The Living Tree, Very Much Alive and Still Bearing Fruit: A Reply to the Honourable Bradley W Miller

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This article critiques Bradley Miller JA's comments on Living Constitutionalism (LC) theory. The author addresses Miller JA's claim that Original Public Meaning Originalism, rather than LC, (a) is faithful to the essential nature of a constitution and its settlement function, (b) avoids certain critiques of the older Original Intentions Originalism, and (c) provides guidance for constitutional interpretation and constitutional construction that Miller argues is not adequately addressed by LC.

The author suggests that Miller's argument in favour of Original Public Meaning Originalism and constitutional settlement depends on whether the constitutional settlements discussed in the Canadian Charter of Rights and Freedoms *exclusively consist of their semantic meaning, or if they encompass the range of applications such words were intended to include or excuse. The author then notes that LC also reflects that a constitution must be able to adapt to changing circumstances, and that such interpretation is still subject to natural limits. As such, LC is flexible yet just as disciplined in its reasoning as other areas of the common law. Finally, the author rebuts Miller JA's assertion that LC is underdeveloped, arguing that it provides as much guidance for constitutional interpretation as Original Public Meaning Originalism, in that LC has the resources to decipher limits within the framework provided by the living tree doctrine.*

The author concludes by acknowledging some points of agreement and discourages dismissing either Original Public Meaning Originalism or LC without exploring their nuanced approaches to constitutional interpretation.

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Introduction

In a provocative article recently published in the *Queen's Law Journal*, Bradley Miller JA sets out to establish a number of theses.[1] Among these are the following:

i. Far too little attention has been given, in Canadian legal practice and scholarship, to theories of constitutional interpretation.

ii. While engaged in constitutional interpretation, Canadian courts and legal academics have largely relied on a misguided and seriously underdeveloped theory of Living Constitutionalism (LC) that originated with the living tree metaphor introduced by the Judicial Committee of the Privy Council in *Edwards v Canada (AG)* (the Persons Case).[2]

iii. LC is both theoretically and practically bankrupt. It provides very little guidance to interpreters in constitutional cases, particularly those involving rights enshrined in the *Canadian Charter of Rights and Freedoms* (the *Charter*).[3]

iv. More specifically, LC simply tells judges that they should, in interpreting and applying a constitution, treat it as a "living tree" that must be permitted to grow and adapt in response to changing circumstances. But LC fails to provide any measure of guidance on

1. See Hon Bradley W Miller, "Constitutional Supremacy and Judicial Reasoning", Judicial Speech (2020) 45:2 Queen's LJ 353 [Miller, "Judicial Reasoning"].

2. [1930] 1 DLR 98 at 106–07, [1930] AC 124. For an earlier discussion of the living tree metaphor introduced in *Edwards*, see Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can JL & Jur 331.

3. Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]. It is not clear to me whether Miller JA believes that LC is, in its essence, bankrupt, or whether he believes this to be true of extant versions of it only. In what follows, I will assume the former with the understanding that his indictment may well extend only to the latter.

how exactly this should be done, resulting in unbridled, unprincipled judicial activism and the denial of the rightful role of elected legislatures in specifying (i.e., rendering more concrete via the development of more specific doctrines and rules) our various legal rights, including our constitutional rights.

v. Furthermore, LC ignores or subverts the very nature of constitutions and one of their essential functions, which is to *settle* on a set of agreed parameters within which our day-to-day legal and political practices are expected to operate. In short, LC ignores or subverts the constitution's *settlement function*.

vi. In failing to provide courts with adequate guidance on how precisely to interpret the constitution, LC leads to an erosion of the rule of law, which demands consistency and predictability in the application of laws, including a society's foundational law, its constitution.

vii. Originalism, a theory with an established history in American legal practice and scholarship, offers a far richer and well-developed alternative to the theoretically bankrupt LC upon which Canadian courts and scholars have fixated and relied.

