Constitutional Supremacy and Judicial Reasoning

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Introduction

Judicial reasoning often takes place in circumstances of uncertainty, where the past acts of law making that are to guide judgment—such as case law, statutes, and regulations—are underdetermined and leave open questions. The problem is often acute in constitutional adjudication, where the constitutional settlements formalized in constitutional texts may be only partial and stated at a high level of generality that perhaps papered over underlying disagreement.

Keeping the constitution supreme is a challenge in the difficult circumstances of incomplete constitutional settlement. Ascertaining what the constitution authorizes or requires, or what constraints it imposes, can be difficult even in the most favourable of epistemic circumstances. But where constitutional texts, particularly bills of rights, are crafted using vague and open-ended language, it falls to other institutions—in acts of legislative, executive, and judicial decision making—to further specify what these vaguely worded rights will mean in the particular, and how they will bear on daily life.

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Courts play an important role here. They take the commitments that a political community has made through the constitution-making process, and use them to craft legal rules—or doctrines—that can be applied to particular disputes. After all, constitutions are not self-interpreting or self-applying. But some constitutional doctrines created by courts, in Canada and elsewhere, have proved especially prone to misapplication and provide unintentional support for an outsized role for the judiciary in making new constitutional commitments on behalf of the political community. Where lawyers, academics, and judges grow overly comfortable with these doctrines—through long acquaintance and acceptance—methodological weaknesses tend to be left unexamined or too readily excused. The remedy, I think, is careful engagement with competing ideas: holding our most familiar doctrines under the spotlight and justifying them. This is both a matter of carefully articulating how these doctrines function, and attending with equal care to the case against them.

There are several such doctrines in Canadian law. This paper examines one doctrine in Canadian constitutional law that has become close to constitutional bedrock and, perhaps as a consequence, receives less critical attention than is warranted. It is the practice of interpreting a constitutional or quasi-constitutional text as a "living tree".[1] It has an analogue in the living constitution jurisprudence of the English courts and the European Court of Human Rights (ECHR), though is in some ways distinct.

I. A Prologue to Constitutional Interpretation

But before proceeding to consider the difficulties posed by living constitutionalism, it will help to first address two background concepts in constitutional theory, both related to the concept of a constitutional settlement. These are: (1) the theory of coordinate interpretation, and (2) the distinction between constitutional interpretation and constitutional construction.

A. Theory of Coordinate Interpretation

To begin, constitutions, whether primarily written or unwritten, are products of political settlements, whether by formal agreement reduced to a written text, or by more informal usage and convention. Written constitutions, in particular, are intended to be difficult to amend; they establish institutions, confer authority and limit it, and set rules, standards, and norms to guide legislative and adjudicative decision making. These settlements are intentionally placed beyond the reach of ordinary politics in order to provide a stable and lasting legal framework for common life.

1. *Hunter v Southam*, [1984] 2 SCR 145 at 156, 11 DLR (4th) 641. See *ibid* at 155–57.

Like all law, a constitution is intended to guide the choices and actions of those subject to it. Law's subjects—not primarily lawyers or judges or governments, but persons and their associations—use the law to figure out what their obligations are, what proposed courses of action are open to them, and how to accomplish whatever changes in legal relations they set out to change. Like individuals, governments are also guided by law—most fundamentally, the constitution, which is a source of both government power and limits on that power.

Judges arrive on the scene only much later, if at all, after some action has already been taken—a statute has been passed, some decision made—based on an understanding of what the constitution permits. That is, judicial review of legislation or executive action only occurs in response to some primary act of another branch of government: an act of law making or law applying that was, paradigmatically, conceived to further the common good in some respect. It would have been guided in some measure by an understanding of the constitution and the whole body of existing law. Judicial review of legislative and executive action for compliance with the constitution is, in this sense, secondary.

Acts of legislation, in a mature and healthy democracy, proceed from background understandings of what legislative options are permitted, prohibited, or (in some instances) required by the constitution. This is the case, I submit, not only in those jurisdictions that formally require that parliament be provided with a report addressing the constitutionality of proposed legislation, but also in all cases where legislators legislate in good faith and for the common good. In legislating with a view to the common good, the conscientious legislator is not predicting—as a legal realist might—how a reviewing court might view the legislation. The legislator's analysis is conducted in the first person. The analysis may be informed by legal doctrines, but it is a matter of selecting means to achieve certain goals that are themselves selected because they further human goods held in common. The legislator makes an independent assessment of whether this series of means and ends is in any way inconsistent with the constitution.[2]

This is obviously the case where a legislature is applying multi-faceted and open-ended constitutional criteria to novel questions, but it is also the case where the legislature concludes that the court's current jurisprudence on what the constitution prohibits is, in some important respects, mistaken, or a wrong turn.

