

# AUSTRALIAN ORIGINALISM WITHOUT A BILL OF RIGHTS: GOING DOWN THE DRAIN WITH A DIFFERENT SPIN

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## I INTRODUCTION

Interest in, and advocacy of, some version or other of originalist theories of constitutional interpretation is largely — perhaps overwhelmingly — an American concern. In my native Canada, ‘living tree’<sup>1</sup> or what Americans would call ‘living constitution’<sup>2</sup> interpretive approaches have vanquished all remnants of originalism when it comes to the top judges there interpreting Canada’s entrenched, constitutionalized *Charter of Rights and Freedoms*.<sup>3</sup> And if originalism has little appeal in Canada it

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<sup>1</sup> In Canada this is traced back to the metaphor used by Lord Sankey in *Edwards v Attorney-General for Canada* [1930] AC 124 Privy Council. For more see Bradley Miller’s ‘Beguiled by Metaphors: The “Living Tree” and Originalist Constitutional Interpretation in Canada’ (2009) 22 *Canadian Journal of Law and Jurisprudence* 331. See too Grant Huscroft’s ‘Vagueness, Finiteness, and the Limits of Interpretation and Construction’ in (eds G Huscroft and B Miller) *The Challenge of Originalism* (CUP, 2011 – hereafter ‘*Challenge of Originalism*’), 203, 205.

<sup>2</sup> See, for example, Steven D Smith’s ‘That Old Time Originalism’ and Stanley Fish’s ‘The Intentionalist Thesis Once More’ both in *Challenge of Originalism*, 230, 114 respectively.

<sup>3</sup> See Huscroft’s ‘Vagueness, Finiteness, and the Limits of Interpretation and Construction’ in *Challenge of Originalism*. And note that I refer to the theory the judges purport to adopt as opposed to what an observer might sometimes think they are doing in practice. Note too that this claim is not true when it comes to federalism cases, to interpreting division of powers disputes. See Justice Ian Binnie, ‘Constitutional Interpretation and Original Intent’ in (eds G. Huscroft and I. Binnie) *Constitutionalism in the Charter Era* (LexisNexis, 2004), 345. Finally, I am also prepared to concede that almost everyone *says* that original intentions and understandings matter to some extent, before many then immediately proceed to

has basically none in the United Kingdom,<sup>4</sup> in New Zealand,<sup>5</sup> or in the decisions of the European Court of Human Rights in Strasbourg.<sup>6</sup> Outside the US it is only in Australia that originalism still has a pulse.<sup>7</sup> In fact I would say<sup>8</sup> that Australia ranks second to the US in terms of

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clarify that it is just that for them these intentions and understandings are not dispositive, or some such qualifier.

<sup>4</sup> For instance, see how the section 3 reading down provision of the *Human Rights Act 1998* (UK) has been interpreted in the leading case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (repeatedly affirmed subsequently): ‘It is now generally accepted that the application of s 3 [the reading down provision in the United Kingdom’s *Human Rights Act*] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning admits of no doubt, s 3 may none the less require the court to ... depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant...’ at [29], [30], and [32]. See too my ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About – Doin’ the Sankey Hanky Panky’ in (eds. T. Campbell, K. Ewing and A. Tomkins) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011), 108.

<sup>5</sup> Again, the statutory bill of rights there has led to all other statutes being interpreted in what the judges take to be a rights-respecting way, though nowhere near as virulently as in the United Kingdom. See, for example, *Simpson v Attorney-General* (‘*Baigent’s Case*’) [1994] 3 NZLR 667. See too my ‘The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand’ in (eds T. Campbell et al) *Sceptical Essays on Human Rights* (Oxford University Press, 2000), 375.

<sup>6</sup> See George Lestas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509 for an argument that the European Court of Human Rights has been dismissive of originalism, preferring a ‘moral reading’ of convention rights.

<sup>7</sup> The best known Australian originalist is Jeffrey Goldsworthy. See, *inter alia*, his ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1 and his ‘The Case for Originalism’ in *Challenge of Originalism*, 42. See too my ‘The Three “Rs” of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no)‘Riginalism’, fn. 70 below, and my ‘The Curious Concept of the “Living Tree” (or Non-Locked-In) Constitution’ in *Challenge of Originalism*, 179.

<sup>8</sup> And American comparative law scholar, and originalism proponent, Richard Kay agrees with me in this claim.

originalism being a viable theory of constitutional interpretation with proponents in the courts,<sup>9</sup> and in the law schools.<sup>10</sup>

So that is one ground for looking to Australia when seeking answers to at least some of the disagreements between ‘living Constitution’ adherents and originalism adherents. Australia may, or may not, bolster some aspects of the originalist case.

Another reason to look at Australia, and I will come back to this in a section below, is because Australia lacks any sort of a national bill of rights, constitutional or statutory. This absence might be surprising given that all other democracies today have some variant or other of a bill of rights instrument.<sup>11</sup> Or it might also be surprising given that by far the biggest influence in drafting the 1901 Australian Constitution — the one that was most copied and mimicked — was the US constitution.<sup>12</sup>

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<sup>9</sup> For example, the recently retired Justice Dyson Heydon of the High Court of Australia is an originalist. See, for example, his judgment in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [267]. So too was retired High Court of Australia Justice Ian Callinan.

<sup>10</sup> See, above n 7.

<sup>11</sup> See, from someone with whom I whole-heartedly disagree on many substantive issues, Geoffrey Robertson’s noting that ‘Australia is the only progressive country without a bill of rights’ in *The Statute of Liberty: How Australians can take back their rights* (Vintage, 2009), 152. Of course the role of judges is nowhere near as powerful in some of these other jurisdictions with bills of rights as it is in the US and Canada. Moreover this is a comparatively recent phenomenon. At the end of World War II only France and the US had national bills of rights, and in the former it was not justiciable.

<sup>12</sup> See Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (CUP, 2009), ch. 3, *inter alia* 70. See too Cheryl Saunders, *The Constitution of Australia: A Conceptual Analysis* (Hart Publishing, 2011), 16. And see Gabrielle Appleby, ‘Imperfection and Inconvenience: Boilermakers’ and the Separation of Judicial Power in Australia’ (2012) 31(2) *University of Queensland Law Journal* 265, at the main text to fn. 25.

