Books
Review Essay: An Australian Reads 'Living Originalism'

Living Originalism by Jack M Balkin
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Abstract

The work under review, by Yale Law School's Jack Balkin, sets forth a theory of constitutional interpretation reconciling originalism with living constitutionalism. It claims that the *United States Constitution* is best comprehended as an enabling framework for a project of governance, which successive generations must build out over time. Using rules, standards, principles and silences as distinctive textual devices, the original framers effected an allocation not only of constraint, but also of delegation. Ascertaining the balance of the allocation calls for originalist methods, while making constructional choices within its bounds commits one to living constitutionalism. Construction is said to be a task shared by the courts, political branches and ordinary citizens, underwritten and legitimated by a deep political and cultural attachment to the Constitution. This essay considers the utility of the theory in Australia. Drawing on Balkin's ideas, it engages with a current debate about how to understand the legitimacy of the *Engineers' Case*, and, with reference to *Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner*, explores the under-theorised question of how ordinary statutes can affect constitutional meaning.

I Introduction

Professor Jack Balkin is an originalist and a living constitutionalist. *Living Originalism* sets forth his theory of constitutional interpretation, which aims to vindicate the claim that 'these two views of the Constitution are compatible rather than opposed'.[1] Balkin is also an American, and he situates his theory

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1 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) 3.

within American political culture and practice. The modest purpose of this essay is to recommend *Living Originalism* specifically to Australian readers who share an interest in constitutional interpretation, the processes of constitutional change, and constitutional culture more generally. My approach is more provocative than dogmatic. I do not defend any prescriptive account of constitutional interpretation, but rather gesture towards aspects of Australian constitutional practice to which Balkin's theory usefully speaks.

Lawrence Solum and Kurt Lash convened a conference at the University of Illinois in advance of *Living Originalism*'s publication. Nine critical reactions to emerge from that conference, together with Balkin's response, were published in a recent symposium issue of the *University of Illinois Law Review*.[2] Among the articles is one by Jeffrey Goldsworthy, a prominent Australian scholar in the field.[3] For any Australian consumer of *Living Originalism*, Goldsworthy's critical reaction is essential reading. He takes up a particularly relevant point about differences between constitutional cultures. For the reasons Goldsworthy gives, no undiscriminating translation can be made into Australia of Balkin's theory.[4] But the obstacles should not be exaggerated (and I do not suggest that Goldsworthy exaggerates them). Treated with some care and appropriate adaptation, *Living Originalism* is fertile ground for Australian constitutionalists.

This essay is in two parts. Part I sets out the large ideas of Balkin's theory. Confined by space, I am unable to do justice to his nuanced argument, or to the rich historical learning that he marshals behind it, or to his detailed treatment of the commerce clause and the Fourteenth Amendment.[5] But I hope to explain concisely the thrust of the thesis and its principal conceptual elements. Part II takes up the question of *Living Originalism*'s utility in Australia. It explains the methodological sympathies between Balkin's approach and some broad commitments of Australian scholarship and practice, before turning to specific applications. Drawing on the theory of interpretation set forth in *Living Originalism*, I engage with a current debate concerning how to understand the legitimacy of the *Engineers' Case*.[6] I then examine the under-theorised question of how ordinary legislation can affect constitutional meaning, with specific reference to the recent voting rights cases.[7]

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2 [2012] 3 *University of Illinois Law Review* 611–877. Yale Law School convened a later conference, 'Constitutional Interpretation and Change', held 27–28 April 2012, and which the present author attended. Select papers from that conference are proposed to be published in (2013) 25 *Yale Journal of Law and the Humanities* (forthcoming).

3 Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' [2012] 3 *University of Illinois Law Review* 683.

4 See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 603 [21] (Gleeson CJ and McHugh J), 610 [42] (Gaudron J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197–8 [34], 199 [38] (Gleeson CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 37–8 [19]–[20] (French CJ), 84 [146], 90 [159]–[160] (Gummow J), 123 [280] (Hayne J); Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45.

5 Balkin, above n 1, ch 9 'Commerce', ch 10 'Privileges or Immunities', ch 11 'Equality before the Law'.

6 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

7 *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

II Balkin's Thesis

Balkin's thesis pivots on the concept of 'constitutional construction'.[8] The interpretation of legal texts, whether by judges or others, is widely understood to involve two distinct exercises. The first exercise is to ascertain the meaning of the words. The second is to give effect to the meaning of the words, through some process of application or implementation. This second exercise has been called 'construction'.[9] The distinction enables Balkin to be both an originalist and a living constitutionalist: he argues for an originalist approach to meaning-ascertainment, and a living-constitutionalist approach to the implementation of meaning by constitutional construction.

Balkin's ability to approach the distinction in this creative way depends largely upon his view that the original 'meaning' of the Constitution allows capacious scope for different 'constructions' to be erected at different times. After all, Balkin is a committed textualist, and insists that 'constitutional constructions must be consistent with the text. We may articulate and supplement the constitutional text through construction, but we may not contradict it.'[10] Balkin's take on original meaning is not the same as the familiar claim that the authors of a text subjectively intended that future interpreters would give the words their contemporary meaning.[11] Nor is it quite the same as the argument that because 'it is *a constitution* we are expounding'[12] it is entitled to living-constitutionalist interpretation.[13] Rather, he envisages the Constitution as 'a basic plan for politics',[14] which, viewed 'holistically', establishes 'a coherent project of governance — or one that at least strives for coherence'.[15] By establishing only a basic plan, rather than a finished product, the Constitution, in its original meaning, calls upon future generations to engage in constitutional construction within the limits of the plan. Balkin describes his approach as 'framework originalism', to be distinguished from 'skyscraper originalism'.[16] As the metaphor suggests, 'skyscraper' originalists regard the original meaning of the Constitution as apt to supply most, if not all, of the content of contemporary constitutional principle. 'Framework' originalists regard the original meaning as supplying only a

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8 Balkin, above n 1, 4.

9 See Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 *Constitutional Commentary* 95 and works cited therein.

10 Balkin, above n 1, 270.

11 See, eg, Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, 11, citing Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, first published 1901, 1997 ed) 21.

12 *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407 (Marshall CJ) (1819) (emphasis in original). See also at 415; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J); *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8 (O'Connor J).

13 For a critical discussion of the living constitutionalist claims upon this dictum, see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 28–9.

