Chapter 6

Originalism in Australia

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I have been asked to speak about an article I published a few years ago about "originalism", those theories of constitutional interpretation which hold that the text of a written constitution means what it meant at the time of the framing. In that article, I compared the practice of originalism in Australia to the practice of originalism in the United States.[1] I argued that the most plausible defence of originalism as a theory of constitutional interpretation is grounded in a particular understanding of constitutionalism: an understanding that accurately describes Australia but that does not accurately describe the United States. I am delighted to revisit these ideas, and to explore them in this address.

Part of the aim of the article was to correct a common misapprehension: namely, the idea that originalism is a distinctively American theory of constitutional interpretation. American constitutional law scholars often claim – and it has been widely assumed by legal scholars elsewhere – that originalism is a distinctively American invention.[2] I think that this claim is incorrect, or at least overstated.

So the question I posed then, and the question I pose in this address, is this: what do we learn once we appreciate that originalism is not an American invention? How does our understanding of originalism as theory of constitutional interpretation change once we appreciate that, in many respects, originalism has a more mainstream place in Australia than it does in the United States?

My claim is that appreciating the place of originalism in Australian constitutional practice helps us see that the best defence of originalism is not based on guarding against judicial activism or based on an appeal to popular sentiments about the founding. The best defence is rather based on factors that go to the type of constitution being interpreted. Here is the punchline: the more plausible it is to think of the Constitution as (nothing more than) a legal text – a text with highly specialised terms designed for legal experts and not for laypersons – the stronger the case for originalism. And in Australia I think that we have a constitution that is more like that than the Constitution of the United States.

Preliminaries: what is "originalism"?

Before I set out my argument, I first need to explain what I mean by "originalism". Broadly speaking, originalism is a theory of constitutional interpretation holding that a written constitution must be interpreted in light of the original understanding of the words contained in its text. There are, however, many different ways to be an originalist. I focus on what I take to be the most mainstream variety of originalism, which is often referred to as "textualist originalism".

There are three core elements of "textualist originalism". I will briefly sketch these out in order to be clear about the kind of view that we are talking about:

1. ***Textualism:*** textualist originalists are committed to the view that a written law is nothing more than its text, including presumptions and implications that follow from text and

structure. So the kind of originalist view that we are talking about relies predominantly on ordinary methods of statutory interpretation to discern the meaning of constitutional provisions. Text and structure are always the starting point.

2. ***Anti-intentionalism***: textualist originalists are committed to the view that the relevant source of a law's meaning is the public meaning of the text at the time of its enactment. So the kind of originalist view that we are talking about is *not* interested in the subjective intentions or expectations of the drafters. What the framers predicted or hoped for the future is irrelevant.
3. ***Semantic fixation***: textualist originalists are committed to the view that the language used in a written law continues to mean what it meant at the time of enactment.[3] So the kind of originalist view that we are talking about is opposed to "living constitutionalism". That is, originalists *reject* the view that the meaning of provisions can evolve over time in response to contemporary, popular understandings of constitutional provisions.

From now on, when I refer to "originalism", I am referring specifically to a view of this kind.

The Place of Originalism in Australian and American Constitutional Practice

Originalism in Australia

Originalism, as I have just described it, is an interpretive theory that will be familiar to anyone who is familiar with Australian constitutional practice. It is familiar because it offers a fairly accurate description of the orthodox approach to constitutional interpretation that has long been used by the High Court – as I think Professor Jeffrey Goldsworthy has convincingly argued in his work.[4] That approach is more commonly labelled "legalism" but, whether we call it "legalism", "textualism" or even "formalism", we are essentially talking about the view that I have just described: "originalism".

Indeed – speaking now as someone who had to learn Australian constitutional law as a second language – the highly "originalist" character of the High Court's approach to constitutional interpretation is something that is immediately striking. Despite the evident *popularity* of originalism in the United States – in the sense that originalism is widely discussed and debated by American academics, jurists, politicians, and members of the public alike – originalism does not describe the predominant approach to constitutional interpretation used by the Supreme Court of the United States. In the United States, originalism has only ever had the support of a few Supreme Court justices, the most famous being the late Justice Antonin Scalia (the Court's greatest *dissenting* voice).