The Framers of Australia's Constitution were extremely well acquainted with the American model. Albeit in the context of the inherited British Westminster parliamentary model, they opted for a US-style *elected* Upper House Senate<sup>13</sup> rather than the Canadian or UK options (though at the time of federation the US's Senate was indirectly elected, its members being chosen by State legislatures). They also copied the American model of federalism rather than the Canadian one.<sup>14</sup> They left the choosing of the top State court judges to the States, as in the US, not to the centre, as in Canada. In fact, Australia even copied the US in opting to create a national capital city not part of any State.<sup>15</sup> As far as important matters go, the Australian Founders only rejected the US model when it came firstly to the amending provision — Australia opting for a Swiss-inspired direct democracy section 128 which requires amendments to be passed in at least one House of the national Parliament and then to win a two-pronged referendum needing a majority of voters nationally *and* a majority of voters in a majority of the States<sup>16</sup> — and secondly when it came to the Bill of Rights.

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<sup>13</sup> The similarities to the US model include the facts of there being the same number of Senators from each state (currently in Australia it is 12 per State); the limited period of tenure; and the full-blooded scope of review powers of these Upper Houses. But Australia's Framers added a 'dispute between the two Houses' resolving mechanism. See s 57 double dissolution dispute resolving procedure if the two houses disagree.

<sup>14</sup> So the Australian drafters opted for a list of enumerated powers for the central government alone (the residue going to the States), rather than the Canadian-style option of enumerating the powers of both the centre and the provinces.

<sup>15</sup> See, Tony Winkelman, 'Selecting a Capital Territory' (2012) 56 *Quadrant* 80. And note that until the 1970s residents there did not have a vote for the Senate or House. For the High Court of Australia case that decided territorians could be given Senate representation by Parliament see *Western Australia v Commonwealth* ('*First Territory Senators Case*') (1975) 134 CLR 201.

<sup>16</sup> There have been 44 Constitutional referenda in Australia and 38 have failed. All but 5 of the failures lost on the first prong of not garnering a majority of voters nationwide.

So despite copying so much else from the American Constitution,<sup>17</sup> a bill of rights was deliberately (and from today's vantage perhaps was surprisingly) omitted. This decision not to include one was made after careful consideration, discussion and debate by those with an excellent knowledge of the US Bill of Rights.<sup>18</sup> Remember that because it will be relevant later in this paper.

## II WHY CONSIDER ORIGINALISM IN A JURISDICTION WITHOUT A BILL OF RIGHTS?

My goal in this paper is not to debate the pros and cons of a Bill of Rights.<sup>19</sup> Rather, my goal is to look at originalism in the context of a

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<sup>17</sup> In fact I think an argument could be made that Australia is the closest constitutional progeny the US has, certainly the most successful progeny.

<sup>18</sup> See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136: '[T]he prevailing sentiment of the framers [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.' per Mason CJ. See too Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249, 252 and his *Freedom of Speech in the Constitution* (CIS, 1998), ch. 2. And also see Alexander Reilly, Gabrielle Appleby, Laura Grenfell and Wendy Lacey, *Australian Public Law* (OUP, 2011), 44-5.

<sup>19</sup> That said, and to lay my cards on the table, I am a strong bill of rights sceptic. My publications on bills of rights include 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 *Oxford Journal of Legal Studies* 337; *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate, 2002); 'Rights, Paternalism, Constitutions and Judges' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) 29; 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561; 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63; 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197; 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; 'Rights Internationalism Coming Home to Roost?' (2006) *San Diego Law Review* 1 (co-written with Grant Huscroft); 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533; 'The Victorian Charter of Human Rights And Responsibilities' (2006) 30 *Melbourne University Law Review* 906; 'Jeremy Waldron and the Philosopher's Stone' (2008) 45

jurisdiction without a Bill of Rights, namely Australia. Yet the obvious question that needs answering before doing that is ‘why bother?’ ‘What can a bill of rights-lacking jurisdiction tell us, or possibly tell us, about originalist constitutional interpretation more generally?’

‘Maybe something quite important; maybe nothing at all; it depends upon why you value originalism’, is my answer. And in the rest of this section I will attempt to sketch out that answer, to give at least the arguments for why, on some bases and in some circumstances, looking at Australia can be informative in testing certain core presuppositions and is something American originalists ought to do.

#### A *Depends on why you value originalism*

To begin to sketch out a case for the possible relevance of Australia to American originalists, our first stop is to ask why someone values or supports originalist interpretation. I will divide the world into two: those who support originalism on a conceptual or analytical basis and those who do so for some normative or ‘it will further some other value of mine’ basis. The first of these amounts to a universalist-type claim, that if you want to claim to be interpreting the words of any constitution – to be honestly seeking their meaning – then only some form or other<sup>20</sup> of originalism actually does that. Put more directly, these sort of originalism adherents take the position that appeal to originalist methods is necessary in order actually to be doing constitutional interpretation.

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*San Diego Law Review* 133; ‘Meagher’s Mischaracterisations of Majoritarianism’ (2009) 20 *King’s Law Journal* 115; and *The Vantage of Law: Its Role in Thinking About Law, Judging and Bills of Rights* (Ashgate, UK, 2011).

<sup>20</sup> We can for now ignore or postpone which forms or variants of originalism that might be.

That may be because of the nature of constitutional (or more widely of legal, or more widely still of any sort of) interpretation itself. Or, it may be because of the nature of all constitutions.

Brian Bix has considered both of these possible grounds for supporting this universalist-type claim on behalf of originalism.<sup>21</sup> He is very sceptical about arguments flowing from some supposed essential nature of all constitutions themselves,<sup>22</sup> while he is somewhat less sceptical of a ‘universal theory of constitutional originalism [that focuses on] ... the nature of *legal* interpretation’.<sup>23</sup>

Of course Bix limits his consideration of these universalist options more or less wholly to ‘new originalist’ or original public meaning (‘OPM’) variants, commenting in passing that ‘[t]raditional originalism, focusing on original intentions [call this original intended meaning or ‘OIM’], might be a somewhat better candidate to be part of a general [or universalist] theory of interpretation’.<sup>24</sup>

I certainly agree with that passing comment. Indeed, the chapters by Stanley Fish and Larry Alexander that appear in the same book as Bix’s chapter can be read as offering not just a defence of ‘old originalism’ or

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<sup>21</sup> See Brian Bix, ‘Constitutions, Originalism and Meaning’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 285, 292.

<sup>22</sup> And anyway, as Bix puts it, ‘an argument that all constitutions must be interpreted the same way seems an even harder persuasive task than the broader argument... that all (legal) interpretation must be done the same way. For assuming that the broader argument *cannot* be made, it would be difficult to say why *constitutions* would have to be interpreted in one single way’. Ibid 295.