viii. In their critiques (and perfunctory dismissals) of Originalism, Canadian courts and academics have targeted a misguided, "anachronistic" version of that theory, Original Intentions Originalism (OIO), that erroneously requires a focus on the original intentions of the constitution's authors when courts engage in constitutional interpretation.[4]

ix. A newer, much more appealing version of Originalism has emerged since its early days. This version, Original Public Meaning Originalism (OPMO), focuses not on the original intentions of the constitution's authors, but on how the specific words used in its various provisions would originally, i.e., at the time of adoption, have been understood by competent users of the language. OPMO (a) remains faithful to the essential nature of a constitution and its settlement function, (b) avoids

4. "It is true that the Court has stated unequivocally that it rejects originalism, but its understanding of originalism is anachronistic." See Miller, "Judicial Reasoning", *supra* note 1 at 362. Contemporary defenders of OIO include Walter Benn Michaels and Larry Alexander. See Walter Benn Michaels, "A Defense of Old Originalism" (2009) 31:1 W New Eng L Rev 21; Larry Alexander, "Simple-Minded Originalism" in Grant Huscroft & Bradley Miller, eds, *The Challenge of Originalism: Essays in Constitutional Theory* (New York: Cambridge University Press, 2011) 87.

the many objections to which OIO is susceptible, and (c) provides the desired guidance that LC is woefully incapable of providing.[5]

x. Canadian courts and academics should do their homework, and look carefully at OPMO and the American scholarship supporting it, for a better understanding of how constitutional interpretation ought properly to be conducted.

xi. If they did, they might well discover that what they view as a stark alternative to Originalism, LC, is in fact largely, if not wholly, compatible with it.

These eleven theses constitute some of the core claims advanced and defended by Miller JA. Many of them have been defended at length elsewhere. Indeed, in one instance Miller JA does so by offering an extended critique of the LC theory I develop and defend in my book on the topic.[6] Space constraints prohibit me from addressing each of the above eleven theses, let alone the many other important claims advanced in Miller JA's article. I will instead focus on

5. As will become clear below, defenders of OPMO distinguish between two modes of dealing with constitutional texts. First, there is constitutional interpretation proper, which is a process of discerning the semantic meaning of the relevant words employed in a constitutional provision. Second, there is constitutional construction, which consists in the very different process of creating rules and doctrines that supplement the semantic meaning discerned in cases of interpretation proper. Constructions are used to help apply constitutional texts to individual cases. On Miller JA's rendering of it, the *Oakes* test is a construction, created by the Supreme Court of Canada to supplement the semantic meaning of section 1 of the *Charter* and assist in its concrete implementation in individual cases. Thus, there are two senses of the word "interpretation" at play in Originalist accounts of constitutional interpretation: interpretation proper that contrasts with constitutional construction; and a broader, looser sense of interpretation that covers both. In what follows, it should be clear from the context which is meant.

6. See WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, UK: Cambridge University Press, 2006) [Waluchow, *A Common Law Theory*]. For Miller JA's critique, see Bradley W Miller, Book Review of *A Common Law Theory of Judicial Review* by WJ Waluchow (2007) 52:1 Am J Juris 297. For further developments of the theory defended in my book, see WJ Waluchow, "Normative Reasoning from a Point of View" in Kenneth Einar Himma, Miodrag Jovanović & Bojan Spaić, eds, *Unpacking Normativity: Conceptual, Normative, and Descriptive Issues* (Oxford: Hart, 2018) 119; WJ Waluchow, "On the Neutrality of Charter Reasoning" in Jordi Ferrer Beltrán, José Juan Moreso & Diego M Papayannis, eds, *Neutrality and Theory of Law,* vol 106 (Dordrecht: Springer, 2013); Wil Waluchow, "Constitutional Rights and the Possibility of Detached Constructive Interpretation" (2015) 9:1 Problema: Anuario de Filosofía y Teoría del Derecho 23.

the three propositions embedded in thesis nine: (a) that unlike LC, OPMO is faithful to the essential nature of a constitution and its settlement function; (b) that OPMO avoids the many objections to which OIO has, historically, been thought susceptible; and (c) that OPMO provides the desired guidance that LC is woefully incapable of providing.