Courts can take wrong turns. The practice of apex courts in overturning their own precedents is some evidence of that. And the nature of these wrong

2. For scholarship on legislation as reasoned activity, see Richard Ekins, *The Nature of Legislative Intent* (Oxford, UK: Oxford University Press, 2012); Richard Ekins, "Legislation as Reasoned Activity" in Grégoire Webber et al, eds, *Legislated Rights* (Cambridge, UK: Cambridge University Press, 2018) 86.

turns is not, usually, described as a matter of faulty legal reasoning or technique. Instead, these changes in direction are often explained as having been compelled or at least invited by more recent developments in the law, or the exigencies of new factual situations, including social change.[3] In such instances, the decision overturned is not expressly rejected as having been wrong at the time it was made, but that it is now normatively unsatisfying, given other legal commitments.

Judicial review for constitutionality should never be mistaken for a mere technical exercise—as though courts engage in nothing more complicated or controversial than proofreading. Judicial review is an unavoidably normative exercise.[4] Although judges sometimes describe judicial review in technical, almost mechanical, terms, like "measuring a statute against the requirements of the constitution", constitutions—and particularly bills of rights—are not typically written in a manner that allows for purely technical reasoning.[5] Judicial statements that the constitution "compels" or "requires" particular results should therefore be read with some caution; this style of expression may inadvertently obscure the extent to which the matter in question remained open prior to judicial choice. Judges do not have access to some Archimedean point from which they can access the true content of the constitution that is unavailable to others.

The idea that the legislature can legitimately disagree with judicially articulated constitutional doctrine, whether the perceived error is ancient or more recent, should not be controversial. The idea that the legislative, executive, and judicial branches of government have coordinate authority to interpret the constitution, and courts do not possess singular authority, is a long-standing principle of political theory. Although it is most strongly associated historically with Abraham Lincoln,[6] it has significant support in both contemporary

3. See *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5.

4. For a frank acknowledgment of this proposition in the context of reasoning about the justifiable limits of rights, see *R v KRJ*, 2016 SCC 31 at para 58. See also Bradley W Miller, "Proportionality's Blind Spot: 'Neutrality' and Political Philosophy" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 370 at 375–80.

5. See Bradley W Miller, "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93; Grégoire CN Webber, "Originalism's Constitution" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 147 at 170–76.

6. See Abraham Lincoln, "Speech at Springfield, Illinois" (26 June 1857) in Roy P Basler with the assistance of Marion Dolores Pratt & Lloyd A Dunlap, eds, *The Collected Works of Abraham Lincoln*, vol 2 (New Brunswick, NJ: Rutgers University Press, 1953) 398 at 400–01.

practice and in the academy.[7] Canadian legislatures have periodically responded to judicial invalidation by re-enacting similar successor legislation,[8] which has been upheld by the courts on subsequent challenge. Furthermore, the Canadian Constitution also makes express institutional provision for one particular exercise of coordinate authority through the use of section 33 of the *Canadian Charter of Rights and Freedoms*, the so-called notwithstanding clause.[9] By invoking the notwithstanding clause when legislating, the federal Parliament and the provincial legislatures are thereby each provided with the express power to immunize legislation temporarily from judicial scrutiny as to compliance with several of the enumerated rights in the *Charter*.

B. Interpretation/Construction Distinction

The second brief meditation I want to offer is on a conceptual distinction familiar from English contract law,[10] and popularized in the constitutional context

7. See Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010); Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the* Canadian Charter of Rights and Freedoms (Vancouver: UBC Press, 2009) 50 [Huscroft, "Mischief of Dialogue Theory"]; Geoffrey Sigalet, "On Dialogue and Domination" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, UK: Cambridge University Press, 2019) 85.

8. For a description of legislative sequels, see Huscroft, "Mischief of Dialogue Theory", *supra* note 7.

9. Part I of the *Constitution Act, 1982*, s 33, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

10. See e.g. *Chatenay v Brazilian Submarine Telegraph Company, Limited* (1890), [1891] 1 QB 79 at 85, [1886-90] All ER Rep 1135 (CA (Eng)). Lord Justice Lindley wrote:

> The expression "construction," as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.

Ibid.

by American constitutional scholars Lawrence Solum,[11] Keith Whittington,[12] and Randy Barnett.[13] This is the distinction between interpretation and construction. This is an extremely important concept, much overlooked, and provides the resources to resolve much superficial disagreement over the authority of judges to "change" the constitution.

The distinction presupposes that written constitutions are intended to lock in agreements, or settlements, and that amendments can only be made according to the exacting requirements of amending formulae. Amending formulae, at least in the Canadian context, make the process of change extremely difficult, requiring broad consensus.

Interpretation, in this schema, has a narrow and technical meaning. It is a question of fact and an act of retrieval: of ascertaining the semantic meaning of the words used in context.[14] This exercise presupposes that the meaning of the text is fixed at the time it was made. No amount of subsequent linguistic drift, or changes as to how we use words, can be used to alter the settlement that was locked in at the time of enactment.