Originalism occupies a much more mainstream place in Australian constitutional practice. It is true that the strength of the High Court's commitment to originalism has waxed and waned over the course of Australia's constitutional history, and that it has varied among different judges on the Court. Nevertheless, I think it is fair to say that originalism (in the "textualist" sense that we are interested in here) has more or less continuously defined the High Court's approach to constitutional interpretation since the early 1900s. As Justice McHugh once observed, "[p]robably most Australian judges have been in substance what Scalia J of the United States Supreme Court once called himself – a faint-hearted originalist."[5]

Originalism in the United States

Despite the fact that originalism is a well-established method of constitutional interpretation that has a very long history in Australia, a common assumption is that originalism has its most natural home in the United States. I think that this assumption is wrong. The unique features of American constitutionalism that have shaped the way that originalism is debated and understood in the United States do not provide the basis for a very good defence of the view. In fact, they tend to undermine it. To explain why, I first need to say what those features are.

The first feature that makes the American reception of originalism unique has to do with the significant role that the founding moment plays in popular constitutional culture. As anyone who follows American political debates knows, the founding and the framers figure prominently in American public life. For instance, the most popular show on Broadway at the moment is *Hamilton*, a musical about none other than the American founding father, Alexander Hamilton. This is a significant point of contrast with Australian constitutional culture. I suspect few will disagree that it is highly unlikely that we will see *Samuel Griffith: The Musical* popping up at the Sydney Opera House anytime soon!

What is the significance of this observation for the place of originalism in American constitutional practice? The role of the founding fathers in popular culture in the United States means that there is a kind of natural link between the appeal to original understanding as a source of constitutional meaning and popular constitutionalism. Appealing to the views of the founders has traction precisely because Americans agree that the founding moment was special and that the founders are worthy of respect.

The second feature of American constitutionalism that makes the American reception of originalism unique has to do with the US Constitution's vague and morally-loaded rights provisions. Many of these provisions are cast in wide terms and use non-technical language that appeals to the opinions and moral sentiments of laypersons. Consider, for instance, the Eighth Amendment's prohibition on "cruel and unusual punishment". Moreover, the interpretation of these rights provisions has been a continuing battleground within the "culture wars" in the United States. Many have argued that as a society's values change over time, so, too, should the interpretation given to rights provisions – particularly so where they are cast in laypersons' language.

Again, what are the implications for the place of originalism in American constitutional practice? These continuing debates about the interpretation of constitutional rights mean that American originalism is reactionary in a way that Australian originalism is not. Originalism in the United States first emerged as a critique of the US Supreme Court's progressive rights jurisprudence,[6] and it continues to exist primarily as a counter-narrative to interpretations of constitutional rights that appeal to contemporary social values.

I draw attention to these two features of American constitutionalism because they help us to appreciate how originalism has been understood and debated in the United States. The trouble, however, is that these reasons for the popularity of originalism in the United States have often been mistaken for a defence of the view. But, although popular reverence for the founding fathers and concerns about judicial restraint in interpreting vague and morally-loaded rights provisions explain why originalism is attractive to Americans, they do not offer a particularly compelling justification for originalism as a theory of constitutional interpretation. In fact, I think they have worked against it.

My suggestion is that examining the place of originalism in Australian constitutional practice makes better sense of the view's underlying logic and justification as an interpretive theory, precisely because Australian constitutionalism lacks these two features. To see why, let us examine how originalism is defended.

Defending Originalism

Judicial Restraint vs Constitutional Formalism

The basic challenge for originalists in defending their view has to do with explaining the authority of original meaning. Why should understandings of a constitution at the time of its drafting be binding in the present day?

American constitutional practice makes it appear as though originalism is best defended as a remedy for judicial activism. In the American context, originalism is overwhelmingly presented both by its defenders and by its critics as concerned with preventing judges from giving effect to contemporary social values when they interpret rights provisions, something that is said simply to disguise a judge's insertion of her own preferences and moral views. Originalism is said to prevent judges from doing this by requiring them to give effect to the original meaning of the text.

But the problem with the judicial restraint-based defence of originalism is that how good a defence it is turns on how well originalism actually *does* restrain judges in practice. The concern is that there is no good reason to think that original meaning is any less susceptible to manipulation than other sources of constitutional meaning – originalism can be practised well, or it can be practised poorly. Here critics argue that originalism is subject to the same kinds of objections raised against consulting Hansard materials when interpreting legislation: for example, the worry about simply "cherry-picking" views that support one's own. Critics point to cases where judges applying originalist approaches reach opposite conclusions. *District of Columbia v. Heller* – the 2008 American case interpreting the Second Amendment – is a good example of this.[7] Both the majority and dissenting judgments were robustly originalist, and yet they reached opposite conclusions on whether the Second Amendment supports an individual right to bear arms.

Although originalists have responses to this set of criticisms, they are not fully satisfying. But examining those responses need not detain us here because there is a far better defence of originalism than the judicial restraint-based defence. This is what I want us to focus on. That alternative and more plausible defence, I suggest, can be found by examining Australian constitutional practice.