<sup>23</sup> Ibid 299. Yet while this ‘may be the most promising [option] ... it would seem hard to show how a single approach to interpretation *must* be used’.

<sup>24</sup> Ibid 296.

of original intentions interpretation, but also as making precisely this sort of universalist, ‘this just *is* what interpretation is’ type claim.<sup>25</sup>

That said, and whatever one might make of these various universalist claims (and as an aside I find the Fish/Alexander/Kay position to be a very powerful one), in this paper I put them all to one side and focus on the contingent, normative basis for supporting originalism — that it will (or is likely to) further some other value or goal that is highly desired. I do that, for one thing, because universalist claims on behalf of originalism leave little, if any, room to ask Americans to learn from the bill of rights-lacking Australian experience. If doing originalism just is, by definition almost, what interpreting and seeking meaning really is, then more limited arguments about how, say, originalist interpretation is more constraining on point-of-application judges, or leaves more scope for democratic decision-making, are only needed where plenty of judges are prepared to do something other than really interpret.

And given that in my view originalist constitutional interpretation loses its attractiveness (whether the alternatives really be interpretation or not) in countries where constitutions are imposed by departing former colonial masters or by triumphant wartime vanquishers, in short where the constitution being interpreted has little or no legitimacy,<sup>26</sup> I want here to side-step all those arguments, and sub-arguments.

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<sup>25</sup> See Stanley Fish, ‘The Internationalist Thesis Once More’ and Larry Alexander, ‘Simple-Minded Originalism’ in *Challenge of Originalism*, 99 and 87 respectively. See too Richard Kay, ‘Original Intention and Public Meaning in Constitutional Interpretation’ (2009) 103 *Northwestern University Law Review* 703. Of course saying ‘this is what interpretation is’ is not the same as saying ‘those with the authoritative power to declare what their country’s constitution will henceforth be taken to mean cannot undertake some other activity when that constitution is deemed to be illegitimate, morally suspect, or both’.

<sup>26</sup> See my ‘The Curious Concept of the “Living Tree” (or Non-Locked-In) Constitution’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of*



I want to consider the situation where originalism is valued because its use is believed to have good consequences, to further other desired values and goals, and want to do so regardless of whether the main alternatives of ‘living Constitutionalism’, or ‘moral readings’, or ‘Herculean best fits’ are (or are not) best characterised as really interpreting or as doing something else.

The arguments in the remainder of this paper, then will be unashamedly aimed at those who are normative originalists. It is to them, or some of them, that I say ‘have a look at bill of rights-lacking Australia’.

### 1 *Depends on which values in particular*

In setting out why American originalists might wish to look at Australia, I firstly pointed to the practical reality that originalism (though less so than in the US) is still alive Down Under, unlike in Canada (and for that matter in India and South Africa with some of the most ‘judicially active’ judges anywhere, the question of constitutional interpretation not arising in the unwritten constitution jurisdictions of the United Kingdom and New Zealand). But secondly, I claimed more specifically that a bill of rights-lacking jurisdiction such as Australia might help test certain grounds or reasons sometimes given for supporting originalism. In the section above, I ruled out any universalist, conceptual type originalism-supporting grounds or bases for looking at Australia. If considering a bill of rights-lacking jurisdiction is worthwhile, it is only worthwhile when

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*Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 179. See too Richard Kay, ‘Constituent Authority’ (2011) 59 *American Journal of Comparative Law* 715, 756-8.

originalism is supported on normative, contingent, ‘this interpretive approach is likely to deliver these other values and outcomes I support’ grounds.

Of course Australia without a bill of rights will not be a testing ground for *all* instrumental reasons Americans might have for being originalists, only some. In this sub-section I will specify which ones I think those are. (And as it happens they are ones that matter to me too.)<sup>27</sup>

These contingent values or outcomes claimed to follow (on average, over time) from the honest application of originalist interpretation will come as no surprise to anyone. They are the benefits of 1) a more constrained judiciary with less room for judges to appeal to their own moral judgments or sentiments in deciding cases and 2) living in a jurisdiction in which there is more scope for society’s contentious, debatable issues to be decided by democratic decision-making procedures (meaning ‘letting the numbers count’ or majoritarian procedures).<sup>28</sup>

Steven D Smith calls them the purposes of ‘(a) constraining courts and preventing them from simply reading current fashions into constitutional law [and] (b) preserving the ability of democratic institutions — of “We the People” — to make meaningful decisions about their constitutions by enacting provisions with relatively definite and fixed meanings [and hence] providing a basis for criticizing “activist” decisions’.<sup>29</sup> Brian Bix describes the benefit as being ‘the constraint of judges who might

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<sup>27</sup> Ibid.

<sup>28</sup> See James Allan, ‘Thin Beats Fat – Conceptions of Democracy’ (2006) 25 *Law & Philosophy* 533.

<sup>29</sup> Steven D Smith, ‘That Old-Time Originalism’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) *Challenge of Originalism*, 230. (Smith articulates the same point differently on 232-3).

otherwise be tempted to enforce their policy preferences'.<sup>30</sup> And Stanley Fish rather more broadly comes at it from the other direction saying 'that "the-interpreters-decide-on-the-basis-of-what-is-best" account of interpretation is the true judicial activism because by attaching interpretation to political hopes and sundering it from authorial intention, it sets interpreters free from any constraints (what I or you think best is not a constraint) and encourages them to make it up as they go along'.<sup>31</sup>

These are the two claimed instrumental benefits of originalist interpretation — more constrained judges and more scope for democratic decision-making — that a bill of rights-lacking jurisdiction such as Australia may more easily test.

## 2 *May depend on which originalism*

It would be nice at this point to move on as though originalist interpretation were one monolithic approach, not riven by 'old' and 'new' branches, not splintering into camps variously focused on intentions, text, original methods, interpretation versus construction, expected rule meaning versus expected rule application, and more — very much like the schisms of Protestant denominations.<sup>32</sup> Alas, though, originalist theories of constitutional interpretation clearly are not uniform and not monolithic. For my purpose in this paper, though, that does not directly matter. What does matter is whether the particular variant of originalist interpretation has the practical effect (to use Steven Smith's words) of

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<sup>30</sup> See Bix in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 288.

<sup>31</sup> See Fish in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 116

<sup>32</sup> Steven D Smith (see fn. 29 above) makes precisely this point, using just this analogy, in arguing that 'the subject has become scholasticized' (227).