Interpretation is a necessary first step in legal reasoning, but it is not everything. In some instances, it does not do much work at all. Although it is always the first step, no one, judge or legislator, who is seeking to reason with a constitution can stop at the first step. Construction is the second step. It is a matter of taking the text as interpreted and situating it among other legal propositions to create doctrinal rules that can be applied to particular disputes.[15]

Take, for example, section 1 of the *Charter*. It provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[16]

Interpretation is a matter of determining the limits of what has been settled by the words used in context. The words used here are fairly general, though not entirely open-ended. What limits on rights can be justified by the fact

11. See Lawrence B Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" in Huscroft & Miller, *supra* note 5, 12.

12. See Keith E Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999) at 1–7.

13. See Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004).

14. See Lee J Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (Cambridge, UK: Cambridge University Press, 2019) at 29. See also Solum, *supra* note 11 at 39–40.

15. See Strang, *supra* note 14 at 31–33; Solum, *supra* note 11 at 39–40.

16. *Charter*, *supra* note 9, s 1.

that one lives in a society? First, we need some background understanding of what is meant by a society. The text here gives some direction: it is a free society—a democratic one. And it is not a society conjured out of nothing, without a history. It is the specific society, extending through time, that produced this constitutional settlement over the course of making many other self-constituting acts over hundreds of years. So, we have patterns of behavior and institutions emerging out of several hundred years of history from which to take some guidance. Early *Charter* jurisprudence emphasized the *Charter*'s continuity with the past, such that the rights enumerated therein had to be "placed in [their] proper linguistic, philosophic, and historical contexts".[17]

So, the settlement to which the text bears witness easily rules out the limits and justifications that might be obtained in societies without free markets, or with an attenuated commitment to respecting the dignity of all persons, or with limited regard for autonomy, privacy, or private property. Stated positively, the settlement includes the limits and justifications needed to preserve the type of society that generated the *Charter* in the first place.

But interpretation of general terms will only go so far. Then we enter the construction zone. So it is that in *R v Oakes*, the Supreme Court of Canada offered a doctrine or legal test[18]—cobbled together from the ECHR jurisprudence[19]—for determining the circumstances in which a limit to a person's interests are justified. The *Oakes* test, which separates the question of whether a person's interests are limited from whether that limitation is justified using a proportionality test, is a *construction*. It was not mandated by the language of section 1. The Court could well have developed some other doctrine to give effect to limits on rights. It could have, for example, concluded that reasonable limits are inherent in the nature of the rights themselves rather than being something external to rights. And the Court could permissibly abandon the *Oakes* test in favour of some other doctrine—and thus change constitutional law—without having changed the constitutional text or the settlement behind it.

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17. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, 9 DLR (4th) 161. For the relationship between the *Charter* and the common law, see *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 928–29, 120 DLR (4th) 12, Gonthier J, dissenting. Justice Gonthier wrote, "I disagree with those who argue that the *Charter* requires that we . . . discard the unique balance of fundamental values which existed in this country prior to 1982. . . . The impact of the *Charter* will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values" (*ibid* at 928–29).

18. [1986] 1 SCR 103, 26 DLR (4th) 200.

19. The Supreme Court of Canada made a belated acknowledgment of its intellectual debt to the ECHR and to German public law in fashioning the *Oakes* test in *Canada (Attorney General) v JTI-Macdonald Corp*. See 2007 SCC 30 at para 36.

Construction is inevitable if one is to reason with a constitution. Very few constitutional provisions are written with sufficient particularity that little or no construction is required. Wherever the text is interpreted and combined with judicial doctrine or applied to particular facts, to yield a rule, this is construction. Although it is a much more creative process than interpretation, which is a matter of ascertaining the meaning of words as a matter of historical fact, construction is nevertheless bounded. It must be consistent with the interpretation of the text and it may not be used to subvert or undo the settlement.

Although the example of construction that I provided was a *judicial* construction, construction is not a judicial preserve. Every act of legislation is, in a sense, a specification of the rights articulated in the constitution. As Grégoire Webber has argued, "the constitution goes only so far . . . the rest is left to the legislature as it struggles with the limitation of underdeterminate rights."[20]

Constructions can be improved, and amended, either in response to a perceived conceptual error, or in response to new factual circumstances. That is to say, constructions, as a matter of open choice within bounds, are revisable. Settlements, however, are not revisable, outside of the formal amendment process. Interpretations may be mistaken and can be corrected. But a court may not set aside an existing constitutional settlement and replace it with a settlement it believes the framers ought to have made, but did not make. This power may not be assumed legitimately under the mantle of interpretation.

With these concepts in mind—coordinate interpretation and the interpretation/construction distinction—I would like to move to consider the challenge posed by the dominant constitutional methodology of the Canadian courts: the concept of the constitution as a living tree.

II. Constitutional Interpretation: The Living Tree and Originalism

Canadian constitutional theory takes its central metaphor from a 1929 decision of the Judicial Committee of the Privy Council, *Edwards v Canada*, a decision better known as the *Persons Case*.[21] The metaphor—involving a living tree—is rather better known than the decision itself, which, like the *Magna*

20. Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, UK: Cambridge University Press, 2009) at 174.