I. Constitutional Settlement

In Miller JA's view, LC subverts the settlement a constitution achieves or represents. Those involved in the process of creating a constitution presumably disagree on a wide range of different issues, some of which raise important questions of political morality while others do not.[7] Should a president's term extend to four or five years? Selecting one of these two options may largely be a matter of drawing a firm, though somewhat arbitrary, line. In other words, not much may turn on which alternative is agreed on. What is crucial, however, is that some such alternative be chosen and settled on. Many constitutional provisions constitute settlements of this somewhat arbitrary nature. But many constitutional provisions represent choices of far greater significance. Should a constitution include a right to procedural justice? Or should it include a wider, much stronger right to substantive justice, where the latter guarantees not merely laws that are fairly applied and administered, but laws that are not in their substance fundamentally unjust? This is an important choice on which much of great significance can turn. And reasonable people may genuinely disagree on which choice is best. Here is another example. Should citizens be deemed to have a right to free speech? Or should the constitution recognize the arguably much wider right to free expression, where the latter unequivocally extends to non-verbal forms of expression like flag burning, marching on city hall, performance art that many find offensive, and so on? One can imagine considerable disagreement and debate on this issue as well. And once again, the question of which alternative should be chosen really does matter, morally speaking. It is not only important that a firm choice be made, but it is also important that the right choice be made, despite the fact that reasonable people will genuinely and profoundly disagree on what that right choice is. In any event,

7. It is worth noting that not all constitutions are deliberately created or authored. Some are "unwritten" and arise through informal means, by way of legal and political practice. In these instances, Originalism, in all its forms, lacks even a modicum of plausibility. Since Miller JA's remarks focus on the Canadian Constitution which at the very least includes the *Constitution Act, 1982* and, before that, various other written constitutional instruments including the *British North America Act, 1867*, we can safely set this point aside. We must, nevertheless, bear in mind that Originalism is, at best, a decidedly incomplete general theory of constitutional interpretation.

in choosing expression over speech, constitutional authors will have settled this controversial issue so far as constitutional practice is concerned. They will have agreed, despite their moral and political differences, that constitutional cases are to be adjudicated on the basis of the choice made.

So, settlement is, according to Miller JA, an important function of constitutional instruments.[8] Any theory of constitutional interpretation that totally subverts this function threatens to undermine the very nature of constitutions and the role they are intended to play in our legal and political practices. It is, therefore, worthy of rejection. But subverting this function is, in Miller JA's view, exactly what LC does. In claiming that constitutional interpretation must reflect the need for constitutions to grow and adapt to meet changing circumstances, LC theory undermines the settlements expressed in them. Furthermore, any judge who interprets as LC demands not only threatens these settlements, but she steps well beyond the boundaries of legitimacy. Constitutional authors, not judges, have the authority to agree on the terms of our constitutional settlements. So any judge who heeds the siren call of LC theory will inevitably be led to engage in what amounts to an unauthorized, indefensible act of constitutional amendment. OPMO, on the other hand, fully respects the legitimacy of the constitutional creation process and the authority of the authors who engaged in it. It does so by requiring interpretations that reflect the public meaning the authors invoked in settling on and expressing the norms they did. In other words, OPMO respects those whose role it was (a) to settle on the terms of our constitutional engagement with one another and (b) to express those settlements in specific words the meaning of which competent users of the language would have understood them to bear. OPMO judges who respect the limits imposed by the original semantic meaning of the constitution's terms, respect the authority of constitutional authors and the settlements their chosen words were meant to express.

Now this is not to say that original semantic meaning is, according to Miller JA, always sufficient to answer a question of constitutional interpretation. Sometimes it will get one only so far and judges will be called on to engage in a mode of reasoning Originalists call "constitutional construction". In some instances, this will be because the semantic meanings of words, chosen unexpectedly and in a way that could not have been foreseen by the constitution's authors, fail to resolve the issue before the court. In other instances, constitutional authors might actually have deliberately chosen

8. This is not to suggest, once again, that settlements need be expressed in written documents alone. It is presumably possible for settlements to arise less formally via common understandings and conventions. Witness the existence of unwritten constitutions, as is the UK at one time, or the many constitutional conventions to the importance of which Albert Venn Dicey drew to out attention. See AV Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed (London: Macmillan & Co Ltd, 1960) at 23–24.

