CHAPTER 32

CONSTITUTIONAL INTERPRETATION

JEFFREY GOLDSWORTHY

Melbourne

I. Interpretive Methodologies and the Rule of Law	**689**
II. Comparing Interpretive Methodologies	**693**
1. The United States	696
2. Canada	698
3. Australia	700
4. Germany	701
5. India	703
6. South Africa	705
III. Explaining the Differences	**706**
1. The Nature and Age of the Constitution	707
2. Legal Culture	709
3. Judicial Appointments and Homogeneity	710
4. Political Culture	712
5. 'The Felt Necessities of the Time'	715

I. Interpretive Methodologies and the Rule of Law

The provisions of national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that judges must decide. In addition, they sometimes seem inadequate to deal appropriately with developments that threaten principles the constitution was intended to safeguard, developments that its founders either failed or were unable to anticipate.

How judges resolve these problems through 'interpretation' is problematic and controversial, mainly because legitimate interpretation is difficult to distinguish from illegitimate change.[1] Judges thought to have improperly changed the constitution while purporting to

[1] This chapter is confined to constitutional interpretation by courts. It is based on the introduction and final chapter of Jeffrey Goldsworthy (ed), *Interpreting Constitutions, a Comparative Study* (2006), referred to hereafter as '*Interpreting Constitutions*'.

interpret it are vulnerable to criticism for usurping the prescribed power of amendment, violating their duty of fidelity to law, retrospectively altering litigants' legal rights, flouting the principles of democracy and federalism (if the amending procedure requires special majorities to protect regional interests), and straying beyond their legal expertise into the realm of politics.

How judges interpret other laws can also be controversial, but the stakes are much higher where constitutions are concerned. As fundamental laws, they allocate and regulate the powers of government and the rights of citizens. Their interpretation can have profound effects on the institutional structure of society, and the exercise of political power within it. It can affect the distribution of powers or rights between organs of government (legislature, executive, and judiciary), levels of government (national and state), and government and citizen. Moreover, legislatures can readily change other laws if they disapprove of the way judges have interpreted them, but constitutions are usually much more difficult to amend, and erroneous or undesirable judicial interpretations therefore more difficult to correct (except by the judges themselves).

This is why political scientists rightly depict constitutional courts as political institutions that wield enormous power. Whenever judicial decisions change the law, judges exercise political power, and when that law is their nation's constitution, they exercise the highest political power that exists in the state. Yet judges, perhaps even more than other political actors, are supposed to be constrained by laws, including the very laws they are responsible for interpreting. Any study of the behaviour of political actors in a society that aspires to the rule of law must include some account of how effectively their exercise of power is ruled by law.[2] Crucial to such an account, in the case of a constitutional court, is the methodology that it uses to interpret the constitution: the considerations it takes into account, explicitly or implicitly, and their relative priority or weight. It is crucial partly because such a court is rarely subject to regular review by any other institution: its fidelity to law depends mainly on its judges' commitment to their own professional ethic, implemented by the procedures and methods of reasoning they follow. Their interpretive methodology constitutes their response to the tension between fidelity to the terms of the constitution, including its amending procedure, and the need to act creatively to resolve indeterminacies in its meaning or (perhaps) even to modify that meaning to deal with other pressing difficulties. That methodology also implicitly defines the boundary between interpretation aimed at revealing or clarifying the meaning that the constitution already possesses, and interpretation that is essentially creative, supplementing or modifying that meaning. This is implicit because judges rarely acknowledge the creative component of their interpretive function.

In drawing this boundary, some courts are more attracted to what can be called, solely for convenience, 'legalism'. This term is used here in a purely descriptive sense, neither to applaud nor to denigrate, but merely to denote interpretive philosophies motivated by distrust of discretionary judicial lawmaking: that is, decision-making guided by subjective values rather than objective legal norms, which changes the law by establishing authoritative precedent. As previously suggested, there are many reasons for this distrust, including equity among litigants, predictability, democracy, and the rule of law.[3]

[2] The concept of the 'rule of law' is notoriously contested, and itself the subject of political debate. Moreover, this Anglophone concept differs from its European counterparts, such as the German *Rechtsstaat* and the French *État de droit*. It is assumed here that the latter incorporate the former. For a full discussion, see Michel Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (2004) 2 *International Journal of Constitutional Law* 633, 638–52. Also see Chapter 10.

[3] See the second paragraph above.

Legalists would prefer law to be objective, determinate, and comprehensive, so that it can provide answers to every dispute, which judges can reliably ascertain and apply. We have already noted that this ambition is impossible to realize in practice, because constitutions inevitably include ambiguities, vagueness, inconsistencies, and 'gaps'. Judges cannot wash their hands of a dispute and leave the parties to fight it out in the street. It follows that they must act creatively to resolve stubborn indeterminacies and gaps in the constitution, by using extra-constitutional principles of justice or public policy to ascribe to it meanings that it did not previously possess. In the real world, legalists must accept the inevitability of both legal indeterminacy and consequential judicial discretion.[4] They can, however, advocate maximal determinacy.

Legalism in constitutional law has been associated with various tendencies, including literalism, formalism, positivism, and originalism. For present purposes, it is useful to characterize legalism as a preference for positivism rather than normativism, and originalism rather than non-originalism. Neither distinction is a dichotomy: each pair of alternatives represents a spectrum of possibilities. Judges, courts, and legal cultures adopt positions somewhere between the two ends of each spectrum, sometimes closer to the legalist end, and sometimes closer to the opposite end. Particular interpretive philosophies could be plotted on a graph, with these distinctions forming the two axes. But they are somewhat opaque, and require further elaboration.

By 'positivism' I mean, in this context, a conception of a constitution as a set of discrete written provisions, whose authority derives from their having been formally adopted or enacted. By 'normativism', I mean a holistic conception of a constitution as more than the sum of its written provisions: as a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality that are the deepest source of its authority. At one extremity of this spectrum, positivism degenerates into literalism: the meanings of the constitution's written provisions are taken to be fixed by conventional word meanings and rules of grammar, independent of the founders' purposes. Less extreme versions of positivism are purposive: they are prepared to interpret the words of express provisions in light of their purposes, without allowing those purposes to either supplement or override the words, or to have independent normative force. A stronger version of purposivism permits the recognition of implications, provided that they are necessary for express provisions to achieve their purposes. As one moves even further towards the normativist end of the spectrum, increasingly abstract formulations of purpose are preferred, and to implement them more effectively, the enacted words may be stretched or compressed, supplemented or overridden—in effect, rewritten. At the extreme end, the most abstract norms attributed to the constitution are directly enforced in their own right, independently of express provisions.

By 'originalism', I mean the thesis that the content of a constitution is determined partly by the intentions or purposes of its founders, or the understandings of the founding generation. 'Non-originalism' treats these considerations as either irrelevant or of little weight, and licenses judges to interpret the constitutional text according to the supposed meanings, values,

[4] This should be uncontroversial except, perhaps, in Germany where the Basic Law still 'tends to be regarded as a self-sufficient code of law' which 'contain[s] the right answer to almost any constitutional dispute': Donald P. Kommers, 'Germany: Balancing Rights and Duties' in *Interpreting Constitutions* 161, 207–8. The Basic Law is expressly based on abstract moral principles, but even if these are objective moral truths accessible to human reason, human choices are often necessary to apply such principles to specific circumstances: see eg John Finnis, *Natural Law and Natural Rights* (1980), 281–9.

or understandings of contemporary society. There are, again, more or less moderate versions of both alternatives. Each one is compatible with either positivism or normativism. An originalist may be a positivist, who maintains that the meanings of express provisions are determined by original intentions or understandings, or a normativist, who equates the constitution's deepest norms with the founders' deepest purposes. Similarly, a non-originalist may be either a positivist or a normativist, regarding either the meanings of express provisions, or the constitution's deepest norms, as determined by contemporary understandings or values.

Non-originalist normativism is a particularly potent agent of substantive constitutional change through judicial interpretation. If a constitution is regarded as based on unwritten, abstract norms of political morality, which can trump the specific terms of written provisions or even be independently enforced, and if those norms can change according to the judges' impressions of contemporary values or their personal values, then the judges possess a remarkable power to reshape the constitution. Indeed, extreme non-originalist normativism may be indistinguishable from natural law philosophies that regard law as a branch of political morality, to which positive law always remains subordinate. Both positions may also be practically indistinguishable from a strong form of pragmatism, which holds that judges should be guided by positive law only insofar as that is the best option, all things considered. Even originalist normativism can be difficult to distinguish from these positions, if the founders' deepest purposes are formulated as abstractly as 'to achieve justice'.

The relationship between these distinctions and the objectivity, determinacy, and comprehensiveness of law is debatable. Normativism makes law more comprehensive than positivism, because it offers much richer normative resources to guide decision-making. Discrete written provisions, even if they are interpreted purposively, provide less comprehensive guidance than abstract norms of political morality. But legalists believe that this greater comprehensiveness comes at the cost of objectivity and determinacy. They distrust the incorporation of moral and political norms into law, on the ground that the usual abstraction and vagueness of such norms compels judges to resort to discretionary value judgments. This is particularly the case if these norms can be used to trump, or be enforced independently of, the wording of enacted provisions.

Legalists fear that strong forms of non-originalism and normativism license judges to change constitutions in three ways: (1) by changing the meanings of their words; (2) by in effect rewriting their express provisions to better implement deeper values; and (3) by adding to them new, 'unwritten' principles. Legalists insist that judges should be bound not only by the founders' ultimate ends, but also by the means they chose to achieve those ends. To be guided only or mainly by their ultimate ends is not to be significantly bound at all.

But legalist critiques are not necessarily persuasive. For example, there can be no doubt that implications are sometimes justified: the content of a constitution, as of any law and indeed any communication, is never completely explicit. Full comprehension of its meaning inevitably depends partly on an understanding of purpose, illuminated by contextual information, and on background assumptions that are taken for granted.[5] Just as indeterminacy gives rise to a superstructure of judge-made law built on the constitutional text, inexplicitness requires a substructure of unwritten purposes to be excavated beneath the text. Furthermore, a strong case can be made for courts sometimes making adjustments for the inability of language in an old constitution, if strictly applied, to achieve its purposes in the modern world, because of

[5] Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994), 150.

technological or social developments that its founders did not anticipate. Take the provision in the US Constitution that vests exclusive power in Congress to raise and maintain 'armies' and 'a navy' and to regulate 'the land and naval forces'.[6] When military aircraft were developed, it would have defeated the provision's obvious purpose if Congress had been denied the power to raise an air force. It is widely accepted that in such cases, the courts may adopt a purposive rather than a literal interpretation, by stretching the provision's literal meaning to give effect to what it originally meant, in a broad sense of 'meant' that is informed by its purpose. But if 'rewriting' to this small extent is justified, where should the line be drawn?