21. See *Edwards v Canada (AG)* (1929), [1930] AC 124, [1931] DLR 38 (PC) [*Edwards* PC].

Carta[22] or Blackstone's *Commentaries on the Laws of England*,[23] is well known in principle, but tends to go unread by teacher and student alike.[24]

In its simplest formulation, living tree constitutionalism is understood as the proposition that courts have plenary jurisdiction to adapt the written constitution to meet changed circumstances, while constrained in some way by the "natural limits" of the constitutional text.[25] So stated, everything turns on what sorts of considerations justify adaptation, and what constitutes a "natural" limit. There has been very little scholarship addressing these questions systematically. So, not all theories of the living constitution are necessarily the same. There could be more and less supportable versions.[26] More commonly, the commitments of living tree constitutionalism are stated negatively by reference to what is understood to be its polar opposite—originalism. But this negative definition is problematic because originalism itself is a family of theories with its own more and less supportable versions.[27] The more supportable versions of each, as some scholars argue, may draw close to each other in important respects and may be indistinguishable.[28] So, for the practice of defining living constitutionalism negatively to have any value depends on a careful exposition of what is meant by originalism. This, too, in both Canadian scholarship and judicial practice, has been lacking.

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22. See *Magna Carta 1297* (UK), 25 Edw 1, c 9 (codifying *Magna Carta 1215*).

23. See William Blackstone, *Commentaries on the Laws of England* (Oxford, UK: Oxford University Press, 2016).

24. Justice Rothstein, of the Supreme Court of Canada, admitted with great candour that he had not read the reasons of the Privy Council in full prior to his retirement, and once having read the reasons, he was surprised to discover that the living tree metaphor did not in fact ground the reasoning of the court. See The Honourable Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79:1 Sask L Rev 1 at 1–2.

25. See e.g. *Hunter v Southam*, supra note 1; *R v Prosper*, [1994] 3 SCR 236, 118 DLR (4th) 154; *Reference Re Same-Sex Marriage,* 2004 SCC 79 at para 22 [*Marriage Reference*].

26. There is scholarship setting out normative justification for living tree constitutionalism. See notably WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, UK: Cambridge University Press, 2007). For my reply to Professor Waluchow's argument, see Bradley W Miller, Review Essay of *A Common Law Theory of Judicial Review*, WJ Waluchow, (2007) 52 Am J Juris 297. However, there is very little descriptive scholarship articulating the commitments of Canadian living constitutionalist doctrine. For one attempt, see Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can JL & Jur 331 [Miller, "Beguiled by Metaphors"].

27. See generally Strang, *supra* note 14 at 29.

28. See WJ Waluchow, "The Living Tree" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford, UK: Oxford University Press, 2017) 891 at 906–08.

The relationship between these two families of interpretive theory, and their place in Canadian constitutional law, is a difficult question, but one that the Canadian legal academy has casually dismissed.[29] The language of living constitutionalism and originalism is, in many circles, extraordinarily divisive and often proves to be an insurmountable barrier to careful and disinterested scholarship. Unlike the United States, which has benefitted from an explosion of energetic debate on methodological questions in constitutional interpretation, the Canadian legal academy has spent nearly forty years in stasis.[30]

There are explanations for this lack of interest in methodological questions. One cause is the perceived association, justified or not, between originalism and American political conservatism.[31] A more proximate cause is the Supreme Court of Canada's overt denunciations of originalism.[32]

As I argued in a paper in 2011, the Supreme Court of Canada's grasp of theories of constitutional interpretation is largely stuck in the 1970s.[33] It is true that the Court has stated unequivocally that it rejects originalism,[34] but its understanding of originalism is anachronistic. What it has rejected are the tenets of one school of originalism that have also been rejected by most contemporary originalists: namely, that we ought to interpret constitutional texts by inquiring

29. See e.g. Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2018), ch 15 at 49–51, ch 60 at 7–9; Miller, "Beguiled by Metaphors", *supra* note 26 at 335–38 (referencing Hogg).

30. The recent *Oxford Handbook of the Canadian Constitution* provides a useful snapshot of the academy's priorities. See Oliver, Macklem & Des Rosiers, *supra* note 28. With the exception of the excellent contribution by WJ Waluchow (a legal philosopher, it should be noted, and not an academic lawyer), none of the *Handbook*'s fifty chapters engage substantively with originalist constitutional interpretation. The chapter on legal theory by Timothy Endicott and Peter Oliver mentions originalism by name only to dismiss it, without engaging with any relevant scholarship. See Timothy Endicott & Peter Oliver, "The Role of Theory in Canadian Constitutional Law" in Oliver, Macklem & Des Rosiers, *supra* note 28, 937.

31. See Jeffrey Goldsworthy & Hon Grant Huscroft, "Originalism in Australia and Canada: Why the Divergence?" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, UK: Cambridge University Press, 2018) 183 at 183.