vague or abstract words whose semantic meaning was recognized by them as insufficient to decide all cases. In these instances, a deliberate choice will have been made to defer settlement to a later time. This is, in fact, a plausible way to view many of the *Charter*'s abstract, morally-loaded provisions. One can examine section 1 of the *Charter* until one is blue in the face, and one will not be able to discern, in the semantic meaning of its terms, an answer to the question whether the reverse onus provision at issue in *R v Oakes* could be considered a reasonable limit justifiable in a free and democratic society. The consequence was that the Supreme Court of Canada was forced creatively to construct a test that fleshes out, for purposes of Canadian legal practice, how compliance with section 1 is to be determined. It is important to note that, in constructing the *Oakes* test, the Supreme Court of Canada did not, in Miller JA's view, subvert the constitution's settlement function or step on the toes of the Constitution's authors.[9] Given that an earlier, deliberate choice was presumably made to leave further settlement to a later time, and assuming that the construction of section 1 offered up by the Court—the *Oakes* test—did not in fact conflict with its semantic meaning, the Court did not undermine the authority of the Constitution's authors and the settlements they enshrined. All the Constitution's authors had settled on was that any limitation of a *Charter* right must be justifiable in a free and democratic society. They left it to others to determine what precisely that normative standard requires.

Sometimes settlement is left to later decision-makers. But in many other cases, Miller JA adds, a different choice is made, i.e., a decision is made to settle the matter clearly and decisively at the moment of constitutional creation, and to express that settlement in the clear semantic meaning of the words chosen to express it. This, despite the tendency of Canadian courts, enamoured with LC and the living tree metaphor, to think otherwise, to treat all provisions of the Constitution as similar to section 1 in being open to construction by the court.

> 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 . . .. 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.[10]

9. See Miller, "Judicial Reasoning", *supra* note 1 at 359–60.

10. *Ibid* at 369.

> [T]he 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.[11]

At first glance, this all seems eminently sensible. No one but an extreme rule-skeptic thinks that Humpty Dumpty was right when he said: "When I use a word it means just what I choose it to mean—neither more nor less."[12] As HLA Hart argued long ago, all but seriously defective laws have a "core of settled meaning" that is sufficient to guide conduct, and later judgment, in many cases.[13] And there is no reason to think this fails to apply to the provisions of a constitution, even those that are significantly vague or abstract. As I said, all this seems sensible—until, that is, one examines the matter a bit further and considers what exactly is to be included in the constitutional settlements upon which Miller JA's argument depends. Do the constitutional settlements embodied in, e.g., sections 1 and 7 of the *Charter*, include nothing but original public meaning, conceived exclusively in terms of semantic meaning? Or do they include other elements, most notably the range of applications those terms were meant to include or exclude? The plausibility of Miller JA's indictment of LC, and his endorsement of OPMO as an acceptable alternative, depend crucially on how one answers this important question because, depending on one's answer, one will inevitably be led to one of two conclusions. Either (a) the new originalism Miller JA endorses, OPMO, is as vulnerable to objection as its "anachronistic" cousin, OIO; or (b) OPMO, as Miller JA conceives it, is really just LC in disguise. Or if it is not LC, it has no more appeal than some of the contemporary versions of LC now on offer in the literature.

II. Adaptation and Natural Limits

Let us begin by looking a bit more closely at LC. LC does not simply insist that constitutional interpretation reflect the capacity of a constitution to adapt in response to changing circumstances. It also says that it must be sensitive to

11. *Ibid* at 363.

