



# Constitutions as "Living Trees?" Comparative Constitutional Law and Interpretive Metaphors

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# CONSTITUTIONS AS “LIVING TREES”? COMPARATIVE CONSTITUTIONAL LAW AND INTERPRETIVE METAPHORS

Vicki C. Jackson\*

Debate over the appropriate role of foreign and international law in adjudication of public law claims is not unique to the United States.<sup>1</sup> Some of the opposition in the United States is driven by resistance to the Supreme Court’s decision on the merits of the issues in recent “hot button” constitutional cases. But the fierceness of positions being taken in the United States, the xenophobic hostility unveiled in some discussions of foreign law, and the emergence of legislative efforts to control the interpretive sources the Court looks at, suggest that there is something more than ordinary constitutional disagreement at stake.<sup>2</sup> At least three different sets of concerns are layered on each other in this debate about foreign and international law (which I refer to jointly as “transnational legal sources”).

One question entailed in current discussions of foreign law is about what the United States and U.S. law stand for in a world perceived as hostile and threatening. External threats to the security of a nation that had become

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\* Professor of Law, Georgetown University Law Center. With thanks for helpful comments to Mark Tushnet, Susan Low Bloch, Robert Taylor, David Schneiderman, Marty Lederman, Dan Tarullo, Sasha Volokh, Alex Aleinikoff, Jim Feinerman, Peter Bryne, Judith Resnik, Rosalind Dixon, and David Fontana, as well as Richard Fallon and other faculty and student participants in the Harvard Public Law Workshop, where a longer version of this paper was presented in April 2006. I want to thank Jim Fleming for organizing and my co-panelists (Noah Feldman, Martin Flaherty, Catherine Powell, and Alec Stone Sweet) for a stimulating conversation at the Fordham Symposium. I also thank my research assistants, Andrew Eberle and Joseph Gallagher, for their able help with the footnotes. The “living tree” metaphor is found in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, 136 (P.C. 1929) (appeal taken from Can.).

1. For example, in Canada, although there is little controversy over whether in principle it is legitimate to consider foreign constitutional decisions in interpreting the Canadian Charter, there is disagreement on the persuasive value of U.S. First Amendment case law. See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697, 740-44 (Can.) (Dickson, C.J.) (distinguishing U.S. case law); *id.* at 812-19 (McLachlin, J., dissenting) (discussing and relying on U.S. case law).

2. For a fierce critique of the U.S. Supreme Court’s use of foreign law in *Roper v. Simmons*, 541 U.S. 551 (2005), see Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 84-90 (2005). For a description of a death threat against two Justices for their having referred to or supported the use of foreign or international law in constitutional cases, see Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Speech Before the Constitutional Court of South Africa (Feb. 7, 2006), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html).

used to seeing itself, and its values, as invincible, seem to be layered over the “culture wars” about “social values,” traditional ideas under assault from within and without. In this debate, references to foreign law may be cast as a form of judicial disloyalty to a distinctively American ethos.<sup>3</sup> As I have argued elsewhere, however, American exceptionalism has comparative underpinnings that might welcome rather than reject thoughtful engagement with the laws of other democratic, constitutional systems.<sup>4</sup>

A second question is whether, in referring to foreign law or legal experience, the Court is “expanding the canon” or introducing something novel to constitutional interpretation.<sup>5</sup> Historic challenges are unfounded. The U.S. Supreme Court has a longstanding practice of (at least episodically) considering foreign legal experience in resolving American constitutional questions. Scholarship in the last several years convincingly shows that reference to foreign law and practice, or to the usages of “civilized nations,” is no novelty but has roots as old as the Court’s earliest constitutional decisions,<sup>6</sup> and by no means limited to explaining the

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3. See, e.g., American Justice for American Citizens Act, H.R. 1658, 109th Cong. (2005) (asserting that judicial references to foreign law in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Lawrence v. Texas*, 539 U.S. 558 (2003) were undermining American self-governance under its own written constitution and stating that no federal court, including the Supreme Court, “shall, in the purported exercise of the judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied on by the Framers of the [U.S.] Constitution”); see also *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting) (objecting to the majority’s brief reference to the views of the “‘world community,’ whose notions of justice are (thankfully) not always those of our people”).

4. See Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 Harv. J.L. & Pub. Pol’y (forthcoming 2006) (arguing, inter alia, that rational exceptionalism is implicitly comparative and can be a source of resistance to the darker impulses of the day by referring constitutional adjudicators to the practices of other countries to help better understand and realize our own commitments to liberty, equality, fairness, and the rule of law).

5. See, e.g., Charles Fried, *Scholars and Judges: Reason and Power*, 23 Harv. J.L. & Pub. Pol’y 807, 819 (2000).

6. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 176-78 (1803); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 459-60 (1793) (Wilson, J.); see also Steven Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 Ohio St. L.J. 1097, 1104-05 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 Wm. & Mary L. Rev. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int’l L. 1 (2006); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539, 545-49, 552-56 (2001); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 109 & nn.3-4, 110 & n.7, 111, 114 (2005) [hereinafter Jackson, *Constitutional Comparisons*]; Vicki C. Jackson, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, 37 Loy. L.A. L. Rev. 271, 335-37 & nn.227-28 (2003) [hereinafter Jackson, *Transnational Discourse*].

Founding generation's specific understandings.<sup>7</sup> While many of the references are brief, others are more substantial. Justice Robert Jackson's concurrence in *Youngstown v. Sheet & Tube Co. v. Sawyer* is an example of a thoughtful discussion of foreign constitutional experience towards gaining further perspective on difficult questions of U.S. constitutional law.<sup>8</sup> His two-page discussion of European constitutional approaches to emergency powers in the period up to and including World War II is omitted from most of the leading casebooks,<sup>9</sup> illustrating the power of legal education to construct incomplete understandings of our own past interpretive practices. Few U.S. cases make as fully argued a use of foreign constitutional experience as Justice Jackson's concurrence did, although Justice Stephen Breyer's discussion of foreign federalisms in *Printz v. United States* was on the Jackson model.<sup>10</sup> But a considerable number of the Court's cases include opinions in which foreign law or practice is noted, sometimes in support, sometimes as a point of contrast.

What is new in recent years is not so much the occasional discussion of foreign law by the U.S. Supreme Court, but the growth in the availability of constitutional or human rights decisions in the world and the increased transnational discourse among courts described by Anne-Marie Slaughter

7. For discussion of contemporary or post-Founding foreign materials, see, for example, *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.16, 734 (1997); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651-52 (1952) (Jackson, J., concurring); *Wickard v. Filburn*, 317 U.S. 111, 125-26 & n.27 (1942); *Muller v. Oregon*, 208 U.S. 412, 419-20 n.1 (1908); *Jacobson v. Massachusetts*, 197 U.S. 11, 31-33 & n.1 (1905); see also, for example, *United States v. County of Allegheny*, 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring).

8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650-52 (1952) (Jackson, J., concurring). Justice Jackson argued that President Harry S. Truman's claim of inherent authority was essentially one for recognition of emergency powers on the part of the President. The possibility of emergencies had not escaped notice of the original framers, but, he argued, they had addressed it only through the provision authorizing legislative suspension of habeas corpus. On this point, he said, it was not entirely "irrelevant" to notice recent experience in Europe with constitutions and emergencies. *Id.* at 651. In Weimar Germany, he said, the constitution permitted the executive to declare an emergency and suspend civil liberties, a power used more than 250 times in thirteen years, until it was last used when Hitler came to power. In France, by contrast, the legislature was required to act to declare a "state of siege," and define the legal consequences thereof. *Id.* In the U.K., the Parliament essentially authorized emergency rule by the cabinet, retaining the power to terminate it. Jackson wrote that the constitutional experiences of these nations were "inconclusive" on whether a modern constitution ought to provide for the exercise of emergency powers. *Id.* at 652. "But," he concluded, "it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.*

9. See Jackson, *supra* note 4 (manuscript at text accompanying notes 27-30, on file with the Fordham Law Review).

10. See *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (noting that "the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control," and that "other countries [including Switzerland and Germany], facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution").

and others.<sup>11</sup> There are today a broader and deeper set of international and foreign legal sources arguably relevant to U.S. constitutional adjudication, sources whose richness and diversity suggest the need for more disciplined knowledge and usage of transnational law.<sup>12</sup> The relevance and legitimacy of considering transnational law will vary depending on the issue of domestic law and the nature of the foreign or international source.<sup>13</sup> And there are considerable challenges to correct understanding and appropriate comparisons with foreign law.<sup>14</sup> But we can begin to identify questions to ask—for example, how ubiquitous or diverse are constitutional approaches to an issue?<sup>15</sup> Is the question embedded in a historically contingent compromise viewed as essential to a nation's existence or is it instead viewed as a commitment to rights understood as having universal features?<sup>16</sup> Is the source international law or foreign domestic

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11. See, e.g., Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. Rich. L. Rev. 99 (1994).

12. Cf. Practice Direction (Citation of Authorities), (2001) 1 W.L.R. 1001, ¶ 1 (Eng.) (issued by Lord Chief Justice of England and Wales), available at <http://www.hmcourts-service.gov.uk/cms/814.htm> (explaining that because of the “growth in the number of readily available reports of judgments in this and other jurisdictions . . . the current weight of available material causes problems both for advocates and for courts” and promulgating rules limiting and regulating citation of authority both from within Britain and from foreign jurisdictions). With respect to foreign law, “[c]ases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction . . . [but] should not be cited without proper consideration of whether it does indeed add to the existing body of law.” *Id.* ¶ 9.1; see also *id.* ¶ 9.2 (requiring advocates, inter alia, to “indicate . . . what [the foreign] authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is; [and] certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish”).

13. See Jackson, *Constitutional Comparisons*, *supra* note 6, at 124-26 (arguing that the legitimacy of comparison will vary with the issue of domestic law; that the persuasive value of foreign law depends on its reasoning, the comparability of its context, and its institutional origin; and what is “fair” use of foreign sources will depend on the purpose of the comparison).

14. Indeed, some have suggested that foreign law and experience offer too vast a field to master in order to avoid errors, and thus should not play any significant role in constitutional adjudication. As others note, the very diversity of foreign law poses difficulties in choosing what to consider, as well as the challenge of properly understanding the foreign context for whatever rule or practice is under examination. And, it might be argued, the United States, with its older constitution and depth of precedent on many issues, may have less to gain from considering transnational law on many issues. Cf., e.g., Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Stud. 499, 514 (2000) (noting that courts might consider foreign law to avoid “reinvent[ing] the wheel” on issues new to their systems but dealt with in others). *But cf.* Jackson, *Transnational Discourse*, *supra* note 6, at 339-41 (noting concern about expertise and arguing that comparative experience may be particularly helpful in addressing how to integrate newer constitutional commitments with older ones); Jackson, *Constitutional Comparisons*, *supra* note 6, at 126 (noting challenges); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 343 (2001) (discussing concerns for expertise).

15. See Jackson, *Constitutional Comparisons*, *supra* note 6, at 127.

16. See Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 Int'l J. Const. L. 91, 102-08 (2004) (explaining why comparative

constitutional law?<sup>17</sup> Thoughtful debate has moved on, as it should, to the questions of when, how, and for what purposes foreign or international law should be used in constitutional interpretation. And this third debate is embedded in a larger discussion of constitutional interpretation and the appropriate limits of judicial review.

One axis of disagreement over constitutional interpretation in the United States is between proponents of originalism and proponents of the "living constitution,"<sup>18</sup> catchwords that represent simplified poles in a complex spectrum of views about democratic legitimacy, the rule of law, judicial constraint, and judicial competence. These questions, going to the role of courts in constitutional systems, are considered in other countries as well. Part I below explores the interpretive approaches of three other high national courts that have engaged in constitutional review over a long period of time, identifying two respects in which they may bear on this debate.<sup>19</sup> First, their jurisprudence relies on interpretive approaches that depend on multiple sources and forms of argument—what some call an "eclectic" method,<sup>20</sup> and others might call common law constitutionalism.<sup>21</sup> Second, the jurisprudence of other significant national courts acknowledges the possibility that interpretive understandings will change. Indeed, in those countries with continuity of rights-protecting constitutional regimes

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constitutional law may be less relevant in analyzing constitutional federalism issues than constitutional rights questions); Jackson, *supra* note 14, at 255-56, 268-74.

17. See Jackson, *supra* note 4 (manuscript at text accompanying notes 54-79, on file with the Fordham Law Review). International law may be a necessary source for understanding certain constitutional terms, like "war," "treaty," or "offenses against the law of nations." See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57, 58 n.10 (2004); Cleveland, *supra* note 6, at 12-23; Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 71 & n.14 (2004). In other cases, foreign constitutional law—depending on what country or countries it is from—may have significant persuasive force, especially insofar as it reflects decisions of a domestic court to enforce norms against its own government on an ongoing basis. See Jackson, *Constitutional Comparisons*, *supra* note 6, at 125; Jackson, *Transnational Discourse*, *supra* note 6, at 343-45. Other aspects of a transnational legal source may also be significant in evaluating their relevance in constitutional interpretation. See, e.g., Cleveland, *supra* note 6, at 113-22 (suggesting that the universality of an international legal principle, and the position of the United States with respect to it, are both relevant to the bearing of international law on constitutional interpretation).

18. Compare, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989), with, e.g., Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 Harv. L. Rev. 32 (1993).

19. I will hereafter refer to these courts as "constitutional courts," whether they are specialized and focus primarily on constitutional disputes, as in Germany, or are more "generalist" courts hearing statutory as well as constitutional cases, as in the United States, Canada, and Australia.

20. Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism, in Interpreting Constitutions: A Comparative Study* 7 (Jeffrey Goldsworthy ed., 2006).

21. For differing perspectives on common law approaches to constitutional interpretation, see, for example, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619 (1994).

and with high courts vested with the power of judicial review,<sup>22</sup> it is a hallmark that constitutions be construed in a certain sense as “living,” with prior interpretations open to modification in light of new developments and changed understandings. This may be a consequence of the debilitation of rationales for intentionalism beyond original generations, and of changes in legal consciousness that undermine the plausibility of more formalist methods. The ubiquity of interpretive change and of multi-sourced methods of interpretation raises questions about claims that democratic legitimacy or appropriate levels of judicial restraint depend on formalist, intentionalist modes of interpretation and exclusive reliance on constitutional amendment for change.