32. See e.g. *Marriage Reference*, *supra* note 25. Interestingly, Oliphant and Sirota record that although the Supreme Court of Canada formally rejects originalism, it engages in originalist argument routinely, though not self-consciously. See Benjamin Oliphant & Leonid Sirota, "Has the Supreme Court of Canada Rejected Originalism?" (2016) 42:1 Queen's LJ 107.

33. See Bradley W Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Huscroft & Miller, *supra* note 5, 120 at 120–22, 134 [Miller, "Origin Myth"].

34. See e.g. *R v Tessling*, 2004 SCC 67 at para 61.

into the subjective intentions of the framers, and in particular, by asking how the framers would have intended the constitution be applied to discrete disputes.[35]

A more common originalist method, dominant since the mid-1980s, is what has become known as original public meaning originalism.[36] Like the theory of original intentions, it is concerned with settlements, and it posits that the semantic meaning of a constitutional text is fixed at the time of its enactment.[37] But it parts company with the intentionalists over how one determines what a text meant at the time it was adopted. Instead of asking what the framers intended (relying perhaps on external evidence of debates and memoranda, or personal recollections of individuals who were present in some capacity), public meaning originalism focuses on the text. The public meaning of the words in context—that is, how an educated reader would have understood the text at the time it was authored—is what governs, not the intentions of the framers or *the counterfactual of how they would have addressed certain questions had they thought of them*. This last point is significant. Originalist constitutional interpretation is premised on the finiteness of constitutional settlements.[38] It takes as axiomatic the proposition that if a constitution is silent on some issue—that is, if there is nothing in the settlement that resolves some controversy or provides criteria or direction as to how some other institution is to resolve it—then the matter remains with legislatures as a matter of non-constitutionally constrained choice.

At its most basic, originalism is a commitment to two core propositions:

(1) the fixation thesis: that the linguistic meaning of a constitutional text is fixed at the time it is made; and
(2) the constraint principle: which states that the fixed semantic meaning must constrain constitutional practice in some way.[39]

There is of course much more to it than that. But the key point with respect to judicial reasoning is that where constitutional debate yielded a settlement or agreement, and that agreement has been reduced to writing in a manner capable of being understood, the judiciary is not free to substitute some new constitutional provision in place of the one actually agreed to and is constrained by the actual settlement reached.

35. See Miller, "Beguiled by Metaphors", *supra* note 26.

36. See Solum, *supra* note 11 at 22–24.

37. See *ibid*.

38. See Grant Huscroft, "Vagueness, Finiteness, and the Limits of Interpretation and Construction" in Huscroft & Miller, *supra* note 5, 203 at 204–05 [Huscroft, "Vagueness"].

39. See Solum, *supra* note 11 at 32–35.

This formulation nevertheless leaves much up in the air. What happens when a provision uses general language, perhaps in order to paper over a large degree of substantive disagreement among the drafters and ratifiers? The language used in bills of rights is often deliberately general or underdeterminate. In such cases, the contribution of interpretation is quickly exhausted. There is no point in demanding more from the text than it can give.

But as I stated earlier, legal reasoning is not exhausted by the more or less technical task of textual interpretation. Once the linguistic meaning of the text is ascertained, a constitutional interpreter, whether governmental or judicial, has the task of creating secondary rules to resolve the vagueness: to create constitutional rules to fill in the gaps and to make choices—where those choices are genuinely left to the interpreter—to resolve constitutional questions. Apart from the constraint that the construction can never contradict the text, and the caution that constitutions are finite settlements and not intended to resolve every political question,[40] little can be said in the abstract about the constraints on construction: construction is highly contingent on the needs of a political community and on the previous commitments that can be ascertained (including past decisions that considered and ruled out possible constructions). In the Canadian context, it is sometimes proposed in academic argument that the right to life, liberty, and security of the person under section 7 of the *Charter* be construed as giving the judiciary the power to define and protect either property rights or economic and social rights.[41] It is uncontroversial that there are no provisions in the *Charter* expressly addressing either of these sets of rights. To determine whether a right to either or both could be constructed from an interpretation of the text of section 7, on this methodology, it would be relevant to ask, for example, whether the inclusion of such rights in the *Charter* was ever considered, whether such a proposal was rejected, and whether that rejection should be understood as forming part of the constitutional settlement.

This is a simple sketch of the dominant stream of contemporary originalist interpretation. And now I want to present an argument demonstrating how much it has in common with the methodology followed in the *Persons Case*, accepted in Canada as the prototype of the Canadian variant of living constitutionalism. If I am correct about this point—that the central commitments of living tree methodology are consistent with contemporary originalism—then living tree proponents have much to gain by attending to, and adapting, the substantial analytical resources developed by originalist scholars.