12. Lewis Carroll, *Through the Looking Glass* (London: Macmillan & Co, 1871) at ch 6.

13. HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 124–54.

what the Privy Councillors in *Edwards* called a constitution's "natural limits".[14] These are points of which Miller JA is fully aware:

> 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. So stated, everything turns on what sorts of considerations justify adaptation, and what constitutes a "natural" limit.[15]

When is adaptation justified? And what are a constitution's natural limits? Even though so much turns on these two questions, Canadian judges and LC theorists have, in Miller JA's view, done precious little to answer them: "There has been very little scholarship addressing these questions systematically."[16] But of course, this is not to say that nothing at all has been said. I am immensely grateful that Miller JA notes my own efforts to provide answers in *A Common Law Theory of Judicial Review: The Living Tree*.[17] Though he does not do so, he might also have mentioned the powerfully articulated and defended theory advanced by American legal theorist David Strauss in his book *The Living Constitution*.[18] Of course, even the Supreme Court of Canada has had a go at providing answers at various junctures, though we might agree that the Court's ruminations have been neither thorough nor particularly satisfactory. Its first serious attempt to deal with the issue of natural limits was in an early Charter case, *R v Big M Drug Mart Ltd*.[19] After noting that interpretation of the relevant *Charter* right (section 2, freedom of religion) "should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" the Court went on to add these crucial, though admittedly vague, caveats:

> [I]t is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this

14. See *Edwards v Canada (AG)*, *supra* note 2 at 107.

15. Miller, "Judicial Reasoning", *supra* note 1 at 361.

16. *Ibid*.

17. See Waluchow, *A Common Law Theory*, *supra* note 6.

18. See David A Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010) [Strauss, *The Living Constitution*]. For further relevant works by Strauss, see David A Strauss, "Common Law Constitutional Interpretation" (1996) 63:3 U Chicago L Rev 877; David A Strauss, "Do We Have a Living Constitution?" (2011) 59:4 Drake L Rev 973.

19. [1985] 1 SCR 295, 18 DLR (4th) 321 [cited to SCR].

> Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 356, illustrates, be placed in its proper linguistic, philosophic and historical contexts.[20]

As these passages illustrate, the Court, in signaling its intention to be guided by the living tree metaphor, was not granting itself carte blanche to ignore any and all limitations on its practices of constitutional interpretation. On the contrary, it recognized a number of limits, all of which, one might add, most Originalists would be more than pleased to endorse. The Court was happy to count, as significant in discerning constitutional meaning:

a. the very language chosen to articulate the specific right or freedom in question,

b. the historical origins of the concepts embedded in the *Charter*,

c. the purposes the securing of which lay behind the decision to include a specific rights provision, and

d. where applicable, the meaning and purpose of other associated *Charter* rights.[21]

How exactly these various factors play out in specific cases is often a complicated question upon which the Court has, admittedly, provided precious little systematic guidance over the years. And we might agree that there is likely to be much room for creative choice here. But there are, for our purposes, at least two important points to stress. First, the Supreme Court of Canada clearly does recognize limits to its interpretive abilities—despite its endorsement of LC. Second, there is reason to think that, in at least some cases, the exact limits warranted will be easily understood by all reasonable interpreters. Returning to an example mentioned above, the resolution of a section 2 case might turn on the fact that the more expansive concept expression was chosen by the Constitution's authors, not the much narrower alternative, speech, one finds in the *US Bill of Rights*. Such an historical fact, and the semantic fact that expression is a wider concept than speech, will likely be enough to undercut any attempt to rule out various non-verbal forms of expression—e.g., flag burning—as outside the scope of section 2.[22] Had the Constitution's authors'

20. *Ibid* at 344.

21. See *ibid*.

22. The question whether flag burning was an instance of protected speech was the centre of focus in *Texas v Johnson*, 491 US 397 (1989).

purpose been to protect nothing but verbal forms of expression, they could easily have settled on the word speech instead of expression. That they did not do so counts significantly in favour of an expansive reading of expression, one that includes a variety of different forms of expressive activity only some of which are verbal in character. None of this is inconsistent with LC.