Part II explores the metaphors through which we think about the “living” and “original” Constitution. The U.S. metaphor—a “living constitution”—does not necessarily capture the actual methodologies of our own constitutional interpretation, which remain grounded in constitutional text and whose sources include original understandings as well as later history and precedent. In Canada, a widely used metaphor is of their constitution as a “living tree.” The idea of a “living tree” may better embrace the multiple modalities—text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns—of contemporary constitutional interpretation. It suggests that constitutional interpretation is constrained by the past, but not entirely. Unlike the less tethered “living constitution,” it captures the idea of constraint, the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth. Yet all metaphors mislead; they can obscure as much as they illuminate; and the tree metaphor understates the effects of major constitutional change and the role of human agency in that process. Nonetheless, moving the metaphor to the Constitution as a “living tree” may emphasize commonalities in interpretive approaches and thus support the idea of legitimate constitutional disagreement as an ordinary part of adjudication, not a symptom of “lawless” judges engaged in “naked political judgment.”<sup>23</sup>

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22. My reliance on continuity over time as a measure of those relatively successful systems with which to draw comparisons may involve some degree of tautology. Indeed, it is hard to see how interpretation could be anything other than “living” in a system with a relatively more “rigid” constitution, like that of the United States, which imposes extraordinarily high barriers to constitutional amendments. The three other countries whose jurisprudence I discuss in this paper arguably have less rigid, formal requirements for constitutional amendments. *See, e.g., infra* note 47 (describing Germany’s requirements). While this paper emphasizes similarities in interpretation, there may be differences in the degree to which major change in interpretation has developed in the respective courts’ cases. Although one could hypothesize that such differences may bear some relationship to the degrees of rigidity in amendment formulae, this paper does not examine that question empirically.

23. The last two sets of quoted words are from Posner, *supra* note 2, at 41, 75, 78, 90.



## I. COMPARATIVE CONSTITUTIONAL LAW AND CONSTITUTIONAL INTERPRETATION

Professor Mark Tushnet has shown how awareness of comparative experience in making constitutions undermines the assumptions of interpretive approaches that presume the coherence of constitutional text.<sup>24</sup> I consider here whether comparative experience casts light on claims about "evolutive" versus "fixed meaning" approaches to constitutional adjudication. I suggest that comparative experience shows that a number of well-established constitutional courts tend to (1) write opinions that rely on multiple sources of legal argument and authority and (2) shift doctrine over time in ways that may evolve away from more specific understandings of initial constitution-makers. I argue elsewhere in a more normative vein that the multiple roles of written constitutions are, over time, best accommodated through the interpretive strategies characteristic of common law constitutionalism,<sup>25</sup> but my effort here is primarily positive.

Comparative study suggests that independent constitutional courts have tended to rely on a range of interpretive approaches and arguments, a range that, in its diversity, is comparable to that seen in the United States. The "eclectic" practices of the U.S. Supreme Court are not out of line with those used in Australia, Canada, and Germany—other jurisdictions with well-established constitutional courts (and a history of judicial independence)<sup>26</sup>

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24. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1285-1301 (1999) (suggesting that comparative study of constitution-making reveals considerable "bricolage," which undermines claims for coherence-based theories of interpretation).

25. See Vicki C. Jackson, *Defending Common Law Constitutionalism: Constitutional Justification in Comparative Perspective* (unpublished manuscript on file with the Fordham Law Review) (arguing, inter alia, that common law constitutional interpretation has a normatively attractive capacity to provide space for legitimate legal disagreement through its multiple forms and sources of argument). I note here only briefly that there may also be arguments from originalism for such approaches. By providing for judicial review under a written constitution, constitution-makers may in some sense be understood to anticipate these phenomena—both the conventions of multi-sourced legal argumentation and the possibility of evolution in constitutional understandings. See also Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. Chi. L. Rev. 836, 862 (1988) ("[In] Publius's thought, adequacy of constitutional communication cannot imply the elimination of controversy and judgment in the quest for the Constitution's practical implications."); cf. Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 Minn. L. Rev. 612, 613-14, 623-30 (2006) (arguing that the original understanding was that later practice and precedent would sometimes be needed to "fix" the meaning of ambiguous constitutional provisions).

26. By judicial independence in this context I mean that the courts are regarded as (relatively) uncorrupt and as having sufficient autonomy from other parts of the government that they are on occasion willing to rule against the positions of their government. I have not attempted a comprehensive survey of constitutional courts meeting these criteria but have relied on my knowledge of those constitutional courts about whom a fair amount of scholarship has been written in English, which may skew analysis. Although the selection criteria may not meet Professor Ran Hirschl's standards for "theory building through causal inference," Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J. Comp. L. 125, 131 (2005), studying these arguably similar courts' work can

that operate in a context in which other branches typically comply with their decisions, in countries with respect for political and civil liberties.<sup>27</sup>

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deepen understanding of an interpretive debate. In an effort to achieve some degree of comparability, I have also limited this study to constitutional courts that have been at work for at least several decades, thus excluding the newer constitutional courts in, for example, South Africa or in Israel, where the High Court's role in constitutional review has developed ambiguously over recent decades. See also note 27, *infra*, for discussion of country selection issues.

27. Australia, Canada, Germany, and the United States each receive the highest ratings for political rights and civil liberties (1-1) from Freedom House, whose tables are regarded as representing reasonably reliable, nonpartisan evaluations. See Freedom House, Freedom in the World: Table of Independent Countries 2005, <http://www.freedomhouse.org/template.cfm?page=211&year=2005> (last visited Oct. 16, 2006). Each of these four countries has had a constitutional court functioning for several decades, with judges who are regarded as independent and whose rulings are generally complied with. However, I have not studied the constitutional jurisprudence of all countries with 1-1 ratings that have constitutional courts. According to the Freedom House report, in 2005 there were 46 independent countries with 1-1 ratings. Not all of these ratings are of long standing, and many of the countries on this list are quite small (under one million people). If one excludes countries that had only recently received this rating (that is, in either the 2005 Freedom House Report or the 2004 Freedom House Report, see Freedom House, Freedom in the World: Table of Independent Countries FIW 2004, <http://www.freedomhouse.org/template.cfm?page=229&year=2004> (last visited Oct. 16, 2006)), and if one also excludes countries with populations of under one million persons, there remain twenty-one countries (including the U.S., Canada, Germany, and Australia). Of these twenty-one countries, some have not had courts empowered to engage in binding constitutional review of laws, as is the case in New Zealand, Netherlands, and the U.K., and some have courts only recently authorized to engage in a very limited form of judicial review, as in Finland in 2000; judicial review in the other Nordic countries in this group (Norway, Sweden, and Denmark) is also notably restrained. See Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 Am. J. Comp. L. 345, 365 (2000); see also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707, 715 (2001). Some other countries have high courts with limited jurisdiction over judicial review of laws. In Switzerland, for example, the court does not have jurisdiction to review national laws, and in France, the constitutionality of statutes can be reviewed only before they go into effect and not at the behest of a private citizen. Other countries in this group include Austria, Belgium, Ireland, Italy, Poland, Portugal, Spain, Slovenia, and Uruguay, though in several of these countries the high court's authority to exercise judicial review is far newer than in Germany. My conclusions, it should be emphasized, are not about whether constitutional courts are necessary to protect civil liberties, nor are they about all constitutional courts in civil-liberties protecting democracies, but they concern the practices of several influential constitutional courts, whose opinions are read beyond their own borders, from among the ten largest countries in this group of 1-1 nations. The ten largest population states in the long-standing 1-1 group are the United States, Germany, United Kingdom, France, Italy, Spain, Canada, Australia, Netherlands, and Portugal. See United States Central Intelligence Agency, *Rank Order: Population, in The World Factbook* (2006), available at <https://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html>. Of these, the U.K. still adheres at least formally to parliamentary supremacy (notwithstanding the Human Rights Act (1998)); France and the Netherlands were discussed above; and Portugal and Spain adopted new constitutions, representing a sharp break with the past, in the 1970s. While Italy's constitutional court is almost as old as Germany's, I have not found many of its decisions of recent decades translated into English. For an early study, see Samuel A. Alito, *An Introduction to the Italian Constitutional Court* (May 31, 1972) (unpublished undergraduate Woodrow Wilson School Scholar Project prepared for Professor Walter F. Murphy) (on file with Mudd Library, Princeton University), available at [http://www.princeton.edu/~mudd/news/Alito\\_thesis.pdf](http://www.princeton.edu/~mudd/news/Alito_thesis.pdf).

These courts tend not to adopt a single metric for constitutional analysis; decisions discuss text, original understanding, structure and purpose, history and constitutional values, and past decisions. Comparative experience thus draws attention to those accounts of the practice and legitimacy of constitutional interpretation in the United States that emphasize the multiple modalities of legitimate constitutional argument, the absence of clear algorithms for resolving disputes between those lines of arguments, the need for judicial judgment, and the tolerance for or receptivity to change in constitutional understandings over time.<sup>28</sup>

To be sure, there are important differences in what arguments have the most weight in the decisions of different constitutional courts. The U.S. Supreme Court, for example, relies more heavily on its own past precedents and history than some other constitutional courts. Prior precedents figure importantly in Canadian and Australian cases as well, reflecting their common law background. German decisions are more likely to begin with a statement of the fundamental constitutional principle at stake. In each of these jurisdictions, the courts employ a set of arguments and analytical techniques that go beyond the text and typically involve resort to prior decisions (even in systems not formally built on judicial precedent), as well as constitutional purpose, and, on occasion, the likely consequences of alternative interpretations or the experience of other democracies, in reasoning that will not be unfamiliar to readers of U.S. Supreme Court decisions.<sup>29</sup>

To illustrate this point, consider the first *German Abortion Decision* (of 1975) where the Federal Constitutional Court of Germany reached a result strikingly different from that in the United States, in an opinion that relies on a number of sources and forms of argument.<sup>30</sup> The Court concluded that the government had an affirmative duty to protect fetal life, even as against the interests of the pregnant woman, and that a statute permitting abortion in the first twelve weeks (if the pregnant woman first had counseling from her physician) was unconstitutional as inconsistent with this affirmative

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28. See, e.g., Philip Bobbitt, *Constitutional Fate* (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); Strauss, *supra* note 21. For a discussion of the inevitable interpretive choices, in considering "original understandings," between specific and abstract levels of intent, meaning, or purpose, see Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 91-94 (1989).

29. Case law from the European Court of Human Rights—interpreting a quasi-constitutional human rights convention to which signatory nations are bound—is likewise multi-sourced, though perhaps more inclined to place weight on the text of the treaty provision at issue. See, e.g., *Soering v. United Kingdom*, App. No. 14038/33, 11 Eur. H.R. Rep. 439, ¶¶ 87-89 (1989) (referring to its "spirit and intentment," the need to make its protections "practical and effective," changes in the international aspects of crime, and noting other international conventions, in interpreting article 3 of the European Convention on Human Rights).

30. See *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. Marshall J. Prac. & Proc. 605 (1976) (Robert E. Jonas & John D. Gorby trans.).

governmental duty.<sup>31</sup> The Court relied on the text of the Basic Law, which declares “human dignity” to be “inviolable” and provides that “every person shall have the right to life,”<sup>32</sup> but is silent on when “life” begins and contains other rights-guarantees that might have laid the basis for finding equality or autonomy rights to protect women’s decisions to abort.<sup>33</sup> To supplement its understanding of the text, the Court referred to the legislative history of the right-to-life clause, which had been drafted less than thirty years earlier. But the Court did not rely only on text and original understandings. Referring to its own past decisions (“constant judicial utterances”) and its value-oriented approach to interpreting the Basic Law (involving an “objective ordering of values”),<sup>34</sup> the Court also concluded that where the mother’s own right to life and “sphere of intimacy” is at stake, requiring continuation of the pregnancy was not constitutionally “exactable” from the mother where it would pose a danger to her life or a grave danger to her health. Accordingly, it held, the legislature must provide exceptions from the ban on abortions at least in those situations and could provide exceptions for reasons of comparable gravity, i.e., that the pregnancy resulted from a crime or that the fetus suffered from nonremediable and serious medical problems.<sup>35</sup>

In rejecting arguments that decriminalizing counseled first-trimester abortions would save more unborn lives,<sup>36</sup> the Court held that it was only

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31. The Court found that the statute failed sufficiently to express legal condemnation of the interruption of pregnancy. *Id.* at 651. A vigorous dissent, agreeing that there was a constitutional duty to protect human life before birth, disagreed that the Basic Law should be interpreted to impose a duty to criminalize abortion. *Id.* at 663-64.

32. Grundgesetz [GG] [Basic Law] art. 2(2) (F.R.G.), translated in Press & Info. Office (F.R.G.), Basic Law for the Federal Republic of Germany (Christian Tomuschat & David P. Curry trans., 1998) (All references to the German Basic Law in English are from this translation.). In Germany, the constitution is called the Basic Law.

33. See *id.* art. 2(1) (protecting “the right to free development of [one’s] personality”), which the German Court agreed protected “the sphere of intimacy” of the pregnant woman, but was of a lesser order of magnitude than the right to life. See *West German Abortion Decision: A Contrast to Roe v. Wade*, *supra* note 30, at 642; see also Grundgesetz [GG] [Basic Law] art. 3 (F.R.G.) (establishing rights of equality, specifically including between men and women).

34. *West German Abortion Decision: A Contrast to Roe v. Wade*, *supra* note 30, at 642. The idea of the “objective ordering of values” may be compared to Professor Strauss’s “preferred” constitutional provisions, see Strauss, *supra* note 21, at 882-83, although the German objective order is a more ambitious concept, part of an effort to provide the basis for a coherent interpretation of the constitution as a whole. For a discussion, see Donald P. Kommers, *Germany: Balancing Rights and Duties*, in *Interpreting Constitutions: A Comparative Study*, *supra* note 20, at 161, 178-80.