Consider also the extent to which courts should remedy failures on the part of the constitution's founders expressly to provide for problems, even if they should have foreseen them. When interpreting statutes, judges usually refuse to rectify failures of that kind, on the ground that the legislature should do so. But when dealing with a constitution, they should arguably be more willing to provide a solution. If a constitution fails to achieve one of its main purposes, the potential consequences are grave. They include the danger of constitutional powers being abused, of the democratic process or the federal system being subverted, and of human rights being violated. If the constitution is difficult to amend formally, or if amendment requires action by the very politicians who pose the threat needing to be checked, there may be good moral reasons for judges to intervene. True fidelity to the constitution may require some adjustment of its terms. On the other hand, legalists worry that such reasoning can be used to justify extensive judicial rewriting of the constitution, especially if the founders' purposes are pitched at a very abstract level ('they wanted to achieve a just society, and this is necessary to achieve justice'). Legalists deny that judges are 'statesmen', appointed to fill the shoes of the founders and continue the task of constitution-making as an ongoing enterprise.

One conclusion that should be drawn from this brief discussion is that constitutional interpretation is an extraordinarily difficult enterprise, which requires striking an appropriate balance between competing, weighty considerations. The distinction between legitimate and illegitimate change depends on a host of other difficult distinctions, such as between determinacy and indeterminacy, purpose used to clarify meaning and purpose used to change it, genuine implications and spurious ones, evidence of intentions or understandings that illuminates original meanings and that which does not, changes in the meaning of a provision and changes in its application, and so on. The sheer difficulty of drawing such distinctions, even for philosophers after prolonged reflection, let alone for busy judges, should make anyone pause before criticizing judges too forcefully. It is doubtful that the most appropriate balance is, even in principle, determined by wholly objective, 'strictly legal' considerations. Ultimately, it requires normative judgment. And how the balance should be struck no doubt varies, depending on the unique circumstances in which any constitutional court finds itself.

II. Comparing Interpretive Methodologies

Comparative studies of how constitutions have been interpreted in different legal systems have a variety of objectives. Sometimes the objective is wholly practical: to help to interpret a provision in one constitution by learning how similar provisions have been interpreted elsewhere. Courts around the world increasingly seek this kind of guidance.[7] Indeed, why, how,

[6] *The Constitution of the United States of America* (1787), Art I, s 8.

[7] The literature is already enormous: see eg Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006).

and to what extent they do so has itself become a subject of comparative study.[8] But this can be part of a much broader inquiry into the interpretive methodologies that different courts employ, and their underlying philosophies, in negotiating the tension previously noted between fidelity to the terms of a constitution, including its amending procedure, and the necessity or desirability of some measure of judicial creativity.[9]

Such an inquiry can be of value to lawyers and political scientists, who are both concerned with practical implementation of the rule of law. Moreover, it can broaden lawyers' horizons by dispelling any sense of false necessity and expanding their sense of what is possible. Learning how foreign courts tackle interpretive problems might reveal that one's own courts 'simply fail adequately to address arguments that apparently sensible people in other nations have addressed'.[10] Of course, it does not follow that practices appropriate in one country are universally applicable: another potential benefit of comparative study is to help to explain or even to justify differences in terms of institutional, political, social, and cultural circumstances. For example, a recent study of constitutional interpretation in Australia, Canada, and the United States attempts to explain the rise of originalism in US academic, political, and judicial circles since the 1980s in terms of cultural circumstances unique to that country.[11] What is necessary or appropriate to the rule of law in one country might not be the same in another. On the other hand, if it turns out that some approaches to constitutional interpretation are almost universal, that might strengthen the case in their favour.

Such an inquiry must not be confined to the interpretation of constitutional provisions that protect human rights, although most of the comparative literature has that focus.[12] Constitutions are not mainly or even primarily about protecting rights from the powers of governmental institutions. Before doing that, they must establish and empower those institutions, and resolve numerous 'structural' issues concerning methods of appointment, decision-making procedures, demarcations of powers, checks and balances, and so on. Just as important as rights guarantees are provisions dividing powers between chambers in a bicameral legislature, between the legislative, executive, and judicial branches of government, and between the national and regional polities in a federation. An overemphasis on rights protection leads to exaggerated claims, such as that the principle of proportionality has made textual interpretation mostly redundant in constitutional cases, or that the main function of constitutional review is to articulate, promote, and enforce the political morality of the community.[13]

[8] See eg Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819; Tony Blackshield, 'National Constitutions in an International World' (2008) *Indian Journal of Constitutional Law* 104.

[9] See eg *Interpreting Constitutions*.

[10] Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (1999), 145.

[11] Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1.

[12] See Vicki C. Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *International Journal of Constitutional Law* 91, 93–4, 100. Two recent comparative studies of federalism are Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (2006) and Greg Taylor, *Characterisation in Federations: Six Countries Compared* (2006). However, Baier is concerned mainly with the role of judicial doctrine (judicially constructed principles, tests etc) in adjudicating federalism disputes, rather than with the interpretive methods used to construct those tests, while Taylor is concerned mainly with one kind of judicial doctrine—that which is used to decide whether legislation deals with subject matters allocated to the enacting legislature. See also Chapter 27.

[13] The first claim is made by David M. Beatty, *The Ultimate Rule of Law* (2004), ch 1, esp 5, and is criticized in Vicki C. Jackson, 'Being Proportionate About Proportionality' (2004) 21 *Constitutional Commentary* 803, esp 814–19 and 842–7 and 859. The second claim is made by David Robertson, *The Judge as Political Theorist* (2010), passim. See also Chapters 33 and 34.

A fixation with rights might also distort an analysis of interpretive methodologies, for reasons given below.[14]

In what follows, I attempt to summarize the interpretive methodologies of the courts of six federations that were the subject of a recent comparative study,[15] and then provide some explanations of the differences between them. They are Australia, Canada, Germany, India, South Africa, and the United States. A more comprehensive comparative study would be desirable. For example, it has been claimed that in Europe, 'recourse to originalism is virtually non-existent'.[16] But constitutional interpretation in Austria, at least in relation to the federal division of legislative powers, involves a combination of originalist and structuralist reasoning.[17]

Attempting an overall characterization of the interpretive philosophy of any court is hazardous. It may be distorted if undue emphasis is given to a small number of prominent but only partially representative decisions (eg decisions exclusively about rights guarantees rather than structural provisions). It involves generalizing about interpretive philosophies that are rarely well theorized by judges and never wholly coherent, using terminology such as 'originalist' that is often ambiguous, vague, and contested. Judges may disagree about these interpretive philosophies, and it may be unclear whose views predominate. Courts that have been in business for a long time may have changed their interpretive approach, possibly more than once.[18] Moreover, to some extent all courts are guided by a diversity of considerations, pursuing what Mark Tushnet calls 'eclecticism'.[19] Consequently, observers may reasonably disagree in characterizing the predominant interpretive methodology even in a single case, and a fortiori in a large number of cases. Nevertheless, there is often widespread agreement among comparativists about the general tendencies and patterns of reasoning of different national courts. It is universally agreed, for example, that the Australian High Court has traditionally been much more legalist (as previously defined) than its Canadian, German, Indian, and South African counterparts.[20]

Constitutional interpretation is guided by much the same set of considerations in all six countries studied. The main ones are: the words of the constitutional text, understood in the context of related provisions; other evidence of the intentions, understandings, or purposes of the founders; presumptions favouring broad, or purposive, interpretations; so-called 'structural' principles regarded as underlying particular provisions, groups of provisions or the constitution as a whole; precedent and judicial doctrine developed from it; and considerations of justice, practicality, and public policy.[21] Other considerations include additional

[14] See text between nn 138 and 143 below.

[15] *Interpreting Constitutions*.

[16] Rosenfeld (n 2), 656; see also 634.

[17] See Taylor (n 12), ch 6, esp 98–106 (Austrians use the term 'petrification theory' to describe this approach).

[18] There have been remarkable changes in the approaches of the Supreme Courts of Canada and India: see *Interpreting Constitutions*, chs 2 and 5.

[19] See Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in *Interpreting Constitutions*, 7. On this point, see Vicki C. Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 *Fordham Law Review* 921, 925 and 927.

[20] Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in *Interpreting Constitutions*, 106; Greene (n 11); Baier (n 12); Taylor (n 12); Vicki C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Rosalind Dixon and Tom Ginsburg (eds), *Handbook in Comparative Constitutional Law* (2011).

[21] These can all be sorted into Philip Bobbitt's well-known 'modalities' of constitutional interpretation, namely, textual, historical, structural, doctrinal, ethical, and prudential: see Philip Bobbitt *Constitutional Fate: Theory of the Constitution* (1982).

presumptions and maxims of interpretation, sometimes counselling deference to long-standing practice or the elected branches of government, international and comparative law, and academic opinion.

But it would be a mistake to overemphasize this similarity in judicial methodology. Careful discrimination is required. Judges rarely attempt rigorous theoretical analysis of interpretive problems or the methods they use to resolve them. In particular, they seldom acknowledge the difference between attempting to clarify a constitution's pre-existing meaning, and creatively supplementing or modifying it. Most of the considerations just listed can be used for either purpose: for example, considerations of justice and public policy can be used as evidence of the framers' intentions ('they could not have intended *that*') or as independent guides to creative gap-filling. Moreover, there are substantial differences in the relative priorities or weights given to these diverse considerations in the six countries studied. For example, precedents and established judicial doctrine naturally play a larger role in common law jurisdictions, and in the interpretation of older constitutions (partly because they have more precedents); academic opinion has far more influence in Germany than in common law jurisdictions; original intentions or understandings are relied on more in the United States and Australia than elsewhere; 'structural' principles play a more pervasive role in Canada, Germany, India, and South Africa than in Australia or the United States; justice and public policy seem more influential in India than anywhere else; and comparative law is given much less attention in the United States than in the other countries. These differences cannot be demonstrated in detail here; particulars are provided in the comparative study previously cited.[22]

Perhaps even more significant are substantial differences in the underlying philosophies of interpretation favoured by courts in the six countries. Australian and US judges have tended to be more attracted to legalist philosophies than their Indian and Canadian counterparts, who changed their approaches, in the 1970s and 1980s respectively; German and South African judges arguably sit somewhere in between; and US judges appear to have been more divided than others over these issues.

1. The United States

Professor Tushnet has depicted constitutional interpretation in the United States as, for the most part, straightforwardly legalist. When the Supreme Court interprets a constitutional provision without the assistance of precedent, either because the issue is novel or because the Court regards existing precedents as erroneous, it starts with the constitutional text, understood in the context of related provisions, and in light of original understandings and the political theory that the Court finds in the text.[23] But in most cases, relevant precedents do exist, and are the predominant consideration, followed by text-based and originalist considerations that 'often go hand in hand'.[24] Professor Tushnet asserts that 'some version of a jurisprudence of original understanding remains an essential element of nearly all practical resolutions of interpretive controversies.'[25] In the recent case of *Heller*, evidence of original meaning notoriously prevailed over a 69-year-old Supreme Court precedent and hundreds of

[22] *Interpreting Constitutions*. These observations are generally confirmed by Greene (n 11) and Jackson and Greene (n 20).