14 Balkin, above n 1, 4.

15 Ibid 257.

16 Ibid ch 2 'Framework Originalism'. See also Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 *Northwestern University Law Review* 549.

foundation upon which successive generations must build out constitutional principle by construction.

This conception of what the Constitution *is* rests upon a normative view of what the Constitution is *for*. There are other views of what constitutions are for. For example, it is common to view constitutions as exercises in pre-commitment,[17] or in minority protection,[18] designed to constrain future generations, to guard against their bad decisions, and 'to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away'.[19] Balkin acknowledges that 'some constitutional features have this purpose and effect'[20] but rejects that the purpose is the best general defence of constitutionalism.[21]

Consistent with his view of the Constitution as an enabling 'plan' or 'framework', Balkin sees the object of ascertaining meaning (the first exercise involved in interpretation) as identifying the constraints which the plan imposes, as well as the areas it delegates to future generations for 'the articulation and implementation of important constitutional principles'.[22] '[D]ifferent degrees of constraint and delegation',[23] also called an 'allocation' or 'economy' of 'trust and distrust',[24] emerge from the different kinds of textual device that constitutional drafters employ in designing constitutional plans. He distinguishes four kinds of textual device: rules, standards, principles and silences.

Rules and standards are similar in that when they apply, they are conclusive of a legal question. They differ in 'how much practical or evaluative judgment they require to apply them to concrete situations'.[25] Rules operate in the constraining way that one would expect, being 'hardwired'[26] into the Constitution and permitting little scope for construction. Examples of rules include the requirements that there be exactly two houses of Congress; that each state get exactly two senators; and that the President be at least 35 years old. Standards, conversely, require constructions that build out and structure the 'practical or evaluative judgment' which they demand. The Fourth Amendment's prohibition of 'unreasonable' searches and seizures is an example of a standard. Like standards, principles also require 'considerable practical judgment',[27] and call for constructions to build out the contours of that judgment. But unlike standards, principles are not usually determinative of legal questions, and must therefore be weighed against competing principles. The resulting problems of how to

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17 See, eg, Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327. But see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 255–81.

18 See, eg, *United States v Carolene Products Co*, 304 US 144, 152–3 n 4 (1938); John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980).

19 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3, 40.

20 Balkin, *Living Originalism*, above n 1, 24.

21 Ibid 29.

22 Ibid 107.

23 Ibid 39.

24 Ibid 46–7, citing Scott J Shapiro, *Legality* (Harvard University Press, 2011).

25 Ibid 349 n 12.

26 Ibid 26.

27 Ibid 350 n 12.

weigh competing principles call for further layers of construction to elaborate that task. An example of a 'principle' is the First Amendment's reference to 'freedom of speech'. Silences feature less prominently in *Living Originalism*, but are said to be important reminders 'that adopters are not omniscient and cannot prepare for every eventuality'.[28]

Ascertaining whether any given set of words instantiates a rule, standard or principle calls for an originalist approach, and may require 'historical inquiries [that] help us understand the degrees of freedom and constraint that the framework contemplates'.[29] In this historical inquiry, 'the expectations and intentions that adopters had about their choice of linguistic technologies of freedom and constraint' are relevant.[30] Otherwise, Balkin's originalism follows the mainstream originalist position that what is to be ascertained is the original *public meaning* of the words used, and not the original *expected applications* of those words.[31] One of his central criticisms of mainstream originalism is that its proponents, while superficially advocating original *meaning* originalism, actually corrupt the approach by confusing meaning with expected application: as though 'the original meaning of the text includes principles stated at a level [of abstraction] that captures most of the public's — or the framers' — expected applications'.[32] Distinguishing semantic meaning from expected application, Balkin's originalism regards itself as bound only by the former. More than that, it regards treating expected applications as though they were binding as positively unfaithful to the framers' decision to provide a standard or principle, rather than a rule:

> The choice of rules, standards and principles is a choice in the constitutional plan about what to settle at the time of adoption and what to delegate to future construction. We are certainly permitted to look to original expected applications in constructing doctrines and institutions. But when we insist that we may not make our own judgments about these matters but may only apply the original expected application, we are confusing the plan with our own choices … we are treating standards and principles as if they were rules. We should accept political responsibility for *that* choice, and not try to blame the imposition of our values on the founders.[33]

Where the Constitution delegates to future generations, it commits them to building the Constitution out by construction. In this process of construction, one finds Balkin's commitment to living constitutionalism. The constitutional interpreter's task lies in 'implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent.'[34] One can readily see the accommodation of the

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28 Ibid 25.

29 Ibid 45.

30 Ibid 46–7.

31 Ibid ch 6 'Originalisms', which provides a helpful intellectual history of originalist theory in the United States. See also Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 42, 51, 64–5. But see Richard S Kay, 'Original Intention and Public Meaning in Constitutional Interpretation' (2009) 103 *Northwestern University Law Review* 703.

32 Balkin, above n 1, 228.

33 Ibid 43.

34 Ibid 4. These five 'modalities' are adopted from Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982) and Philip Bobbitt, *Constitutional Interpretation*

judicial role to this prescription. The mass of doctrine that accretes around abstract constitutional standards and principles is 'constitutional construction' — good faith attempts to carry on the constitutional plan enacted by the framers, by giving contemporary meaning to those constitutional standards and principles delegated to the future. Evident at this point is the open-ended nature of the constructional task as Balkin envisages it.[35] True enough, he says that constructions may not contradict the text,[36] but otherwise 'all the modalities of interpretation' are in play and 'people using [his] method [of interpretation] will often reach contrary conclusions about the best way to interpret the Constitution'.[37]

Balkin not only tolerates this indeterminacy, he embraces it. For him, a theory of constitutional interpretation 'is not a decision procedure. It is more like a common language that allows people with very different views to reason together.'[38] At another point, he describes his theory as offering '[c]ommon rhetorical resources', permitting constitutional argument and persuasion to occur, rather than dictating a correct decision.[39] And so he also repudiates any judicial monopoly on the task of constitutional construction, which he regards as belonging also to the political branches and ordinary citizens. The political branches, it is said, 'must do more than simply not violate the Constitution' — 'they have affirmative obligations to construct institutions and laws that will carry out the Constitution's purposes'.[40] Ordinary citizens, by social and political mobilisation, 'offer[] competing interpretations of what the Constitution really means'.[41]

The move to include non-judicial actors in the processes of constitutional construction is central to Balkin's normative justification for framework originalism. *Living Originalism* sits within a school of democratic constitutional thought in the United States that responds to Alexander Bickel's famous 'counter-majoritarian difficulty'[42] by protesting the insensitivity of court-centric scholarship to the capacity of popular movements to affect the constitutional understandings ultimately enforced by judicial review.[43] For Balkin, the Constitution's legitimacy depends upon it

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(Blackwell, 1991). Bobbitt identified these five modalities, and a sixth 'textual' modality, which Balkin excludes from his list because, unlike Bobbitt, he believes that textual arguments trump all other kinds: at 341 n 2.