At issue in the appeal of the *Persons Case* to the Privy Council was whether section 24 of the *British North America Act* (since renamed the *Constitution*

40. See Huscroft, "Vagueness", *supra* note 38 at 204–05.

41. See Margot Young, "Section 7: The Right to Life, Liberty, and Security of the Person" in Oliver, Macklem & Des Rosiers, *supra* note 28, 777; *Charter*, *supra* note 9, s 7.

Act, *1867*[42]) permitted the Governor General of Canada to appoint women to the Senate. The Supreme Court of Canada had said that it did not, that the text provided for the Governor General to appoint qualified persons, and that qualified persons in this context was clearly intended in 1867 to indicate men only. It would have been unthinkable, the Supreme Court of Canada said, for the framers of the *Constitution Act, 1867* to have intended otherwise.[43]

Lord Sankey, writing for the unanimous panel on appeal to the Privy Council, rejected this method of analysis. But before proceeding to a brief exegesis of the method he actually followed, it is important to dispel a perennial myth about the judgment. The dominant narrative of the decision, one duly handed on from professor to student since the late 1970s or early 1980s, and one that I argue is wholly erroneous, is this: (1) section 24, by referring to persons evidenced a constitutional settlement that women be ineligible for appointment to the Senate; but (2) social circumstances had changed by 1929, and this settlement was now plainly iniquitous; such that (3) the judiciary was authorized to set aside this settlement and re-author the text so that persons would now indicate male and female persons.

This line of reasoning is wholly absent from Sankey LC's reasons for judgment. To the contrary, he expressly stated that "in any code where women were expressly excluded from public office the problem would present no difficulty".[44] That is, had there been a clear statement of a constitutional settlement excluding women, the Court would have been bound by it, regardless of whatever change in circumstances had occurred in the meantime.

Whatever Sankey LC's view of the equities of the case, he maintained the careful discipline of reasoning from authoritative legal sources. The analytical method on display in the *Persons Case* is concerned in the first instance with retrieving the settlement evidenced in the text; it is entirely concerned with ascertaining the meaning of "persons" that was fixed in 1867 when the *Constitution Act, 1867* was enacted. The Court's concern, he said, was not the counterfactual "what may be supposed to have been *intended*, but what has been said".[45]

Like the Supreme Court of Canada, Sankey LC noted that the ordinary meaning of the word persons denotes both male and female persons, and that in some usages it can also be restricted to male persons. But whereas the Supreme Court resolved the ambiguity—male and female or just male—by appealing to the counterfactual supposition of what the framers would have intended

42. (UK), 30 & 31 Vict, c 3, s 24, reprinted in RSC 1985, Appendix II, No 5.

43. See *Edwards v Canada (Attorney General)*, [1928] SCR 276 at 276–77, [1928] 4 DLR 98 [*Edwards* SCC].

44. *Edwards* PC, *supra* note 21 at 133.

45. *Ibid* at 137 [emphasis added].

had they actually addressed the specific question, Sankey LC went to the text. Specifically, he noted that some sections of the *Constitution Act* used persons to denote both male and female persons while other sections referred specifically to male persons.[46] Unlike a contemporary living constitutionalist might have done, Sankey LC did not address the question of what persons meant in 1929. He was fixated on what the word meant at the time the *Constitution Act, 1867* was enacted. And so it is unsurprising that he drew support from the mechanism by which John Stuart Mill's proposed in 1867 to secure voting rights for women in the *Representation of the People Bill*: to replace the word man with the word person.[47]

With its focus on fixed meaning of the text, rejection of original intent, and embrace of original public meaning, this judgment—ground zero of living constitutionalism in Canada—is a judgment that could easily have been penned by Scalia J.[48]

How, then, did living tree constitutionalism develop in Canada? It did not emerge until fifty years later, in judgments contemporaneous with the ECHR's first articulation of living constitutionalism. The *Persons Case* lay largely dormant until the Supreme Court of Canada pressed it into service for interpreting the new *Charter of Rights and Freedoms*.[49] The Court harnessed a passage in which Sankey LC stated, over the course of a meditation about the need to give the Constitution a large and liberal interpretation, that the *Constitution Act, 1867* "*planted* in Canada a living tree capable of growth and expansion within its natural limits".[50]

This is the metaphor that swallowed the decision.

But the passage from which the metaphor was taken is almost invariably misquoted. Lord Sankey does not say, as later judges take him to have said, that the *Constitution Act, 1867,* is, itself, a living tree.[51] The passage, rather, is that the *Constitution Act, 1867, planted* a living tree.

The difference is significant.

The Privy Council's decision has to be situated in the politics of the time. The decision came down between the Balfour Declaration of 1926 and the passage

46. See *ibid* at 138–42.

47. UK, HC Deb (20 May 1867), vol 187, col 817 (John Stuart Mill). For a more detailed exegesis of the decision, see Miller, "Origin Myth", *supra* note 33.

48. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law—An Essay by Antonin Scalia* (Princeton, NJ: Princeton University Press, 1997).

49. See *Hunter v Southam*, *supra* note 1.

50. *Ibid* at 155–56 [emphasis added].