[23] Tushnet (n 19), 40 and 48–9.

[24] Ibid 42 and 47.

[25] Ibid 38.

federal court opinions based on it.[26] Resort to 'structural' principles is less frequent, except in separation of powers and individual rights cases, and is used mainly to support other arguments; and explicit reference to moral or political philosophy is rare except when the text expressly incorporates moral principles.[27] Where the text does so, the Court is entitled to ignore the founders' possibly mistaken expectations about the proper application of those principles; any accusation of 'activism' in such cases is therefore unfair.[28] Sometimes the Court is criticized for excessive formalism.[29]

Yet the Supreme Court has acquired a reputation for activism, because of perceived innovations such as substantive due process, the 'incorporation' of the Bill of Rights in the Fourteenth Amendment, broad interpretation of some provisions contrary to the apparent original understanding, and unenumerated rights, such as the right to privacy recognized in *Griswold v Connecticut* and extended to abortions in *Roe v Wade*.[30] Professor Tushnet acknowledges that the Warren Court had an 'aggressive agenda', which aroused considerable controversy over its alleged activism from the 1950s onwards.[31] But he maintains that its decisions fell well within the bounds set by standards of professional competence.[32] Some if not all of those decisions can be defended on orthodox legalist grounds: substantive due process, for example, reflected a technical meaning acquired by the words 'due process' before they were inserted into the Constitution, and the implied right to privacy is arguably as legitimate as implied intergovernmental immunities.[33]

Professor Tushnet argues that orthodox interpretive considerations—text, original understanding, precedent, and so on—have been unable to significantly constrain decision-making.[34] Precedent, for example, has not provided 'stability' partly because the judges have been unwilling to subordinate their views to those expressed in the precedents. Consequently, the precedents have come to provide an array of alternatives from which current judges can choose.[35] And original understandings have failed to constrain, partly because they often merely reveal disagreements among the founders themselves, and partly because they can be specified at different levels of generality, which point to different conclusions.[36] Consequently, judges can implement their own 'values and visions' by choosing appropriate interpretive methods, without exceeding the bounds set by standards of professional competence.[37]

But to the outside observer, the impression conveyed by the political battles that often attend the confirmation of Supreme Court nominees is that interpretive standards are deeply conflicted in the United States.[38] Decisions attacked as activist fall outside the standards

[26] *District of Columbia v Heller* 128 S Ct 2783 (2008) and *US v Miller* 307 US 174 (1939), discussed in Greene (n 11), 12.

[27] Tushnet (n 19), 32, 39–40 and 47.

[28] Ibid 39.

[29] Ibid 21–2.

[30] See eg Robert H. Bork, *The Tempting of America: the Political Seduction of the Law* (1990) Part I, for a critique along these lines. On abortion, see Chapter 51.

[31] Tushnet (n 19), 14, 52.

[32] Ibid 50–1 and 54.

[33] Ibid 28, citing John V. Orth, *Due Process of Law* (2003); see also Tushnet (n 19), 20 and 32 esp n 77. See also Chapter 44.

[34] Ibid 50.

[35] Ibid 17–20.

[36] Ibid 35–8 and 50–1.

[37] Ibid 50–1.

[38] See Christopher Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (2009).

accepted by some sections of the profession, even though they are within the standards accepted by others. If so, US constitutional culture might best be characterized as a site of conflict over interpretive philosophies, within the profession as well as outside it.

Professor Tushnet's chapter includes some evidence that professional standards are conflicted, with many lawyers accepting normativist standards that others repudiate. First, he point outs that the early debate between Justices Iredell and Chase in *Calder v Bull*, about the legitimacy of 'unwritten principles' of reason and justice, was never resolved.[39] Consequently, a controversial strain of natural law thinking seems to have persisted in US constitutional jurisprudence. For example, Justice Chase's insistence that all governments in the United States are necessarily limited may have provided the crucial 'structural' pre-supposition behind the much-criticized right to privacy.[40]

Second, Professor Tushnet claims that the American people have come to accept that constitutional interpretation 'is the means by which the Constitution is recurrently revised to accommodate the general values embodied in the Constitution with the realities of governance in a changing world.'[41] This view can be traced back to Chief Justice Marshall's influential statement in *McCulloch v Maryland*, that the Constitution was 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'.[42] According to Professor Tushnet, this became 'the touchstone for everyone who defended the idea of a living Constitution'.[43] The notion of a 'living constitution' that the courts can 'adapt' to changing circumstances is ambiguous: it could mean either that broad but unchanging meanings must be applied to new and unexpected phenomena, or that the meanings themselves must sometimes be changed for that purpose. As Professor Tushnet explains, the principal method of adapting the Constitution to external change has been to identify the general purposes or principles underlying specific constitutional terms, and then to determine how those principles apply to contemporary problems.[44] It is notable that in *Heller*, the principal dissenting judgment involved just such reasoning.[45] This is what I have called 'originalist normativism'. If the underlying principles are couched at a sufficiently abstract level of generality, the specific terms may lose their grip. That, one suspects, has been a bone of contention.

2. Canada

The Privy Council almost took a literal approach to the Canadian Constitution, refusing to consult legislative history to ascertain the founders' intentions or purposes. The text itself had been drafted in a deliberately ambiguous fashion, and the ambiguities were resolved according to the judges' preconceptions of the nature of a genuine federation.[46] In other words, the judges' own ideology proved decisive.[47] It generally favoured broad interpretations of provincial powers and narrow interpretations of national ones, which may have suited Canadian society better than the founders' intentions, by mollifying separatist sentiment in Quebec.[48] This is a good example of how literalism, by excluding extra-textual evidence of legislative purpose and intention, can increase textual indeterminacy and the consequential need for discretionary judicial lawmaking.[49]

[39] Tushnet (n 19), 26–7, discussing *Calder v Bull* 3 US 386 (1798).
[40] Tushnet (n 19), 32. [41] Ibid 49; see also 7, 16–17 and 54.
[42] *McCulloch v Maryland* 17 US 316, 415 (1819).
[43] Tushnet (n 19), 24. [44] Ibid 37.
[45] *District of Columbia v Heller* (n 26), Stevens J dissenting.
[46] Peter Hogg, 'Canada: From Privy Council to Supreme Court' in *Interpreting Constitutions*, 66.
[47] Ibid 75–6. [48] Ibid 76, 104. [49] Ibid 104.

The Privy Council described the Constitution as a 'living tree capable of growth and expansion within its natural limits',[50] but probably did not have in mind changes in the meaning of the text resulting from judicial interpretation.[51] It probably intended merely to endorse 'generous', rather than 'dynamic', interpretation.[52] But the modern Supreme Court has enthusiastically employed the metaphor to justify dynamic interpretation: the notion that, without any need for formal amendment, the Constitution should be capable of 'growth, development and adjustment to changing societal needs'.[53] Professor Hogg states that originalism has 'never enjoyed any significant support in Canada', and 'indifference to the original understanding lingers on in the modern Supreme Court'.[54] Indeed, the lawyers and politicians who drafted and adopted the Charter apparently assumed that the Court would not be bound by their intentions.[55] Consequently, the Court has held that a provision embodied the US doctrine of substantive due process, even though it had been deliberately drafted so as not to do so.[56] The judicial choice of the opposite meaning to the one intended goes well beyond 'adaptation' of the provision to cope with developments unanticipated by its framers: it involves altering the provision's intended meaning in circumstances that they fully anticipated. Professor Hogg describes the principle of 'progressive (or dynamic) interpretation' as 'the dominant theory of interpretation in Canada'.[57] It should be noted, however, that originalist reasoning has played a large part in so-called 'confederation bargain' cases, concerning constitutional provisions thought to embody pragmatic compromises rather than high principles.[58]

Over the last quarter of a century, the Supreme Court seems to have shifted from a positivist to a normativist conception of the Constitution, giving to fundamental, unwritten principles a normative force that is independent of specific provisions.[59] Professor Hogg asserts that the Court has sometimes invented, rather than discovered, these principles, thereby amending the Constitution by judicial fiat in defiance of the prescribed procedures for amendment.[60] The supposed unwritten principle of judicial independence is a product of non-originalist normativism, since the principle runs counter to textual evidence of the founders' intentions.[61] While such principles could be found 'to accommodate virtually any grievance about government policy', Professor Hogg notes that lately, the Court has shown 'some sign of reigning in its creative impulses'.[62] An example is a recent unanimous statement that 'in a constitutional

[50] *Edwards v A-G Canada* [1930] AC 124, 136 (Lord Sankey).

[51] Bradley W. Miller, 'Origin Myth: The *Persons Case*, The Living Tree, and the New Originalism' in Grant Huscroft and Bradley W. Miller (eds), *The Challenge of Originalism; Essays in Constitutional Theory* (2011); Hogg (n 46), 84.

[52] Ibid 87.

[53] *Re British Columbia Motor Vehicle Act* [1985] 2 SCR 486, 509 (Lamer CJ).

[54] Hogg (n 46) 83; also 78–9.

[55] Ibid 87.

[56] *Re British Columbia Motor Vehicle Act* [1985] 2 SCR 486. Admittedly, the choice of the words 'fundamental justice' to avoid that result was a remarkably inept piece of drafting.

[57] Ibid 87. See also Greene (n 11), 18–40. Bradley W. Miller argues that Canadian legal theory has failed to grapple with these issues with any sophistication, and consequently overlooks many critical distinctions: 'Beguiled by Metaphors: The "Living Tree" and Originalist Interpretation in Canada' (2009) 22 *Canadian Journal of Law and Jurisprudence* 331.

[58] Miller (n 57), 345.

[59] Hogg (n 46), 90–1.

[60] Ibid 90 and 104.

[61] Ibid 91–2.

[62] Ibid 92.

democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.'[63]

The Supreme Court has interpreted Charter rights more broadly than their US equivalents have been interpreted, and has enthusiastically adopted an activist approach.[64] Its judges seem much more united in embracing non-originalism and normativism than their US counterparts.

