abetted by this process, constitutional methodology, and originalism in particular, has become a site for popular political mobilization.

This rite is unknown to Canada or Australia. Befitting nations in which legislative majorities are likely to control the government, in neither country does the national parliament have any formal role in the nomination of high court justices, and in neither country 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. 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.\textsuperscript{507}

There have been intermittent calls for a broader public discussion of Supreme Court nominees in Canada,\textsuperscript{508} and the 2006 appointment of Marshall Rothstein to the Court featured the first public interview process for a high court nominee in Canada.\textsuperscript{509} 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.\textsuperscript{510} And 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.\textsuperscript{511}

As one columnist writes, “Whenever 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.”\textsuperscript{512}

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.”\textsuperscript{513} 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 nonprofessional audiences, its neutering of the decision-making authority of legal elites, and its fundamentally nationalist orientation.\textsuperscript{514} 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.\textsuperscript{515} Even if the same set of ethical values has purchase in Canada or Australia,

\textsuperscript{507} Hogg, \textit{supra} note 114, at 59.
\textsuperscript{508} See, e.g., \textit{id.} (asserting that the lack of transparency in the appointment process is “widely recognized as a deficiency that should be corrected”).
\textsuperscript{510} \textit{id.} at 530–31.
\textsuperscript{512} Anthony Keller, \textit{Wanted: A Public Word with the Would-Be Judges}, \textit{GLOBE & MAIL} (Can.), Dec. 1, 1997, at A17; see also Morton & Knopff, \textit{supra} note 198, at 17 & 169 n.22 (collecting sources discussing the need for greater public involvement in the selection of Justices to the Supreme Court of Canada).
\textsuperscript{513} George Williams, \textit{High Court Appointments: The Need for Reform}, 30 \textit{SYDNEY L. REV.} 161, 161 (2008); cf. Goldsworthy, \textit{supra} note 277, at 112 (asserting that most judicial appointees are well qualified).
\textsuperscript{514} Greene, \textit{supra} note 1, at 708–14.
\textsuperscript{515} See \textit{id.} at 694 (describing the highly public, televised nature of confirmation hearings in the United States).
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. Cover said that courts arise out of “the need to suppress law, to choose between two or more laws, to impose upon laws a 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.”

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. 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. 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 supplies 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

516. See Robert Cover, Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 40 (1983) (arguing that, although diverse communities theoretically create and give meaning to laws through their distinctive narratives and precepts, the “jurisgenerative principle by which legal meaning proliferates... never exists in isolation from violence”).

517. Id.

518. See, e.g., Balkin, supra note 30, at 301–02 (explaining that changes in constitutional interpretation may be the result of political and social arguments about the restorative and redemptive potential of a constitution’s text); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. 1323, 1323 (2006) (“Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding...”).

519. Greene, supra note 1, at 700.

520. See Scalia, supra note 32, at 862 (praising originalism for “prevent[ing] the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable” and “requir[ing] the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside”).
would tell you is now absent.\textsuperscript{521} "There was a conscious jettisoning [by the Mason Court] of the notion that certainty is the object of the legal system . . . .\textsuperscript{522} "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.\textsuperscript{523} For law to hold out the possibility of capture is bound to create uncertainty and instability, but for many marginalized communities it is what makes the legal-language game worth playing.\textsuperscript{524}

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 patriation and is expressed in numerous Charter provisions, and the ongoing tension surrounding Canada's fundamental heterogeneity has produced several constitutional crises over the last three decades.\textsuperscript{525} The Charter itself guarantees a number of express rights to language minorities;\textsuperscript{526} guarantees the right to travel;\textsuperscript{527} protects the rights of aboriginal peoples (including treaty rights);\textsuperscript{528} grants rights to sectarian schools;\textsuperscript{529} and requires that the Charter "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."\textsuperscript{530} The very existence of the Federal Department of Canadian Heritage suggests a certain insecurity about Canada's cultural unity, and as if to assuage any suggested affinity for hegemony, the
Department has stated its two "strategic outcomes" in full: "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." Québec in fact still has not ratified the Charter, and efforts to institute reforms that would bring Québec fully into the national fold have failed. Canadians have never quite been one people, and the Charter has not succeeded in its lofty though necessarily half-hearted ambition to make them so.