51. See e.g. *Re BC Motor Vehicle Act,* [1985] 2 SCR 486 at 509, 24 DLR (4th) 536. Endicott and Oliver repeat the error in their account of the *Persons Case*. See Endicott & Oliver, *supra* note 30 at 949.

of the *Statute of Westminster* in 1931 and, as the Canadian constitutional historian Eric Adams has it, "the living tree was an expression and confirmation of Canada's constitutional distinctiveness and independence."[52] The occasion of the *Constitution Act, 1867* had been the decision of the former colonies of Upper and Lower Canada to unite with Nova Scotia and New Brunswick to form the new Dominion of Canada. The purpose of the Act was to grant a Constitution to this new political community: it would delineate the legislative authority of the federal and provincial governments, as well as establish the institutions of government. The new dominion was to be established by Royal Proclamation, and it was to be governed according to the provisions set out in the *Constitution Act, 1867*. The tree planted by the *Constitution Act*, *1867* is primarily the new political community that is the Dominion of Canada and secondarily the institutions that govern it, including its constitutional law. It is the Dominion that will grow, and the constitutional doctrine that will grow with it. The settlement, however, remains fixed.[53]

There is of course a sense in which the constitution does grow, although the text remains what it is. As Sankey LC continued "[t]he object of the Act was to grant a Constitution to Canada" and "'[l]ike all written constitutions it has been subject to development through usage and convention'".[54] The methodology of the *Persons Case* is easily reconciled with development through usage and convention, as well as the Supreme Court of Canada's later insistence that constitutional concepts not be frozen in time.[55]

The key is the distinction drawn earlier, between constitutional interpretation and constitutional construction. When it comes to questions of interpretation, in the strict sense of ascertaining what the bargain was (what the settlement

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52. Eric M Adams, "Canadian Constitutional Identities" (2015) 38:2 Dal LJ 311 at 331. Adams has argued that:

> The living tree metaphor has been largely embraced as an approach to liberal and progressive constitutional interpretation, but in its own time and context, set against the Balfour Declaration, the politics of independence, and on the eve of the passage of the *Statute of Westminster, 1931*, the living tree was an expression and confirmation of Canada's constitutional distinctiveness and independence.

Ibid.

53. See John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in NW Barber, Richard Ekins & Paul Yowell, eds, *Lord Sumption and the Limits of the Law* (Oxford, UK: Hart Publishing, 2016) 73 at 83–85.

54. *Edwards* PC, *supra* note 21 at 136.

55. See *R v Tessling*, *supra* note 34 at 458–59; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33; *Marriage Reference*, *supra* note 25 at para 22.

was), this is simply a question of reporting the facts. There is no room for courts to improve on it. Setting aside or otherwise amending a constitutional settlement is a failure to keep faith with all those who participated in the process of constitution making for the common good, who were assured that the process would bind.[56] It is not the judicial role to replace the actual constitutional settlement with another provision reflecting some better political or social arrangement, or as Sumption LJ characterized the practice of the ECHR, the court's view of "what is appropriate to a democratic society".[57]

Constitutional construction, however, is on a different footing. Where a political community is faced with changed and unanticipated circumstances—as all communities are continually—the problem arises as to how the new phenomena—be they technological or social—can be addressed under a constitutional settlement that did not anticipate the issue. It is a matter of providing answers to new questions, such as where to allocate jurisdiction—federal or provincial—over aeronautics, nuclear power, or cellular data.[58] This is gap filling of the *ejusdem generis* variety.[59] Further, where a constitutional provision incorporates a moral principle, a judge is required to determine what the principle actually requires (subject to whatever other constraints the law imposes) and not what the founders believed it to require.[60]

The limits to genuine construction are particular to specific constitutional settlements. But there are some limits that can be stated generally. One such limit is that construction cannot be used to provide new answers to old questions already settled by the constitution. Much turns here on what is understood by settlement. It is broader, it seems to me, than just what is included in the text. It could also include, negatively, constitutional proposals that failed and other deliberate omissions. What it does not include is arguments of the type accepted by the Supreme Court of Canada in the *Persons Case*, but rejected by the Privy Council: the counterfactual that *had* the framers squarely addressed some question, which they did not, they *would have* resolved it in a particular

56. See James Allan, "The Curious Concept of the 'Living Tree' (or Non-Locked-In) Constitution" in Huscroft & Miller, *supra* note 5, 179; Finnis, *supra* note 53.

57. Lord Sumption, "The Limits of Law" in Barber, Ekins & Yowell, *supra* note 53, 15 at 23.

58. See *Reference Re Regulation and Control of Aeronautics in Canada*, [1931] UKPC 93 (aeronautics); *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457 (nuclear power); *Reference Re Regulation and Control of Radio Communication in Canada*, [1932] AC 304, [1932] 2 DLR 81 (PC) (telecommunications); *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 (cellular data).