Endorsement of LC should not be, and has not been, viewed as an invitation to unbridled choice masquerading as constitutional interpretation. Natural limits are recognized. Of course, one might think that the limits mentioned in *Big M Drug Mart* fail to provide much in the way of significant constraint in most cases—that a court hellbent on arriving at a preferred decision might easily finesse them in such a way as to upend the settlement expressed in the Constitution, and substitute a preferred outcome seemingly more in line with personal or current social preferences. This would be a fair point, were it not for two additional factors. First, though this might well be true in some cases, it is clearly not true in all of them. There are clearly limits to the fudging of limits. Second, LC is fully consistent with additional constraints upon legitimate constitutional interpretation. And these are sometimes sufficient to rule out preferred outcomes. In our various writings on the subject, David Strauss and I have developed a form of LC theory we call "common law constitutionalism". These theories, much like the theory espoused by Miller JA, respect the role of constitutional authors in settling, to varying degrees, the range of important issues of political morality a written constitution addresses. Once again, the authors of Canada's *Constitution Act, 1982* decided that nonverbal forms of expression should be protected by constitutional right. It follows from this fact that any interpretation according to which non-verbal forms of expression lie outside the scope of the protected right is simply wrong. If one likes, it runs afoul of the constitutional settlement section 2(a) represents. The same can be said about the decision to include, in section 7, reference to the principles of fundamental justice, not the much narrower principles of procedural justice.[23]

But as Strauss and I both argue, there is much more to the Constitution than what is captured by the semantic meaning of the Constitution's terminology. And these additional elements provide considerably more constraint than pure semantic meaning. The ongoing interpretation of a constitution's abstract rights provisions is, according to the common law constitutionalist, a process much like the familiar process by which judges have developed equally abstract, common law notions like "negligence" and "the reasonable use of force". According to Strauss, the US constitutional system "has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself. . . . [I]t is not one that judges (or anyone

23. For rejection of an OIO approach to interpreting section 7's phrase "the principles of fundamental justice", see *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, [1985] SCJ No 73.

else) can simply manipulate to fit their own ideas".[24] The same, I hazard to suggest, is true of Canada. On common law constitutionalism, constitutional interpretation must accommodate itself to previous attempts to interpret and apply the abstract rights provisions expressed in our main constitutional text, the *Constitution Act, 1982*. These prior interpretive decisions serve as constitutional precedents that further constrain judges' interpretations.[25] And just as the traditional rules of precedent combine respect for the (albeit limited) wisdom and authority of previous decision makers (legislative and judicial) and the need for clear, antecedent guidance, with an awareness of the need to allow adaptation in the face of changing views and circumstances, so too must constitutional interpreters respect the wisdom and authority of constitutional authors and previous interpreters, and the need for some measure of constitutional settlement, all the while allowing the constitution to adapt to new or unforeseen circumstances. The living constitution and its interpretation, though flexible and adaptive, are no less constrained and disciplined than reasoning in other areas of the common law.

III. Constitutional Settlement and Constitutional Construction

So according to the common law conception of LC, there is much more to the constitution than the semantic meaning, original or otherwise, of the written Constitution. Precedents set in cases such as *Oakes* are as much a part of our constitutional law and practice—our little-c constitution—as the big-C *Constitution Act, 1982*. And they constrain subsequent judicial interpretations

24. Strauss, *The Living Constitution*, *supra* note 18 at 3. Strauss usefully distinguishes between the US (big-C) Constitution, the written document an original copy of which is found under glass in Philadelphia, and the US (little-c) constitution, the set of constitutional norms only some of which are explicitly articulated in the written US Constitution. Other norms found with the US constitution are expressed in the complex set of precedents and doctrines established in applying the written US Constitution. Some such distinction, between the little-c and the big-C constitution, seems applicable in the Canadian case as well—and will be employed in the remainder of this paper. Though it is nowhere to be found in the Canadian (big-C) Constitution, the *Oakes* test is (at least for the time being) clearly part of the Canadian (little-c) constitution.

25. Whether and how constitutional precedents differ from precedents set in other areas of the law, e.g., torts or contracts, is an intriguing question. The special, foundational role served by constitutions, coupled with the consequent fact that they tend to exhibit some degree of entrenchment, lead one to think that constitutional precedents might be less susceptible to adaptation or rejection than precedents set in these other areas. But this issue can safely be set aside for purposes of this paper. The crucial point is that constitutional precedents, though open to adaptation, nevertheless serve to constrain constitutional interpretations.

of the Constitution's various provisions. Indeed, one might even go so far as to speculate that the common law conception of LC recognizes even *more* constraint than OPMO does! This conclusion follows if the latter restricts the source of constraint to the original semantic meaning of the terms employed in the Constitution. But it is not clear that this is true of Miller JA's OPMO. As we noted above, he is fully aware that semantic meaning is often insufficient to decide cases involving the abstract rights provisions of the Constitution, and that judges must draw on resources over and above interpretive ones in order to settle the issue in dispute. As we have also seen, when this occurs, judges leave behind the domain of constitutional interpretation and enter the realm of constitutional construction.