35. *West German Abortion Decision: A Contrast to Roe v. Wade*, *supra* note 30, at 618-19. Under this reasoning, the Texas state law at issue in *Roe v. Wade*, 410 U.S. 113 (1973), would be unconstitutional because it did not allow abortions in the event of threats to the mother’s health, but only made exceptions to the criminal ban for those abortions performed “for the purpose of saving” the mother’s life. *Id.* at 117-18 & n.1 (quoting the Texas statute).

36. The German statute made abortions in the first twelve weeks after conception “not punishable,” provided there was counseling on the availability of assistance to go forward with the pregnancy. *Id.* at 611-12. This provision was found unconstitutional.

permissible to except from legal condemnation those specific individual cases for which there was adequate justification for an abortion, but the first trimester counseling model of the law gave "unrestricted power of disposition" to terminate the pregnancy, regardless of reason, to the pregnant woman.<sup>37</sup> The Court also reasoned, consequentially and based on comparative experience, that permitting the abortion to be performed by the same physician who provided counseling (about social assistance to encourage continuation of the pregnancy) would be ineffective in preventing abortions; as experience in England showed, doctors could be found who would perform counseling, not with an eye to discouraging, but with an eye to allowing abortion, either for reasons of financial self-interest or ideological commitments to women's emancipation or self-determination.<sup>38</sup> The Court rejected arguments from the liberalization of abortion laws in other Western countries because abortion regulations were sharply contested everywhere and because the Basic Law's principles could "be understood only in light of the historical experience and spiritual moral confrontation with the previous system of National Socialism."<sup>39</sup>

In this one opinion, then, we see high theory, historicism, and intentionalism, and the balancing of different constitutional interests within an interpretive framework created by the German Court that gives priority to one over another of the constitutionally protected rights. We also see a concern for the practical consequences of the legislation being evaluated, drawing on comparative experience, and at the same time an insistence on German "exceptionalism" in interpreting its constitution, framed in the wake of the defeat and repudiation of Nazism.

Over time, continuities and change in the Court's approach to the abortion question emerged. In the 1975 *German Abortion Decision*, the Court had rejected the argument that "developing life would be better protected through individual counseling of the pregnant woman than through a threat of punishment," asserting that "[t]he weighing in bulk of life against life which leads to . . . the destruction of a supposedly smaller number in the interests of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life."<sup>40</sup> In the *Second German Abortion Decision* of 1993, the Court appeared to retreat from this position, based on experience with the 1975 law.<sup>41</sup> As Professor Gerald Neuman describes the later decision, with some exceptions the Court upheld the approach of the new abortion law (adopted following unification of East and West Germany) insofar as it eliminated criminal punishment for first-trimester abortions that follow

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37. *Id.* at 652-53.

38. *Id.* at 659.

39. *Id.* at 662.

40. *Id.* at 650, 655.

41. For related discussion, see Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 *Tul. J. Int'l & Comp. L.* 109, 137-41 (2001).

independent counseling by someone other than the physician performing the abortion.<sup>42</sup> Because pregnancy could not be perceived in the first trimester, “[a] system that elicited the cooperation of the woman therefore had a greater chance of success in preventing abortion than a system that antagonized her and prompted evasion,” and the “threat of criminal punishment and the subjection of the woman to third party evaluation of her need for an abortion had proved antagonizing.”<sup>43</sup> While adhering to the central point made in the first *Abortion Decision* about the constitutional duty of the state to protect fetal life,<sup>44</sup> the court was willing in light of experience to relax its approach, not requiring third party evaluation of whether suitable “indications” for abortion were present, in the expectation that a counseling based system would save more fetal lives.

According to Professor Donald Kommers, the foremost American scholar of the last thirty years writing on German constitutional law, the German Court generally draws on sources including unwritten principles, the written constitutional text, the practices of German constitutionalism, the history of the constitution, judicial precedents (though rejecting the principle of stare decisis as such), academic writings, and comparative and international materials; the intentions of the drafters are in his view clearly secondary. In contrast to the U.S. Supreme Court, the German Court sees its role as one of harmonizing the sometimes conflicting rights and duties set forth in the Basic Law,<sup>45</sup> in an effort to establish constitutional coherence and unity in the context of the broader German community.<sup>46</sup> Kommers’s description of the German approach and that of the United States suggests differences in degree, not kind: “Most Germans would accept the ‘living instrument’ conception of the Basic Law, but they would be less inclined . . . to admit

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42. See Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273 (1995).

43. See *id.* at 282 (emphasizing that the Court’s methodology in this decision required an “empirical estimate of the future effects” of the legislation).

44. Indeed, the Court held that changes were required to make the 1993 statute constitutional, including eliminating a provision declaring that abortion in the first twelve weeks was “not unlawful” and demanding more rigorous requirements for the counseling to encourage the pregnancy. *Id.* at 283-85.

45. Kommers, *supra* note 34, at 177-78.

46. Kommers writes,

This notion of the constitution as a substantive unity has good pedigree in Germany’s tradition of . . . conceptual jurisprudence . . . , a tradition that envisions law as a self-contained, internally coherent, system of rules and norms. Yet constitutional law transcends the boundaries of positive law. Social context, political morality, and cultural norms play an important role in constitutional interpretation. An important interpretive canon postulates the interdependence of the constitutional order and the broader community. The nature of the community—ie, the German people—defines and refines the constitutional order, just as the latter defines and refines the existential reality of the community.

*Id.* at 178.

to leaving major change—transformative change if you will—to interpretation.”<sup>47</sup>

Canada, whose “living tree” jurisprudence is discussed further below, considers a broad range of legal arguments and factors in making constitutional decisions and allows for the evolution of its constitutional law. A dramatic example is the Canadian Court’s movement from 1991 to 2001 on the question of whether it would violate the Charter of Rights and Freedoms to permit the extradition of a person to the United States to face a possible death sentence.<sup>48</sup> In *Kindler v. Canada*,<sup>49</sup> the Supreme Court of Canada rejected a claim that section 7 of the Charter (prohibiting deprivations of liberty inconsistent with fundamental principles of justice) prohibited the extradition of the defendant, who had already been sentenced to death, to the United States. A decade later, however, the Court held in *United States v. Burns*<sup>50</sup> that, in general, extradition to face the death penalty would be inconsistent with the fundamental principles of justice. The Court explained its change of position in light of intervening developments, including international initiatives, change in other state practices, and accelerating concern in Canada over wrongful convictions in Canada and the United States. Although “the basic tenets of [Canada’s] legal system . . . have not changed since 1991 when *Kindler* and [*Reference re Ng Extradition*] were decided, . . . their application in particular cases (the ‘balancing process’) must take note of factual developments in Canada and in relevant foreign jurisdictions . . . . [The] balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome.”<sup>51</sup>

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47. *Id.* at 179 (“Taking the constitution seriously in Germany implies heavy reliance on the formal amendatory process when political or social realities begin to diverge from the original handiwork of the Basic Law’s framers.”). The German Basic Law is easier to amend than the U.S. Constitution. *Compare* Grundgesetz [GG] [Basic Law] art. 79(2) (F.R.G.) (providing that the Basic Law may be amended by a two thirds vote of each house of the German legislature), with U.S. Const. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid . . . as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .”). The German constitution makes some of its provisions unamendable. *See* Grundgesetz [GG] [Basic Law] art. 79(3) (F.R.G.) (which include, *inter alia*, human dignity and the democratic and federal character of the F.R.G.).

48. The last execution in Canada was in 1962; the death penalty was abolished by statute in Canada in 1976 for all nonmilitary offenses; and in 1998 the death penalty was abolished entirely. *See* Amnesty Int’l Can., *The Death Penalty in Canada: Twenty Years of Abolition*, <http://www.amnesty.ca/deathpenalty/canada.php> (last visited Sept. 29, 2006).

49. [1991] 2 S.C.R. 779.

50. [2001] 1 S.C.R. 283 (Can.).

51. *Id.* at 361. For a recent study of the Canadian court’s use of foreign or international law in Charter cases, see Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U. Toronto Fac. L. Rev. 99 (2004) (finding uses of foreign or international law in 34 out of 402 Charter cases decided from

It is not only in Charter cases that the Canadian Supreme Court has applied progressive and multi-factored analyses of the scope of constitutional provisions. For example, in *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23,<sup>52</sup> the Supreme Court of Canada upheld federal power to enact a law providing for paid maternity and parental leave.<sup>53</sup> The Quebec Court of Appeals had found the law *ultra vires* the federal power over “unemployment insurance,” relying on the more narrow legislative history of the 1940 amendment to the 1867 Constitution Act authorizing federal unemployment insurance. The Supreme Court of Canada, however, concluded that changes in women’s participation in the labor market since 1940 justified a broader understanding of the scope of this constitutional authority.<sup>54</sup> Although not uncontroversial (especially in Charter cases), the Canadian Court’s “living tree” metaphor appears to be an accepted part of the legal discourse.<sup>55</sup>

Australia is an interesting contrast to Canada because its judges, for the most part, have not explicitly embraced the “living constitution” approach found in Canada and in some German and U.S. opinions. While a range of interpretive views have been expressed by its justices, including some jurists who argue that the Australian Constitution should be interpreted as a “living force,”<sup>56</sup> a number of the judges who over time have sat seem to be committed to what Professor Goldsworthy calls “moderate originalism,” or “legalism,” in which the words of the constitution are understood to mean

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1998-2003 and concluding that references were appropriately cautious and did not involve “cherry-picking” or judicial activism).

52. [2005] 2 S.C.R. 669 (Can.).

53. Emphasizing that “the Court takes a progressive approach to ensure that Confederation can be adapted to new social realities” in identifying heads of federal power, and referring to the “‘living tree’ metaphor,” the Court rejected Quebec’s argument that the principal purpose of the law (its pith and substance) was to assist families, a matter within provincial authority; rather, the “fundamental objective of the maternity benefits plan is to protect the workers’ incomes from the time when they lose or cease to hold their employment to the time when they return to the labour market.” *Id.* at 677, 687.

54. *Id.* at 702. Thus, the Court wrote,

The evolution of the role of women in the labour market and of the role of fathers in child care are two social factors that have had an undeniable economic impact on individuals who are active participants in the labour market. A generous interpretation of the provisions of the Constitution permits social change to be taken into account. The provincial legislatures have jurisdiction over social programs, but Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth to or care for children. The provision of income replacement benefits during maternity leave and parental leave does not trench on the provincial jurisdiction over property and civil rights . . . .

*Id.*

55. See Wil Waluchow, *Constitutions as Living Trees: An Idiot Defends*, 18 Can. J. L. & Juris. 207 (2005).

56. See Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 Melb. U. L. Rev. 1, 11 (2000) (approving of Andrew Inglis Clark’s argument that the Australian Constitution must be “made a living force” and arguing that present understandings of the Constitution’s meaning should control interpretation today).



the same thing now as when they were enacted.<sup>57</sup> However, this originalist approach distinguishes between the connotation of the term, which is unchanging, and its denotation, or application, which may vary as circumstances change.<sup>58</sup> And the Australian case law, while giving greater weight to text as originally understood, also pays attention to many of the factors discussed by other courts, including "structural principles and implications," which may be unwritten, and "policy" concerns of "justice, utility and good government."<sup>59</sup>

Although still prone to formalism or "legalism,"<sup>60</sup> in recent years the Australian Court has shown some willingness to re-understand the meaning of constitutional text and its own precedent in light of contemporary development, particularly under the years of the so-called "Mason Court."<sup>61</sup> For example, in *Street v. Queensland Bar Ass'n*,<sup>62</sup> the Court reconsidered a question decided ten years earlier—whether the Constitution permitted a state to impose either a residency or a primary practice requirement for an attorney licensed in another state to become a member of the bar. At issue was the meaning of section 117 of the 1900 Constitution, which had been interpreted in a formal and narrow way, to allow substantial room for state discrimination against out-of-staters.<sup>63</sup> The Court—unanimously, but in

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57. See Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in *Interpreting Constitutions: A Comparative Study* 106, *supra* note 20 [hereinafter Goldsworthy, *Devotion to Legalism*]; Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *Fed. L. Rev.* 1, 7 (1997) [hereinafter Goldsworthy, *Originalism*]. The approach may reflect Australia's greater commitment to parliamentary sovereignty, also reflected in the absence of a bill of rights in its constitution. The Australian Constitution has only a small number of provisions concerning individual rights at the federal level. In 1988, a proposed constitutional amendment to extend those rights to the states was overwhelmingly rejected. Goldsworthy, *Devotion to Legalism*, *supra*, at 110; see also James Allan, *Paying for the Comfort of Dogma*, 25 *Sydney L. Rev.* 63, 65, 66 n.11 (2003).

58. See Goldsworthy, *Originalism*, *supra* note 57, at 31-32; see also *id.* at 20 (arguing that a distinction in "enactment" and "application" intentions, which roughly corresponds to the distinction between broad concepts and specific conceptions, is an aspect of moderate originalism, under which only enactment intentions are relevant to constitutional meaning); see also *Street v. Queensland Bar Ass'n* (1989) 168 C.L.R. 461, 537-38 (Austl.) (Dawson, J.) (discussing "denotation" and "connotation" of constitutional terms).

59. Goldsworthy, *Devotion to Legalism*, *supra* note 57, at 128, 131-33.

60. *Id.* at 132-34. For a helpful comment, see also Leslie Zines, *The Present State of Constitutional Interpretation*, in *The High Court at the Crossroads: Essays in Constitutional Law* 224, 234-38 (Adrienne Stone & George Williams eds., 2000) (describing the decision in *Lange v. Australian Broadcasting Corp.* as having more the tone than the substance of a more legalistic attitude, critically discussing the *Re Wakim* case, and concluding that the Court displays no "general pattern" or interpretive direction).

61. Anthony Mason sat as the chief justice from 1987 to 1995. For a description of the Mason years and those that followed, emphasizing continuities in interpretive method, see Michael McHugh, Justice of the High Court of Australia, *The Constitutional Jurisprudence of the High Court, 1989-2004*, The Inaugural Sir Anthony Mason Lecture in Constitutional Law (Nov. 26, 2004), available at [http://www.hcourt.gov.au/speeches/mchughj/mchughj\\_26nov04.html](http://www.hcourt.gov.au/speeches/mchughj/mchughj_26nov04.html). For a different perspective, see Jason L. Pierce, *Inside the Mason Court Revolution* (2006).