‘collapsing ... into its long-time nemesis, the idea of the “living Constitution”’.<sup>33</sup>

Let me be blunt. I am only focused on those variants that do *not* collapse into ‘living constitutionalism’. On that basis, any versions of originalism that fall under the aegis of Jack Balkin’s *Living Originalism*<sup>34</sup> will not obviously claim to offer the instrumental benefits of more constrained judges and more scope for democratic decision-making that might be open to testing by considering Australia’s experience. So I ignore all such versions or variants of originalism, whichever they may be.

That said, I recognize that there are competing views on whether, or at least the extent to which, so-called ‘old’ and ‘new’<sup>35</sup> originalist variants produce outcomes that differ all that much or more than marginally. On the one hand, there is Steven D Smith’s suspicion (and Jack Balkin’s and others’ hope<sup>36</sup>) that new originalist variants are not at all interchangeable with Alexander/Fish/Kay-type original intentions variants and will amount to yet another interpretive theory that delivers a so-called ‘living constitution’. However, on the other hand, there is Richard Kay’s and Larry Alexander’s argument<sup>37</sup> that original intentions and original public

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<sup>33</sup> Ibid 230

<sup>34</sup> See Jack M. Balkin, *Living Originalism* (Harvard University Press, 2011). See, too, the 2012, volume 92, Symposium issue of the *Boston University Law Review* on this topic. And of course that is on the debatable assumption that Balkin’s interpretive methods really are best described in terms of originalism. For a strong argument that this is not the case, see fn. 36 below.

<sup>35</sup> By which I mean textualist or OPM variants.

<sup>36</sup> Some would argue that Balkin’s underlying interpretive approach ought not even to be considered as an originalist one, however much he might himself describe it that way. For just such a critique of Balkin’s position, see Larry Alexander, ‘The Method of Text and ?: Jack Balkin’s Originalism with no Regrets’ (2011) 2012 *University of Illinois Law Review* 611, 621.

<sup>37</sup> See Richard Kay, ‘Original Intention and Public Meaning in Constitutional Interpretation’ (2009) 103 *Northwestern University Law Review* 703, 712-4 and Larry Alexander, ‘Simple-Minded Originalism’ in Grant Huscroft and Bradley W Miller

meaning can only differ when the authors were either deliberately attempting to mislead (by secretly using words in a non-standard way) or when they erroneously did this, namely by screwing up.<sup>38</sup> And in the context of writing a constitution (as opposed to a James Joyce novel) such ‘deliberately deceiving the reader at the time’ and ‘big time screw up in choice of words’ scenarios will be exceptionally rare. Certainly Justice Antonin Scalia does not see his version of textualist or public meaning originalism collapsing into anything with the slightest traces of metaphorical life.<sup>39</sup>

But as I said, I need not take a position on any of that. I simply here repeat my proviso that using a bill of rights-lacking Australia to test the claims that originalism delivers a more externally constrained judiciary and more scope for democratic decision-making may possibly depend on the particular variant of originalism.

So if certain variants or versions of originalism do turn out to collapse into the functional equivalent of ‘living constitutionalism’ then I am ignoring those versions in what follows.<sup>40</sup>

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(eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 87.

<sup>38</sup> Grant Huscroft gives a Canadian example of screwing up with respect to the term ‘fundamental justice’ in s 7 of Canada’s *Charter of Rights*. See his ‘Vagueness, Finiteness, and the Limits of Interpretation and Construction’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 215.

<sup>39</sup> See, for example, Justice Antonin Scalia, ‘Romancing the Constitution: Interpretation as Invention’ in G Huscroft and I Brodie (eds.) *Constitutionalism in the Charter Era* (LexisNexis, 2004) 337.

<sup>40</sup> There is the further issue I have touched on in the past (see footnote 19 above) and that is raised in section 3 below. That issue amounts to this: Is the task of searching for historical facts just as subjective as the task of seeking morally best, or most preferable, outcomes? I say that the former is less subjective, that here there are more mind-independent constraints on the searcher than with the latter. And that comparative claim is nevertheless compatible with admitting that there are regular and reasonable debates and disagreements about historical matters. This boils down to

### III WHAT A BILL OF RIGHTS MIGHT OBSCURE FOR ORIGINALISTS

There is one last caveat to make before turning to Australia and three case studies. If you are someone who values originalist constitutional interpretation because you believe that it tends to impose more external constraints on the point-of-application interpreter — that it gives that interpreter less scope to appeal to his or her own first-order moral and political judgements and preferences — than ‘living constitutionalism’ or “‘the-interpreters-decide-on-the-basis-of-what-is-best” account of interpretation’,<sup>41</sup> then the underlying basis for that belief has to do with thinking that a search for historical fact is more constraining than trying to find what is morally or politically best.<sup>42</sup>

Put differently, and as a generalisation, what-the-fact-of-the-matter-is (even the fact of what people in the past intended or understood, assuming the historical records are more than Spartan) has a smaller ‘penumbra of doubt’<sup>43</sup> than what-is-the-morally-best answer. Facts are less contestable and debatable, and so more constraining, than values, at least on average, over time. That is the claim at the core of normative originalism.<sup>44</sup> And if you dispute that overall claim<sup>45</sup> then the normative

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accepting the Humean fact/value dichotomy. Those who reject that dichotomy may well go on to assert that finding historical claims is just as subjective an exercise as making moral evaluations/judgements. I disagree.

<sup>41</sup> See Stanley Fish, cited in above n 31, 116. Fish also labels this the ‘a text means what its interpreters... say it means’ approach. Ibid 113.

<sup>42</sup> See, for example, Antonin Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 *Cincinnati Law Review* 849.

<sup>43</sup> H L A Hart, *The Concept of Law* (OUP, 1961) 119 *inter alia*.

<sup>44</sup> Of course there may in some circumstances be room for doubt about that overall claim, the doubt being that in some situations errors in regard to historical

originalist ancillary claims about a more constrained judiciary and more scope for democratic decision-making will not follow for you either. Sure, you might still be a conceptual originalist of the sort sketched above, but you will not be a normative originalist.

Yet let us here simply assume that as a generalization the finding of answers to questions of historical fact is more certain and less contestable and debatable than it is to questions of which reading is more moral or more in keeping with changing social values. Let us just assume that for a moment (though in countries such as the US and Australia with quite full historical records I happen also to believe it to be true<sup>46</sup>) because it is worth registering a partial caveat or rider to that ‘interpretation involving the finding of historical facts is more constraining’ position.