35 See Goldsworthy, 'Constitutional Cultures', above n 3, 690: 'insofar as Balkin is right that the Constitution or the methodology for construing it are so flexible … what is the point? The Constitution is then like an ink blot, onto which any vision can be projected.'

36 Balkin, above n 1, 270.

37 Ibid 134.

38 Ibid 135–6.

39 Ibid 257.

40 Ibid 17.

41 Ibid.

42 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, first published 1962, 1986 ed) 16–23.

43 See especially Bruce A Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013; Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991); Bruce Ackerman, *We the People: Transformations* (Harvard University Press, 1998); Reva B Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA' (2006) 94 *California Law Review* 1323; Robert Post and Reva Siegel, '*Roe* Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373 and the references collected therein at n 3. See also William N Eskridge Jr and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, 2010).

serving three functions:[44] *basic* law — a supreme law that trumps other laws; *higher* law — 'a source of inspiration and aspiration, a repository of values and principles';[45] and *our* law — a law with which the people identify and to which they are attached, in the sense that it serves as a 'constitutive narrative through which people imagine themselves as a people'.[46] The 'basic', 'higher' and 'our' law functions correspond respectively to 'procedural', 'moral' and 'sociological' legitimacy, all of which Balkin says are necessary for democratic legitimacy.[47]

Framework originalism realises the legitimacy of the constitutional project because it separates 'the Constitution', as a shared plan, from the implementation of that plan at any given time (the 'Constitution-in-practice').[48] The conceptual separation allows the sovereign people to accept the plan, even if they do not accept its ascendant implementation, and from this 'platform for persuasion'[49] make 'their' claims on 'their' law.[50] Balkin describes his theory of legitimacy as 'redemptive constitutionalism',[51] which is explored more fully in a companion work.[52] The key point for *Living Originalism* is that constitutional construction is said to be primarily in the hands of the people. Even judicial constructions, it is said, are 'responsive to democratic politics in the long run, but not directly controlled by it in the short run'.[53] Balkin does not say, and in fact explicitly rejects, that judges should do anything other than 'try to decide cases according to law, in the best way they can'.[54] Rather, he argues that democratic politics and social and political mobilisation, mediated through legal professionals, will shape constitutional culture and gradually change the forms of argument that come to be regarded in that culture as plausible, or professionally defensible.[55] The evolving constitutional culture in turn influences judges, as well as the political branches' choice of judges.

To summarise then, Balkin's theory has two aspects. The first is an account of constitutional interpretation: the Constitution is a plan, to be given its original meaning, including its original allocation of constraint and delegation; future generations, in those areas delegated to them, must implement the plan by building out institutions and structures that give it effect. The second aspect is a normative account of the interpretive method's legitimacy: the Constitution *as a plan*, gives the people a common platform from which to stake competing claims in respect of the *implementation* of the plan; these claims, with varying success, gradually move through the political branches and the courts, building out a constitution-in-practice that is legitimate for its own time.

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44 Balkin, above n 1, ch 4 'Basic Law, Higher Law, Our Law'.
45 Ibid 60.
46 Ibid 61.
47 Ibid 64–5.
48 Ibid 35, 69–72.
49 Ibid ch 8 'A Platform for Persuasion'; see especially at 133.
50 Ibid 86.
51 Ibid 73–4, ch 5 'Constitutional Faith and Constitutional Redemption'.
52 Jack M Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011).
53 Balkin, above n 1, 327.
54 Ibid 328.
55 Ibid 293–6.

III Utility in Australia

A *Methodological Sympathies*

Something like 'framework originalism' had an early local advocate in the South Australian federationist, Sir John Cockburn. In opposition to Joseph Chamberlain's insistence upon the maintenance of Privy Council appeals in constitutional matters,[56] and arguing that only an Australian court could legitimately settle Australian constitutional questions, Cockburn wrote: 'The written words of the Commonwealth Bill are but the framework or skeleton to which the living form will be imparted by the interpretations placed upon it from time to time by the decisions of the High Court'.[57] Although anticipating Balkin, Cockburn did not proclaim any novelty in his own view, specifically adding that it was 'inferred from the history of the American Constitution'.[58]

American interpretive methodologies, and the surrounding debates, maintain their influence today. But Australian constitutional law tends to be less polarised than it can be in the United States, as does our constitutional scholarship. Goldsworthy advocates 'moderate originalism',[59] which he says is equivalent to moderate non-originalism: 'a properly refined, and therefore moderate, version of originalism turns out to be equivalent to the most persuasive version of non-originalism. As both theories are purged of their weaknesses, they become more moderate and eventually merge.'[60] Goldsworthy's moderate originalism contemplates that judges may have to go beyond original enactment intentions and 'act creatively' when original enactment intentions cannot resolve an issue of meaning.[61] Sympathetically with this understanding, Balkin's theory illuminates the circumstances in which original enactment intentions can be seen to have deliberately abstained from resolving future disputes about meaning: the choice to enact a standard or principle, instead of a rule, is a choice to delegate rather than to constrain.

Moderate forms of originalism/non-originalism also dominate the decisions of the High Court. The Court's sometime adherence to the 'outdated philosophical distinction'[62] between the connotation (meaning) and the denotation (application) of a term shares some superficial similarities with framework originalism.

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56 But see *Australian Constitution* s 74; J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 248–69.

57 Sir John A Cockburn, 'The Commonwealth of Australia' in Sir John A Cockburn, *Australian Federation* (Horace Marshall & Son, 1901) 42, 55, quoting the author's own letter to the Press.

58 Ibid.

59 See, eg, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation', above n 13; Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24 *Melbourne University Law Review* 677. See also Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323.