62. (1989) 168 C.L.R. 461 (Austl.).

63. *Id.* at 481-83 (Mason, C.J.). Section 117 of the Australian Constitution provides, "A subject of the Queen, resident in any State, shall not be subject in any other State to any

separate opinions by seven justices—disavowed earlier interpretations of section 117 of the Australian Constitution, finding that it was more consistent with the purpose of making a unified country to interpret the ban on discrimination based on state residence more broadly.<sup>64</sup>

Several of the justices were quite candid in describing how recent developments influenced their understanding of the clause. For example, Justice Mary Gaudron wrote that the prior decisions interpreting section 117 “do not reflect recent developments within the field of anti-discrimination law which have led to an understanding that discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination),” relying on both Australian and American statutes and cases interpreting them.<sup>65</sup> Arguing against the constitutional formalism of past decisions, Justice William Deane asserted that the requirement for residency or primary practice as a condition to practicing law in a state must be found in violation of section 117, “[i]n the light of the material before the Court and in the context of modern circumstances in this country including the existence of a unitary system of law administered in the various States and Territories by both national and State courts . . . .”<sup>66</sup> And Justice Gerard Brennan wrote that to continue to insist on a formal, and narrow understanding of section 117, ignoring subsequent developments in the understanding of discrimination, would be to “fossilize” section 117.<sup>67</sup> The presence of an evolutionary approach to interpretation, based on a range of legal developments, is thus apparent even in the Australian case law,<sup>68</sup> and while observers have identified some retrenchment since the change in the

disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other state.” Commonwealth of Australia Constitution Act, 1900, § 117. The prior doctrine essentially limited the prohibition to statutes involving direct classifications concerning domicile only. See *Henry v. Boehm* (1973) 128 C.L.R. 482 (Austl.); see also *Davies and Jones v. Western Australia* (1904) 2 C.L.R. 29. *Henry v. Boehm* was overruled in *Queensland Bar*. See *infra* notes 64, 67.

64. See, e.g., *Queensland Bar* (1989) 168 C.L.R. at 485-86 (Mason, C.J.); *id.* at 512 (Brennan, J.); *id.* at 545-49 (Dawson, J.).

65. *Id.* at 566 (Gaudron, J.).

66. *Id.* at 531 (Deane, J.).

67. *Id.* at 518 (Brennan, J.) (“[T]he developments of the law since [*Henry v. Boehm*] have given us new insights into the law of discrimination and those insights reveal shortcomings in the reasons of the majority. To adhere to *Henry v. Boehm* would be to fossilize s. 117 while the general law of discrimination continues to develop.”).

68. Also apparent is an increased tendency to refer to foreign law. See, e.g., Brian Opeskin, *Australian Constitutional Law in a Global Era*, in *Reflections on the Australian Constitution* 184, 187 (Robert French, Geoffrey Lindell & Cheryl Saunders eds., 2003) (demonstrating that since 1980, the Australian High Court’s citations to foreign sources in deciding constitutional issues has increased). For an argument by Australian Justice Michael Kirby that the constitution ought to be interpreted in light of international human rights law when the constitution itself is ambiguous, see Michael Kirby, *International Law: The Impact on National Constitutions*, 21 *Am. U. Int’l L. Rev.* 327, 342 (2005) (Seventh Annual Grotrius Lecture before the American Society of International Law). However, no other justices of the Australian High Court have gone this far. See *id.*

Court's membership in 1995, relative to earlier periods the Court's approach remains less formal and more eclectic.<sup>69</sup>

Thus, constitutional courts in other well-functioning democracies have not found it of critical importance either to limit their interpretive process to a narrow view of original intent nor to a small set of relatively constrained arguments. Indeed, Professor Goldsworthy, editor of a recent comparative study of constitutional interpretation and himself a proponent in Australia of what he has termed "moderate originalism," comments, "[i]nterpretation everywhere is guided by similar considerations, including the ordinary or technical-legal meanings of words, evidence of their originally intended

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69. The Mason Court (1987-1995), was followed by the Brennan Court (1995-1998); the Chief Justice since 1998 has been Murray Gleeson. As one Australian legal scholar commented in response to an earlier draft of this paper,

Beginning with the Mason Court in the mid-1980's, the High Court of Australia has repeatedly endorsed a common law or 'living tree' approach to Constitutional interpretation. The current court, the Gleeson Court, has tended to take a somewhat more restrained, backward-looking approach to interpretation, but a majority of that Court has continued to reject a strictly originalist or textualist approach to interpretation.

E-mail from Rosalind Dixon to author (Aug. 15, 2006) (quoted with permission, on file with the Fordham Law Review). As an example, see *SGH Ltd. v. Comm'r of Taxation* (2002) 210 C.L.R. 51, 75 (Austl.) (Gummow, J.). Justice William Gummow wrote,

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.

The provisions of the Constitution, as an instrument of federal government, and the issues which arise thereunder from time to time for judicial determination are too complex and diverse for either of the above courses to be a satisfactory means of discharging the mandate which the Constitution itself entrusts to the judicial power of the Commonwealth . . . . The state of the law of the Constitution at any given time is to be perceived by study of both the constitutional text and of the *Commonwealth Law Reports*. Decisions of this Court dealing with the text and structure of the Constitution but not bearing directly upon a particular provision nevertheless may cast a different light upon that provision and so influence its interpretation.

This indicates . . . that questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of the judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the Parliament and the electors, the Constitution meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the Constitution.

*Id.* (emphasis added); see also McHugh, *supra* note 61, at text accompanying notes 13-19, 98 (noting the argument that the Gleeson Court has returned to a former "legalism" but concluding that there was "no discernible break in the judicial method applied by the majority in the Gleeson, Brennan and Mason Courts;" that majorities on all used the tools of common law constitutional method; and finding on the Gleeson Court "a consensus that questions of constitutional interpretation are not determined simply by linguistic considerations that pertained a century ago"); see also *supra* note 60 (describing Professor Zines's view as of 2000). But cf. Simon Evans, *Developments—Australia: Mandatory Administrative Detention*, 4 Int'l J. Const. L. 517, 530 (2006) (stating that a "positivist and formalist approach" is now ascendent).

meaning or purpose, ‘structural’ or ‘underlying’ principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility.”<sup>70</sup>

Robert Bork, and others, may claim that these interpretive overlaps are the manifestation of the “New Class” of “cultural[ly] left” elites that have come to dominate western courts.<sup>71</sup> But the idea that this is an illegitimate, anti-democratic power grab must be reconciled with its regular occurrence in countries most highly rated for democratic, civil, and political freedoms<sup>72</sup> and with the potential of multi-sourced interpretive approaches to yield “conservative” as well as “liberal” results. Perhaps, some might still say, these interpretive approaches reflect institutional power grabs by the courts. But let me suggest instead some features of the work of the courts and the changing legal context that may offer different explanations.

First, contemporary constitutional courts that have been successful in judicial review over a long period of time face the problem of the debilitation, over time, of the democratic or popular sovereignty rationales for adherence to more specific original intentions. That is, the further out in time one is from the original body that enacted and agreed to a constitution, the more difficult it is to treat past expressed intentions as binding (based on the democratic legitimacy of the initial body) on today’s voters, legislators, or those acting under current law. Rule-of-law considerations require

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70. Jeffrey Goldsworthy, *Introduction: The Challenges of Constitutional Interpretation, in Interpreting Constitutions: A Comparative Study*, *supra* note 20, at 1, 5.

71. See Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* 2-3, 5-10 (2003); see also Kenneth Kersch, *The New Legal Transnationalism, the Globalized Judiciary and the Rule of Law*, 4 Wash. U. Global Stud. L. Rev. 345 (2005).

72. See *supra* note 27. Some political scientists attribute the spread of judicial review to a desire to contain the effects of increased democratization of politics. See, e.g., Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 18 (2003) (describing judicial review as “political insurance”); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 7-8, 17-30, 38-49 (2004) (describing the development of judicial review in settings without obvious regime transition as a response to the expansion of majoritarian politics, involving efforts by older political elites, together with economic and judicial elites, at self-interested “hegemonic preservation”); cf. Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. Legal Stud. 59 (2003) (concluding that support for independent judicial review depends, inter alia, on the presence of a competitive political system). In light of the spread of human rights consciousness, it is unlikely that explanations that sound in self-interested elite protectionism tell the whole story. Another part of the story may well be the support, from those not in power, for judicial human rights enforcement, or the desire to manage conflict through law rather than violence, which is itself more conducive to the protection of democratic civil liberties. Both elements appeared to have been at work in South African constitutional politics of the early 1990s. See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L.J. 2009, 2059-60 (1997) (treating the South African interim constitution as important in affirming liberal values through protecting rights of equality and thus aiding post-apartheid transition to more legitimate government).

adherence to valid written law, but the interpretive force of original intentions tends to weaken over time.<sup>73</sup>

Second, a related set of changes in legal consciousness over the course of the 20th century has occurred. The plausibility of claims that texts have entirely fixed meanings has come under assault not only in law but in literature and history, leading—at a minimum—to increased debate about defining meaning at appropriate levels of generality.<sup>74</sup> Relatedly, there has been a decline in lawyers' and judges' abilities to see formalism as a representation of legal reality, as a result of the critiques of Legal Realists and Critical Legal Scholars.<sup>75</sup> Both of these phenomena contributed to a decline in confidence in any one source as appropriate in identifying (and constraining) constitutional meaning.

An additional set of changes in legal consciousness, arguably related to the first, must also be noted: Contemporary legal consciousness places much greater weight on values of democracy in the sense of tying the legitimacy of governance to widespread suffrage, extended on equal terms, to all or most adult citizens, than did conceptions of self-governance in the 18th or even 19th centuries. This emerging democratic consciousness, manifest in Tom Franck's suggestion in the early 1990s that international law might be coming to recognize a right of democratic self-government,<sup>76</sup> is more explicit in arguments that the legitimacy of constitutions may now rest on popular participation in their drafting and ratification.<sup>77</sup> The greater emphasis in contemporary (at least Western) legal thought on the need for constitutions to be grounded in a participatory, democratic process may work to undermine theories of original intention with respect to the U.S. Constitution, whose principal portions (including the rigid amendability

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73. *But cf.* Randy E. Barnett, *Restoring the Lost Constitution* 100-09 (2004) (linking justifications for "public meaning" originalism to the fact of a written constitution). Professor Barnett argues that only by interpreting its words in accord with their original public meanings can the written Constitution serve its purpose of constraining the government. *Id.* at 103-09, 117. Drawing an analogy to contract law, he argues that the reason why the Constitution was written was to constrain the future. Professor Barnett's thoughtful and sophisticated argument nonetheless rests on too narrow an understanding of why constitutions are written and ignores how constitutions are different from contracts. As I discuss elsewhere, *see* Jackson *supra* note 25, the suggestion that if interpretation is not constrained by original public meaning, written words cannot constrain at all is likewise mistaken: Written texts are neither wholly determinate nor wholly indeterminate, and their interpretation can be constrained by other legal sources (e.g., precedent) and understandings (e.g., of the role of a court in a self-governing democracy) as well as by original meanings.

74. For discussion of the interpretive tradition of written texts in Jewish religious law, *see* Elliot N. Dorff & Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* 14, 185-90, 200, 565 (1988) (exploring how exegesis replaces prophecy and how interpretive tradition in Jewish law provides both continuity and flexibility).

75. *Cf.* Pierce, *supra* note 61, at 25 (describing the Mason Court in Australia as "usher[ing] legal realism into a judicial culture long-steeped in formalism").

76. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. Int'l L.* 46 (1992).

77. *See, e.g.,* Vivien Hart, *Democratic Constitution Making* (U.S. Inst. of Peace, Special Rep. 107, July 2003), available at <http://www.usip.org/pubs/specialreports/sr107.html> (last visited Sept. 25, 2006).

provisions of Article V) were drafted and ratified at periods when most women and racial minorities were ineligible to vote; in Australia, whose 1900 Constitution was ratified by an overwhelmingly male electorate (women being excluded from the vote in most of the states) and in a process that excluded aboriginal persons from participation; and (possibly) even in Germany, where the Basic Law was drafted under constraints imposed by the Allied occupation forces and was not adopted by referendum but by votes of the *länder* legislatures.<sup>78</sup> While the emphasis on democratic participation might be thought to be at odds with any judicial review of legislation,<sup>79</sup> in empirical terms that is not the case: Strongly participatory efforts at constitution-making in recent years, such as in South Africa, have also provided for independent constitutional courts.<sup>80</sup> But the effect may be to reinforce interpretive approaches that permit current understandings of constitutional terms and ideas to play a role. Thus constitutional courts engaged in judicial review may be responding to the perceived need to justify their use of such a power to invalidate arguably more majoritarian norms,<sup>81</sup> and doing so in an environment which embodies a consciousness that did not exist in the 18th or mid-19th century.

Whatever the reasons, constitutional adjudication in these four countries proceeds through legal argument based on several different kinds of sources, including the constitution's text, its structure and history, the original understandings and intentions of its drafters, the respective court's prior jurisprudence, the consequences of interpretive choices, and, on occasion, consideration of international or foreign law. Over time both continuities and change emerge in the doctrinal interpretations and applications of the same constitutional texts, justified by reference to new developments, new experiences, or revised understandings. While the

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78. More speculatively, if one believes that constitutional courts have a persuasive function of justifying their decisions to relevant audiences, then the democratization of voting may imply that the persuasive function of constitutional courts is no longer limited, if ever it was, to legal elites. Rather, at least potentially, there is a broad audience for judicial decisions, and with a broader audience a broader array of arguments may be helpful in explaining decisions. Although the literature suggests low public attention to the reasoning of most judicial opinions, see Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. Pa. L. Rev. 1511, 1527-28 (2006), mass media on occasion devotes time to legal reasoning in ways that may affect general impressions of the legitimacy of the courts' work. See, e.g., Adam Liptak, *Many Experts Fault Reasoning of Judge in Surveillance Ruling*, N.Y. Times, Aug. 19, 2006, at A1.