And here is my caveat or rider. It is that bills of rights (or indeed any morally pregnant words and phrases in a constitution) have the potential partially to obscure this fact/value divide. Or rather they have that obfuscating potential for originalists.<sup>47</sup>

Notice that my caveat is a qualified one, that I say there is the ‘potential’ for a bill of rights ‘partially’ to obscure the normative attractions of originalist interpretation. What I have in mind is what Steven D Smith

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matters will be so frequent and so wide-ranging that the associated costs of those errors will outweigh the costs of ideologically-influenced, value-laden interpretation.

<sup>45</sup> Perhaps because there are other ways equally, or more, likely to constrain the point-of-application interpreter. For example, see A W B. Simpson’s *Reflections on the ‘Concept of Law’* (OUP, 2011) and his notion that a cohesive, similarly indoctrinated legal profession can provide considerable certainty of outcome.

<sup>46</sup> In the Australian context see the extensive ‘Records of the Australasian Federal Conventions’, accessible online on the Parliament of Australia’s website: <[http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/Records\\_of\\_the\\_Australasian\\_Federal\\_Conventions\\_of\\_the\\_1890s](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s)>.

<sup>47</sup> For ‘living Constitution’ adherents the interpretive task is anyway a morally pregnant one. So my caveat or rider here is directed at originalists.

calls the ‘distinction between “meaning” and “expected application”’,<sup>48</sup> with the latter for some originalists merely being evidence of the former, ‘the two things [being] distinct and ... not [to] be conflated’.<sup>49</sup>

Now, notice how difficult it is to distinguish between a rule’s expected meaning and that same rule’s expected application when the rule relates to some moral or normative criterion such as ‘no cruel punishments’ or ‘no unreasonable searches’. Smith himself suggests that this distinction between ‘meaning’ and ‘application’, though conceptually or at least verbally distinguishable, is highly suspect across the board. The two ‘are inextricably co-mingled’.<sup>50</sup> But that is, I suspect, too sweeping. If the rule relates to some question of fact — not of value — then the distinction is moderately straight forward to make.

No doubt that is why writers who offer up this distinction almost always (or so it seems to me) use hypotheticals in which the rule relates to a question of fact. Here is a hypothetical I have come across on a number of occasions used to illustrate the distinction. We are to imagine some variant on a constitutional provision that mandates that ‘all those suffering from a contagious disease be quarantined’.

Here, because what diseases are and are not contagious is a question of fact in the external, causal world, we can separate what the rule means and what its enactors intended. If these enactors intended the rule to apply to psoriasis, say, then because they were simply wrong about a question of fact as to which diseases are contagious, we can moderately

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<sup>48</sup> Steven D Smith, ‘That Old-Time Originalism’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 239.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 240.



easily distinguish that expected application from the meaning of ‘contagious’.

Yet there is no such neat way to make the distinction work when we turn from a rule focused on facts (what is and is not contagious) to a rule focused on values (such as whether punishment X ought to be understood as cruel). Indeed I think, and have argued, that this conflating of facts and values can lie at the heart of flawed arguments in favour of, say, greater and more frequent appeals to transnational legal standards in constitutional interpretation<sup>51</sup> or Dworkinian defences of there being ‘one right answer’ in matters of interpretation.<sup>52</sup>

But whether you agree with those wider claims of mine or not, the point here is that when an originalist is asked to find the meaning of some rule that lays down a morally pregnant, value-laden standard, then in that situation I think Smith’s assertion that the expected meaning of the rule and what its enactors thought its expected application would be are ‘inextricably co-mingled’.<sup>53</sup> At the very least they are exceptionally hard to unravel because for the originalist interpretation simply is a search for historical fact. It is the ‘living constitutionalists’ who look to tell us what they think (or feel, for most non-cognitivists) the most moral reading is or the most ‘keeping pace with society’s changing values’ reading is. It is they who appeal to value judgements. Originalists do not (at least when

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<sup>51</sup> See my ‘Jeremy Waldron and the Philosopher’s Stone’ (2008) 45 *San Diego Law Review* 133.

<sup>52</sup> See my ‘Truth’s Empire: A Reply to Ronald Dworkin’s “Objectivity and Truth: You’d Better Believe It” ’ (2001) 26 *Australian Journal of Legal Philosophy* 61.

<sup>53</sup> Steven D Smith, ‘That Old-Time Originalism’ in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 240.

interpreting as opposed to what Larry Solum and Randy Barnett call ‘constructing’<sup>54</sup>).

So for originalists seeking the historical fact of which punishments are cruel, there is no mind-independent reality (as with which diseases really are contagious) to which appeal can be made to make the distinction easily work. They either appeal to the framers’ expectations – to what the historical record on the balance of probability tells us they thought was cruel and so to which the rule applied — or they appeal to some other group’s expectations and moral judgements, maybe those of today’s judges or their own personal ones or some hypothetical, made-up person’s (which almost always collapses into their own personal ones) or those of overseas judges or what have you. Even if they opt to use framers’ expectations only as a guide or starting point – perhaps by putting them in a list and then attempting to discern the ‘essential features’ of that list so as to extrapolate for the present day – it is nevertheless today’s listmaker whose judgement is deciding on what those supposed essential features are. And that, too, is surely a value laden (and normatively contestable) endeavour.

To be blunt, a morally laden rule’s expected meaning, for an originalist, is very, very difficult to know without looking to what those who made the rule thought were its expected applications. Those are the facts that constrain today’s interpreters. So in this realm, and as Steven D Smith asserts, ‘[e]xpected applications are not *evidence* of a provision’s meaning, perhaps, as much as they are *ingredients* of that amalgamation

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<sup>54</sup> See Larry Solum, ‘The Interpretation-Construction Distinction’ (2010) 27 *Constitutional Commentary* 95; Randy Barnett, ‘Interpretation and Construction’ (2011) 34 *Harvard Journal of Law & Public Policy* 65.

[of meaning and application] ... [and] insisting on a distinction ... distorts understanding'.<sup>55</sup>

Brian Bix makes essentially this same point, that when it comes to normatively charged provisions 'the tie between meaning and application may be closer'<sup>56</sup> than with assertive or descriptive provisions, 'that discussion of the "meaning" of a term from a legal norm ... differs in important ways from a similar discussion in the context of descriptive propositions'.<sup>57</sup>

I agree with Bix. And if we restrict ourselves to morally pregnant rules or provisions then I agree with Smith too. The distinction between that sort of a rule's expected meaning and its expected application is a hard one, perhaps sometimes an impossible one, to uphold for originalists. Certainly what the framers expected some normative rule's application to be needs to be more than just evidence to throw in the pot with the interpreter's own moral antennae being the final determiner. That is 'living constitutionalism' interpretation. It is not a search for historical fact, with all the potential mind-independent constraints that carries with it.