The predominant reason why originalism is so well-embedded in Australian constitutional practice has to do with the nature of the Constitution of Australia. Unlike the Constitution of the United States, it is not implausible to think that the Australian Constitution is a text like other legal texts. I call this kind of view, "constitutional formalism". By "constitutional formalism" I just mean the view the written constitution has no other significance for constitutionalism apart from the fact that it is a legal text.

There are a few different variations on this. One might take the view that the Constitution is a statute in all relevant respects – differing from ordinary statutes only in its subject matter and the process of its revision or repeal. Alternatively, one might take the view that the Constitution is a kind of contract – that is, a binding legal agreement that contains the essential terms of the "constitutional bargain".

This kind of characterisation of the Constitution of Australia is widely accepted by scholars and commentators from across the political spectrum. They point to the Constitution's lack of a bill of rights and its emphasis on mundane structural issues. Some lament it,[8] whereas others celebrate it,[9] but either way there is considerable consensus that the Constitution of Australia is first and foremost a pragmatic charter of government. It is plausibly described as a compact between the States or as a special kind of statute, but not as a declaration of the social values and aspirations of the Australian people.

It is not difficult to see why constitutional formalism goes hand-in-hand with originalism. Indeed, once it is accepted that a law *is* (nothing more than) its written text, it is difficult to dismiss original meaning out of hand: all laws have a meaning; a law is what it means; thus, if the meaning of the law changes, the law changes.[10] So constitutional formalism, the view that the constitution is a text like other legal texts, appears to make originalism (at least in a broad sense) uncontroversial. As a consequence, the defence of originalism in Australia is more closely attached to a formalist conception of constitutionalism than it is to concerns about judicial activism (at least as those concerns are typically understood).

This is certainly not to suggest that judicial activism *never* figures in Australian debates about constitutional interpretation. Such a proposition is obviously incorrect. My suggestion is only that judicial activism is not the overriding concern that figures in the defence of originalism. It is true that original meaning has frequently been invoked to criticise rights-like implications, such as the implied freedom of political communication, which sounds in concerns about judicial activism. But original meaning has been at least as frequently invoked as a corrective to an overly rigid "literalism" associated with certain forms of legalism, which as we know has led to an expansion of Commonwealth power not contemplated by the Constitution's framers. Indeed, the High Court's landmark decision in *Cole v Whitfield* to permit the consultation of Convention debates alongside other standard historical sources was a response to perceived failures of overly literal readings.[11]

In both its anti-implication and its anti-literalism strands, then, the common logic of originalism in Australia is not preventing judicial activism *per se* but preserving the constitutional bargain struck between the States at the time of federation. Rights implications are suspect insofar as they upset that bargain. But so, too, are overly literal readings that ignore the terms of the bargain that was struck. This includes narrow, literalist readings of rights provisions. For instance, it has often been suggested that the few express rights guarantees found in the Constitution require a broad construction if so indicated by original understanding.[12]

In the United States, by contrast, it is not very plausible to describe the written constitution in formalist terms. In fact, there is a strong *anti-formalist* understanding of the US Constitution, which has to do both with its contents and with its special status as a founding document. The written constitution is widely understood not simply as a legal text but as a revolutionary historical achievement that symbolises the aspirations of the American people.

Notably, however, there have been attempts to present the Constitution of the United States in a formalist light in order to strengthen the case for originalism. For example, in his extra-judicial writings, Justice Scalia insisted that the US Constitution is not "philosophical" or "aspirational," but rather a "pragmatic and practical charter of government" that consists of concrete and specific provisions.[13] Moreover, Justice Scalia played down the significance of rights, insisting that structural provisions concerning federalism and the separation of powers are the

"real" Constitution. "[I]t is a mistake," he argued, "to think that the Bill of Rights is the defining, or even most important, feature of American democracy."[14]

Leaving aside whether his view of the US Constitution is normatively attractive, as a purely descriptive matter Justice Scalia's formalist characterisation of American constitutionalism can only be described as "revisionary" and "prescriptive". To put it bluntly, his description simply does not hold water with the US Supreme Court's interpretive practices or with the weight of authority.

This leads to the next possible line of defence.

Popular reverence for the founding versus Founding Expertise

The lack of a widely-accepted formalist understanding of the US Constitution means that American scholars have to rely much more heavily on a judicial restraint-based defence of originalism. This makes American originalists more vulnerable to the charge that originalism is an irrational form of "ancestor worship". After all, if original meaning is just as susceptible to judicial manipulation as other sources of constitutional meaning, then why else privilege the views of the founding generation over the views of the people today?