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, and its minority populations are, ironically perhaps, insufficiently insular to enjoy political power comparable to that of the Québécois. It is easier for an assimilationist ethic to flourish in the United States—or in Australia, for that matter—than in Canada. Public-values surveys conducted by the research firm Environics throughout the 1990s show the number of Canadians who said they "relate to nonconformists" remaining consistently at two-thirds, but the number of Americans who said the same dropping from 64% in 1992 to 52% in 2000. During the same period, the number of Canadians agreeing that "[n]on-
whites should not be allowed to immigrate to this country" rose from 11% to 13%, while in the United States it rose from 16% to 25%.538

The U.S. Constitution 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.539 But the ethic extends beyond race. Justice Scalia is conspicuously fond of relying upon it in constitutional cases. His spirited dissent in the VMJ 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.540 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 of religion on the grounds, in part, that 97.7% of Americans practice monotheistic faiths.541 It was the very commitment to equality as against appreciation of difference that Justice Scalia cited in Employment Division v. Smith,542 which rejected the claim of a Native American to constitutional protection of his peyote use.543

Consider also Justice Scalia’s plurality opinion in Michael H. v. Gerald D.,544 in which the Court refused to extend visitation rights to the biological father of a child born to a woman married to another man.545 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 historic practices of our society.”546 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

538. Id. at 66.
541. See McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (arguing that “acknowledgement of a single Creator” and “the establishment of a religion” are distinguishable because the former is “‘a tolerable acknowledgment of beliefs widely held among the people of this country’” (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983))).
543. Id. at 888 (“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.”).
545. Id. at 131–32.
546. Id. at 124 (plurality opinion).
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 idiosyncrasies.547

Justice Brennan identified a set of fault lines often neglected in interpretive debates. Originalists tend to disfavor particularized claims of right and seek to conform our constitutional history to that posture. Such claims must of necessity remain viable within a political culture that, like Canada's, cannot afford to celebrate assimilation.

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 Bible, it has evolved “through interpretation, legislation, and custom.”548 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.”549 It is in part for this reason that Jewish law has been compared within that classical tradition to a “living tree.”550 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.551

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.”552 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.”553

As Jaroslav Pelikan noted in his insightful comparison of biblical and constitutional interpretation, the first of Martin Luther's Ninety-Five Theses—"Our Lord and Master Jesus Christ, when He said Poenitentiam

547. Id. at 141 (Brennan, J., dissenting).
549. Id. at 14.
550. Id.
552. Kirby, supra note 5, at 2.
553. Id.
agite, willed that the whole life of believers should be repentance—no less than "an appeal from the current teaching and practice of the church to the original intent and sensus literalis of the Gospels." The point here is that the "original, grammatical meaning of Scripture" commands a devotion to a life of repentance, not the performance of penance or "the ritual of contrition, confession, and satisfaction" commanded by the Roman Catholic Church. Luther was appealing to the original meaning of the text rather than the scriptural decision rule crafted by the Church.

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. Max Lerner once described the Constitution as America's "totem and its fetish." He wrote:

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.

556. Id. at 100-01.
557. See, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 225 (1986) (referring to the emergence in the 1920s of "a constitutional cult . . . that manifested strong religious overtones"); J.M. Balkin, AGREEMENTS WITH HELL AND OTHER OBJECTS OF OUR FAITH, 65 FORDHAM L. REV. 1703, 1721-22 (1997) (analogizing fidelity in a personal relationship to having faith in an institution such as the Constitution); Edward S. Corwin, THE CONSTITUTION AS INSTRUMENT AND AS SYMBOL, 30 AM. POL. SCI. REV. 1071, 1072 (1936) (describing American constitutional symbolism as "consecrate[ing] an already established order of things" that "harks back to primitive man's terror of a chaotic universe, and his struggle toward security and significance behind a slowly erected barrier of custom, magic, fetish, [and] tabu"). See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) (questioning the link between affirmation of national identity and unqualified devotion to the Constitution). Henry Monaghan's critique of substantive due process proponents as advocating a "perfect" constitution begins by quoting an emblematic if not quite characteristic indulgence:

Our great and sacred Constitution, serene and inviolable, stretches its beneficent powers over our land . . . like the outstretched arm of God himself . . . the people of the United States . . . ordained and established one Supreme Court—the most rational, considerate, discerning, veracious, impersonal power—the most candid, unaffected, conscientious, incorruptible power . . . O Marvelous Constitution! Magic Parchment! Transforming word! Maker, Monitor, Guardian of Mankind!