> 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.[26]

But how, exactly, is this process of constitutional construction to take place?

> 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, *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).[27]

There are two things to note here. First, we should be careful not to be uncharitable in assessing what Miller JA seems to be saying in this second passage. No theory of constitutional interpretation is capable of providing a rigorous decision-procedure that generates incontrovertible results in concrete cases. And we should not expect it to do so, whether it is a version of LC or a version of Originalism. As Joseph Raz notes:

> There is no general theory of constitutional interpretation if that is meant to be a general recipe for the way such interpretation should be conducted that is set out in some

26. Miller, "Judicial Reasoning", *supra* note 1 at 364.

27. *Ibid* [emphasis added].

> detail in order to guide the interpreter every step of the way with practical advice. There is little more that one can say other than "reason well" or "interpret reasonably". What little there is to say consists mainly of pointing out mistakes that have been made attractive by the popularity they enjoy among judges, lawyers, or academic writers.[28]

The second thing to note is Miller JA's assertion that constitutional construction must be sensitive to "the needs of the political community" and respectful of previous constitutional commitments, including "past decisions that considered and ruled out possible constructions". Here, Miller JA is drawing on a theory that assigns a significant role to legislatures in determining the concrete commitments expressed in the rights provisions of a constitution. On this theory, constitutional authors set an abstract standard that must subsequently undergo what St. Thomas Aquinas referred to as "determination" or "specification" of "common notions".[29] Sometimes, this process is undertaken by courts, as occurred in *Oakes*.

> [I]nterpretation 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—cobbled together from the ECHR jurisprudence—for determining the circumstances in which a limit to a person's interests are justified.[30]

But in many other cases, perhaps the vast majority of them in Miller JA's view, construction is undertaken by legislators when they adopt legislation that fleshes out the abstract moral commitments enshrined in the semantic meaning of the Constitution's rights provisions.

> Although the example of construction that I provided [*Oakes*] 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

28. Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 357.

29. See St Thomas Aquinas, *Summa Theologica*, Part I–II, question 94, art 4, ad 3; question 95, art 2; question 99, art 3, ad 2; question 104, art 1.

30. Miller, "Judicial Reasoning", *supra* note 1 at 359 [footnotes omitted].

> is left to the legislature as it struggles with the limitation of underdeterminate rights."[31]

This is not the place to provide a thorough evaluation of the role assigned here to legislatures. But I will say this. It would seem that the greater the role we assign to legislators in "specifying" the meaning of our *Charter* rights, the greater the risk we run that those rights will be robbed of their essential role—which is to protect us from the very governments who are being called on here to specify them. That we do sometimes need protection from government action is one of the principal reasons most modern constitutional democracies adopt judicial review and assign to the courts the primary task of determining the meaning of their constitutional rights. If, when they engage in judicial review of legislation, courts are constrained by the legislature's very own specifications of the relevant constitutional rights, then judicial review comes close to being utterly toothless. Given the highly abstract nature of constitutional rights provisions, and the resultant fact that their semantic meaning seldom gets one very far, the content of our constitutional rights will largely be determined by the legislature. The end result? In most instances, the scope of our constitutional rights ends up being determined by the very body being judged, the very body from which they were meant to serve as protections. Whether this comes perilously close to putting the fox in charge of the henhouse is a vitally important question.