60 Jeffrey Goldsworthy, 'Constitutional Interpretation: Originalism' (2009) 4 *Philosophy Compass* 682, 692. See also at 699; Balkin, above n 1, 115–16, citing Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849, 861; Goldsworthy, 'The Case for Originalism', above n 31, 60–5;

61 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 13, 20–1.

62 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 21.

Although the terminology is now out of favour, the Court has had little difficulty extending the heads of power in s 51 to accommodate new 'denotations', without overtly modifying their 'connotation'.[63] The distinction can also apply to restrictions upon power, in the way that the contemporary denotation of the word 'jury' in s 80 is understood to be different from its denotation in 1900.[64] McHugh J preferred to express the same basic idea by reference to the distinction, introduced to the legal canon by Ronald Dworkin,[65] between a fixed 'concept' (more abstract) and variable 'conceptions' (less abstract) of that concept.[66] Much earlier, Higgins J attempted a similar distinction between the 'centre' and the 'circumference' of a power.[67] These approaches attempt to capture the idea that '[t]he denotation of words becomes enlarged as new things falling within their connotations come into existence or become known'.[68] But to attribute an evolution in meaning to a change only in the 'denotation', or to attribute one's insistence upon original meaning simply to an adherence to the 'connotation', is merely to label a conclusion reached on other grounds, because there is no 'fixed "nature" that a term has which can be ascertained by examination and pure thought'.[69]

Balkin improves upon the underlying idea. Framework originalism looks not for the elusive 'connotation' of a particular word, or for fixed constitutional 'concepts' or 'centres', but rather for the degrees of freedom and constraint contemplated by the level of generality with which a word or set of words is used in the constitutional plan. Rules, standards and principles encourage distinctive degrees of flexibility in their construction. Moreover, and importantly, whereas resort to the connotation/denotation distinction pretends that constitutional meaning somehow emerges simply from the nature of the word (connotation) and its relation to objective facts (denotation), Balkin's theory does not shy away from the necessity for judges to accept responsibility for their constructional choices within the constitutional plan. As Balkin says:

> Advocates of living constitutionalism sometimes talk as if our Constitution has grown through gradual adjustment to objective changes in social conditions. More often, I think, our Constitution has grown through disagreement — disagreement about what is actually happening, disagreement about values, and disagreement about what to make of the situation given our values.[70]

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63 See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479.

64 *Cheatle v The Queen* (1993) 177 CLR 541, 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

65 Ronald Dworkin, 'The Jurisprudence of Richard Nixon' (1972) 18(8) *New York Review of Books* 27, 28: 'When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter'; Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 134–5; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 70–2. See also John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 5.

66 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 551–4 [40]–[49], citing Ronald Dworkin, *Taking Rights Seriously*, above n 65, 134.

67 *A-G (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 610.

68 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 267 (Windeyer J).

69 Zines, above n 62, 27.

70 Balkin, above n 1, 133.

There are other methodological sympathies that render *Living Originalism* appealing to an Australian audience. The theory is explicitly 'not a decision procedure'.[71] This orientation should appeal to those who take seriously the claim that '[q]uestions 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',[72] which is the dominant, though not always unanimous,[73] position of the High Court. Relatedly, Balkin's adoption of Philip Bobbitt's 'modalities of constitutional argument'[74] is consonant with the High Court's inclusive approach to what counts as a constitutional argument.[75] To take just a single case as an illustration, every one of Bobbitt's modalities can be identified in the justifications offered in *Kirk v Industrial Court (NSW)*[76] for the entrenchment of State Supreme Courts' supervisory jurisdictions: *textual* — the 'constitutional description' of a 'Supreme Court of a State';[77] *structural* — the position of inferior courts within the judicature established under the superintendence of the High Court;[78] *historical* — 'accepted doctrine at the time of federation';[79] *prudential* or *ethical* — there cannot be 'islands of power immune from supervision and restraint';[80] and *doctrinal* — the existing doctrine that Supreme Courts must retain their defining characteristics.[81]

The utility of Balkin's thesis goes beyond these methodological convergences. In particular, the idea of the Constitution as an enabling framework and the related idea of constitutional construction are particularly provocative for Australian constitutionalists. Let me elaborate.

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71 Ibid 135.

72 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41] (Gummow J). See also *Wong v Commonwealth* (2009) 236 CLR 573, 582 [20] (French CJ and Gummow J); Justice J D Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) *Bar News* (Winter 2007) 12, 26; Sir Anthony Mason, 'Constitutional Advancement — Some Reflections' in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 283, 292.

73 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'), 303–5 [738] (Callinan J). See also Kirby, above n 11, 2–3, 13; Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 245, 245–7.

74 See above n 34 and accompanying text; Balkin, above n 1, 4, 272, 341–2 n 2. Bobbitt, *Constitutional Interpretation*, above n 34, 11–22.

75 Bobbitt presents 'a typology of the kinds of arguments one finds in judicial opinions, in hearings, and in briefs' in the United States: Bobbitt, *Constitutional Fate*, above n 34, 6. For examples of Bobbitt's reception in Australia see Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 213–14; Justice Susan Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007) 45; Nicholas Aroney, 'Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*' (2011) 30 *University of Queensland Law Journal* 145, 145.

76 (2010) 239 CLR 531.

77 Ibid 566 [55], 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

78 Ibid 579 [93], 580-1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

79 Ibid 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

80 Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

81 Ibid 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63].

B *Frameworks*

The *Australian Constitution*, even more so than the *US Constitution*, has a compelling claim to be comprehended as a framework for governance, rather than an untrusting instrument of constraint upon future generations. Bruce Ackerman has distinguished between constitutions for 'federalism' and constitutions for 'new beginnings', and explains that constitutions for federalism are generally characterised by their 'ongoing project of intensive coordination', rather than their function as 'a symbolic marker of a great transition in the political life of a nation'.[82] The categories may not be mutually exclusive, but fitting comfortably into the first category is the *Australian Constitution*, which as Gleeson CJ observed:

> was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.[83]

Thus, Sir Anthony Mason recently wrote of the Constitution that it 'is expressed as a framework of government, consisting in part of a statement of broad concepts and principles, leaving the detail to be supplied by legislation and judicial interpretation.'[84]