3. Australia

Of all six courts studied, the High Court of Australia has been the most legalist. Its judges have frequently expressed aversion to changing the Constitution through creative interpretation.[65] At least since 1920, the Court has devoted itself to a predominantly positivist methodology. Many of its judges have praised 'dry legal argument',[66] insisted on not straying too far from the text,[67] repudiated political and pragmatic considerations,[68] and spoken disparagingly of reasoning from such abstractions as the 'spirit' of the Constitution or 'vague and imprecise expressions of political philosophy'.[69] Indeed, much of the Court's jurisprudence before the late 1980s can fairly be described as literalist and formalist. The Court's commitment to positivism is epitomized by Chief Justice Latham's declaration that even if the Commonwealth used its financial supremacy to destroy the federal system, the Court might be powerless to stop it.[70]

The judges have often referred to 'underlying principles' such as federalism, representative and responsible government, the rule of law and the separation of powers, but have generally used them to aid the interpretation of express provisions. They have tended to be wary of implications, which are usually required to be 'necessary' for express provisions to achieve their purposes.[71] They have recognized a limited doctrine of implied intergovernmental immunities, and a much more robust doctrine of the separation of judicial power, but the latter has plausible support in the constitutional text.[72] Recent attempts to derive implications directly from the principle of representative government were scotched, on the ground that it must not be treated as a 'free-standing' principle.[73]

[63] *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473, 2005 SCC 49, para 66. See also Kent Roach, 'Judicial Activism in the Supreme Court of Canada' in Brice Dickson, *Judicial Activism in Common Law Supreme Courts* (2007), 102–3.

[64] Robert Harvie and Hamar Foster, 'Ties that Bind: the Supreme Court of Canada and American Jurisprudence' (1990) 28 *Osgoode Hall Law Journal* 729. See also Hogg (n 46), who uses the term 'activist', 71, 81, 88 and 103–5, and Roach (n 63), 118.

[65] Many cases are cited by Jeffrey Goldsworthy (n 20), 119–20, 121–2, 133, 141–2, 146, 151, 153, and 154–5.

[66] Sir Garfield Barwick, *A Radical Tory* (1994), 66; *A-G (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469, 559.

[67] *Henry v Boehm* (1973) 128 CLR 482 (Gibbs J).

[68] *SA v Commonwealth* (*First Uniform Tax* case) (1942) 65 CLR 373, 411–12.

[69] *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 388 (Isaacs J); *A-G (Cth) (ex rel McKinley) v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ).

[70] *South Australia v Commonwealth* (1942) 65 CLR 373, 429 (Latham CJ).

[71] Goldsworthy (n 20), 128 and 136. See eg *McGinty v Western Australia* (1996) 186 CLR 140, 427 (McHugh J).

[72] Goldsworthy (n 20), 128–9.

[73] *McGinty v Western Australia* (1996) 186 CLR 140; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

The Court has usually endorsed a moderate version of originalism. It has maintained that the meaning of the text (its 'connotation') cannot be changed through interpretation, even though its application to external facts (its 'denotation') can change, and it has often relied on historical evidence of what a provision was originally understood to mean.[74] Its commitment to moderate originalism has been fortified in recent years by its willingness to consult the Convention Debates and other historical evidence of original understandings and purposes.[75] Only a handful of judges have expressly endorsed a 'living tree' theory of the Constitution.[76]

The Court's approach became less legalist after 1987, when Sir Anthony Mason became Chief Justice. The Court repudiated literalism and formalism, and adopted a more purposive and substantive approach.[77] It purported to find an implied freedom of political communication in the Constitution, which was criticized as an example of its increasing activism.[78] Commentators spoke of a 'Mason Court revolution', but this was an exaggeration.[79] After Mason's retirement, the Court's refusal to expand the recognition of implied rights, together with some decisions remarkable for their legalism, suggested that the movement away from legalism had stalled.[80] But the Court continued to be more willing than formerly to interpret and apply provisions purposively, and to acknowledge the need for judicial discretion on policy grounds to resolve stubborn indeterminacies. Recent judges have also been less certain as to whether the meaning, or connotation, of constitutional terms cannot change, but in most cases their reasoning has remained predominantly positivist and moderately originalist.[81] The main exceptions to this are cases dealing with judicial authority and independence, which the Court has always been eager to protect even when that has required an unacknowledged compromise of its usual legalist methodology.[82]

4. Germany

The interpretive philosophy of Germany's Federal Constitutional Court is extremely normativist, partly because the Basic Law virtually dictates a normativist approach. Like other post-war constitutions, it expressly enumerates many 'structural principles' that its detailed provisions are intended to implement.[83] Opinions have differed as to the nature and source of authority of these principles, with 'higher law' conceptions—especially popular after the

[74] Many cases are cited by Goldsworthy (n 20), 124–7 and 150–2.

[75] The trend started with *Cole v Whitfield* (1988) 165 CLR 360. See Goldsworthy (n 20), 126–7.

[76] Ibid 150.

[77] See Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1.

[78] H.P. Lee, 'The Implied Freedom of Communication' in H.P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003), 392; Goldsworthy (n 20), 146 and 157–8.

[79] Compare Jason Louis Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006), with Fiona Wheeler and John Williams, 'Restrained Activism" in the High Court of Australia' in Dickson (n 63), 19.

[80] Exemplary legalist decisions include *Re Wakim; ex p McNally* (1999) 198 CLR 511, discussed in Goldsworthy (n 20), 132–3, and *Al-Kateb v Godwin* (2004) 219 CLR 562.

[81] For a brief discussion of recent trends, see Goldsworthy (n 20), 144–52; Wheeler and Williams (n 79); Greene (n 11), 50–61; Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H.P. Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent, Essays in Honour of George Winterton* (2009) 245, 262–8.

[82] See nn 230–2 below; Goldsworthy (n 20), 148–50 and 160; *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

[83] Although these have been supplemented by the FCC: Kommers (n 4), 191.

War—recently losing ground to originalist theories.[84] But the Court has not limited itself to the interpretation and application of enumerated principles. It has inferred other, unwritten or 'supra-positive', principles from 'the normative realities underlying the Basic Law'.[85] For example, it has inferred 'objective values' from constitutional rights, values that are taken to impose positive obligations on all organs of the state in addition to the negative obligation of not infringing the rights.[86] Moreover, the Court does not regard constitutional norms as separate from extra-legal political or social norms: the constitutional order and the broader community are regarded as interdependent, each helping to define and refine the other.[87]

Professor Kommers observes that 'Structural reasoning is deeply ingrained in Germany's culture of interpretation.'[88] In comparison with the United States, where it is resorted to only occasionally, when other interpretive considerations are indeterminate, in Germany it is 'as standard as doctrinal reasoning in the common law tradition'.[89] According to him, the Federal Constitutional Court has had to maintain a 'creative balance' between the many competing principles of the constitutional order, and also to creatively adjust the Basic Law to 'necessity'.[90]

Yet German lawyers are not attracted to the notion that substantive constitutional change may be brought about through interpretation. The Court frequently relies on evidence of the founders' intentions or purposes, including the Basic Law's legislative history, especially in cases involving federal–state conflicts.[91] Indeed, it has been said that 'the importance placed on historical considerations is the most distinctive feature of German scope [of legislative power] doctrine.'[92] When political or social realities begin to diverge from the founders' handiwork, Germans turn to formal amendment, which has been frequently utilized.[93] 'Any judicially imposed remodelling of the Basic Law—enduring and binding changes in particular—would diminish the clarity, precision, and predictability required of the constitutional *Rechtsstaat*.'[94]

Although many judges agree that there is no 'slide rule' to calculate how to weigh and balance the competing values set out in the Basic Law, so that some judicial discretion is inevitable, most 'are reluctant to admit publicly that they are doing anything other than engaging in objective constitutional interpretation.'[95] They generally insist that the process of interpretation is apolitical, even though most would concede that its effects are political.[96] The old civil law conception of written laws as self-sufficient codes lingers on: 'many judges regard the Basic Law, like the civil code, as a unified body of rules and principles that contain the right answer to almost any constitutional dispute.'[97] Despite the quasi-legislative nature of its role, it 'was expected to employ strictly judicial methods of interpretation, methods designed, in

[84] Ibid 180, 182–3, and 189.

[85] Ibid 189. The trend started with *Southwest State Case* 1 BVerfGE 14, 61 (1951), the landmark decision that has been compared to *Marbury v Madison* 1 Cranch 137 (1803).

[86] Kommers (n 4), 180–1.

[87] Ibid 178.

[88] Ibid 199.

[89] Ibid 178–9 and 213–14.

[90] Ibid.

[91] Ibid 191–2 and 197–8.

[92] Taylor (n 12), 84 (summarizing 77–84).

[93] Kommers (n 4), 179.

[94] Ibid 171; see also 179.

[95] Ibid 179 and 213; see also 207.

[96] Ibid 213, which seems to qualify the statement at 179. See also 211.

[97] Ibid 208.

the FCC's perception of its task, to determine rationally and objectively the true meaning of the Basic Law.'[98]

The theory that the Basic Law embodies an 'objective order of values', which are hierarchically ordered, in itself suggests that subjective judicial value judgments and discretion are unnecessary.[99] These values are considered to be specified by the constitutional text, as informed by history, rather than a product of judicial precedent.[100] Basic constitutional doctrines, according to the Federal Constitutional Court, 'reflect the normative realities underlying the Basic Law.'[101] Moreover, German jurisprudence continues to rely heavily on formal reasoning: 'the emphasis in legal education...on theory, conceptual clarification, deductive reasoning, and systematization...[is] reflected in general commentaries on the Basic Law.'[102] Definitional refinement and doctrinal elaboration, as well as normative theorizing, dominate the Court's opinions, which aim to prove the 'rightness, neutrality, and integrity of decisional outcomes'.[103]

Many observers will be sceptical about this aspiration to apolitical, objective legalism. But even if German constitutional reasoning is not objective, in a strong sense of the word, it may articulate a greater degree of inter-subjective agreement than exists in, say, the United States. The key to reconciling normativism and legalism in Germany seems to be professional consensus, which is converted into judicial doctrine and then steadfastly maintained. Leading journals are edited by practitioners, judges, and professors, and the Federal Constitutional Court pays as much if not more attention to leading academic commentaries as to judicial precedents. '[T]he "ruling opinion" in the literature takes pride of place in the interpretation of the Basic Law.'[104] The process by which the Court prepares its opinions is one of genuinely collegial decision-making aimed at achieving consensus within the Court, and general acceptance outside it,[105] especially within the legal academy, which the opinions are mainly aimed at convincing.[106] The Court's standard practice of handing down single, unsigned opinions also emphasizes the law's 'rationality, objectivity, and depersonalisation'.[107]

5. India

The Indian Supreme Court has radically changed its interpretive philosophy. For two decades, its philosophy was very similar to that of the Australian High Court. This is not surprising, since both courts initially adopted the rules of statutory interpretation that had been developed by British judges in the nineteenth century. The position adopted in *Gopalan* (1950), that courts can only enforce limits found in the Constitution by express provision or necessary implication, rather than 'a spirit supposed to pervade the Constitution but not expressed in words',[108] is identical to that adopted in the leading Australian case of *Engineers* (1920).[109] The

[98] Ibid 207.
[99] Ibid 179–80.
[100] Ibid 180 n 70.
[101] See n 85 above.
[102] Kommers (n 4), 209.
[103] Ibid 210.
[104] Ibid 193.
[105] Ibid 211–12.
[106] Ibid 210.
[107] Ibid 208.
[108] *Gopalan v India* AIR 1950 SC 27 (Kania J).
[109] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, discussed in Goldsworthy (n 20), 120.