79. As I explore in other work, the idea that a constitution, written before any of us was born, constrains democratically elected legislatures is itself in tension with some values of democratic self-government; yet it is central to the rule of law. Rule-of-law concerns require that constitutional interpretation be seen and practiced as a form of law, and with the constraints of legal discourse, but do not necessarily require any one interpretive approach.

80. See S. Afr. Const. 1996, §§ 166-67, 172, 174, 176.

81. Cf. David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652, 661-98 (2005) (providing positive account of mechanisms by which "generic," or shared, constitutional law develops, including, inter alia, that "constitutional courts experience a common theoretical need to justify the sometimes counter-majoritarian institution of judicial review" and necessarily employ balancing and means-ends analyses to justify decisions).

similarities between the interpretive practices of these constitutional courts do not answer a range of normative questions that interpretive theories must address, they do suggest that the interpretive challenges are shared. And while interpretive theories are most useful if they account for current interpretive practices,<sup>82</sup> our own interpretive debates sometimes seem to degenerate into caricature and antinomy, missing the rather large areas of overlap in the interpretive practices of most justices.

## II. DO METAPHORS MATTER? CONSTITUTIONS AS LIVING TREES

Interpretive battles in the United States pitch the "living constitution,"<sup>83</sup> whose content can change not only through amendment but through interpretation, against an unmovable "original" Constitution intended to "obstruct modernity,"<sup>84</sup> whose meaning was fixed at some point in the past, changeable only by the Article V amendment process.<sup>85</sup> Poised as polar

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82. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal. L. Rev. 535, 537-38, 544-45, 560-62 (1999) (describing different theoretical views about "fit" between theory and constitutional text or constitutional practice and noting that, in addition to meeting substantive criteria, a theory should be broadly acceptable); see also David A. Strauss, *What Is Constitutional Theory?*, 87 Cal. L. Rev. 581, 582 (1999) (arguing that constitutional theory is both prescriptive and descriptive, "because it cannot call for a wholesale departure from existing practices").

83. See, e.g., Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 32, 41 (1993). The term "living constitution" goes much further back. See, e.g., Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (1927). Critics of the "living constitution" approach sometimes suggest that it is entirely unconstrained by anything but judges' "preferences," but this is a caricature. Significant differences about interpretation concern the levels of generality at which original understandings are taken and the scope they allow for considerations of other sources, most of which (e.g., precedent, consequences of differing interpretations in light of constitutional purposes, other historic practices) are relied on by most judges at least some of the time. Cf. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 Harv. L. Rev. 2387, 2390-91 (2006) (book review) (praising Justice Stephen Breyer's book for "remind[ing] us that American jurisprudence rests on a broad and usually consensual base" and that "all judges 'use similar basic tools' (text, textual context, history, tradition, precedents, evidence regarding purpose, and 'likely consequences')").

84. Antonin Scalia, *Modernity and the Constitution*, in *Constitutional Justice Under Old Constitutions* 313 (Eivind Smith ed., 1995) [hereinafter Scalia, *Modernity and the Constitution*]. For examples of Justice Scalia's use of the terms "dead Constitution" and "enduring Constitution," see Antonin Scalia, *On Interpreting the Constitution*, The Manhattan Institute Wriston Lecture (Nov. 17, 1997), available at <http://www.manhattan-institute.org/html/wl1997.htm> (unedited transcript) ("Come along with me and admire the Dead Constitution. I have to get a new term for it . . . [M]aybe the Enduring Constitution. That's a little better."); see also Antonin Scalia, *God's Justice and Ours*, *First Things*, May 2002, at 17, available at <http://www.firstthings.com/ftissues/ft0205/articles/scalia.html> ("As it is, however, the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring.").

85. I do not mean to say that the metaphorical fight is the same as the interpretive battle—there are many highly developed theories of constitutional interpretation, some in the more "fixed" constitution school, some in the "living" constitution school. Nor is the only important argument about *how* to interpret, given theories about *who* should interpret, some of which argue that the Constitution does not belong in the courts—at all, or very much, or

opposites in American legal culture today, the “original constitution” seems to have significant appeal over the “living constitution.” The narratives of the U.S. “founding” hold much that is attractive in the national consciousness: 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.<sup>86</sup> Yet each of these shorthands is misleading.

All but the most rigid originalists allow room for the operation of precedent through the doctrine of *stare decisis*,<sup>87</sup> so the “Constitution” they defend looks quite remote from specific 18th or 19th century understandings. And if other originalists allow that some parts of the Constitution articulate “concepts” intended to evolve over time,<sup>88</sup> the legitimate gap between then and now is even greater. So most “originalists,” it might be said, recognize that some change in constitutional interpretation is appropriate or inevitable. On the other hand, the “living constitution” metaphor, like the Australian “living force” metaphor,<sup>89</sup> is oddly disembodied: What form of life is it? It brings to mind an amorphous mass, with possibilities that constitutional law is untethered to anything but current judges’ preferences. In this respect it is misleading as a metaphorical inscription of current practices. Original understandings and constitutional texts and past precedents continue to play an important role in interpretive practices, and for good reason. Constitutions serve many purposes and among these is to provide links with a society’s past and enduring commitments.

The “living constitution” phrase does capture the idea of the Constitution as something that grows and is subject to contest and interpretation by

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not exclusively. *See, e.g.*, Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 Cal. L. Rev. 959 (2004).

86. What political figure today in the United States has the kind of heroic, and self-restraining qualities attributed to those who fought the Revolutionary War and participated in the Constitutional Convention? For a description of the first President’s restraint and perceived public virtue, see Garry Wills, *Cincinnatus: George Washington and the Enlightenment* 1-84 (1984) (describing how Washington’s resignation contributed to his “secular charisma” and how he “perfected the art of getting power by giving it away”).

87. *See* Philip Bobbitt, *Constitutional Interpretation* 98 n.50, 214 (1991) (quoting Bork’s testimony in his confirmation hearing, saying “anybody who tries to follow original intent must also have a respect for precedent because some things it’s too late to change”). *But see, e.g.*, Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as it Sounds*, 22 Const. Comment. 257, 262-66 (2005) (arguing that precedent should be followed only insofar as it does not conflict with the original public meaning of the Constitution).

88. *Cf.* Goldsworthy, *Originalism*, *supra* note 57, at 20-21 (1997) (discussing “moderate originalism”). On specific versus abstract intentions, or “concepts” versus “conceptions,” see Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 76 (1996); Ronald Dworkin, *Taking Rights Seriously* 134-35 (1977) [hereinafter Dworkin, *Taking Rights Seriously*].

89. *See supra* note 56 and accompanying text.



subsequent generations<sup>90</sup>—indeed, that part of what has made the Constitution workable over time has been the practice of evolving interpretation and its openness to competing lines of argument.<sup>91</sup> But what the “living constitution” phrase does not capture is the idea that part of what makes the Constitution a fundamental law is its inscription in written form through legal processes of adoption and ratification accepted by sufficient numbers of people as a legitimate exercise of self-government.<sup>92</sup>

At least one other western democracy, Canada, sees its constitutional law as a “living tree”—a metaphor that in some ways better captures the idea that even a “living” document is constrained by its origins. Trees, after all, are rooted, in ways that other living organisms are not. The phrase is from the opinion of Lord Chancellor Sankey, in *Edwards v. Attorney-General for Canada* (also known as the “Persons Case”),<sup>93</sup> a decision of the British Privy Council involving an interpretive question that had arisen under the Canadian constitution, which had been enacted in the form of a statute, the British North America Act, 1867.<sup>94</sup> The question was whether women were among those who could serve as members of the Canadian Senate; it was, in a sense, a question of gender equality, decided under a constitutional act that made no provision for either a general principle of equality of persons or a specific ban on sex discrimination.

Section 24 of the British North America Act, 1867 provided for the appointment of “qualified Persons” to the Senate.<sup>95</sup> Section 23 of the 1867 Act defined the qualifications of a senator in the masculine voice, e.g., “He shall be . . . ,” and among the requirements was that the person hold

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90. Cf. Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 Stud. Am. Pol. Dev. 55, 99 (1995) (describing arguments by proponents of the impeachment and removal from office of Supreme Court Justice Samuel Chase that the writtenness of the Constitution enables contest and dispute over its meaning; a written constitution can “resist previous bad interpretations attributed to it” and “the court[s] should always be available to hear reargument and criticism of its precedents”).

91. I elaborate on this point and offer other normative defenses of a “common law” approach in Jackson, *supra* note 25.

92. Cf. David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale L.J. 1717, 1731-35 (2003) (arguing that the text provides a “common ground” and that it is a “convention” that the text is authoritative). My argument goes beyond Strauss’s, I think: What supports the conventionalism of treating the text as binding is the special legitimacy of fundamental written law, adopted through legal procedures accepted in our legal culture. See Jackson, *supra* note 25.

93. [1930] A.C. 124 (P.C. 1929) (appeal taken from Can.).

94. The British North America Act, 1867 (which in 1982 was renamed the “Constitution Act, 1867”) was, formally, not an “act” of a self-governing polity but a statutory enactment of the British Parliament for its Canadian domain. See Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Yet, at a substantive level, the 1867 Act was an act of self-governance in that it embodied an agreement worked out between the French and English communities of British North America, embodied in a written document that was then enacted into law by the British Parliament. See Peter W. Hogg, *Constitutional Law of Canada* 38 (4th ed. 1997); Robert C. Vipond, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* 16-17 (1991).

95. Constitution Act, 1867, § 24.

property of certain types and amounts and be a citizen.<sup>96</sup> In a proceeding initiated by the government on the request of five women, the Supreme Court of Canada unanimously concluded that the phrase “qualified Persons” in section 24 excluded women from those who could be appointed to the Senate.<sup>97</sup> Four judges relied on the common law disability of women to hold public office, which, they indicated, would have been understood at the time of enactment in 1867 to exclude women from serving by election or appointment in public office.<sup>98</sup> These arguments were reinforced, in the Court’s view, by a prior Privy Council decision indicating that the 1867 Act was a statute and should be interpreted like other statutes.<sup>99</sup> Accordingly, the Canadian Court wrote, the words of section 24 must “bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted.”<sup>100</sup> And it would be a “striking constitutional departure” from the common law to permit women to be eligible to sit, an innovation that, if it had been intended, would have been made express.<sup>101</sup> A fifth judge, Justice Lyman Poore Duff, disagreed with the majority’s reliance on general common law presumptions but reached the same conclusion on other grounds.<sup>102</sup>

96. *Id.* § 23.

97. See Reference re Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276 (Can.), *rev’d*, *Edwards v. Att’y-Gen. for Can.*, [1930] A.C. 124, 136 (P.C. 1929) (appeal taken from Can.).

98. They placed particular weight on an earlier British case construing an election law not to include women. See *id.* at 290 (citing *Chorlton v. Lings*, (1868) L.R. 4 C.P. 374) (“[*Chorlton*] is conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of ‘qualified persons’ within s. 24 of the [British North America] Act by the terms in which s. 23 is couched . . .”). In *Chorlton*, at issue was whether section 3 of the Representation of the People Act, 1867, 30 & 31 Vict. ch. 102, which entitled every “man” to vote, also entitled women to vote, in light of section 4 of Lord Brougham’s Act of 1850, 13 & 14 Vict. ch. 21, providing that in all Acts words importing the masculine gender are deemed to include women “unless the contrary . . . is expressly provided.” The four judges who issued opinions in the Court of Common Pleas in *Chorlton* all concluded that women were not entitled to vote, notwithstanding Lord Brougham’s Act. See *Chorlton*, (1868) L.R. 4 C.P. at 382-87 (Bovill, C.J.); *id.* at 387-92 (Willes, J.); *id.* at 392-94 (Byles, J.); *id.* at 394-97 (Keating, J.).

99. Reference re Meaning of the Word “Persons,” [1928] S.C.R. at 282 (citing *Bank of Toronto v. Lambe*, [1887] 12 A.C. 575 (P.C.) (appeal taken from Can.)). In *Bank of Toronto*, the Privy Council alluded to the reasoning in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), but held that it had no application to the issue before it, interpreting the language of an Act of Parliament (the 1867 Act) establishing a “carefully balanced constitution.” *Bank of Toronto*, 12 A.C. at 587.

100. Reference re Meaning of the Word “Persons,” [1928] S.C.R. at 282.

101. *Id.* at 285.

102. Focusing on the intent of the 1867 Act with respect to the Senate, Justice Duff concluded that sections 23 and 24 precluded women from serving in light of prior understandings specifically excluding women from eligibility to sit in the Senate and because, unlike other provisions for the composition of the Canadian House of Commons, the Canadian Parliament was disabled from changing the Senate. *Id.* at 291-302.

At this time, the Supreme Court of Canada was not the final word on the meaning of the 1867 Act—the British Privy Council had jurisdiction to review Canadian Supreme Court decisions. And the Privy Council disagreed, both on the proper interpretive approach and on its judgment. After discussing possible bases for ambiguity on the question of original understanding, Lord Sankey wrote that section 24 must not be given a narrow interpretation. Signaling a reversal of the prior Privy Council position on the interpretation of the 1867 Act, he wrote, “The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. *But there are statutes and statutes . . .*”<sup>103</sup> Statutes which were constitutions were to be distinguished from other kinds of statutes such as those imposing taxes or establishing criminal penalties:

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 subject to development through usage and convention.”<sup>104</sup>

The Privy Council explained that historic understandings and practices of women’s exclusion should not be controlling.<sup>105</sup> Custom and history could not decide the matter, because “[c]ustoms are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.”<sup>106</sup> With respect to “extrinsic” evidence, the Privy Council commented that “their Lordships do not think it right to apply rigidly to Canada *of to-day* the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.”<sup>107</sup>

103. *Edwards v. Att’y-Gen. for Can.*, [1930] A.C. 124, 136 (P.C. 1929) (appeal taken from Can.) (emphasis added) (quoting a Canadian treatise).

104. *Id.* (emphasis added) (quoting another Canadian treatise).