So that is why, in my opinion, a bill of rights with its enumerated list of morally-laden provisions has the potential to obscure, at least in part, the core consequential benefits that are claimed on behalf of originalism — that it imposes more external constraints on the point-of-application interpreter and hence, normally, leaves more decision-making to the

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<sup>55</sup> See Steven Smith, 'That Old-Time Originalism' Originalism' in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 240 (italics in the original).

<sup>56</sup> See Brian Bix, 'Constitutions, Originalism and Meaning' Originalism' in Grant Huscroft and Bradley W Miller (eds.), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP, 2013) 286-91.

<sup>57</sup> Ibid 289.

democratic process. With a bill of rights in place it might, just might, be harder to see the difference between the answer originalist interpretations throws up and the answer ‘living constitution’ interpretation can throw up. The normative benefits of originalism might be somewhat obscured.

Of course Australia has no national bill of rights.<sup>58</sup> So turning to look at Australia, and constitutional interpretation there, might give us a clearer answer to whether originalist interpretation would be significantly more constraining on present day judges – and on the interpretive answers they could claim honestly to be finding – than the ‘living constitution’ interpretive alternatives. In fact I think Australia will show just that.

#### IV THREE CASE STUDIES FROM AUSTRALIA

The hypothesis we are now ready to test is that Australia without a bill of rights shows originalist constitutional interpretation to be far more constraining on the top judges (and so leaves more decision-making to the democratic process) than does ‘living constitution’ interpretation or indeed anything else. Without the obfuscations and complications that the interpretation of morally supercharged provisions might at times give rise to, we can look at three case studies to see whether originalism would clearly foreclose the sort of answers the High Court of Australia managed to produce by shunning originalism (in the majority judgments).

In each of these three cases the constitutional words being interpreted were ‘directly chosen by the people’. Of course these five words comprising this phrase are not value free, not normatively naked. But the phrase is clearly at the thin end of the moral overlay spectrum. And this

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<sup>58</sup>

One of the six States has a statutory bill of rights.

phrase appears twice in the Australian Constitution, both times in Chapter I dealing with the legislature.

Section 7 reads to start:

### *7 The Senate*

The Senate shall be composed of senators for each State, *directly chosen by the people* of the State, voting, until the Parliament otherwise provides, as one electorate. (emphasis mine).

Meanwhile, section 24 read to start:

### *24 Constitution of the House of Representatives*

The House of Representatives shall be composed of members *directly chosen by the people* of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. (emphasis mine)

The first of our three case studies is from 1992 and is known in Australia as the *ACTV* case.<sup>59</sup> Prior to this case there had been two attempts, in 1944 and again in 1988, to amend Australia's Constitution to include aspects of a bill of rights. In the latter instance (just 4 years before *ACTV*) Australians were asked in a section 128 constitutional amendment referenda whether they wanted to entrench protections of a sort typically found in a constitutionalised bills of rights, namely ones related to freedom of religion, jury trials and acquisition of property on just terms. The answer was an emphatic 'no'.<sup>60</sup> Indeed in the 1988 constitutional

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<sup>59</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>60</sup> See Parliamentary Library Department of Parliamentary Services, 'Parliamentary Handbook of the Commonwealth of Australia' (42<sup>nd</sup> Parliament, 2008) p. 396 and 407-408, available at

referendum there was not a single Australian State in which the majority of voters was in favour, with no State recording more than 37 percent in favour of any of the four proposed (and voted on separately) new rights for entrenchment. It was a landslide against.

What effect this had on proponents, many of whom came from legal circles, is anyone's guess. But fewer than four years later came *ACTV*, the first of what in Australia is known as the implied rights series of cases.<sup>61</sup> I have written about those initial implied rights cases elsewhere,<sup>62</sup> and the way in which I think the majority decisions were premised on a 'living constitution' interpretive approach.<sup>63</sup>

For this paper there is no need to recanvas all the detail. Let me instead just set out the central reasoning of the Chief Justice (in the majority) in that *ACTV* case.

Mason CJ arrived at the conclusion that the Australian Constitution — one that you will recall explicitly and deliberately left out any US-style bill of rights or First Amendment-type free speech entitlements and protections opting, after much debate and discussion amongst the Founders (and after two failed attempts later to amend it), to leave such

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[http://parlinfo.aph.gov.au/parlInfo/download/handbook/newhandbook/2008-12-19/toc\\_pdf\\_repeat/Part%205%20-%20Referendums%20and%20Plebiscites.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/handbook/newhandbook/2008-12-19/toc_pdf_repeat/Part%205%20-%20Referendums%20and%20Plebiscites.pdf;fileType=application%2Fpdf) at 24<sup>th</sup> November 2009.

<sup>61</sup> Others I will not cover here go from *Nationwide News v Wills* (1992) 177 CLR 1 through to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>62</sup> See, for example, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228; 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63; and 'A Defence of the Status Quo' in (eds. Campbell, Goldsworthy and Stone) *Protecting Human Rights* (OUP, 2003) 175. See too the volume 30, 2011 Special Issue of the *University of Queensland Law Journal* on these implied rights cases.

<sup>63</sup> Or perhaps 'substantive proceduralism' or 'half-baked albeit seductive progressivism'.

social policy balancing exercises to Parliament — nevertheless implicitly created an implied freedom of political communication amounting to less than a personal right but enough to be used to strike down or invalidate statutes. The Chief Justice’s reasoning followed these steps: 1) The Constitution provides that elected Members of Parliament (MPs) are to be ‘directly chosen by the people’;<sup>64</sup> 2) hence these MPs are representatives of the people; 3) hence they are accountable to the people; 4) thus they have a responsibility to take account of the views of the people; 5) therefore (these first four steps giving the grounds for the implicit conclusion that) the judges interpreting this Constitution must be able to, and hereby do, assert that there is an implied freedom of political communication which in some circumstances will allow the judges to invalidate legislation believed to infringe that discovered implied freedom<sup>65</sup> — as was the case in *ACTV* itself as the High Court of Australia struck down or invalidated parts of a campaign finance law that limited the buying of election advertisements on television and radio in favour of a scheme that allocated ‘free time’ on a basis that included factors such as how the parties had fared last election.