Supreme Court did not always adhere to its early positivism: in a series of cases, it adopted strained interpretations of constitutional provisions in order to protect private property from expropriation without full compensation.[110]

The Court shifted to a more normativist approach when it circumscribed Parliament's power of constitutional amendment. In *Golaknath* (1967), it purported to adopt a literal, positivist interpretation of the relevant provisions, but constitutional experts regarded this as obviously erroneous, and concluded that the Court had really been guided by the anti-majoritarian sentiments expressed in the judgments.[111] The Court also, for the first time, adopted prospective overruling, which 'flew in the face of the theory that the judges did not make law, but merely interpreted it'.[112] In *Kesavanand* (1973), the Court read into the amending power a limitation nowhere expressed, nor contemplated by the founders.[113] Although the Court purported to rely partly on the words 'the Constitution shall stand amended', they were interpreted in light of the underlying structure or spirit of the document, comprised of enduring constitutional values.[114]

Since then, the Court has applied the 'basic structure' doctrine in other contexts,[115] overturned government action that violated broad, unwritten principles rather than specific provisions,[116] taken the non-justiciable Directive Principles into account in interpreting the Fundamental Rights,[117] interpreted an article that was deliberately drafted so as not to incorporate substantive due process as doing the opposite,[118] found many new, unenumerated, 'positive' rights to be implied by the right to life and personal liberty,[119] and interpreted several of the Fundamental Rights as incorporating international human rights that did not exist when the Constitution was adopted.[120]

In some of its most creative decisions, the Court relied on a 'basic structure' argument, as well as a Directive Principle, to interpret a provision requiring the government merely to 'consult' with the Chief Justice, before making judicial appointments, as requiring it to act on his recommendations. It then added a novel requirement that the Chief Justice must consult with four senior colleagues before tendering any recommendations.[121] Although this interpretation seems completely unsupported by the provision's express words, especially when understood in light of appointment practices at the time the Constitution was adopted ('consulted' never meant 'obeyed'), the Court did claim to be guided by the founders' purposes.[122] As recently as 2001, the Court stated that 'it is the function of the Court to find out the intention of the framers of the constitution'.[123] The judges' strategy therefore seems to be to appeal to

[110] S.P. Sathe, 'India: From Positivism to Structuralism' in *Interpreting Constitutions*, 239–42.

[111] Ibid 242–3.

[112] Ibid 224.

[113] *Kesavanand Bharati v Kerala* AIR 1973 SC 1473, discussed in Sathe (n 110), 244.

[114] Ibid 246.

[115] See eg *Indira Gandhi v Rajnarain* AIR 1975 SC 2299; *Minerva Mills v India* AIR 1980 SC 1789; *SR Bommai v India* AIR 1994 SC 1918; discussed in Sathe (n 110), 245–7.

[116] See eg the principle of secularism, in *Ismail Faruqui v India* (1994) 6 SCC 360; *Aruna Roy v India* (2002). See Sathe (n 110), 262.

[117] See eg *Hanif Quareshi v Bihar* AIR 1958 SC 731, cited by Sathe (n 110), 251.

[118] *Maneka Gandhi v India* AIR 1978 SC 597, cited by Sathe (n 110), 252.

[119] See many cases discussed in Sathe (n 110), 252–3.

[120] *Vishaka v Rajastha* (1997) 6 SCC 241, discussed by Sathe (n 110), 254.

[121] *SP Gupta v India* AIR 1982 SC 149; *Supreme Court Advocates on Record Association v India* (1993) 4 SCC 441; discussed by Sathe (n 110), 259–60.

[122] Ibid 260.

[123] *SR Chaudhuri v Punjab* AIR 2001 SC 2707 at 2717; (2001) SCC 126.

the founders' purposes at a very abstract level, and then to 'adapt' their words to give better effect to those purposes. That is very a strong form of normativism.

On several occasions, Professor Sathe comments that the Court interpreted the Constitution in ways that were clearly inconsistent with the founders' intentions.[124] It has said that the Fundamental Rights have 'no fixed contents', and acknowledged that it may be justified in finding 'new rights'.[125] It has openly embraced a creative role in interpreting the Constitution, which it has described as 'a vibrant document alive to the social situation [rather than] as an immutable cold letter of law unconcerned with the realities'—a 'living organ' that must change to meet the 'felt necessities of the time'.[126] In *Golaknath* (1967), Chief Justice Subba Rao stated that:

> Arts. 32, 141 and 142 are couched in such wide and elastic terms as to enable this court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds the law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary in this country.[127]

6. South Africa

It is difficult to characterize the jurisprudence of a Constitutional Court that has been in existence for such a short period. So far, it seems to have adopted a moderately normativist approach, which does not subordinate the language of the text to underlying values.

The South African Constitution expressly incorporates abstract values and principles. Section 1, for example, declares that the state is 'founded on certain basic values' including human dignity, equality, human rights, the rule of law, and democracy. Section 39(1) requires the Court to interpret constitutional rights so as 'to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.' Governing principles also precede specific chapters, including those dealing with cooperative governance, public administration, and the security services. In a striking innovation, section 39 requires that international law be taken into account in interpreting the Bill of Rights. This could reasonably be construed as a sign that the founders intended constitutional rights to be interpreted dynamically, in response to global developments in the understanding of human rights.

Such provisions clearly encourage a normativist approach. Concerned that this might be taken too far, Justice Kentridge warned that if the language of the text were ignored in favour of a general resort to values, the result would be 'divination' rather than interpretation, allowing the judges to make the Constitution mean whatever they would like it to mean.[128] The Court subsequently declared that interpretation should be 'generous and purposive', giving expression to the Constitution's underlying values, 'whilst paying due regard to the language that has been used'.[129] Professor Klug provides several examples of cases in which rights were

[124] See eg Sathe (n 110), 252.

[125] *India v Association for Democratic Reforms* (2002) 5 SCC 294, and *Kapila Hingorani v Bihar* (2003) 6 SCC 1, cited by Sathe (n 110), 253.

[126] *Kapila Hingorani v Bihar* (2003) 6 SCC 1 and *Indra Sawney v India* (1992) ATC 385, respectively; quoted by Sathe (n 110), 253 and 262.

[127] *Golaknath v Punjab* AIR 1967 SC 1643 at 1669.

[128] *S v Zuma* 1995 (2) SA 642 (CC) para 17, quoted by Heinz Klug, 'South Africa: From Constitutional Promise to Social Transformation' in *Interpreting Constitutions*, 292.

[129] *Makwanyane* 1995 (3) SA 391 (CC) para 9, quoted by Klug (n 128), 292.

not interpreted as broadly as they might have been, because of textual, contextual, and purposive considerations.[130]

The Court takes into account the circumstances in which the Constitution was adopted, and even its legislative history, but only when this clearly illuminates the purpose of a provision. It does not examine the comments of individuals who participated in the constitution-making process in order to construct an 'original intent'.[131]

Some of the Court's decisions seem strongly normativist. In one case, a majority adopted a non-literal interpretation of section 241(8) of the 'interim' Constitution, which provided that 'pending cases shall be dealt with as if the Constitution had not been passed'. Although the case had commenced before the Constitution was adopted, they held that the petitioners were entitled to the benefit of new constitutional rights. They interpreted the section as including an implied qualification limiting its effect to the preservation of the jurisdiction of courts in which pending cases had been commenced.[132] Despite the apparent breadth of the enacted words, the Constitution's founding values and emphasis on rights was thought to constitute stronger evidence that a narrower meaning had been intended. Justice Mahomed expressly treated the Constitution as 'a holistic and integrated document with critical and important objectives'.[133] But the majority's reasoning exemplifies originalist rather than non-originalist normativism.[134] Justice Sachs insisted that:

> This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole.[135]

The Court has also inferred, from the reference to the rule of law in section 1, an implied requirement of legality that is independent of the administrative justice clause. Neither the Parliament nor the President may act capriciously or arbitrarily, and the President must exercise his powers in good faith.[136] This principle is treated as an additional requirement that underpins the express rights, including the right to administrative justice, which are treated as elaborations of it.[137]

III. Explaining the Differences

What explains these different interpretive philosophies? Judges are not, of course, automatons whose opinions are entirely 'caused' by external factors. They have reasons for their opinions, such as the principled reasons for preferring non-originalism to originalism, or vice versa. The simplest explanation might therefore be that judges in different countries just happened to find different sets of reasons persuasive. But a deeper explanation seems called for, given that these highly intelligent people did not find the same reasons compelling and converge on the same interpretive philosophy. It seems undeniable that social, cultural, political, and institutional circumstances help to explain the differences.

[130] Klug (n 128), 293–5.
[131] *S v Makwanyane* 1995 (3) SA 391, discussed by Klug (n 128), 286–7.
[132] *S v Mhlumgu* 1995 (3) SA 391 (CC), discussed by Klug (n 128), 292–3.
[133] *S v Mhlumgu*, para 15.
[134] Ibid paras 100, 102.
[135] Ibid para 112.
[136] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).
[137] Ibid; discussed by Klug (n 128), 278–9.

1. The Nature and Age of the Constitution

The nature of a constitution is surely an important factor in determining how it is interpreted. The Australian Constitution deals mainly with structural matters such as establishing governmental institutions and dividing powers among them. Its origins as a British statute, its relatively prosaic nature, and its lack of both a ringing appeal to national aspirations and a bill of rights, have surely contributed to the High Court's legalist approach to its interpretation.[138] Structural provisions, such as those dividing powers, are often interpreted by more legalistic methods—focusing on text, structure, and original intent—than rights guarantees. This may be because divisions of powers are often interdependent components of historically contingent 'package deals', reflecting deliberate and hard-won compromises between competing interests, which constitute 'original intentions' that courts are reluctant to disturb.[139] The meaning of provisions embodying such contingent and specific bargains seems less amenable to illumination by reference to abstract principles reflecting general human experience than is the meaning of rights guarantees commonly found throughout the world.[140] As a study of judicial doctrine in federalism cases concludes, 'The comparative evidence does not indicate that there is a core of universal federalism values or principles that motivates courts.'[141] This is no doubt a matter of degree rather than kind: indeterminacies in structural provisions are also resolved partly by appealing to their purposes, which usually involve political principles as well as pragmatic compromise. Moreover, some structural principles such as judicial independence are as ubiquitous as human rights.[142]

Constitutions that protect abstract rights require judges to make moral choices that arguably should not, and probably cannot, be governed by the framers' opinions or expectations.[143] Some modern constitutions explicitly require judgments of political morality rather than original intent. Section 39 of the South African Constitution requires that rights interpretations 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom', and section 1 of the Canadian Charter refers to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The adoption of the Charter of Rights in 1982 inspired a transformation in the interpretive philosophy of the Canadian Supreme Court, which adopted a strongly normativist approach and a pattern of enthusiastic activism throughout its jurisdiction, in non-Charter as well as Charter cases.[144]

But there may be significant differences between bills of rights. Professor Robertson argues that bills of rights in some older constitutions are treated as merely 'list[s] of highly individuated and specific things' that governments have a negative duty not to violate, whereas more modern ones appear more integrated, holistic, and purposive, intended to embody a coherent hierarchy of values that government has a positive duty to promote.[145]

[138] Goldsworthy (n 20), 109, 113, 153, and 155.