105. *Id.* at 128 (“The exclusion of women from all public offices is a relic of days more barbarous than ours, . . . [when] the necessity of the times often forced on man customs which in later years were not necessary.”). Further, it noted, the language of section 24 is itself ambiguous, because the word “persons” could embrace men and women; statutes enacted “several centuries ago” would not have included women in the intended meaning of persons eligible for public office, not because of any limitation inherent to the word “persons” but “because at common law a woman was incapable of serving a public office.” *Id.* at 134. As to practice, “[t]he fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.” *Id.*

106. *Id.*

107. *Id.* at 134-35 (emphasis added). It appears that Lord Sankey was referring here to decisions in other English cases between the 1860s and 1922, including one considering another 1867 British statute, as well as to the Canadian Supreme Court’s discussion of the Roman law. *See id.* at 135 (referring to the reasoning below concerning “the appeal to Roman law and to early English decisions”).

Turning to the “internal” aspects of the 1867 Act, Lord Sankey explained further the idea of a constitution as a “living tree”:

Their Lordships do not conceive it to be [their] duty . . . 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 mistress in her own house . . . .<sup>108</sup>

Flexibility of interpretation, then, was linked to the idea of a constitution and to self-governance in Canada, under a constitution “large” enough to allow for its own development. Implicitly echoing the reasoning of John Marshall in *McCulloch v. Maryland*, Lord Sankey continued, “That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.”<sup>109</sup> The Privy Council thus shifted the burden from that implied by opinions emphasizing original understandings of women’s eligibility for office, instead declaring that the burden was on those who would deny that the term “qualified persons” includes women.<sup>110</sup> This burden could not be met for several reasons, including, as first on the list, “the object of the Act—namely to provide a constitution for Canada, a responsible and developing State,” and, second, the ambiguity of the term “person.”<sup>111</sup>

Although the “liberal” construction of the word “persons” by Lord Sankey in *Edwards* did not affect the allocations of power to the national and provincial governments, the “living tree” principle was soon extended to interpretations of national powers. In 1931 it was relied on to conclude that the powers of the national government in Canada extended to regulation of radio communications, even though radio was unknown at the

108. *Id.* at 136.

109. *Id.* at 137 (quoting from arguments made in *St. Catherine’s Milling & Lumber Co. v. R.*, (1888) 14 App. Cas. 46, 50, as noted by a Canadian treatise writer).

110. *Id.* at 137-38. Contrary to the reasoning of the Canadian Supreme Court, the Privy Council concluded, the qualifications listed in section 23 for being in the Senate did not by implication exclude women, or married women, from the purview of “qualified persons.” The requirement that a senator be a property holder did not by implication exclude most (married) women, since the Married Women’s Property Act of 1859 permitted married women to own property; the requirement that a senator be a natural born or naturalized British subject did not fail to address and thus implicitly exclude married women since the nationality of women who married those of British nationality was determined by the Aliens Act of 1844. *Id.* at 139.

111. *Id.* at 143. The Privy Council also noted, as factors leading it to reverse the Canadian Supreme Court, that (1) the term “persons” was used elsewhere in the 1867 Act in a way that embraced females, (2) other portions of the 1867 Act used the term “male” to limit the class of persons referred to, and (3) a British statute, the Interpretation Act, 1889, “provide[d] that words importing the masculine gender shall include females.” *Id.* at 139-40. Lord Sankey had also noted with “interest” that John Stuart Mill had “moved an amendment to secure women’s suffrage, . . . [by] leav[ing] out the word “man” in order to insert the word “person” instead,” in a committee of the British House of Commons considering the Representation of the People bill in 1867. For a related discussion, see *supra* note 98 (describing the subsequent *Chorlton* decision).

time of the 1867 Constitution Act.<sup>112</sup> Although the decision in the 1937 *Labour Conventions Case* retreated from the "living tree" approach to the definition of national powers,<sup>113</sup> over time the "living tree" view has come to play a significant role in the Canadian constitutional law of federalism, language rights, and Charter rights. It has been relied on in the interpretation of the scope of federal and provincial powers in Canada on a number of occasions; for example, in 1979 the Canadian Supreme Court interpreted section 133 of the 1867 Act to require that Quebec permit the use of either French or English before Quebec's administrative agencies, even though the constitutional text referred only to the legislature and courts.<sup>114</sup> More recently, it was invoked in upholding federal power over parental leave issues, as discussed above.

Indeed, the "living tree" metaphor has become a staple in Canadian constitutional law, both as applied to the provisions of the 1867 Act and to the new 1982 Charter.<sup>115</sup> Within two years of the Charter's adoption, the "living tree" analogy was invoked in its interpretation. In 1984, *Law Society of Upper Canada v. Skapinker* asserted a continuity in the principle

112. See Reference re Jurisdiction of Parliament to Regulate & Control Radio Comm'n, [1931] S.C.R. 541, 546, *aff'd*, [1932] A.C. 304 (P.C.) (appeal taken from Can.); see also Reference re Regulation & Control of Aeronautics in Can., [1930] S.C.R. 663.

113. See Att'y-Gen. for Can. v. Att'y-Gen. for Ontario (*Labour Conventions Case*), [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.) (referring to the "watertight" compartments of authority under the 1867 Act in holding that the federal government lacked authority to implement treaties (that it could enter into) where the subject matter was not already enumerated to the federal government and thus lacked authority to enact federal minimum wage and working conditions statutes); see also Peter W. Hogg, *Canada: From Privy Council to Supreme Court, in Interpreting Constitutions: A Comparative Study*, *supra* note 20, at 55, 63-64 (discussing the *Labour Conventions Case*).

114. Att'y-Gen. of Quebec v. Blaikie, [1979] 2 S.C.R. 1016. As to regulations, "it would truncate the requirement of s. 133 if account were not taken of the growth of delegated legislation . . ." *Id.* at 1027. As to adjudicatory bodies, the Court concluded,

In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them.

*Id.* at 1028. It went on to say that this mode of analysis was supported by the Privy Council decisions in the *Persons Case* (quoting the living tree language) and the Privy Council decision in *Att'y-Gen. of Ontario v. Att'y-Gen. of Can.*, [1947] A.C. 127, where

Viscount Jowitt said in the course of his discussion of the issues, that "it is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act*. To such an organic statute the flexible interpretation must be given which changing circumstances require."

*Blaikie*, [1979] 2 S.C.R. at 1029 (quoting *Att'y-Gen. of Ontario*, [1947] A.C. at 154).

115. Canada has had two major constitutional acts. The first in 1867 established the basic "structural" constitution for Canada, through what was formally an enactment of the British Parliament; subsequent amendments also had to be made, in form, through British statutes. In 1982, the Charter of Rights and Freedoms—a written bill of rights—was added to the Canadian constitution, and other changes were made to "patriate" the constitution and to give Canadians the legal power to amend their constitution themselves so that the British Parliament no longer controls Canada's constitution.

of flexible constitutional interpretation, explaining that the Charter, unlike a statute, is a part of the Canadian constitution, and as a constitution, its interpretation must be "modulated by a sense of the unknowns of the future."<sup>116</sup> In a 1991 case challenging the reapportionment of districts in Saskatchewan, Justice Beverley McLachlin, writing for the majority of the Court which upheld the new districting, noted that "the *Charter* is grafted onto the living tree that is the Canadian constitution . . . . Thus, to borrow the words of Lord Sankey . . . it must be viewed as a living tree capable of growth and expansion within its natural limits."<sup>117</sup> What this means, the Court explained, is that "the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future."<sup>118</sup> Echoing Justice Brian Dickson's analysis in a freedom of religion case,<sup>119</sup> the Court wrote,

The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote—a philosophy which is capable of explaining the past and animating the future."<sup>120</sup>

Although the Justices of the Canadian Court disagreed on whether the reapportionment plan passed muster under the Charter, the broader interpretive claims made in the majority opinion elicited little if any disagreement.<sup>121</sup> Canadian case law now seems to accept that a hallmark of constitutional, as compared to statutory, interpretation is the need for "large, liberal" interpretation.<sup>122</sup>

116. *Law Soc'y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, 366; *see also id.* (noting that the Charter "cannot be readily amended," and that the "fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch"). The Court added that because the Charter is designed to "serve the Canadian community for a long time," a "[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." *Id.*

117. *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158, 180 (internal quotation marks omitted).

118. *Id.*

119. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 343-44 (Can.) ("[T]he *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.")

120. *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. at 181.

121. *See id.* at 171 (Cory, J., dissenting, with two others, but agreeing with the majority opinion's statement of the criteria by which the right to vote should be interpreted). *But cf. id.* at 198 (Sopinka, J., agreeing with the majority's judgment and "substantially with its reasons," but differing on "the approach of interpretation" and stating that "the primary inquiry is to determine on what principles the right to vote, which has existed in this country for many years, was based").

122. *See also Reference re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 509 (rejecting undue emphasis on original intent as inconsistent with the constitution's capacity for growth and "adjustment"). The Court has also rejected the

The "living tree" doctrine seems to have exceptions, however, and implies constraints as well as evolution. Decisions in the last decade concerning the provisions for aboriginal rights, in section 35 of the 1982 Constitution Act,<sup>123</sup> have been a source of controversy over the degree to which the rights protected were intended to be "frozen," or defined by practice at a particular moment in the past, or more dynamic.<sup>124</sup> And in 2004 the Canadian Supreme Court upheld, but only in part, the federal government's power to enact legislation providing for civil marriage for persons of the same sex.<sup>125</sup> Under section 91(26) of the 1867 Act, the federal government has the power to determine the legal capacity for marriage; the provinces, under section 92(12) have power over the solemnization of marriage. Against arguments that the constitutional concept of marriage in the 1867 Act entrenched common law definitions of marriage as including only the union of a man and a woman, the Court wrote that "[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."<sup>126</sup> Relying explicitly on the *Persons Case*, the Court rejected arguments that marriage was a concept that could not admit of same sex unions and that the specific intentions of the framers on the meaning of marriage should govern.<sup>127</sup> The

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suggestion that the origin of the Canadian constitution in British Acts of Parliament should affect its character, or interpretive approaches to it as a constitution. See *Law Soc'y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, 365 ("The adoptive mechanisms may vary from nation to nation. They lose their relevancy or shrink to mere historical curiosity value on the ultimate adoption of the instrument as the Constitution.").

123. Rights of the Aboriginal Peoples of Canada, § 35, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

124. See, e.g., *Mitchell v. M.N.R.* [Minister of Nat'l Revenue], [2001] 1 S.C.R. 911, 928-29 (Can.). Relying on *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.), *Mitchell* explained that

an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact . . . .

Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form: ancestral rights may find modern expression.

The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition.

*Mitchell*, [2001] 1 S.C.R. at 928-29; see also *id.* at 964 (Binnie, J., concurring) (emphasizing rejection of the "frozen rights" approach to defining the scope of art. 35); *Van der Peet*, [1996] 2 S.C.R. at 514-15 (L'Heureux-Dubé, J., dissenting) (arguing for a "dynamic right" rather than a "frozen right" approach to art. 35, because the latter imposes an inappropriate burden not only to show that the right predated British settlement but that it has been continuously exercised since).

125. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

126. *Id.* at 710. In so doing, the Court added, "our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted." *Id.* at 711.

127. The Court wrote,

Court upheld section 1 of the proposed federal marriage act, which extended the capacity to marry to persons of the same sex.<sup>128</sup> The Court likewise rejected arguments that the common law definition of marriage, as between a man and a woman, defined the “natural limits” of the growth of the Canadian constitutional tree.<sup>129</sup> But the Court did not uphold the entirety of the proposed federal legislation: It found that section 2, which addressed who would be obligated to perform such marriages, was not within exclusive federal legislative competence, since the provinces have power over the solemnization of marriages.<sup>130</sup> The “living tree” did not trump plain constitutional allocations of power to the provinces.

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[I]t is argued [that] the institution of marriage escapes legislative redefinition. Existing in its present basic form since time immemorial, it is not a legal construct, but rather a supra-legal construct subject to legal incidents. In the *Persons* case, Lord Sankey L.C., writing for the Privy Council, dealt with this very type of argument, though in a different context. In addressing whether the fact that women never had occupied public office was relevant to whether they could be considered “persons” for the purposes of being eligible for appointment to the Senate, he said at p. 134:

The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive. Lord Sankey L.C. acknowledged, at p. 134, that “several centuries ago” it would have been understood that “persons” should refer only to men. Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today.

*Id.* at 712. The Court took note of Lord Sankey’s further language anticipating growth within the “natural limits” of the Act, but concluded that it did not deprive Parliament of the power to authorize same sex unions. And with respect to the argument that particular intentions of the framers should control, as they did in *R. v. Blais*, [2003] 2 S.C.R. 236 (Can.), discussed *infra* notes 131-33 and accompanying text, the Court distinguished between historically specific compromises and other provisions: “That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here.” *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. at 713-14.

128. The proposed federal law that was the subject of this reference provided,

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

*Id.* at 699 (quoting the proposed legislation). For the legislation that was in fact enacted after the Canadian Supreme Court’s decision, see An Act respecting certain aspects of legal capacity for marriage for civil purposes (Civil Marriage Act), 2005 S.C., ch. 33 (Can.) (providing, *inter alia*, that “[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”).

129. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. at 712-13 (referring to arguments based on language in the *Persons* case referring to the constitution as a living tree, capable of growth “within its natural limits”).

130. *Id.* at 716-17. The federal government defended section 2 as merely declaratory of the Parliament’s understanding of the interpretive effect of section 1. The Court, however,



Nor does the "living tree" overcome specific historic compromises. In *R. v. Blais*,<sup>131</sup> the Court rejected the argument by an Aboriginal person of Métis heritage that a provision in the Constitution Act, 1930, relating to Manitoba's lands extended to him, concluding that the meaning of the clause, itself an exception to a provision establishing provincial authority to regulate hunting, was limited to a group of Indians that did not include the Métis. While reiterating that the "living tree" doctrine is a "fundamental tenet" of constitutional interpretation, "the Court is not free to invent new obligations foreign to the original purpose of the provision at issue, but rather must anchor the analysis in the historical context of the provision."<sup>132</sup> The purpose of the exception was limited by the different historical relationships Canada had to different groups of aboriginal peoples, the Court explained.<sup>133</sup> And the Canadian Court has refused to apply Charter section 15's ban on discrimination to disrupt the entitlement scheme to government support of certain, but not all, minority religious schools provided for in section 93 of the 1867 Act, because "[s]ection 93 is the product of an historical compromise which was a crucial step along the road

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concluded that if the language were operative, it was ultra vires the federal power over marriage because it concerned who solemnized marriage, and under the Constitution Act, 1867, "only the provinces may legislate exemptions to existing solemnization requirements;" and if it were not operative, it was "superfluous" and in any event not within exclusive federal legislative competence. *Id.* at 716-17. For an argument that the ultra vires holding is of little substantive significance, see Peter W. Hogg, *Developments—Canada: The Constitution and Same-Sex Marriage*, 4 Int'l J. Const. L. 712, 719-20 (2006). The law enacted after this decision addresses the freedom of officials of religious groups to refuse to perform civil marriages, but in somewhat different language than had been before the Court in *Reference re Same-Sex Marriage*. See Civil Marriage Act, 2005 S.C., ch. 33, § 3 (Can.) ("It is recognized that officials of religious groups are free to refuse . . ."); *id.* § 3.1 (providing that no one should be penalized under any federal law for refusing to perform a same-sex marriage based on Charter-protected religiously based objections).