59. See Miller, "Beguiled by Metaphors", *supra* note 26 at 337–38.

60. For analysis of how to interpret a constitutional provision that incorporates a moral principle, see Goldsworthy & Huscroft, *supra* note 31 at 194–95.

way. The Constitution does not include provisions that might have achieved unanimous support had anyone thought about them at the time, but that no one proposed, discussed, or voted upon.

So, there is truth in the claim that the constitution is not "frozen": where there are modest gaps, or vagueness, or irresolvable ambiguity, there is room for judicial construction—that is, supplementation and development of constitutional doctrine.

But this claim must be separated from the unsound claim that nothing in the Constitution is beyond the revising pen of the judge. And no serious proponent of the Canadian variant of living constitutionalism advocates such a proposition.[61] What is settled is settled. To be sure, we must not understate the difficulty in ascertaining what is settled. Sometimes settlements are deliberately incomplete and the answers sought will not be there. But we must not overstate the difficulty either. There is often a settlement in some respect, even if it is incomplete, and this will sometimes be enough to dispose of a dispute, or at least to foreclose some proffered interpretation or construction. Where such a settlement exists, it is appropriate to call the constitution to that extent fixed, frozen, what have you. Although the Supreme Court of Canada appears, from time to time, to insist otherwise, this is a semantic infelicity that should not be understood as denying the binding nature of constitutional settlements, but allowing, rather, for the possibility of constitutional construction.

The absence of scholarship on the limits of constitutional adjudicative change suggests that the academy is unconvinced that this is a subject that warrants serious study. Consider a contribution to the recent *Oxford Handbook of the Canadian Constitution* from Professors Timothy Endicott and Peter Oliver. They begin, "[a] theory of living tree constitutional interpretation allocates power to judges to change the Constitution."[62] The statement is supportable, it seems to me, to the extent that the concept of "change" is understood as limited to construction only, and the reference to the "Constitution" is not a reference to the settlement recorded in the text.

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61. At one time I had understood my colleague Sharpe JA to have advanced such a proposition. See Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: Toronto University Press for The Osgoode Society for Canadian Legal History, 2007) (particularly a passage stating that "the courts were now free, on the basis of changed social circumstances, to permit what had plainly been forbidden when the constitution was written" at 202). I mistook Sharpe and McMahon to have argued that courts were free to set aside what is expressly prohibited by the constitution. The better reading of that passage is that courts, in interpreting a constitution, are not bound by the expectations of the framers.

62. Endicott & Oliver, *supra* note 30 at 951.

But they carry on to observe that contemporary judicial practice under living constitutionalism permits judges to change the Constitution without any "articulate doctrine specifying the distinction between sensitive and sensible interpretation of the Constitution, [on the one hand] and 'unconstrained constitutional creation or construction masquerading as interpretation [on the other]'".[63] Endicott and Oliver are, it seems to me, entirely too sanguine about the absence of doctrinal guidance for judicial constraint. The constraint provided by doctrine provides for the rule of law rather than the rule of individual judges. Attention to constitutional settlements and the constraints they impose are therefore of critical importance to the legal system. The nature of the natural limits imposed by the constitutional settlement should therefore be of great interest to not only those constitutional scholars who understand themselves to be working within a school of originalism, but also those working within the tradition of living constitutionalism. Given that the subject of constraint has generated such an enormous literature from originalist constitutional scholars abroad, those constitutional scholars in Canada who would work to improve the methodology of living tree constitutionalism could benefit tremendously from mining this resource.

Conclusion

To sum up, the neglect of constitutional methodology, and constitutional interpretation in particular, risks disregard for constitutional settlements. That disregard may stem from the best of intentions: the belief that a better, more just, and more equitable settlement is available; that this new settlement would be an undeniable benefit to the political community now, and would surely now be chosen if the circumstances for amendment were more readily available; and that the political community should not be denied this benefit now simply because of the limited foresight, imagination, or even moral clarity of a previous generation of constitution makers.

But if a community manages to coalesce around a framework for governance, courts are vested with the responsibility of understanding the agreement and applying it. Living constitutionalism, in its dominant form, is an incomplete interpretive methodology that does not give adequate guidance to judges. Constitutional interpretation will never be uncontroversial. But it can, it

63. *Ibid* at 952 [footnotes omitted]. Endicott and Oliver cite to Professor Waluchow's entry on "Constitutionalism" in the Stanford Encyclopedia. See Wil Waluchow, "Constitutionalism" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy Archive*, Spring 2014 ed (Stanford, CA: The Metaphysics Research Lab Center for the Study of Language and Information), online: <plato.stanford.edu/archives/spr2014/entries/constitutionalism/>.

seems to me, benefit from a more robust methodology that provides greater guidance and leaves less to the discipline and virtuosity of individual judges. It is unfortunate that the current dichotomy in Canadian constitutional discourse between originalism and living constitutionalism has blocked the development of sound constitutional methodology. What is needed is for scholars, and judges, to get past the labels and focus on how constitutional doctrine can be developed to guide judicial reasoning.