Stephen Gageler, now a Justice of the High Court, has articulated in more detail a framework conception of the Constitution, arguing that constitutional interpretation should be guided not only by the text, but also by the 'structure and function' of the Constitution.[85] On its function as an enabling plan, Gageler said that federation was 'conceived not as a means of dividing and restraining government but as a means of empowering self-government by the people of Australia' and that the Constitution was not 'a mechanism for avoiding majoritarian excesses' but 'a mechanism for moving to a higher and more beneficial plane the powers of self-government'.[86]

Michael Detmold has advanced a thesis about how a framework conception of the Constitution bears upon its evolution over time: 'Constitutions work … they do things in communities. They change communities, and thereby change their own relation to communities. They are always in that sense in movement.'[87] For Detmold, constitutional 'movement' is not the non-originalist notion that the meanings of words modernise over time, or even that changes in societal conditions require

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82 Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771, 775–8.
83 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 172 [1].
84 Mason, above n 72, 286–7.
85 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138. See also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162.
86 Gageler, 'Beyond the Text', above n 85, 145–6.
87 M J Detmold, 'Australian Law: Federal Movement' (1991) 13 *Sydney Law Review* 31, 31.

judges to construct new constitutional meanings.[88] Detmold, rather like Balkin, sees the Constitution as a platform upon which its subjects act in the world. For example, he says of s 92, that 'as mere words [it] would have been powerless if there had not been Australians intent … on expanding their outward trade'.[89] He adds that the drafters did not include s 92 'because it was good idea' but 'because it had work to do'.[90] In Balkinian terms, Detmold's insight is that s 92 was never a rule-like 'skyscraper' (a 'good idea' that must be given some fixed meaning to constrain future generations), but a 'framework' principle or standard (which successive generations faithfully and inevitably build out through their actions).

If it be accepted that the *Australian Constitution* is best understood as a plan or framework for governance, rather than a finished architecture, then the potential utility of Balkin's account of 'framework originalism' is perceived. We should, says the theory, interpret the framework in accordance with its original meaning, but with sensitivity to its original allocation of both constraint and delegation. That allocation is to be discerned by careful attention to the original meaning of the constitutional text and its choice of rules, standards and principles. Fidelity to original meaning requires that we respect the framers' decisions to employ standards and principles: original *expectations* about how those might be applied are no part of the original *meaning* that remains binding today.

Identifying the original allocation of constraint and delegation is far from straightforward. It may be a weakness of *Living Originalism* that its professed reconciliation of polar viewpoints might ultimately serve to obscure rather than to resolve the differences between them. It cannot be overlooked that determining the degrees of freedom and constraint within a given constitutional provision or set of provisions is itself an interpretive task, and a task for which Balkin offers little guidance beyond saying that we should use historical inquiry to determine the original allocation. In this respect, interpretive disagreement is likely to persist about the level of abstraction at which different interpreters are prepared to construe the constitutional 'framework'. Compare, for example, Goldsworthy's 'moderate originalism' with Jeremy Kirk's 'evolutionary originalism'. Goldsworthy accepts that original meaning must not be confused with original expected applications.[91] But he also claims that '[w]ell known application intentions … serve as enactment intentions when they clarify the meaning of a law'.[92] Kirk, conversely, argues that '[j]udges should be limited to giving effect to original ideas … or concepts'.[93] The difference between Goldsworthy and Kirk is how abstractly they are prepared to read original meaning. There is a whole spectrum of possible abstractions that might claim to be consistent with 'framework originalism', from correspondence with application intentions, to the broadest conception of a mere 'idea'.

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88 Ibid 32–3, discussing *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*'), 396–7 (Windeyer J); see also at 34: 'My point so far will have been entirely misunderstood if it is thought that I am talking about meaning in movement.'

89 Ibid 32.

90 Ibid 33.

91 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 13, 30.

92 Ibid 31. See also Goldsworthy, 'The Case for Originalism', above n 31, 50–1.

93 Kirk, above n 59, 358.

Balkin attempts to narrow the range of abstractions that is constitutionally plausible by drawing attention to the textual distinctions between rules, standards and principles. The force of these distinctions may be seen in the answer they provide to one of Goldsworthy's favourite examples in defence of originalism, namely, the words of s 51 conferring with respect to enumerated subjects plenary power to make laws 'for the peace, order, and good government of the Commonwealth'.[94] Goldsworthy argues that under a non-originalist interpretive theory there would be no principled basis to resist construing the phrase literally as a limitation upon legislative power, the absurdity of which shows the error of non-originalism.[95] Zines has described this as '[o]ne of Goldsworthy's strong arguments'.[96] The argument is correct as far as it goes, but it is correct only because the phrase instantiates a (power-conferring) *rule*. The interpretive rigidity that it counsels may not apply to different constitutional provisions that, in their original meaning, deploy *standards* or *principles* instead.

It is true that the *Australian Constitution* does not contain quite the proliferation of abstract principles to be found in the *US Constitution*, and particularly the Bill of Rights, though neither is it devoid of them: 'directly chosen by the people',[97] 'just terms',[98] 'absolutely free',[99] 'inconsistency',[100] 'disability or discrimination'.[101] It is also important to emphasise that Balkin does not limit his account to *moral* principles, but includes *structural* principles as well: 'My account does not require that constitutional principles must state norms of justice or moral values. Many constitutional principles … like the principles of federalism or the separation of powers, state policies or goals within particular institutions.'[102]

Understanding federalism as a structural 'principle' that is amenable to different 'constructions' by different generations allows us to explain the fundamentally opposed views of the federal structure that prevailed before and after the *Engineers' Case*.[103] That case, of course, saw Isaacs J's expansive view of Commonwealth powers finally prevail over Griffith CJ's narrow view based on a notion of reserved state powers. Goldsworthy has recently argued that the *Engineers' Case* must be understood as either (1) the correction of antecedent error or (2) a 'judicial update' of the Constitution, and cannot be explained (as the High Court following Windeyer J now explains it)[104] as (3) 'a consequence of developments that

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94 See *Riel v The Queen* (1885) 10 App Cas 675, 678–9.

95 See Goldsworthy, 'Interpreting the Constitution', above n 59, 681-3; Goldsworthy, 'The Case for Originalism', above n 31, 43–4, 67–9.

96 Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25 *Adelaide Law Review* 3, 15. See also Zines, above n 62, 25.

97 *Australian Constitution* ss 7, 24.