558. Max Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1294 (1937).
559. Id. at 1294-95; see also PELIKAN, supra note 555, at 7 ("With the reduction in the private authority of Christian Scripture, and especially in its public authority, American Scripture has been called upon to fill some of the gap.").
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. What Ackerman calls constitutional moments Scalia might call apocrypha, as far as their authority over him extends. Add to this broth the evangelical movement, which generally favors literal interpretation of the Bible—that is, according to the author's original semantic intention—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-identify as evangelical Protestant and roughly 4 in 10 Americans say they attend church weekly. Almost 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." Evangelicalism is far less prevalent in Canada and Australia. Approximately a quarter of the population of either country is Protestant, and more than 15% of the population of each country has no religious belief at all. By contrast only 4% of U.S. adults report that they are atheist or agnostic. Although both Canada and Australia have larger Roman Catholic populations

560. See J.I. PACKER, FREEDOM AND AUTHORITY 48 (Regent College Pub'l'g 2003) (1981) ("Exegesis means drawing from each passage the meaning and message which it was conveying to its writer's own first readers. The exegetical task is to read everything out of the text while taking care to read nothing into it.").


563. Id. at 154.

564. Id. at 178. By comparison, fewer than 1 in 10 American Jews hold this view. Id.


567. THE PEW FORUM ON RELIGION & PUB. LIFE, supra note 562, at 12.
On the Origins of Originalism

than the United States, Catholic biblical interpretation is traditionally eclectic and purposive rather than dogmatic and strictly textualist.

“Restoration” and “redemption” are, as Jack Balkin writes, “the key tropes of constitutional interpretation by social movements and political parties.” 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.” 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 over constitutional law.

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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. 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 interpretive methodology. Thus, a particular orientation combined with a particular

568. Compare id. (noting that 23.9% of Americans are Catholic), with The World Factbook: Australia, supra note 565 (noting that 25.8% of Australians are Catholic), and The World Factbook: Canada, supra note 565 (noting that 42.6% of Canadians are Catholic).

569. See PELIKAN, supra note 555, at 55–57 (describing the Church’s magisterium, or infallible teachings, as comprising both formal pronouncements and what comes to be universally incorporated into everyday preaching and worship); PONTIFICAL BIBLICAL COMM’N, THE INTERPRETATION OF THE BIBLE IN THE CHURCH (1993), available at http://catholic-resources.org/ChurchDocs/PBC_Interp-FullText.htm (noting that the study of the Bible “is never finished; each age must in its own way newly seek to understand the sacred books”); cf. Powell, supra note 451, at 889–91 (locating the intellectual origins of revolutionary American ideas about interpretation within British Protestantism and its opposition to papal corruption of Biblical authority). That the Court’s two most devout originalists, Justice Scalia and Justice Thomas, are also Catholic does nothing to diminish the point that originalism itself is a more fundamentally Protestant mode of interpretation.

570. Balkin, supra note 30, at 301.

571. Id.

572. Cf. PELIKAN, supra note 555, at 45 (citing the opening language of Zwingli’s Sixty-seven Conclusions, the first Protestant confession: “‘All who say that the gospel is nothing without the approbation [and interpretation] of the church err and slander God.’”).

573. See Balkin, supra note 8, at 506 (arguing that when social movements appeal to the Constitution, “they naturally adopt the rhetorical tropes of restoration and redemption that are characteristic of our history”); Post & Siegel, supra note 39, at 574 (advocating that in order to counter conservative politics of restoration mediated through originalism, progressives must develop an equally potent politics of either restoration or redemption).
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. It depends, rather, on the attitude we take towards the authority of the past and towards the value of metaphors of evolution, and on the attitude our legal institutional structures take towards popular engagement with constitutional method. Originalism and historicism are socially embedded and culturally contingent. 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 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."

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.'" As Charles Black has observed, it seems that Justice


576. Id.

577. Id. at 867.
On the Origins of Originalism

Black cannot have meant what he said. 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. 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.” 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:

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.