Here American originalists are able to bolster the defence of their view by tapping into the reverence for the founding in popular constitutional culture. No argument is needed to explain why original meaning is entitled to deference because the wisdom of the founding generation is so widely assumed. Originalism has instant popular appeal.

But there are some obvious problems with relying on popular sentiment. For one thing, popular sentiment is fickle: what if "the people" change their minds about the founding generation? Another problem with relying on popular sentiment is that it makes original meaning vulnerable to re-appropriation by living constitutionalists. The reverence for the founding in American popular culture, coupled with a strong anti-formalist view of the written constitution, suggests that it is the inheritance of particular values, ideals, and aspirations that matters and not the firm settlement of norms and principles in a binding legal agreement. In this way, many American scholars have transformed originalism into a form of living constitutionalism, a trend referred to as "living originalism" or as the "new textualism".[15] The ready-made appeal of originalism thus appears to be its undoing.

Here, too, I want to argue, Australian constitutional practice suggests a more promising line of defence. This lies in meeting the "ancestor worship" charge by establishing that the Framers had a special kind of *expertise*. To help tease this out, I think some of Justice Heydon's references to sources of original meaning are apt. In *XYZ v The Commonwealth* his Honour wrote that:

> the meaning of an expression in the Constitution … comprises the meanings which *skilled lawyers and other informed observers* of the federation period would have attributed to it.[16]

Besides "skilled lawyers and other informed observers," his Honour also referred to the debates that "[t]he most distinguished lawyers and political thinkers … attended and participated in,"[17] the views of "prominent writers at the time,"[18] and to "other materials reflective of the views of distinguished lawyers contemporary with the federation period".[19]

The emphasis is clear: the views of the founding generation merit consideration because of their special expertise and *not* because the public esteems the framers or because the founding

plays a role in public deliberation. Indeed, arguments based on popular reverence for the founding are simply non-starters in Australia: there is no such popular constitutional culture here. But why think that the founding generation, way back then, had expertise that warrants our deference here today?

There are two sets of considerations that we might draw upon. First of all, we might consider the nature of the constitution-making project. The framing of a written constitution is very different from ordinary law-making. Ordinary law-making concerns problems that are more concrete and particularistic than that of designing the fundamental framework that defines the state's legitimate exercise of political power. So we might think that the founding generation's commitment to and active engagement in the project of constitution-making means that their views are entitled to deference.

Second, we might consider the personal characteristics and traits of the framers that distinguish them from other constitutional actors. In doing so, we might reach the view that the framers' understanding is entitled to respect because of the special knowledge and unique practical experience that they brought to bear on the set of issues falling within the constitutional law-making project.

Now, the American founding and the Australian founding can both be plausibly described as involving the extraordinary commitment of the founding generation to an extraordinary law-making project. But the second step in the argument, which involves appealing to the special expertise of the founding generation, seems far more plausible in the Australian context than it does in the United States. This, too, goes to the differences between the kinds of constitutions being interpreted.

The Constitution of Australia is famously (some might say "notoriously") a highly technical, legalistic document – particularly so in comparison to its global counterparts. Justice Ronald Sackville once described the Australian Constitution as "inaccessible".[20] His Honour observed that "without legal training (or sometimes with it), even diligent readers may have considerable difficulty relating the text of the document to current political institutions and practices."[21] As such, the Australian Constitution does not readily lend itself to importing popular understandings. Instead, it can plausibly be argued that its interpretation in fact *requires* consulting the expert views of those who drafted it.

In the first place, most constitutional terms are drawn from legal concepts or terms of art. For example, the Constitution grants the Commonwealth power to make laws for "peace, order, and good government" with respect to a list of enumerated subjects. Although the ordinary meaning of that phrase appears to limit the Commonwealth's legislative power, the phrase is a term of art that was used by the Privy Council at the time of federation to refer to a plenary grant of legislative power.[22]

In the second place, because the dominant character of the Constitution is that of a bargain struck between the States, even less technical terms may need to be understood in the context of federation. For example, section 92 states that "trade between the States … shall be absolutely free." Without going into detail, this is an area of law where importing a "layperson's understanding" of the phrase, "absolutely free" – which suggests that there is an individual right to free trade – is widely agreed to have taken jurisprudence in this area off course. The High Court overruled this view in Cole v Whitfield,23 the landmark originalist decision endorsing reference to the Convention debates.