98 Ibid s 51(xxxi).

99 Ibid s 92.

100 Ibid s 109.

101 Ibid s 117.

102 Balkin, above n 1, 351 n 12.

103 (1920) 28 CLR 129.

104 *Work Choices Case* (2006) 229 CLR 1, 119 [193] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), citing *Payroll Tax Case* (1971) 122 CLR 353, 396–7 (Windeyer J); see also Gageler, 'Beyond the Text', above n 85, 142, citing 'The Armistice' (1918) 25 CLR v.

had occurred outside the law courts'.[105] *Living Originalism* suggests this might be a false trichotomy, and offers another possibility: (4) constitutional construction. The difference between Balkinian construction and 'judicial update' by a 'more radical … more robust kind of judicial creativity'[106] is significant. For Goldsworthy, 'judicial update' of the federal structure must entail either the removal of authentic constitutional implications, or the addition of spurious implications.[107] But this regards 'federalism' as possessing a rule-like and 'skyscraper' quality. By reference to the 'skyscraper' — some determinate cluster of authentic federalism implications — either one or the other of Griffith CJ and Isaacs J must have done something spurious. Balkin would say, however, that federalism is not a *rule*, but a structural *principle*, allocating both delegation and constraint. On that footing, both Griffith CJ's and Isaacs J's views can be read as constructions within the allocation of delegation (while the allocation of constraint might be something like the principle later identified in *Melbourne Corporation v Commonwealth*).[108] Each construction is permissible, and can be seen to be legitimate for its own time if it be accepted that over the first two decades of national life, there was a generational shift in constitutional attitude (or 'movement'),[109] perhaps partly in reaction to external social facts, towards central government.

Against the claim that there was a genuine shift of this kind explaining and justifying the *Engineers' Case*, Goldsworthy invokes Geoffrey Sawer for the proposition that, in 1920, majority political opinion was opposed to the expansion of federal powers.[110] The first response to this argument is that judicial sanction of expansive federal power does not deprive the electorate of its political capacity to discipline a parliamentary government for over-reaching in the use of that power if there be genuine opposition to federal control of some or another issue. Therefore, the principle in the *Engineers' Case*, being about the powers the federal Parliament *has*, should not be measured against political opinion about how the federal Parliament should *exercise* those powers. The second response is that 'constitutional constructions' by the courts can be expected to be responsive to democratic politics only in the long term.[111] When one considers Sawer's assessment of federal politics' broader arc around 1920, it is far from clear that the *Engineers' Case* was not responsive to and consistent with long-term trends. Sawer says of the divided High Court as early as the period of the third Parliament (1906–10) that although '[t]he majority were closer to the likely intentions of the Founders; the minority were closer to the likely preferences of the electors'.[112] By

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105 Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers' Case*' (2009) 37 *Federal Law Review* 363, 363–5.

106 Ibid 370.

107 Ibid. In fairness, Goldsworthy appears here to be following Windeyer J's own claim that the Court's 'avowed task is simply the revealing or uncovering of implications that are already there': at 365, citing *Payroll Tax Case* (1971) 122 CLR 353, 402. See also Goldsworthy, 'Originalism in Constitutional Interpretation', above n 13, 16.

108 (1947) 74 CLR 31. See also *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

109 Detmold, above n 87, 32–3.

110 Goldsworthy, 'Justice Windeyer', above n 105, 364 n 8, citing Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 329.

111 Balkin, above n 1, 327.

112 Sawer, above n 110, 87.

1929, Sawer attributes the demise of the Bruce-Page government to its attempted return to decentralisation 'while Labour, in spite of its dissatisfactions with the post-Higgins Court, stayed true to its instinctive preference for federal control'.[113] One might also perceive the trend by comparing the unsuccessful referendums to extend federal powers held in 1911 and 1913, and by noticing the greatly improved though narrowly insufficient support achieved by 1913.[114]

This point aside, Goldsworthy views the 'external social facts' account of the *Engineers' Case* as endorsing illegitimate interpretive methods. He objects to the possibility that 'future judges will be free to reject the current emphasis on text and structure, and give the *Constitution* a radically novel construction, if they believe that relevant social and political conditions have, once again, changed.'[115] But if one views legitimate evolution not simply as the unrestrained creative reaction to perceived social facts, but as a Balkinian process of construction that occurs within the original meaning of the text and structure of the framework — 'taking seriously the Constitution's choice of rules, principles, standards, and silences'[116] — then any abandonment of text and structure is precluded. Professional norms and constitutional culture, which can change only very gradually,[117] further constrain judges from radical, and sudden, novelty.

C *Constructions*

One question to arise from *Living Originalism* is why we would call the constructions of abstract standards and principles '*constitutional* constructions'. Where the Constitution delegates to, rather than constrains, future generations, why are not their subsequent elaborations simply 'ordinary politics'? Goldsworthy points out that change in Australia occurs largely 'through the political process, not through the "construction" of abstract constitutional principles'.[118] Similarly, Gageler's conception of the framework Constitution is inseparable from his conception of responsible government (ordinary politics) as the primary 'mechanism of constitutional constraint'.[119]

Balkin accepts that 'constitutional constructions' in the form of legislation (such as the *Social Security Act* of 1935 and *Civil Rights Act* of 1964) 'can be amended … or even repealed through the ordinary political process'.[120] So he cannot be using 'constitutional' to mean 'unamendable by ordinary legislation'. It

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113 Ibid 327.

114 In 1911, 1 248 226 out of 2 341 624 registered voters cast votes; two questions were put and failed, with overall minorities of 259 348 and 247 724 votes. In 1913, 2 033 251 out of 2 760 216 registered voters cast votes; six questions were put and failed, with overall minorities ranging from just 8612 to 33 688 votes: Department of Parliamentary Services (Cth), *Parliamentary Handbook of the Commonwealth of Australia* (32nd ed, 2011) 376–9.