131. *R. v. Blais*, [2003] 2 S.C.R. 236, 237 (Can.).

132. *Id.* at 255.

133. In its unanimous judgment the Court noted that under section 13 of the Constitution Act, 1930,

Manitoba would have the authority to pass laws respecting game and fish that would apply to all hunting and fishing activities in the province, including the activities of Indians. The exception was that Indians, a subset of the population with a particular historical relationship to the Crown, would not thereby be deprived of certain specified hunting and fishing rights.

The protection accorded by para. 13 was based on the special relationship between Indians and the Crown. Underlying this was the view that Indians required special protection and assistance. Rightly or wrongly, this view did not extend to the Métis. The Métis were considered more independent and less in need of Crown protection than their Indian neighbours . . . . Shared ancestry between the Métis and the colonizing population, and the Métis' own claims to a different political status than the Indians in their Lists of Rights, contributed to this perception. The stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis, who were its negotiating partners in the entry of Manitoba into Confederation.

*Id.* at 252-53; see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 538-40 (Can.) (emphasizing the importance of historic, pre-occupation facts in defining section 35 rights).

leading to Confederation.”<sup>134</sup> Distinguishing those “powers” or “rights” to be given the broad, liberal interpretation from those regarded as more specific, historical compromises that need to be read in accordance with those historic intentions is thus necessary in the Canadian jurisprudence, and presents quite difficult line-drawing questions.<sup>135</sup>

One helpful articulation of the limits inherent in the “living tree” metaphor is found in *R. v. Prosper*,<sup>136</sup> where the Court rejected an argument to extend Charter section 10(b) to require the government to provide publicly funded “duty” counsel.<sup>137</sup> Under prior case law of the Court, the police had an obligation to inform the defendant of his section 10(b) right to “retain and instruct counsel” and to provide detailed information on existing Legal Aid lawyers, the financial requirements for legal aid, and the availability of “duty” lawyers for temporary advice regardless of ability to pay. However, these obligations were established only with respect to existing legal services; in *Prosper*, no duty lawyer service was at the time available. A four-justice plurality rejected the argument that section 10(b) imposed a duty on the government itself to assure the availability of such a service, in important part because “there is evidence which shows that the framers of the Charter consciously chose *not* to constitutionalize a right to state-funded counsel under s. 10 of the Charter.”<sup>138</sup> Agreeing with the plurality on this issue, a dissenting opinion stated,

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134. *Adler v. Ontario*, [1996] 3 S.C.R. 609, 640; *see also* Reference re Educ. Act (Quebec), [1993] 2 S.C.R. 511, 529-30.

135. *See supra* text accompanying note 134; *infra* note 141.

136. [1994] 3 S.C.R. 236 (Can.).

137. Section 10(b) provides, “Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right.” Canadian Charter of Rights and Freedoms, § 10(b); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). In *Prosper*, at the time of his arrest for drunk driving, the defendant was advised of his Charter right to have the assistance of an attorney; when he said he wanted an attorney, he was given a list of Legal Aid attorneys, with their home numbers, and sent to a cubicle where he made fifteen calls to twelve lawyers, without success. (Legal Aid at the time had a slowdown and most of its lawyers would not take new cases after normal business hours.) The defendant declined to call private attorneys, indicating he could not afford them, and then agreed to take the breathalyzer test. The evidence from that test formed the basis for his conviction. *See Prosper*, [1994] 3 S.C.R. at 248-49.

138. *Id.* at 266 (Lamer, C.J., joined by Sopinka, Cory and Iacobucci, JJ.). In addition, the Chief Justice noted, “The fact that such an obligation would almost certainly interfere with governments’ allocation of limited resources by requiring them to expend public funds on the provision of a service is . . . a further consideration which weighs against this interpretation.” *Id.* at 267. Instead, building on prior cases, Lamer found that the police had a duty to and should have “held off” to allow the defendant more time to obtain legal advice before trying to elicit incriminating evidence, even though waiting more than two hours for the test would deprive the Crown of a statutory presumption from a positive breathalyzer done within a two hour window to prove the defendant’s impairedness while driving, *see id.* at 269-76; however, according to the opinion, later breathalyzer tests could still be taken and used, albeit without benefit of the statutory presumption. *Id.* at 276-77. Because the defendant had not effectively waived his right to seek counsel, the Court suppressed the evidence and vacated the conviction. *Id.* at 283-85. Four dissenting justices disagreed with the disposition, while a fifth judge agreed with the disposition but on somewhat different

Before us, counsel for the appellant [Prosper] . . . referred to the "living tree" theory and argued that the Charter had grown to the point where state-funded duty counsel should be constitutionally guaranteed. While the "living tree" theory would perhaps let us by-pass the will of the legislature, that theory is usually used to put right an interpretation which is no longer in accordance with the current socio-economic context. . . . I doubt it can be used to interpret a constitutional document, such as the Charter, which is still in its infancy at a time when the socio-economic context has not evolved. Besides, the "living tree" theory has its limits and *has never been used to transform completely a document or add a provision which was specifically rejected at the outset*. It would be strange, and even dangerous, if courts could so alter the constitution of a country."<sup>139</sup>

Thus, the opinions suggest, the "living tree" concept in constitutional interpretation was not one intended to contradict the specific historical intentions of the Charter in a period soon after its enactment,<sup>140</sup> nor to legitimate such judicial "alterations" of the constitution.<sup>141</sup>

reasoning. *See id.* at 297-308 (McLachlin, J.) (disagreeing with Lamer on the "holding off" duty).

139. *Id.* at 287 (L'Heureux-Dubé, J., dissenting) (emphasis added). Two other dissenting judges indicated in separate opinions their general agreement with Justice L'Heureux-Dubé's opinion. *See id.* at 285 (LaForest, J., dissenting); *id.* at 296-97 (Gonthier, J., dissenting). For the fourth dissent, see *id.* at 308 (Major, J., dissenting).

140. *Cf. Gosselin v. Att'y Gen. of Quebec*, [2002] 4 S.C.R. 429, 491-92 (implying that, while section 7 could not now be interpreted to impose a positive duty on the federal government to provide welfare, it might be so interpreted in the future under the living tree approach).

141. *But cf. Hogg, supra* note 113, at 83-85 (suggesting that a 1985 decision, *Reference re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, ignored the intended meaning of the phrase "principles of fundamental justice" in Charter section 7, which, according to witnesses before the Constitutional Convention, was adopted to avoid the substantive due process case law of the United States by giving constitutional protection only to procedural norms); see also Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 Int'l J. Const. L. 1, 23-24 (2004) (agreeing that the Canadian drafters' stated intent was that "principles of fundamental justice" meant to exclude substantive due process and was not followed by the Court, but observing that the drafters' deepest concerns—with economic substantive due process—have been influential in Canadian constitutional interpretation). Although concluding that the drafting history was admissible in determining the meaning of the Charter, the Court in the reference concerning the British Columbia Motor Vehicle Act found that statements indicating that the words were limited to procedural justice were of relatively little weight for several reasons. First, the statements of witnesses, even from the executive department which drafted the amended language, could not reliably capture the sentiments of the many people involved in ratification of the Charter. *Reference re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. at 504-08. Second, to give too much weight to such expressed original intentions would be inconsistent with the Charter's capacity, over time, to be a "living tree": "the 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." *Id.* at 509. Third, and perhaps more important, the Court concluded that the surrounding Charter text and context was consistent with a broader understanding, in which fundamental justice referred to basic tenets of Canadian law, without regard to the division between the procedural and the substantive in the American jurisprudence. *Id.* at 498. I do not mean to suggest that the Canadian Court is entirely consistent in its application of the

The “living tree” is a metaphor, not an interpretive theory that provides a full account, for example, of when some aspect of the constitution is or is not “frozen.” Its Canadian provenance, moreover, is neither a reason for nor against use of this metaphor here in the United States.<sup>142</sup> But the cases illustrate that the “living tree” metaphor is available to describe an approach to constitutional interpretation that contemplates both constraint and growth. I explore this metaphor further below.

### III. MOVING THE METAPHOR?

In contrast to the American metaphor of a “living constitution,” or the Australian term, “living force,” the tree metaphor is one that draws attention to origins, to roots, as well as to the possibility of growth. It implies a connection with interpretation in older decisions and a more constrained view of the choices open to later generations—unlike animals that can migrate at will, plants (including trees), must grow from where they begin, and maintain contact with their roots for nourishment and health. Though not without its difficulties, the living tree metaphor embraces the mixed elements of rootedness and change that are so much a part of American constitutional adjudication.

That the case which gave rise to this expression in Canada concerns gender equality is not surprising. Constitutions are framed, inevitably, by human beings whose commitments to enduring principles, such as equality or liberty, may coexist with quite narrow present understandings of the application of those principles. Both the United States and Australia have had original constitutions that were emphatically not intended to treat women, or racial minorities, with that equality which contemporary understandings of constitutionalism require.<sup>143</sup> Not only did the 1789 U.S.

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“living tree” doctrine or of constraints upon it based on the clarity of founding compromises. (Indeed, one wonders in *Prosper* if Chief Justice Lamer’s interpretation might have the practical effect of compelling provinces to provide duty counsel, notwithstanding the refusal to so interpret the Charter.) My point is only that the “living tree” implies both growth and limits.

142. While Canadian commitments to constitutionalism, the rule of law, and democracy are of long standing, there are important differences between Canadian and U.S. constitutional history, structure, and text that caution against any ready assumption that constitutional interpretations that are legitimate in the one would be so in the other. The Canadian constitutional texts developed incrementally over time, as Canada moved from a British colony to full independence. See *supra* notes 94, 115. Canada’s Charter of Rights and Freedoms, under which many of the “living tree” cases have arisen, was adopted long after the major rights-protecting provisions of the U.S. Constitution and provides (at least in theory) for democratic limitation of the effects of its Court’s decisions through a “notwithstanding” clause in effect permitting legislative overrides of Charter rights for limited time periods. See Canadian Charter of Rights and Freedoms, § 33 (permitting national or provincial governments to enact laws valid for up to five years, “notwithstanding” certain Charter rights).

143. Section 41 of the Australian Constitution was designed to assure that those women then allowed to vote in state elections (only two states at the time allowed adult women to vote) would be able to vote in Commonwealth elections, but it was a compromise, transitional provision, not itself intended to enfranchise the many other women in Australia

Constitution contemplate the continued existence of slavery and a voting structure favoring the slave states, but there is evidence that the framers and ratifiers of the Fourteenth Amendment did not necessarily understand the Equal Protection Clause to prohibit state imposed segregation of the races.<sup>144</sup> The Fourteenth Amendment introduced a provision indicating that male voting rights counted more than female, just as its stirring statement of national citizenship and equal protection of the laws was invoked by women to claiming voting rights.<sup>145</sup> Although the Nineteenth Amendment extended suffrage to women, it did not on its face direct a more general constitutional acceptance of the equality of women within the framework of the Fourteenth Amendment. But the Fourteenth Amendment has been re-understood to prohibit most gender classifications,<sup>146</sup> in part as a result of

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who could not at the time vote in elections or on referenda on the constitution. See Deborah Cass & Kim Rubenstein, *Representation/s of Women in the Australian Constitutional System*, 17 Adel. L. Rev. 3, 11, 28-39 (1995); Goldsworthy, *Originalism*, *supra* note 57, at 46-47. Issues of gender equality have generated apparent departures from narrow forms of originalist interpretation. In *Cheatle v. The Queen* (1993) 177 C.L.R. 541 (Austl.), the Australian High Court interpreted section 80 of the Constitution, which requires a trial by jury, to require unanimity in verdicts of conviction. In its discussion, the Court indicated that the jury trial right now required the inclusion of women (and the poor) on the juries, even though in 1900 juries were made up only of men meeting minimum property qualifications. *Id.* at 560-61. Excluding women was no "essential feature" of the right; indeed, "[t]he relevant essential feature . . . was, and is, that the jury be . . . representative of the wider community" and excluding women would now be inconsistent with this essential feature. The Court's opinion recognized that the exclusion of women and persons without property was "seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property," but stated that it would be "absurd to suggest that a requirement that the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993." *Id.* At the same time, the Court held, the requirement of unanimity for jury verdict was an "essential" feature of the original jury right that could not be changed. *Id.* at 561.

144. See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 116-54 (2d ed. 1997); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 252 (1991); see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 58-63 (1955) (arguing that although there is no evidence of any specific intention to prohibit segregation by enacting the Fourteenth Amendment, the broad wording of Section 1 was designed to leave open for the future, through "language capable of growth," the full extent of the Amendment's promise of the "equal protection of the laws"). But see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (arguing against the widespread consensus that *Brown v. Board of Education*, 349 U.S. 294 (1955), was inconsistent with the original understanding of the Fourteenth Amendment).

145. See U.S. Const. amend. XIV §§ 1, 2; Reva Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 971-73 (2002). The Supreme Court rejected the claim that women had a right to vote by virtue of the Fourteenth Amendment in *Minor v. Happersett*, 88 U.S. 162 (1875).