Now to be perfectly blunt, I like the outcome of this *ACTV* case; I am at the far end of the spectrum in terms of wanting as much scope as possible for people to speak their minds, including scope to pay for broadcast time to do so in an election campaign. But liking the outcome of a case has nothing to do with thinking that the interpretation of the Constitution that achieved that outcome was even remotely plausible.

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<sup>64</sup> In sections 7 and 24 as set out above.

<sup>65</sup> This five step reasoning process is most clearly seen in *ACTV* at 106, 138.

Rather, the majority's reasoning in *ACTV* was implausible and far-fetched in the extreme. The judges did not 'discover' this implied right, as defenders assert, they made it up and did so but four years after the failed 1988 constitutional referendum.

Consider the phrase itself, 'directly chosen by the people'. Not only were the Framers of the Australian Constitution well aware of America's First Amendment and well informed when explicitly rejecting a bill of rights, they also were well acquainted with how the US Senate was at that time (before the 17<sup>th</sup> Amendment) indirectly chosen. And they understood how the indirect Electoral College worked.

They simply preferred all legislators to be directly elected, and they set that out in sections 7 and 24, the final draft of the Constitution then being put to all the voters in each State.

My claim is that no OIM originalist (or 'old originalist') could have reached the majority result in *ACTV*. And I think that even most OPM originalists (or 'new originalists') would have had a very tough time doing so. The history of the Constitution as a whole, the many references to 'until the Parliament otherwise provides',<sup>66</sup> the clear evidence of the rejection of any bill of rights and morally pregnant free speech right provision, the historical evidence of what 'directly chosen by the people' did refer to,<sup>67</sup> and more, would categorically foreclose this *ACTV*-type outcome for *an originalist constitutional interpreter*.

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<sup>66</sup> See the *Australian Constitution* ss 3, 7, 10, 22, 24, 29, 30, 31, 39, 46, 47, 48, 51(xxxvi), 65, 66, 67, 73, 87, 93, 96 and 97. And see too ss 121 and 122.

<sup>67</sup> See Nicolas Aroney, *The Constitution of a Federal Commonwealth*, fn. 1 above, chs. 7 and 8, which canvasses the Australian Framers' views about 'representation' and the impact of those views on ss 7 and 24 of the Constitution.



Sure, there is a scintilla of seductive plausibility for ‘living constitution’ interpreters (even 90 years after the Constitution came into effect) in constructing a connection between electing one’s legislators and the notion or principle of representative government, and then in turn connecting that manufactured moral abstraction to a posited need for a moderately free flow of views back-and-forth from electors to elected MPs, and then in turn using that to ‘find’ (or really to create out of nothing) a tool — call it an implied freedom, a non-personal, bracketed right, a limit on legislative sovereignty, what have you — that the top judges can use, when they think it appropriate, to strike down legislation.

Or at least it is clear that many non-originalists will find this reasoning seductive. But I do not think any OIM originalist could, whether he or she liked the substantive outcome (as I do) or not.

Put differently, originalist interpretation in our first case study clearly imposes more external constraints on the judiciary and leaves more social policy decision-making on the democratic table.

Our second and third Australian case studies, if this is intellectually possible, are even more egregious and even more illustrative of the comparative absence of constraints of ‘living constitutionalism’.

I will consider these second and third case studies together as both involve what might broadly be thought of as ‘voting rights’ issues, as both implicitly are constructed and dependent on that *ACTV* case, and as both can point to nothing in the Constitution itself, absolutely no other textual words whatsoever, other than that aforementioned ‘directly chosen by the people’.

I refer to the 2007 High Court of Australia case of *Roach*<sup>68</sup> and the 2010 High Court of Australia case of *Rowe*.<sup>69</sup> I have discussed these two cases at length.<sup>70</sup> However, for our purposes in this paper I need only make the following points: in the *Roach* case the High Court of Australia (4:2) struck down legislation that prevented any person serving any full-time prison sentence from voting in federal elections. These Justices held that the then existing legislation which disqualified *all* prisoners was invalid, however the older legislation that disqualified those serving sentences of three years or more was constitutionally valid and could stand. On top of that (and this applies also to *Rowe*) it is plain from the majority judgments that legislation can be — indeed was — constitutionally valid at the time of federation and the coming into force of the Australian Constitution (and indeed that the legislation remained so up to 1983 and beyond) but that that same legislation is today, when the Court struck it down, no longer constitutionally valid. There is even the clear and undeniable suggestion in *Roach* (and *Rowe*) that if Parliament keeps its hands off and leaves alone old legislation governing when prisoners can vote (or when electoral rolls must close) then that old legislation will be and will remain valid. But where a Parliament in the recent past happens to have legislated to liberalise those rules then no Parliament of even more recent vintage will be able to revert back to the older (and back then constitutionally valid) rules. Not ever.

So in effect the legislature, by passing a new statute that the top judges consider more liberal or more in keeping with transnational standards or changing social mores, can change the Constitution.

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<sup>68</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162.

<sup>69</sup> *Rowe v Electoral Commissioner* (2010) 273 ALR 1.

<sup>70</sup> See my 'The Three "Rs" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no)'Riginalism' (2012) 36 *Melbourne University Law Review* 743.

Try reaching that sort of conclusion as an originalist! And ask yourself what sort of external constraints (not ones of the variety of ‘I looked inside myself and boy did I feel constrained’ but constraints there for all to see and to be pointed to) are in place if this counts as a persuasive interpretation of an Australian constitutional text that disavows any US-style bill of rights or voting rights provision, such issues being intended and at the time understood to be left to the elected Parliament. And I ask that as someone who is not a ‘lock ‘em up and throw away the key’ sort of person, someone who (again) does not at all object to the substantive outcome in this case. And I ask reminding the reader that no relevant part of the text of the Australian Constitution — the constitution the majority judges say in the past used to allow the legislature to do something but now does not — has changed. All that has changed is the scope for judges to invalidate democratically enacted legislation, largely it seems because of the passage of time and the current prevailing sentiments of the judiciary.

Again, I simply cannot see how any honest originalist could have reached this conclusion. He or she would have been constrained, whatever his or her substantive preferences or druthers, and the decision would accordingly have been left with Parliament.