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 antistatist, 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 is not “originalism.” In 1982 Philip Bobbitt articulated a typology of constitutional argument that has become familiar to legal academics. Bobbitt divided con-

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578. Charles L. Black, Jr., Mr. Justice Black, the Supreme Court, and the Bill of Rights, HARPER’S, Feb. 1961, at 63, 65; see also BICKEL, supra note 9, at 96–97 (examining Professor Black’s gloss on Justice Black).
580. Id. at 66.
581. Black, supra note 575, at 867.
stitutional argument into six modalities: historical, textual, structural, prudential, doctrinal, and ethical.\textsuperscript{582} 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.”\textsuperscript{583} In Bobbitt’s account, such arguments advance “the character, or ethos, of the American polity” as legal authority.\textsuperscript{584} Bobbitt concluded that a surprising range of decisions employ primarily ethical argument—from the Cherokee Cases\textsuperscript{585} to Trop v. Dulles\textsuperscript{586} to the Pentagon Papers Case,\textsuperscript{587} among others.\textsuperscript{588}

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. He argues:

Such imagining . . . 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.\textsuperscript{589}

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.\textsuperscript{590} 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.”\textsuperscript{591} 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 so self-referential. As Bork and Scalia have noted, there was a time when it was unusual for American judges to suggest any alternative to originalism. But in the great battles between Justices Black and Frankfurter and Justices Breyer and Scalia, the originalist position has indeed become as much “rhetoric as decision procedure.”

When multiple modalities are made available and become the subject of judicial discussion, conventions develop 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 was perhaps better characterized as prudential, designed to impart needed certainty upon judicial decision making. The practice of constitutional law is the practice of making a set of 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: it relies on ostensibly verifiable historical facts about the world. 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 rely upon are imagined to emerge from analysis rather than advocacy. But if the choice of a historical modality is culturally

592. Greene, supra note 1, at 674–76.
593. See supra notes 242–48, 402–06 and accompanying text.
594. See supra notes 127–38 and accompanying text.
595. See supra note 274 and accompanying text.
596. See supra section III(B)(4).
597. See, e.g., Adam M. Samaha, Originalism’s Expiration Date, 30 CARDOZO L. REV. 1295, 1347 (2008) (suggesting that an honest commitment to originalism could guide judges away from their ideological preferences).
598. See Michael W. McConnell, Active Liberty: A Progressive Alternative to Textualism and Originalism?, 119 HARV. L. REV. 2387, 2415 (2006) (book review) (summarizing the originalist position that originalism arises not from judges’ ideological preferences but from their commitment to safeguarding the distinction between law and politics).
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. 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 nonincumbent 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 protections for private discrimination, school prayer, state autonomy, and property rights. We can now add gun rights to that program, although resurrection of the Second Amendment was not a mainstream view in the 1980s. 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.

No similarly coherent political program has emerged from

599. See, e.g., Douglas T. Kendall & James E. Ryan, Liberal Reading, NEW REPUBLIC, Aug. 6, 2007, at 14, 16–17 (arguing that liberals should respond to conservative methodological rhetoric by making textualist and historicist appeals of their own).


601. Alex Spillius, Democrats Gain in House and Senate, DAILY TELEGRAPH, Nov. 6, 2008, at 11.


603. Id. at iii.

604. Id.

605. See supra notes 54–55 and accompanying text.

606. See Greene, supra note 1, at 716 (concluding that originalism’s appearance of value-neutrality explains, at least partially, its popularity as an interpretive methodology).
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 many 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 us 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. As the nation diversifies culturally, narratives of assimilation may become less fecund and the unifying potential of Founding Era 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.

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. 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

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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. 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 policy platform for the current time. It is, moreover, a platform easily accommodated by representation reinforcement, by the Reconstruction-oriented originalism of Justice Black, or even, in this Democratic era, by 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, a difficult process 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 their constitutions, a different place in domestic political time, a different approach to judicial selection, and a different set of cultural and religious predicates.

610. See generally Goodwin Liu, Rethinking Constitutional Welfare Rights, 61 STAN. L. REV. 203 (2008) (arguing that public dialogue about distributive justice expressed through legislation must precede any judicial recognition of constitutional welfare rights); cf. Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 9 (1969) (“[T]he judicial ‘equality’ explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called ‘minimum welfare.’”).

611. Cf. supra note 436 and accompanying text.

612. See Cass R. Sunstein, The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever 3 (2004) (arguing that some American politicians are “committed, in principle, to ‘freedom from want’” but in practice “the public commitment is often partial and ambivalent, even grudging”).

613. Id. at 1.
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 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.