[139] Jackson (n 12), 102–8.

[140] Ibid.

[141] Baier (n 12), 159; see also ibid 18–19.

[142] Robertson (n 13), 361–2 and 370.

[143] See text accompanying n 28 above. The framers' intentions are arguably binding only insofar as they illuminate the meaning of the law they made: their opinions and expectations as to how judges should apply that law are not part of the law that the judges are bound to accept.

[144] Hogg (n 46), 71, 88, and 103. The term 'activism' is used by Professor Hogg.

[145] Robertson (n 13), 355; see also ibid 27.

Those of Germany and South Africa are examples of 'transformative' constitutions, designed to make a fresh start and repudiate discredited past values and practices by including founding values and structural principles whose interpretation requires a normativist approach.[146] As a result, the German Federal Constitutional Court is always able to invoke values internal to the Constitution, whereas the US Supreme Court, although it can appeal to structural principles embedded in the Constitution, often appeals to values external to the Constitution.[147]

The structure of a constitution can have many effects on interpretive methods. Constitutional rights appear to be interpreted more expansively in Canada and South Africa than in the United States, partly because their constitutions expressly mandate a two-stage inquiry, in which infringements of rights established at the first stage can be justified to the court at the second stage. The possibility of justification at the second stage relieves the courts of the need to adopt narrow interpretations of rights in order to accommodate legitimate competing interests.[148] Also, the presence in the Canadian Charter of the famous 'notwithstanding clause', which enables legislatures to insulate their statutes from judicial invalidation for violating the Charter, might have encouraged judges to be more expansive in construing Charter rights and less deferential to legislatures in enforcing them.[149] It has also been suggested that the relative terseness of the US Bill of Rights, and its impractical depiction of rights as absolutes, has made it necessary for the Supreme Court to be more creative, and more reliant on subjective judicial ideology.[150]

The degree of difficulty in formally amending a constitution may also be a factor. Professor Tushnet argues that because the US Constitution is inherently difficult to amend, and the political culture averse to formal amendments, the Supreme Court has felt compelled to make adaptations through creative interpretation, and the American people have accepted this as the appropriate method of updating the Constitution.[151] The Supreme Court of Canada has explicitly cited the difficulty of amending its Constitution as a justification for allowing 'growth and development over time'.[152] This is corroborated by the German experience where, Professor Kommers suggests, the comparative ease of formal amendment has reinforced judicial reluctance to bring about substantial changes through interpretation.[153] But this factor can also cut the other way: in India, the Constitution was so easy for the dominant Congress Party to amend, that the Supreme Court felt compelled to act creatively to restrict the amending power.[154]

Professor Tushnet suggests that the age of the US Constitution, as well as the difficulty of amending it, has encouraged adaptation through judicial interpretation.[155] It does seem inevitable that, as a constitution ages, its language will become less capable of fulfilling its underlying purposes, when applied to unanticipated technological and social changes. The development of an air force in the United States, mentioned previously, is an example.[156] On the other hand, the degree of difficulty of the constitution's amendment procedure is probably the more important factor. The pattern of legalism versus activism in the six countries studied does not correlate strongly with the relative ages of their constitutions. The two most activist

[146] Ibid, see also 256. [147] Rosenfeld (n 2), 661–2.
[148] Hogg (n 46), 70, 103; Klug (n 128), 293. [149] *Canada Constitution Act* 1982, s 33.
[150] Robertson (n 13), 27. [151] Tushnet (n 19), 7, 16–17, and 54.
[152] *Hunter v Southam* [1884] 2 SCR 145, 155, quoted by Hogg (n 46), 77.
[153] Kommers (n 4), 171–2. [154] Sathe (n 110), 242–5.
[155] Tushnet (n 19), 7. [156] See n 6 above.

courts, in India and Canada, deal with a Constitution, and a Charter of Rights, that are both relatively new.[157]

The greater age of the US Constitution is significant in two other respects. First, the fact that comparative jurisprudence is paid much less attention in the United States than elsewhere is surely due partly to that Constitution having been adopted before any of the others. To the extent that the meaning of a constitution (or a constitutional amendment) is determined by the intentions or understandings of its makers, the interpretation of constitutions adopted subsequently in other countries is of little relevance.[158] The constitutions of all the other countries studied here include provisions copied wholly or partly from other constitutions. It is often reasonable to assume that such a provision was intended to have a meaning similar to the meaning it had in the country of origin at the time it was copied. Even in the United States, British constitutional traditions up to 1789 have often been examined to shed light on concepts and principles derived from them.[159]

The second respect in which relative age is significant is that precedents naturally play a much larger role in the interpretation of older constitutions, simply because there are more of them. When constitutions are young, courts have a greater need to seek guidance elsewhere, which diminishes as they build up their own stock of indigenous precedents.

2. Legal Culture

An obviously important factor is the legal culture in which judges receive their legal education, and practise their profession before appointment to the bench. The judges responsible for interpreting the constitutions of Canada, Australia, and India—the Privy Council and the Canadian Supreme Court, the Australian High Court, and the Indian Supreme Court respectively—were all steeped in the British legal tradition, and initially set out to apply British principles of statutory interpretation.[160] By the end of the nineteenth century, if not before, the British legal tradition had become much more legalist than that of the United States.[161] Not that British principles of statutory interpretation were monolithic: they were themselves open to rival interpretations, which helps to explain early disagreements between the Privy Council in Westminster and courts in Australia and Canada.[162] But on any interpretation they were strongly positivist and moderately originalist. They did not permit judges to stray far from the text: any implications had to be 'necessary'. Although they did not permit recourse to legislative history to establish the lawmakers' intentions, they did allow reference to the legal and historical context in which a statute was enacted, in order to reveal the 'mischief' it was intended to remedy. And they did not permit the meanings of statutory terms to change over time, except through formal amendment or fidelity to erroneous judicial precedent.

[157] This assessment is corroborated in a recent comparative study of judicial activism: Dickson (n 63), 12–13 and 15.

[158] Tushnet (n 19), 45–6. But only 'to that extent', because the interpretation of constitutions elsewhere can be useful for other purposes.

[159] Ibid 28–9 and 45.

[160] Hogg (n 46), 104; Goldsworthy (n 20), 115–21; Sathe (n 110), 227.

[161] Patrick Selim Atiyah and Robert Samuel Summers, *Form and Substance in Anglo-American Law* (1987), summarized at 408–15.

[162] Hogg (n 46), 75; Goldsworthy (n 20), 115–19.

Legal education and scholarship in Australia, Canada, and India were less receptive to sociological jurisprudence and legal realism, which swept through US law schools in the early twentieth century, and to the scepticism about legal determinacy that they preached. It seems likely that the post-Charter shift in Canada, to an enthusiastic judicial activism, is partly due to its proximity to the United States, and consequential influence of US jurisprudence on the Canadian legal academy and profession.[163] In Australia, the controversial emergence of a limited and tentative form of judicial activism in the 1990s has been attributed partly to the introduction of more pragmatic, consequentialist theories at Sydney Law School in the 1950s.[164]

In South Africa, widespread condemnation of the legal positivism that dominated legal thinking in the apartheid era, and which some feared would stunt implementation of the new Constitution, has no doubt inspired judges to adopt a more normativist approach.[165]

The importance of legal culture is also evident in the section on Germany. The Federal Constitutional Court's legalist philosophy clearly owes much to what Professor Kommers calls the 'civilian-positivistic' tradition, which treats legal codes as 'unified bodies of law covering all possible contingencies arising out of human interaction'.[166] He depicts legal education in Germany as highly formalistic, its main objective being mastery of pre-existing legal rules and principles, with an emphasis on 'theory, conceptual clarification, deductive reasoning, and systematization'.[167] In Germany, too, ordinary principles of statutory interpretation were carried over to the field of constitutional law.[168]

On the other hand, inherited legal culture is clearly not determinative. Professor Sathe observes that in India, a tradition of narrow, technical, 'black letter' legal education continued until quite recently. This was well after legalism in constitutional jurisprudence came to an end in the 1970s, which must be attributed to other factors.[169]

3. Judicial Appointments and Homogeneity

In Australia, the social and intellectual homogeneity of the High Court bench—drawn almost exclusively from the conservative Melbourne and Sydney bars—has probably helped to preserve the tradition of legalism inherited from Britain, and broad judicial consensus as to the proper interpretive methodology.[170] Recent appointments to the bench have been deliberately designed by the government to preserve that consensus.[171] Another relevant factor is the function of a court charged with constitutional review. If it is a court of general jurisdiction, whose tasks also include the interpretation and application of ordinary law, then its judges are naturally inclined to apply the same professional techniques and habits of thought to all aspects of their work. That has certainly been the case in Australia and the United States, and initially, in Canada and India. On the other hand, judges in exclusively constitutional, or 'Kelsenian' courts are more likely to approach constitutional review in a different spirit.[172] In Germany, judges of the Federal Constitutional Court have until recently been recruited from a broader field than ordinary judges, including prominent politicians, civil servants, judges, and academics (they are now appointed mainly from the judiciary and academia).[173] It has been suggested that the Court would have been much less adventurous had its judges been appointed from the same career hierarchy as private law judges, many of whom strongly

[163] Hogg (n 46), 81. [164] Haig Patapan, *Judging Democracy* (2000), 20–2.
[165] Klug (n 128), 269 and 292. [166] Kommers (n 4), 208 and 207 respectively.
[167] Ibid 209. [168] Ibid 208. [169] Sathe (n 110), 263.
[170] Goldsworthy (n 20), 112–13 and 155. [171] Ibid 157–8.
[172] Robertson (n 13), 12. [173] Kommers (n 4), 174–5.

resented its intrusions into their field.[174] The same point has been made about the South African Supreme Court.[175] On the other hand, all German Federal Constitutional Court judges have had legal training of a kind that strongly encourages professional consensus.[176] It has also been suggested that, although Canadian judges seem less homogeneous in terms of regional and professional background than their Australian counterparts,[177] they have generally been of unquestioned professional standing and seem broadly to agree on the Court's non-originalist and relatively activist stance.