146. Professor Siegel argues that although early judicial decisions after adoption of the Nineteenth Amendment correctly understood it as a constitutional "norm," with implications for many areas of the law, it was soon thereafter treated as a narrower, "constitutional rule" relating only to suffrage. Siegel, *supra* note 145, at 1020-22; see also *id.* at 1015 (discussing *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and commenting that "[t]he *Adkins* opinion is historically significant, not simply because it reads the Nineteenth Amendment as conferring equality on women, but because the opinion understands sex equality as freedom from traditions of reasoning about gender rooted in the common law of marital status").

social and cultural change in the understandings of human equality, of the manifestation of these changed understandings in statutory law, and judicial development of equality norms, including the casting off of prior doctrine built on assumptions of women's incapacities or differences.<sup>147</sup> These understandings of women's equality—embodied in the movement on behalf of the Nineteenth Amendment—have been read in to the provisions of Section 1 of the Fourteenth Amendment, while the gender-based distinction in Section 2 has been essentially ignored, treated as the more historically specific (and anachronistic) clause it was and, to the extent it embodied a principle of gender discrimination in voting, as overruled by the Nineteenth Amendment.<sup>148</sup>

The “living tree” metaphor embraces such a process of re-understanding the application of a broad constitutional concept like equality, over the possible objections of originalists.<sup>149</sup> But it also captures the degree to

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147. See Siegel, *supra* note 145, at 1042 (“[W]e should interpret the Constitution so as to honor the decision of the Nineteenth Amendment’s framers to disavow traditional understandings of the family supporting women’s disfranchisement; yet we . . . ought not . . . do so by endeavoring to build the constitutional order . . . on the gender understandings of men who had just concluded that gender restrictions on the franchise offended the first principles of our constitutional democracy. We honor these foundational acts of lawmaking by reading them as foundations, whose significance to us today is legible through the subsequent constitutional struggle that they inaugurated . . .”); see also *id.* at 1033 (“Arguably, the *post-ratification* history of the Fourteenth Amendment—the history of *Brown* and the civil rights movement—now plays a more important role in shaping interpretations of the Fourteenth Amendment’s Equal Protection Clause than does anything in the debates attending its adoption.”); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. Miami L. Rev. 265, 271-83 (2003) (suggesting that the equality norms represented in the Fourteenth and Nineteenth Amendments may affect understandings of earlier parts of the Constitution). On the importance of transnational interchange in effecting changed constitutional understandings, see Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 Yale L.J. 1564 (2006) and Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001).

148. See John Hart Ely, *Interclausal Immunity*, 87 Va. L. Rev. 1185, 1190 (2001). *But cf.* Edward Hartnett, *A “Uniform and Entire” Constitution; or, What if Madison Had Won?*, 15 Const. Comment. 251, 276-77 (1998) (speculating that, had the amendments been inserted into preexisting constitutional text as it was modified, the Fourteenth Amendment’s provision calling for reduction of representation might have been deleted after the Fifteenth Amendment, but treating section 2 of the Fourteenth Amendment as still operative in requiring reduction in representation for denials of male voting). The gender equality cases cannot be read simply as the product of changed circumstances, as in the application of constitutional rules to previously unforeseen technologies, since the underlying argument for women’s equality had been available for centuries. Rather, they represent how the “living tree” approach permits revised understandings to develop through interpretive processes, where those understandings are in a sense continuous with values that can be identified as immanent in the Constitution.

149. *Cf.* Antonin Scalia, *A Matter of Interpretation* 47 (1997) (suggesting that the Nineteenth Amendment was necessary to give women a constitutional right to vote); Goldsworthy, *Originalism*, *supra* note 57, at 39-40, 46-48 (disapproving of the willingness of the Australian Court in *Cheatle* and two other cases to revise understandings of the original Australian Constitution to now include women as members of juries and as voters, especially since the compromise over section 41 of the Constitution, which secured the vote

which constitutional questions, and hence analyses, are constrained and framed by the text of a constitution. In U.S. constitutional practice, no judicial nominee would claim to be unconcerned with original understanding embodied in the Constitution's text.<sup>150</sup> The disagreements are about (a) whether those meanings are understood broadly or narrowly, as "concepts or conceptions,"<sup>151</sup> or as "enactment intentions or application intentions,"<sup>152</sup> and (b) whether original understandings are the dominant, or exclusive, basis for decision, over and above past precedents, reasoning from broad structure, evolving understandings of the meaning of concepts, or consequences or different interpretive choices in light of underlying constitutional values. Originalism, while inadequate as a complete interpretive approach for a deeply entrenched constitution designed to function over time, draws on normatively powerful ideas of continuity in self-governance and the rule of law that ought not to be ignored.<sup>153</sup> There may be some issues that are best determined through a predominantly originalist analysis; Jed Rubenfeld suggests that there are paradigmatic wrongs that constitutional provisions sought to prevent which cannot be ignored in interpretation without depriving the Constitution of its normative roots.<sup>154</sup> There may be particular provisions which should be interpreted to

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for women in South Australia, followed on the defeat of an effort to provide for full women's suffrage).

150. See, e.g., *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 120 (1994) (colloquy between Sen. Orrin G. Hatch and then-Judge Breyer) (Question by Senator Hatch: "Would you agree, then, that the meaning of the law is to be ascertained according to the understanding of the law when it was enacted?" Answer of Stephen Breyer: "Almost always. . . . The reason that I hesitate a little is because . . . there are instances, particularly with the Constitution and other places, where it is so open and unclear as to just how the Framers or authors intended it."); *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 127-28 (1993) (Colloquy between Sen. Hatch and then-Judge Ginsburg) (asserting in response to Sen. Hatch that there will be questions whether specific intention concerning equality or general intention to create an enduring Constitution will control, but generally agreeing that judges should consider the law givers' intentions); cf. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 260 (2002) (arguing for an approach that goes beyond text and precedent to consider consequences for active liberty); Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. Ill. L. Rev. 101, 105 (1988) (discussing original understanding with respect to the confirmation process).

151. See Dworkin, *Taking Rights Seriously*, *supra* note 88, at 134, 136-37 (arguing that judges should consider constitutional terms like "equality" not as specific conceptions of rights but as "appeals to moral concepts"); see also Chemerinsky, *supra* note 28, at 91-94 (discussing choice among various levels of specificity and generality in defining original meaning or intent).

152. Goldsworthy, *Originalism*, *supra* note 57, at 20 (arguing that a distinction in "enactment" and "application" intentions (which roughly corresponds to the distinction between broad concepts and specific conceptions) is an aspect of "moderate originalism"); cf. Scalia, *supra* note 18, at 861 (arguing that virtually every originalist would allow for the operation of *stare decisis*).

153. I discuss this point in Jackson, *supra* note 25.

154. On paradigmatic cases, see Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 178-95 (2001). On how paradigmatic cases can shift over

continue unchanged from their inception because of their textual clarity or how foundational they were to historically contingent agreements to federate, notwithstanding their possible inconsistency with other normative constitutional values. In the United States today, perhaps the rule of two senators is one such example.<sup>155</sup>

The “living tree” metaphor links present day constitutional decisions with a specific national past, conveying a more organic notion of constitutional interpretation.<sup>156</sup> It also captures the element of contingency in organic constitutional development more powerfully perhaps than Dworkin’s chain novel metaphor<sup>157</sup>—not simply the path dependency of decision-making, but the way in which real and complex developments in a world outside of law, outside of the imagination of any single author in the chain, condition both the questions and the context for decision. It conveys the idea of balance (so the tree will not fall over); it avoids the inflexibility of narrowly grounded historical interpretation (structures that are too rigid break rather than bend under the pressures of time). It embodies the idea of flexibility over time, of the shaping and pruning of a tree through forces of human agency as well as conditions that push in particular directions, without the connotations of untethered, illegitimate decision-making by whoever

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time, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 236-37 (1998) (asserting that our understanding of the paradigmatic expression protected by the First Amendment moved from being the work of popular newspapers to the unpopular abolitionist speaker and arguing that the shift was part of a “new First-Fourteenth Amendment tradition that is less majoritarian and more libertarian”).

155. Cf. Ely, *supra* note 148, at 186-87, 1199 (suggesting that the two senators rule stands and is not plausibly open to alternative interpretations).

156. On the centrality and importance of metaphors in the structure of law and legal argument, see Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* 21, 43-68 (2001) (insisting on “the irreducibly imaginative nature of reason” and suggesting that logical arguments or principles in law are inextricably related to larger conceptual metaphors). Winter acknowledges the legal realist and other critiques of metaphor, noting, for example, Cardozo’s statement that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Id.* at 2 (quoting *Berkey v. Third Ave. Ry Co.*, 155 N.E. 58, 61 (N.Y. 1926)). But, Winter argues, metaphors are an inescapable part of human reasoning—even the language of “breaking” the law involves an implicit metaphor comparing law to a physical object. *Id.* at 4.

157. Ronald Dworkin, *Law’s Empire* 228-32 (1986). Metaphors play an important role in conceptualizing or expressing interpretive theories. Cf. Philip Bobbitt, *Constitutional Fate* 238 (1982) (describing John Wheeler’s twenty questions game, where responders agree to have no fixed answer to what “it” is, the dialogue is constructed by what the questioner asks, and the answer to each question is constrained to fit with prior responses); *id.* at 248 (describing the Constitution as like a ballet dancer’s mirrored wall, reflecting unceasing movement); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 546 (1989) (analogizing to train travel, with judges as interpreters in the caboose, watching the terrain in which recent constitutional developments in the foreground are integrated into a landscape including the more distant past). On the importance of accuracy and intuitive accessibility of metaphors, see also Edward Rubin, *Independence as a Governance Mechanism, in* *Judicial Independence at The Crossroads: An Interdisciplinary Approach* 56, 57-63 (Stephen B. Burbank & Barry Friedman eds., 2002) (arguing against the three-branched tree as a metaphor for the modern state and in favor of a network image and discussing work by others attacking arborescent imagery as too “unitary, logical and hierarchical”).



happens to be the judges. It treats the Constitution as under-determined, but not entirely indeterminate; there are roots, a trunk, and large branches that condition the choices open to claimants, litigants, and judges.<sup>158</sup> And it conveys both the possible longevity, and possible fragility, of a constitution.

On the other hand, the "living tree" is only a metaphor and, in some respects, a misleading one. The image that may come to mind—a spreading oak, a graceful maple, the iconic representations of the "tree of life"—are single-trunked and generally symmetrically branched. Older constitutions, like the United States', however, may have formal amendments that are in some respects more like second trunks. The Civil War Amendments in the United States do not seem entirely like branches but rather like new legal roots of a markedly changed form of constitutionalism. Likewise, in Canada, the Charter of 1982 does not seem so much like a branch as a newly rooted foundation, a joint foundation with the 1867 Act. Can we conceive of a multi-trunked tree? Although there are such trees (banyan trees have multiple trunks and roots; aspens may grow as clones in groves with a common root system), the metaphor now seems strained.<sup>159</sup> Moreover, the natural metaphor understates the role of human agency and the extent of the rupture in the United States from founding premises represented by the Civil War Amendments' outlawing of slavery, abandonment of the "three-fifths compromise," and extension of federal constitutional rights to limit the state governments.

Thus, while for some the living tree is not a rigid enough image to capture the role of a constitution in "obstructing modernity,"<sup>160</sup> for others the metaphor may imply too much continuity, too much balance and harmony over time, too little recognition of the significance of formal constitutional change when it happens, as was the case in several decisions in the post-Civil War era.<sup>161</sup> And the "naturalness" of the living tree metaphor is misleading with respect to the many forms of human agency that influence the development of constitutional law. A tree's branches will

158. Cf. Goldsworthy, *Originalism*, *supra* note 57, at 29 (arguing, from the perspective of a "moderate originalist," that judges need not choose between "living tree" and "dead hand of the past," because the living tree metaphor embraces the idea that "the very possibility of growth depends on the trunk and roots remaining firmly in place").

159. Cf. Rubin, *supra* note 157, at 60-61 (criticizing the use of a "rhizome" analogy (as in a strawberry bush) for representing modern bureaucracy, on the grounds that it is inaccurate in its failure to capture hierarchy in bureaucracy and non-intuitive, thus defeating the purpose of using a metaphor).

160. See Scalia, *Modernity and the Constitution*, *supra* note 84, at 313.

161. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state imposed racial segregation in public transport); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding public accommodations provisions of federal civil rights law unconstitutional); *United States v. Harris*, 106 U.S. 629 (1883) (narrowly construing congressional authority to provide for prosecution and punishment of members of a lynch mob). Indeed, viewing the Civil War Amendments as mere 'branches' of a constitution rooted in the older structure of 1789, rather than as cutting away or uprooting a significant part of that structure, might have contributed to the narrow judicial constructions of those Amendments that helped undermine Reconstruction era efforts towards racial justice and equality.

grow in directions influenced by the availability of sun and water, responsive to a natural environment, but the environment of a constitution is made up of human beings, acting individually, in groups, and in institutions. There is a choicefulness in constitutional development that natural, organic metaphors obscure.

But as metaphors go, there may still be something to say for moving our metaphor away from the less tethered "living constitution" towards the more rooted "living tree." It better captures the degree to which constitutional interpretation is framed, though not necessarily determined, by the Constitution's text and the Court's past decisions and at the same time captures the necessarily evolutive nature of constitutional interpretation over time. In a period when a leading judge in the lower federal courts accuses the Supreme Court of the United States of "lawless[ness]" in making "naked political" choices in constitutional interpretation in the *Foreword* of the *Harvard Law Review*,<sup>162</sup> one may question the efficacy of words and metaphors to diminish the polarization that over the long run will threaten the capacities of courts to function as independent checks on the other branches of government. But if constitutional law is to remain law, enforceable by independent courts as a constraint, the search for some middle ground of interpretive agreement may prove to be a necessary, though not sufficient, condition.<sup>163</sup>

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162. Posner, *supra* note 2, at 41, 75, 78, 90.

163. *Cf.* McConnell, *supra* note 83, at 2390 (praising Justice Breyer's book for reminding readers that "[l]aw is not simply politics in another guise" and that, despite their differences, most judges use similar legal tools for constitutional interpretation). Judge McConnell writes, "Our differences are certainly important, as this book demonstrates, but differences should not be confused with chasms. If Justice Breyer's elegant and accessible little book helps to calm the waters, it will have done a national service." *Id.*