The majority’s reasoning in *Roach* clearly relies on there being an implied freedom of political participation somehow linked to the *ACTV*’s implied freedom of political communication, though this link is half-heartedly side-stepped or disguised.<sup>71</sup> And when it comes to telling us why it is that they, the majority Justices, can strike down and invalidate

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<sup>71</sup> See *Roach*, [43]: ‘[W]hat is at stake ... is *not so much* a freedom to communicate about political matters but participation as an elector in the central processes of representative government’ (emphasis mine). I think, and have argued (see *Ibid*), that this claim is disingenuous.

this statute they have virtually nothing to point to in the Constitution itself save for a few passing references to ‘directly chosen by the people’ and a huge dollop of implicit and unspoken reliance on the earlier implied rights cases.<sup>72</sup> That and plenty of talk of how ‘the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution’<sup>73</sup> (finessing, quite blatantly, the crucial question of whether representative government will change through time solely because of decisions made by Parliament — as I think any originalist would be forced to conclude — or with the unelected High Court of Australia having some sort of supervisory role).

In *Roach* (and as we will presently see in *Rowe* as well) the High Court of Australia answers that in its own favour, concluding that the top Australian judges have been given a supervisory role by the Constitution, at least by the year 2007 if not before. It is an answer that cannot point to or rely on original intentions, that cannot point to original understandings, and that requires a remarkably fast-and-loose (even for ‘living constitutionalism’) interpretive approach that deep down appeals only to readers agreeing with the substantive outcome and to vaguely reassuring proportionality-type analyses<sup>74</sup> nowhere mandated by the Constitution.

If it is possible, this second case study of *Roach* shows the normative attractions — the greater limits on point-of-application interpreters — of originalism even more starkly than our first case study of *ACTV*.

However our third case study of *Rowe* takes the cake. Even a few ‘living constitutionalists’ are embarrassed by it. In *Rowe* (4:3) the High Court of Australia struck down another statute of the former conservative Howard

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<sup>72</sup> For example, the *Lange* decision is relied on at [44] of *Roach*.

<sup>73</sup> *Roach*, [45].

<sup>74</sup> See *Roach*, [84] – [102].

government. This time the statute had to do with when the electoral rolls (listing who is legally entitled to vote) must close after the calling of an election. In most Westminster systems election dates are not fixed, though there is a maximum time period before which one must be held. In almost all circumstances it is the sitting Prime Minister who decides when the election will be held, though there is the pretence that the Queen's representative the Governor-General is calling it. This requires a writ to be issued.

The *Rowe* case related to a 2006 Act. The previous 1983 Act had provided a 7 day grace period for people who were legally obliged to be enrolled — indeed who were subject to a legal penalty for failing to enrol — to do so once the election had been called and writ issued. The 2006 Act, the one struck down in *Rowe*, removed this 7 day grace period.

Put somewhat differently, the majority Justices in *Rowe* decided that the Australian Constitution gives them the power to supervise (and indeed gainsay the elected legislature's decision as to) when the electoral rolls will close. And it does so as regards *7 days*, and all the other minutiae surrounding the many competing incentives and disincentives involved in trying to get voters to enrol in a timely fashion. That is the meaning, supposedly, of a bill of rights-lacking Constitution, one that makes repeated references to 'until the Parliament otherwise provides'.

The majority in *Rowe* make virtually no attempt to point to any constitutional provisions with only a quick recital of the 'directly chosen by the people' words. Instead the majority judgments cite and rely on the

earlier *Roach* decision in 29 different paragraphs,<sup>75</sup> which is over 10 percent of all of the paragraphs in the majority judgments.

If this is not a bootstraps operation pure and simple it is certainly the basis on which the majority judges assert they have been empowered to undertake what can be thought of as an extensive proportionality analysis.<sup>76</sup>

And of course *Rowe* mimics *Roach* in standing for the bizarre proposition that old legislation (because a few decades back further than the 1983 Act there had been legislation allowing no grace period for enrolling) will be valid if left alone. But if it is ‘liberalized’, the legislature is then constitutionally foreclosed from returning to what had been a constitutionally valid position. Only this time in *Rowe* the judges use their living Constitution to overrule not when prisoners can vote, but rather the number of days grace that will be given to those who have thus far breached their legal obligation to enrol. The top judges end up supervising a few days, here or there.

As I have said, it seems to me that no originalist could reach such a result. And this point is made in the forceful dissents in both *Roach* and *Rowe* by Justices Hayne and Heydon. Indeed these dissents read very much the way an originalist would expect and would agree with, and would find intellectually compelling.

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<sup>75</sup> See my ‘The Three “Rs” of Recent Australian Judicial Activism’, fn. 70 above.

<sup>76</sup> It is described in terms of ‘substantial reason[s]’ or ‘rational connections’ at [161] by Gummow and Bell JJ and in terms of ‘practical effects’ at [78] by French CJ. Personally, I am inclined to agree with Thomas Poole who argues that ‘proportionality [analysis] is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgment that can be massively broad or incredibly narrow – and anything in between’. Thomas Poole, ‘The Reformation of English Administrative Law (2009) 68 *Cambridge Law Journal* 142, 146.

As I said at the start of this paper, originalism is alive and has a pulse in Australia. It is just that of the seven High Court Justices only two (some would say one<sup>77</sup>) can be relied on to subject themselves to the external constraints it imposes.

## V CONCLUSION

My hope is that ‘living constitutionalism’s’ virtual absence of external constraints — of a lack of limits on the point-of-application interpreter achieving whatever result he or she thinks morally or substantively best — is even more evident in the Australian context than in the US one. Lacking a bill of rights, and being comparatively morally enervated, Australia’s Constitution, and the interpretation of that Constitution, shows clearly, starkly and unmistakably the normative benefits of originalist constitutional interpretation (and obversely the egregious absence of real constraints of ‘living constitutionalism’).

Of course whether someone wants the top judges to be more constrained in the decisions they can plausibly reach is a different matter. So too is the issue of whether someone wants locked-in limits on when the top judges can supervise and overrule the elected branches, or prefers his or her judiciary’s gainsaying role to be fluid, not really much constrained, and able to expand in line with judges’ perceptions of changing social values, of transnational standards, of moral best answers, what have you.

Those differences of preferences aside, there is a flip side to the conclusion that Australia shows originalism to be more constraining. This is the possible realization one might come to that if originalism and originalist interpretation cannot prevail in Australia then that suggests

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<sup>77</sup> And a very, very solid originalist (Justice Callinan) retired only a few years back, replaced by a non-originalist.

they are unlikely to keep judges in check in the sort of high-profile bill of rights cases that matter to the Scalias and other normative originalists (including me) who think this is originalism's biggest selling point. So there are optimistic and pessimistic conclusions one can draw from looking at Australia. And here, if nowhere else, we originalists of an optimistic bent might choose to downplay the facts.