In the United States, by contrast, an expertise-based argument for the authority of original understanding is much harder to defend. Although Justice Scalia claimed that most constitutional interpretation involves terms with technical legal meanings rather than moral meanings, this is a far more plausible characterisation of the Australian Constitution than the US Constitution. As I noted earlier, many of the US Constitution's rights provisions contain morally-loaded language, such as "cruel and unusual", where consulting contemporary social values as a source of meaning seems far more plausible than consulting views held hundreds of years ago. Far from being an "inaccessible" lawyer's document, the US Constitution has been described as offering "a common vocabulary for our common deliberations, and a shared narrative thread".[24]

Thus, even if American originalists can plausibly argue that the founding generation is entitled to deference given the nature of the constitution-making project, they nevertheless face pressure to grapple with the question of why popular understandings do not count in a way that Australian originalists simply do not.

To conclude, I have argued that the logic of originalism is more compelling in the Australian context than it is in the American context for reasons that have to do with the nature of the constitution being interpreted. In Australia, it is far more plausible to describe the Constitution in formalist terms. Thus, in the same way that it makes sense to inquire into the objective understanding of Parliament when interpreting a written statute, a view long-accepted by the High Court, it makes sense to ask the same about the Constitution's drafters. Moreover, the Constitution of Australia is not a constitution "for the people" in any socially profound sense, but a technical legal document. This, too, makes it more plausible to think that the understanding of the founding generation merits deference.

Why, then, have so many people assumed that originalism has its most natural home in the United States? I suggest that this is only because of the attention that originalism has received from American constitutional scholars and members of the American public. There has been a confusion of the popularity of originalism with its soundness as a theory of constitutional interpretation. But once the features of American constitutionalism that account for the popularity of originalism in the United States are stripped away, it is clear that these features do not offer the best defence of the view. To the contrary, I have suggested, they have led to the transformation of the view to suit anti-originalist purposes, such as advent of "living originalism."

Originalism not only has firm footing on Australian turf but the features of the Australian constitutional system that are most at odds with standard (that is, United States-biased) assumptions about what makes originalism an attractive theory of constitutional interpretation – namely, the lack of a bill of rights, and the lack of a popular constitutional culture – in fact allow for a far more plausible defence of the view. For this reason, I say, Americans have overstated their claim to originalism. Originalism may have been popularised in the United States, but its more natural home is here in Australia.

Endnotes

1. Lael K. Weis, "What does comparativism tell us about originalism?" (2013) 11 *International Journal of Constitutional Law* 842.

2. See Jamal Greene, "On the Origins of Originalism" (2009) 88 *Texas Law Review* 1.

3. This terminology is adopted from Lawrence B. Solum, "Semantic Originalism" (2008) *Illinois Public Law Research Paper* No. 07-24 <http://ssrn.com/abstract=1120244>.

4. Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1.

5. *Eastman v The Queen* (2000) 203 CLR 1, 41.

6. Starting with the work of Raoul Berger and Robert Bork: see Raoul Berger, *Government by the Judiciary: The Transformation of the Fourteenth Amendment*, Harvard, 1977; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, Simon & Schuster, 1990; Robert H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) *Indiana Law Journal* 1.

7. 554 U.S. 570 (2008).

8. See Justice Ronald Sackville, "The 2003 Term: The Inaccessible *Constitution*" (2003) 27 *University of New South Wales Law Review* 66.

9. See Jeffrey Goldsworthy, "Constitutional Cultures, Democracy, and Unwritten Principles" (2012) *University of Illinois Law Review* 683, 684-90.

10. Above n. 3, 9-10.

11. (1988) 165 CLR 360, 385.

12. For example, Justice Heydon has urged a liberal approach to the Commonwealth's obligation to provide "just terms" for acquisitions of property pursuant to section 51(xxxi) on this basis: see *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 211; *JT International SA v Commonwealth* (2012) HCA 43 [193].

13. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, A. Guttman (ed.), Princeton, 1998, 133-134.

14. Antonin Scalia, "Foreword: The Importance of Structure in Constitutional Interpretation" (2008) 83 *Notre Dame Law Review* 1417, 1417.

15. See Jack M Balkin, *Living Originalism*, Harvard, 2011; David A Strauss, "The New Texualism" (1998) 66 *George Washington Law Review* 1153 (reviewing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale 1988)).

16. (2006) 227 CLR 532, 584.

17. Ibid 585.

18. Ibid.

19. Ibid., 587.

20. Above, n. 6.

21. Ibid., 67.

22. See *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1.

23. Above, n. 9.

24. Akhil Reed Amar, "Foreword: The Document and the Doctrine" (2000) 114 *Harvard Law Review* 26, 47.