In the United States, there appears to have been even greater diversity in judicial appointments, which until recently were sometimes used to reward a President's friends and supporters, or appease powerful lobby groups.[178] One suspects that politicians such as Earl Warren, upon appointment to the bench, were less committed to professional craft norms than life-long practising lawyers or serving judges.[179] Indeed, a recent study purports to demonstrate a correlation between the more highly politicized appointments of US Supreme Court judges, and the greater influence of personal ideology in their decision-making, compared (in both respects) with their Australian and Canadian counterparts.[180] In addition, the legal profession in the United States seems, to an outsider, much more diverse—socially, culturally, politically, and intellectually—than in many other countries. Even today, when concerns about judicial activism have prompted a new emphasis on technical legal expertise and prior judicial experience as qualifications for appointment to the Supreme Court, intense political battles over confirmation reflect competition between rival interpretive philosophies.[181] The inference is not that the Supreme Court is more activist than other constitutional courts: on the contrary, the Indian Supreme Court seems to deserve that title.[182] Rather, the inference is a more sharply divided bench in the United States compared with other countries. Professor Tushnet points out that US judges have been socialized into a professional culture that frowns upon judicial wilfulness, making them unlikely to be wilful in any interesting sense.[183] Yet Supreme Court judges regularly attack one another for being wilful, which suggests that instead of a generally unified professional culture sharing interpretive norms, there are distinct sub-cultures—'liberal' and 'conservative'—that are almost deadlocked in a competition for influence.

It has yet to be seen how the express constitutional requirement in South Africa, that the judiciary should reflect the racial and gender composition of the nation, a requirement that the composition of the Constitutional Court already satisfies, will affect its interpretive methodology.[184]

There is some evidence that the method of judicial appointment affects the way federal distributions of powers are interpreted. The power of appointment enjoyed by national governments in Australia and the United States have probably contributed to the relatively generous

[174] Robertson (n 13), 380.
[175] Ibid 279.
[176] Kommers (n 4), 208–9.
[177] Hogg (n 46), 58–9.
[178] Tushnet (n 19), 14.
[179] Ibid 15.
[180] David L. Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada and Australia' (2010) 20 *Political Research Quarterly* 1, available online at <http://prq.sagepub.com/content/early/2010/03/23/1065912909352775.full.pdf+html>.
[181] Tushnet (n 19), 14–15.
[182] This assessment is corroborated in Dickson (n 63), 12–13, 15, and ch 4.
[183] Tushnet (n 19), 54.
[184] Klug (n 128), 284.

interpretation of national powers in those countries.[185] Professor Tushnet argues that this is part of a broader pattern of Supreme Court decisions reflecting the 'regime principles' of the national political elite to which its judges belong.[186] In both Canada and Germany, on the other hand, a jurisprudence much more sympathetic to regional governments was constructed by judges whose appointments were either completely independent of the national government (the Privy Council), or partially dependent on the regional governments (the Federal Constitutional Court).[187] In Canada, after appeals to the Privy Council were abolished in 1949, the main lines of its federal–state jurisprudence were not changed by the Supreme Court, perhaps partly because statutory requirements and constitutional convention require the Court's judges to be representative of different regions.[188] Australia and Canada are particularly strong contrasting examples, because in both cases the result of judicial interpretation was the opposite of what the founders intended (weak and strong central government respectively).[189] Evidence is lacking in India, where federal–state disputes have arisen less often, and have usually been resolved politically rather than legally.[190]

4. Political Culture

The judges charged with interpreting the Canadian, Australian, and Indian constitutions had imbibed the British constitutional tradition of parliamentary sovereignty. In these countries, the adoption of new national constitutions was not the consequence of armed struggle against perceived tyranny, but of pragmatic reform assisted by the imperial government (albeit, in India, only after much popular agitation). Although not strictly applicable to any legislature operating under a written, federal constitution, the principle of parliamentary sovereignty was nevertheless very influential. It encouraged broad interpretations of legislative power, trust in legislative rectitude, and deference to legislative will.[191] It was inhospitable both to broad interpretations of express rights, and to the imposition of new, supposedly implied, constraints on legislative power.

In the United States, on the other hand, the War of Independence was fought largely over Britain's resolve to impose the sovereignty of its Parliament over its American colonies, and in prosecuting the War, some of the new state legislatures adopted draconian measures.[192] One consequence was ingrained distrust of legislatures, which favoured narrow interpretations of their powers, broad interpretations of express rights, and the recognition of additional, implied constraints.

As for Germany, the Nazi experience profoundly disturbed the traditional European veneration of parliaments, and subordination of courts to 'apolitical civil service-like agencies entrusted with faithfully carrying out the will of legislative majorities.'[193] 'Profound distrust of politicians as a consequence of the disastrous policies of the Third Reich . . . made the soil particularly fertile for expansive rule by untainted constitutional judges.'[194] As the chief guardian of the Constitution, the Federal Constitutional Court was accorded a constitutional status and administrative autonomy that is unique among German courts.[195] Many Germans were

[185] Goldsworthy (n 20), 156. [186] Tushnet (n 19), 53.
[187] Hogg (n 46), 62–3, 75–6, 104 and Kommers (n 4), 187–8. [188] Hogg (n 46), 58, 62–3, and 95.
[189] Ibid 75–6, 104, and Goldsworthy (n 20), 108. [190] Sathe (n 110), 232–4.
[191] Hogg (n 46), 56; Goldsworthy (n 20), 109–10, 148, and 156; and Sathe (n 110), 227.
[192] Jeffrey Goldsworthy *The Sovereignty of Parliament, History and Philosophy* (1999), 192–7 and 204–15.
[193] Kommers (n 4), 206. [194] Rosenfeld (n 2), 641; see also ibid 665.
[195] Kommers (n 4), 172–3.

attracted to notions of a 'higher law' that neither positive law nor the will of the people can alter or override,[196] and at least in its early years, the Court rejected the legal positivism of the Weimar period.[197] Similarly, in South Africa, the doctrine of parliamentary sovereignty that prevailed under the former apartheid regime was decisively rejected in favour of a form of constitutionalism emphasizing the protection of human rights.[198] The Constitutional Court often refers to the founders' deliberate decision to make a clean break with the values of the pre-existing legal order.[199] Professor Robertson argues that this is typical of constitutional review under 'transformative' constitutions, which are designed to inaugurate a new era based on new principles such as human dignity and equality.[200]

Political culture can change. In India, judicial attitudes of deference to the legislature were initially reinforced by the superior prestige of elected politicians compared with that of judges. But politicians' abuses of power during the 1975 emergency, and increasing corruption, diminished their superior prestige and the trust that had been reposed in them, not least by the judges. This provided judges with both the motivation, and the opportunity, to act creatively to impose new limits on the executive and legislature. Public esteem for the Supreme Court was enhanced by activist decisions designed to check abuses of power by the political branches of government. Indeed, Professor Sathe suggests that one reason the Court assumed an activist stance after 1977 was to restore its credibility, by demonstrating that it was prepared to stand up to the politicians.[201]

The influence of prevailing political culture is also evident in the impact of the recent global 'rights revolution' on judicial philosophies. In Canada, the adoption of the Charter coincided with this transformation of political attitudes, propelled by increasing distrust of majoritarian democracy. The result has been enthusiastic judicial activism in non-Charter as well as Charter cases.[202] It is as if the Canadian Supreme Court has adopted what Professor Tushnet calls 'holistic' interpretation, whereby the adoption of an amendment (in this case, in a non-technical sense, the Charter) is taken to change the overarching 'spirit' of the entire constitution, so as to justify new readings of older, unamended provisions. This is a technique not yet accepted by the US Supreme Court.[203] The 'rights revolution' has no doubt transformed public attitudes as well as judicial ones. Consequently, Canadian politicians are not well placed to resist perceived judicial activism. Their inability to use the 'notwithstanding clause' (s 33) to override judicial interpretations of the Charter, suggests that the general public is unlikely to condone any political attack on the judiciary.[204]

The rights revolution no doubt influenced Australian judges as well, contributing to the High Court's greater creativity in the 1990s, evident in the 'discovery' of an implied freedom of political speech. But the Court's perceived departure from its long-standing tradition of legalism did not, as in India, enhance its standing relative to the elected branches of government. Australian politicians reacted to nascent judicial activism in a way that was not open to their Indian counterparts. They were angered by it, and used their power of judicial appointment to turn the Court back to a more legalist approach.[205] This may corroborate an opinion that Australian judges have sometimes expressed, that 'strict legalism' is the best means of maintaining public confidence in the Court as a neutral umpire.[206] If that is so, the contrast with

[196] Ibid 167 and 180. [197] Ibid 182.
[198] Klug (n 128), 269. [199] eg ibid 315.
[200] Robertson (n 13), 29; ibid 265 on South Africa.
[201] Sathe (n 110), 251. [202] Hogg (n 46), 105.
[203] Tushnet (n 19), 29. [204] Hogg (n 46), 69 and 99 n 162.
[205] Goldsworthy (n 20), 157–8. [206] Ibid 157.

India and Canada is stark. Australia may have a more robust political culture than Canada, in terms of the willingness of politicians to denounce judicial decisions in strong language. It also differs from Canada in lacking what Charles Epp has called 'a support structure for legal mobilization': a body of well-funded human rights lobby groups that use litigation to advance their political objectives. In Canada, these groups form part of a 'court party' that vigorously defends the judiciary from political attack.[207]

Political backlash also seems to have affected judicial methodology in the United States, where the rise (or perhaps revival) of originalism since the 1980s has been the explicit goal of a populist political movement opposed to the perceived 'judicial activism' of the Supreme Court since the 1950s.[208] This movement has perhaps been assisted by the US tendency to venerate the Constitution and its Founding Fathers to an extent unknown in most other countries.[209] It has also been suggested that the Constitution's quasi-sacred status might be associated with its crucial role in forging the nation's identity, and with the higher levels of religiosity in that country compared with other Western democracies.[210]

Another example of how political culture influences interpretive methodology is the impact in the United States of the ideology of autonomous individualism, evident in the expansive interpretation of free expression, and hostility to social and economic rights,[211] compared with the greater openness of German jurisprudence to communitarianism, which led to a strikingly different treatment of abortion.[212] The Constitutional Court in South Africa has also struggled with tensions between individualist and communitarian conceptions of freedom, which may in the future be resolved through development of the indigenous concept of *ubuntu*.[213]

Regional heterogeneity has clearly been a factor in some countries, although it can cut in different ways. In Canada, the Quebeckers' concern to protect their language and culture led them to demand provincial rights, which other Canadians accommodated due to fear of Quebec separatism.[214] On the other hand, in the United States, regional heterogeneity may have had the opposite effect. According to Professor Tushnet, the activism of the Warren Court reflected the distrust held by national political elites for white majorities in the American South, as well as distaste for 'outlier' legislation in other states that had fallen behind progressive developments in the rest of the nation.[215] Fear of religious fundamentalism and intolerance that are more prominent in some regions than others may also have been a factor in decisions of the Indian Supreme Court.[216] And no doubt differences between the Kwazulu-Natal Province and other provinces in South Africa will have an impact on interpretive methods there.[217] Strong regional variations of this kind are absent in Australia, which is more culturally homogeneous.[218]

[207] Charles Epp, *The Rights Revolution* (1998); Brian Galligan and Frederick L. Morton, 'The Rights Revolution in Australia' in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006); Rainer Knopff and Frederick L. Morton, *The Charter Revolution and the Court Party* (2000).