115 Goldsworthy, 'Justice Windeyer', above n 105, 374.

116 Balkin, above n 1, 43.

117 Ibid 329–34.

118 Goldsworthy, 'Constitutional Cultures', above n 3, 687.

119 Gageler, 'Foundations of Australian Federalism', above n 85, 164.

120 Balkin, above n 1, 311.

is also clear that Balkin regards the distinction between constitutional construction and ordinary politics as blurred:

> in practice it is useless to try to draw clear boundaries between activities that in hindsight we would label constitutional construction and ordinary political activity. Potentially almost all political and governmental activity could be constitutional construction. Often we may only know what counts later on when institutions become settled and practices and precedents become established.[121]

The word 'constitutional' appears to be working in a 'small-c' sense. Small-c constitutional are those constructions which concern and affect the powers of governmental institutions — those which 'help forge new understandings of the relative powers of the different branches or of the federal and state governments under the Constitution'.[122]

It is easy within the Australian system to regard the written Constitution as exhaustive of constitutional commitments. But it is also plainly wrong to do so, as constitutional conventions, for example, readily attest. There is a growing interest in a small-c constitution and specifically in the ways in which statute and common law transform constitutional understandings. As the Hon James Spigelman noted:

> Constitutional significance should be attributed to a number of common law doctrines and a number of statutes. Both are, of course, theoretically able to be amended by Parliament. Nevertheless, the fundamental nature of some of these laws and principles, and the improbability of modifying legislation, justifies treating such statutes and principles of the common law as part of constitutional law.[123]

Common law rules of statutory interpretation have been described as 'constitutional',[124] as has the more specific principle of legality, or presumption against the abrogation of fundamental common law rights.[125] Some judges have suggested that whether any 'deep' common law rights constrain state constitutional powers remains an unanswered question.[126] Chief Justice French has articulated, in extra-curial writings, a constitutional conception of the common law and statute law underpinning the native title regime.[127] These examples might be regarded as

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121 Ibid 298–9.

122 Ibid 299.

123 James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 55.

124 See *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Dickson v The Queen* (2010) 241 CLR 491, 507 [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146], 95–6 [183] (Gummow J), 123 [280] (Hayne J).

125 *Evans v New South Wales* (2008) 168 FCR 576, 593–4 [70] (French, Branson and Stone JJ). See also Spigelman, above n 123, 53–6; Leslie Zines, 'Chief Justice Gleeson and the Constitution' in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 269, 271, 275–7.

126 *Momcilovic v The Queen* (2011) 245 CLR 1, 215–16 [562]–[563] (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ).

127 Chief Justice Robert French, 'Native Title — A Constitutional Shift?' (Speech delivered at the JD Lecture Series, University of Melbourne, 24 March 2009).

manifesting small-c 'constitutionality' in a merely adjectival, or even speculative, sense. There are more substantial examples that I want to consider in greater detail.

One under-theorised aspect of Australian constitutionalism is the effect of ordinary statutes upon constitutional principle. The construction of the written Constitution can legitimately evolve as a result of developments in ordinary legislation. Sometimes this evolution is the product of the Constitution's language being taken to have referred to a body of law acknowledged in 1900 to be in a state of development, such that the language is properly construed to be capable of accommodating future developments in that body of law.[128] Sometimes the evolution is less overtly contemplated by the constitutional text. In *Street v Queensland Bar Association*,[129] Gaudron J justified overruling the existing case law on s 117 in part because the decisions:

> [did] 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).[130]

Her Honour continued:

> These developments may be seen in legislative provisions such as those contained in the *Sex Discrimination Act 1984* (Cth), s 5, the *Anti-Discrimination Act 1977* (NSW), s 7, the *Equal Opportunity Act 1984* (Vic), s 17, and the *Sex Discrimination Act* 1975 (UK), s 1.[131]

Amelia Simpson has more recently argued that case law from statutory anti-discrimination regimes '[a]s a source of guidance … might be tapped and channelled' into the constitutional context.[132] And Gummow J suggested in oral argument that something similar might have occurred in relation to s 92:

> I say we have moved on from *Cole v Whitfield* because in *Betfair* there is a deeper appreciation, perhaps, of what one might call the competition aspects of this doctrine, given the fuller appreciation now of life with Part [IV] of the *Trade Practices Act* for many years.[133]

'Discrimination' within the meaning of s 117, and 'absolutely free' within the meaning of s 92, are examples of standards or principles requiring successive generations to engage in what Balkin calls 'construction'. Gaudron and

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[128] See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495–6 [23], 498–9 [34] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 89 [5] (Gleeson CJ), 97 [34] (Gaudron and Gummow JJ), 141–2 [165] (Hayne J).

[129] (1989) 168 CLR 461.

[130] Ibid 566.

[131] Ibid.

[132] Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications and Implications' (2007) 29 *Sydney Law Review* 263, 286.

[133] Transcript of Proceedings, *Sportsbet Pty Ltd v New South Wales* [2011] HCATrans 52 (11 March 2011) 106–9. See *Cole v Whitfield* (1988) 165 CLR 360; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act 1974* (Cth)).

Gummow JJ's insight is that ordinary legislation may transform the shared understandings of constitutionally significant principles and standards.[134]

On the other hand, the supremacy of the Constitution, which precludes the Parliament from enacting itself into power,[135] must limit if not deny the capacity of ordinary legislation to alter constitutional meaning. The challenge is to distinguish 'constitutional construction' statutes from other statutes. One idea is that certain statutory provisions that articulate a principle or standard upon which the text of the Constitution confers special significance might function not only as legislation *simpliciter*, but also as *evidence* of underlying constitutional commitments in respect of that principle or standard. The kind of statutes that might function in this special way are those which attain a measure of canonicity, do so over a sustained period of time, and effect structural reform. I emphasise structural reform — like the competition law and discrimination laws — because the legislation must deal with the large principles or standards found in the Constitution, and must also be capable of transforming basic premises of the legal culture, which affect judges in making constitutional decisions.[136] I emphasise canonicity and the passage of time, because truly enduring constitutional commitments will embody the assent of a *temporally extended* people and not a merely transient majority.[137] In this way, consistent with the observations of Gaudron and Gummow JJ, legislation can affect constitutional meaning without elevating the stream above its source.

The recent voting rights cases can be read in precisely this light. One of the hardest questions to arise out of *Roach v Electoral Commissioner*[138] is why the disenfranchisement of prisoners serving a sentence of three or more years remained valid, while a broader exclusion of prisoners was invalidated. What is the constitutional basis on which such a line can be drawn? And why was the minority wrong to hold that the Constitution commits to the Parliament the task of drawing that line from time to time?[139] There is much more to say about the decision than is possible here, but notice how the constitutional mandate that the Parliament be composed of representatives 'directly chosen by the people'[140] arguably embodies not a rule, but a standard that is properly amenable to 'constitutional construction'. The words 'must be understood as words of generality, not as words of universality',[141] or at least not *necessarily* as words of universality, it being a matter contingent upon contemporary construction. Viewed one way, *Roach* raises the problematic question of why the court's 'construction' should prevail over the

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134 Cf Michael Stokes, 'The Interpretation of Legal Terms Used in the Definition of Commonwealth Powers' (2007) 35 *Federal Law Review* 239, 246 (describing constitutional heads of power as referring to traditions of argumentation capable of evolution).