[208] See Greene (n 11), 6–7, 13–14, and 17. Possibly 'revival' because a version of originalism was the dominant interpretive methodology in nineteenth-century America: ibid, 14 and 85.

[209] Ibid 63–5.

[210] Ibid 66–9, 78–1; Rosenfeld (n 2), 657.

[211] Tushnet (n 19), 52. See also Chapters 49 and 50.

[212] Kommers (n 4), 178 n 60, 183, 190 and 213–14.

[213] Klug (n 128), 302–3 and 316–17.

[214] Hogg (n 46), 93–4.

[215] Tushnet (n 19), 52.

[216] Sathe (n 110), 262.

[217] Klug (n 128), 290–1.

[218] Goldsworthy (n 20), 156.

5. 'The Felt Necessities of the Time'

There is a popular perception that no matter what their stated interpretive philosophy, judges somehow manage to find ways of adjusting their constitutions to 'the felt necessities of the time.'[219] That might explain, to take just one example, why the Privy Council consistently interpreted national powers in Canada narrowly, while the Australian High Court interpreted national powers broadly, in both cases contrary to the founders' intentions, despite both courts purporting to apply British principles of statutory interpretation.

Are the interpretive philosophies described in this chapter mainly rhetoric, that conceal essentially result-oriented decision-making? Two issues must be distinguished. The first is the extent to which law remains stubbornly indeterminate, whatever interpretive methodology is employed, thereby requiring judges to exercise discretion on moral or policy grounds. The second is the extent to which judges are willing either to misapply, or to abandon, their orthodox methodology in order to reach strongly desired conclusions.

Professor Tushnet argues that in the United States, orthodox interpretive methods have proved sufficiently indeterminate that judges have been able to 'do the jobs [they] think need to be done at any specific time.'[220] Whether his argument holds universally is debatable. The judicial interpretation of national powers in Canada and Australia, contrary to the founders' intentions, might be examples of indeterminacy: British principles of statutory interpretation did not allow recourse to legislative history to resolve textual indeterminacy. On the other hand, many cases can be cited in which the Australian High Court's legalist methods led to very different conclusions than the Us Supreme Court had previously reached. They include cases on interstate commerce, freedom of religion, and electoral equality. It is possible that such differences merely reflect the judges' different political ideologies. Alternatively, they might be the result of the larger number of abstract, and therefore less determinate, principles in the US Constitution, of a broader range of interpretive methods being accepted within the US judiciary as orthodox, or of the accumulation in the United States of a larger and more diverse body of precedents that can be used to rationalise result-oriented decisions.

As for the second issue, it is clear that judges sometimes feel they have no alternative but to act creatively in order to defuse a crisis, or to prevent or remedy what seems to them a particularly outrageous breach of some important constitutional value. When judges previously committed to legalist methods find them an obstacle in that regard, they sometimes either covertly misapply them, or abandon them (temporarily or permanently) in favour of normativism. From a legalist perspective, such cases involve a conflict, whether or not the judges perceive it, between their sense of moral responsibility, and their limited legal authority, to intervene. From a normativist perspective, especially a non-originalist one, there is less likely to be a conflict.[221]

Professor Hogg describes three examples of what he calls 'crisis management', where the Canadian Supreme Court exceeded the normal limits of its authority to craft an unorthodox solution to a looming political or legal crisis. In each case the Court adopted a normativist strategy, by resorting to 'unwritten principles'. Professor Hogg acknowledges that in one case, it is hard to see how the Court could responsibly have reached any other conclusion.[222] But he implies that in the other two cases, the Court's solution was neither necessary nor clearly

[219] A phrase famously used by Oliver Wendell Holmes Jr in *The Common Law* (1881), 1.

[220] Tushnet (n 19), 7. Tushnet acknowledges that they are not wholly indeterminate—eg the structural provisions of the Constitution are often clear-cut: ibid 27–8.

[221] See discussion of normativism in Section I above.

[222] Hogg (n 46), 98, referring to the *Manitoba Language Reference* case.

desirable.[223] In one of them, it adopted a novel idea that had never been publicly suggested before or even argued by counsel.[224]

In India, the shift from a predominantly positivist to a strongly normativist approach was initially motivated by fear that the power of constitutional amendment would be abused, a fear subsequently vindicated during the 1975 emergency.[225] The Supreme Court's post-emergency activism was aimed at curbing majoritarian threats to constitutional values, political corruption, and oppression of the most marginalized and deprived segments of Indian society.[226]

Professor Tushnet notes that the US Supreme Court has sometimes relied on moral concepts to surmount limitations inherent in other interpretive approaches.[227] The Warren Court's activism was motivated by strong disapproval, shared by national political elites, of the distinctive culture of the American South, and archaic laws in a few other states that were out of step with progressive developments in the rest of the nation.[228] The paradigm example is *Brown v Board of Education*, concerning racial segregation in schools, whose moral authority even originalists have found difficult to challenge, although it is hard to defend on originalist grounds.[229] *Griswold v Connecticut*, dealing with a state prohibition of contraception, is another example.[230]

One relevant factor, then, is the number of occasions that judges are confronted, or fear they may be confronted, by executive or legislative measures they regard either as contrary to a vital national interest or as morally outrageous. One is reminded of Oliver Wendell Holmes' famous 'puke' test—any law that made him want to puke must be invalid—which Felix Frankfurter converted into a 'shocks the conscience' test.[231]

Of all potential threats to constitutional values, encroachments upon their own exclusive authority or independence often cause the greatest shock to the judicial conscience. In Australia, the most legalist of the six countries, the High Court first began to construct a doctrine of strict separation of judicial power in a case where it was contrary both to the constitutional text and the founders' intentions.[232] More recently, the Court partially extended this doctrine to most state courts, although this was inconsistent both with previous authority and with strong disapproval of 'free standing' unwritten principles expressed in recent cases.[233] This was followed by an even more radically novel interpretation of provisions that mention state courts, based on a patently implausible appeal to original intent, in order to invalidate state legislation restricting judicial review of decisions of inferior courts and administrative agencies.[234] In Canada, even the Privy Council before 1949 and, later, the Supreme Court, struck down laws granting judicial power to administrative tribunals, although 'the basis for the decisions was unclear or implausible'.[235] In 1997, the Supreme Court invoked an 'unwritten principle' of judicial independence, and proceeded to construct 'an elaborate edifice of

[223] Ibid 99–100.

[224] Ibid 96–100, quotation at 100, referring to *Re Secession of Quebec* [1998] 2 SCR 217.

[225] Sathe (n 110), 243, 247.

[226] Ibid 262.

[227] Tushnet (n 19), 39.

[228] Ibid 52–3, discussing Lucas A. Powe Jr, *The Warren Court and American Politics* (2000).

[229] Tushnet (n 19), 40–1.

[230] Ibid 32.

[231] Letter from Justice Holmes to Harold Laski (23 October 1926), in Mark DeWolfe Howe (ed), *Holmes-Laski Letters* (1953), 888; *Rochin v California* 342 US 165, 172 (1952).

[232] *New South Wales v Commonwealth* ('the *Wheat* case') (1915) 20 CLR 54, discussed in Goldsworthy (n 20), 125–6 and 128–9.

[233] *Kable v DPP for NSW* (1996) 189 CLR 51, discussed in Goldsworthy (n 20), 148–9.

[234] *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

[235] Hogg (n 46), 73, referring to *Re Residential Tenancies Act* [1981] 1 SCR 714, and *MacMillan Bloedel v Simpson* [1995] 4 SCR 725.

doctrine with little or no basis in the text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues.'[236] The Indian Supreme Court, arguably with stronger moral justification, implausibly interpreted a provision requiring the Chief Justice to be consulted before new puisne justices were appointed, as requiring his advice to be followed, and then added a requirement with no textual support whatsoever, that the Chief Justice must consult with his four most senior colleagues before tendering that advice.[237] In South Africa, many of the grounds on which the Court initially objected to the draft constitutional text related to its own jurisdiction and authority.[238]

Creative decisions that give principles highly valued by the judges greater protection than is warranted by the constitutional text, as originally understood, are not always 'progressive'. Judges share the values, including the prejudices, of the social class from which they are drawn.[239] In India, for example, the Supreme Court during its most legalist phase attempted to limit the legislature's efforts to enhance social justice by redistributing property.[240] In the United States, the doctrines of substantive due process and freedom of contract were notoriously applied before 1937 to invalidate labour laws and other legislative reforms designed to improve social welfare. In Canada, the 'unwritten principle' of judicial independence was invoked to protect judges' salaries from public sector budget cuts that posed no conceivable threat to their independence.[241] And in Australia, an implied freedom of political speech was 'discovered' and used to invalidate legislation aimed at reducing the dependence of political parties on the wealthy individual and organizations that donate the funds needed for expensive political advertising.[242]

The object of this chapter, however, has not been to criticize the interpretive methods and philosophies described in this book. It has merely been to compare and explain them.

Bibliography

Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (2006)

Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (2007)

Jeffrey Goldsworthy (ed), *Interpreting Constitutions, A Comparative Study* (2006)

Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1

Vicki C. Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *International Journal of Constitutional Law* 91

Vicki C. Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 *Fordham Law Review* 921

Vicki C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Rosalind Dixon and Tom Ginsburg (eds), *Handbook in Comparative Constitutional Law* (2011)

David Robertson, *The Judge as Political Theorist* (2010)

Michel Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (1994) 2 *International Journal of Constitutional Law* 633

Greg Taylor, *Characterisation in Federations: Six Countries Compared* (2006)

[236] Hogg (n 46), 74, referring to *Re Remuneration of Judges* [1997] 3 SCR 3.

[237] Sathe (n 110), 259–61.

[238] Klug (n 128), 302.

[239] Sathe (n 110), 264.

[240] Ibid 239–41.

[241] *Re Remuneration of Judges* [1997] 3 SCR 3, discussed in Hogg (n 46), 73 and 92.

[242] *Australian Capital Television v Commonwealth* [1992] 177 CLR 106, discussed in Goldsworthy (n 20), 145.