135 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

136 Cf Balkin, above n 1, 71.

137 Cf Bruce Ackerman's account of 'landmark statutes', identified by the extraordinary process by which they come to be enacted in times of high constitutional politics: Bruce Ackerman, 'The Living Constitution' (2007) 120 *Harvard Law Review* 1737, 1770–1 (describing the Civil Rights Act of 1964 as the product of constitutional politics precipitated by *Brown v Board of Education*, 347 US 483 (1954)). See also Ackerman, *We the People: Foundations*, above n 43, 266–7 (describing in more detail the phases of higher lawmaking).

138 (2007) 233 CLR 162.

139 Ibid 206 [111]–[112] (Hayne J), 223 [177] (Heydon J). See also *Australian Constitution* ss 8, 30.

140 *Australian Constitution* ss 7, 24.

141 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 210 [127] (Hayne J).

legislature's 'construction'. But, viewed another way, the court's constructional choice actually adhered closely to longstanding legislative practice:

> there is long established law and custom, stemming from the terms of the institution in the Australasian colonies of representative government, whereby disqualification of electors (and candidates) was based upon a view that conviction for certain descriptions of offence evinced an incompatible culpability which rendered those electors unfit (at least until the sentence had been served or a pardon granted) to participate in the electoral process. That tradition is broken by [the impugned law] as such a law has no regard to culpability.[142]

Roach can be viewed less as a judicially *creative* restriction upon legislative power, and more as a judicially *conservative* resistance to a transient majority's attempt to enact what would have been a significant departure from an entrenched practice that was not merely legislation *simpliciter*, but also evidence of a constitutional commitment made by a temporally extended people. In Balkin's words (albeit in a slightly different context) the court has to decide whether it 'has adequately recognized a genuine trend, and whether the trend marks a truly enduring constitutional value or merely reflects a temporary and revisable policy preference.'[143]

A similar analysis can be applied to *Rowe v Electoral Commissioner*,[144] which held to be invalid laws that amended the timing of the closure of the electoral rolls. French CJ noticed the manner in which the impugned amending legislation departed from norms established by a course of legislative and executive practice:

> The legal effect of the impugned provisions is clear. They diminish the opportunities for enrolment and transfer of enrolment that existed prior to their enactment. These were opportunities that had been in place as a matter of law for eight federal elections since 1983. They were consistent with an established executive practice which provided an effective period of grace for nearly fifty years before 1983.[145]

One of the dissenting judges expressly controverted this reasoning in terms, with respect, comporting with orthodox understandings of the hierarchy of legal sources: 'The constitutional validity of legislation depends on compliance with the *Constitution*, not on compliance with "higher" standards established by the course of legislation and by the operation of executive discretion.'[146] The difference between the two views appears to be one about the extent to which the Constitution exhausts constitutional principle, and perhaps also about the possibility of constitutional constructions by the political branches.

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142 Ibid 200–1 [90] (Gummow, Kirby and Crennan JJ). See also at 182 [23]–[24] (Gleeson CJ). In a slightly different context see also at 174 [7] (Gleeson CJ): 'the words of ss 7 and 24, because of changed historical circumstances *including legislative history*, have come to be a constitutional protection of the right to vote' (emphasis added).

143 Balkin, above n 1, 302.

144 (2010) 243 CLR 1.

145 Ibid 38 [78] (French CJ).

146 Ibid 102 [311] (Heydon J). See also at 89 [266] (Hayne J).

The voting rights cases are subtle and complex. The particular aspect of the reasoning examined here was not necessarily central to either result, and nothing I have said should be taken to deny that very difficult questions must arise if courts strike down legislation on a basis such as this.[147] Balkin does not suggest that 'constitutional constructions' in the form of legislation cannot be repealed by ordinary means. But this does not detract from the need to understand and explain the cases, which plainly prompt the question of how it is that ordinary legislation (and executive practice) can affect constitutional meaning. *Living Originalism*'s account of building a constitution out by 'construction' offers a powerful set of ideas in that direction.

IV Conclusion

I have not considered in any detail Balkin's notion of 'redemptive constitutionalism'. It will be apparent that 'redemption' is quite foreign to Australian constitutional culture and practice. The *Australian Constitution*, while serving the function of 'basic law', does not obviously serve the functions of 'higher law' or 'our law'.[148] It is a distinctive feature of American culture that 'political and social movements … have regularly drawn on the constitutional text and its underlying principles to justify social and legal change … [and that] ordinary citizens have called on the text of the Constitution as a foundation and source of their rights'.[149] Any notion of citizens 'redeeming' their shared constitutional plan, by articulating 'protestant constitutional claims',[150] sits uneasily with the realities of Australia's un-penetrating constitutional culture.

Nevertheless, *Living Originalism*'s treatment of interpretive method fits well with the broad commitments of Australian constitutional scholarship and practice: it accepts textualism; it aspires to reconcile polarised viewpoints; and it does not pretend to offer an 'algorithm of decisionmaking'.[151] In so doing, it presents a vision of the constitutional enterprise as an on-going project of governance. It offers a useful account of how to comprehend a constitution that was designed to be an enabling plan or a framework, rather than an immutable or rigid instrument of restraint: the framework is to be realised by careful attention to how the text's original choice of rules, standards, principles and silences effects an allocation of both trust and distrust. Where we stand the trustee of delegated power, we must make and take responsibility for the constructional choices committed to us. Constructions to build out constitutional principles and standards can take various forms and, by illuminating these forms, *Living Originalism* can fertilise the emerging Australian interest in the legitimate influence of the common law and ordinary legislation upon constitutional principle.

147 Cf *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 [180] (Heydon J).
148 Goldsworthy, 'Constitutional Cultures', above n 3, 685.
149 Balkin, above n 1, 83–4. See also at 17, 54.
150 Ibid 95.
151 Ibid 134.