Further consideration of this last concern will have to await another day. Let us assume that even when the legislature has partially specified the content of constitutional rights, there are still details to be worked out. In this case, the primary vehicles for doing so presumably lie in the decisions of judges. As noted earlier, Miller JA's stated view is that constitutional constructions must respect "previous commitments that can be ascertained (including past decisions that considered and ruled our possible constructions)".[32] Clearly, as we have just seen, he believes that some of these commitments are made in acts of legislation. But we have also supposed that these are often insufficient to rule out the need for further specification by judges. If this is so, then one can only speculate about the nature of any further commitments to which Miller JA might be referring. Are they perhaps the ones highlighted by common law constitutionalism, namely, constitutional precedents set by judges as they go about the business of applying the Constitution's abstract rights clauses?[33] If they are, then one is led to wonder whether Miller JA not so much offers an alternative to LC as

31. *Ibid* at 360, citing Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, UK: Cambridge University Press, 2009) at 174 [emphasis added].

32. Miller, "Judicial Reasoning", *supra* note 1 at 364.

33. One of Originalism's most famous defenders was Antonin Scalia J of the US Supreme Court, who did not wish to dispute the authority of constitutional precedent. Yet,

endorses the common law version of it defended by Strauss and myself. And if this is so, his indictment of LC seems misguided. LC theory of the common law variety does indeed have the resources to flesh out the natural limits contained within the living tree doctrine introduced in *Edwards*. And if Strauss and I are right, American and Canadian courts have actually utilized the reasoning that theory prescribes as they go about deciding constitutional cases. The *Oakes* test is firmly entrenched, as binding constitutional law, in Canadian judicial practice. And although its abandonment or modification may not require the level of commitment to change mandated by the cumbersome and onerous formal amendment procedures prescribed by the *Constitution Act, 1982*, it is difficult to overestimate how much of an effort that would actually require—and how much of a sea change in attitudes about justifiable rights infringement that really would reflect or bring about.

So, what are we to conclude from all of this? First off, we can conclude that LC is far from the inchoate, underdeveloped theory Miller JA's assessment of it suggests. There is little need to look to OPMO for answers to our important questions about the nature of constitutional interpretation. LC theory, as it has been practiced by our courts, and defended by at least some legal scholars, is quite up to the task. Indeed, if the commitments which constrain judicial constructions are as we have supposed them to be, that is, if they are to be found in constitutional precedents largely set by our courts, then the answers LC provides may not be all that different from those provided from OPMO's supposedly superior, and more fully developed, account.

But let us suppose that my reading of Miller JA's views on construction is off the mark, and that judges who follow the dictates of OPMO are not as constrained by prior judicial interpretations as the common law version of LC suggests—or that they are not constrained by them at all. After all, according to OPMO, the principal source of constitutional norms seems to lie in the decisions of the Constitution's authors. It was they who had the authority to settle the terms under which governments are to conduct their affairs. Hence Scalia J's acknowledgment that he was a faint-hearted Originalist. But then we are left with the following dilemma: either the terms set are very thin indeed,

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Scalia J recognized that ascribing authority to constitutional precedents threatens the core claim of Originalism, that judicial decisions must respect original understandings, not later decisions by judges. Recognizing that it would be considered a grave mistake to underplay the biding nature of precedents such as *Brown*, or to ignore contemporary views about what constitutes cruel and unusual punishment, Scalia J was willing to bend and sometimes allow decisions based on these factors. In so doing, he acknowledged that he was a "faint-hearted" Originalist: "I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." See Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57:3 U Cinn L Rev 849 at 862–64.

given the vague, abstract nature of constitutional rights provisions; or what was introduced by the Constitution's authors were norms, not to be understood solely in terms of original semantic meaning, but also in terms of additional factors which introduce far more content and much more constraint. Perhaps, that is, what is binding on interpreters is not only the original public meaning of the relevant constitutional norms, but the author's understandings of what those norms require—the kinds of things they conceived their norms as covering or excluding.

There is some reason to believe that this latter option might be the one Miller JA actually endorses. In discussing limits on constitutional construction, he writes, "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".[34] Fair enough. This seems like a flat-out rejection of old school OIO. Moral truth is the only thing that constrains interpretation. But then Miller JA goes on to add the following:

> 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.[35]

The view endorsed in the first paragraph is this. When interpreting a constitutional rights provision that incorporates a moral principle, say the Fourteenth Amendment of the US Constitution, judges must decide what that moral principle really requires, not what the authors who incorporated it believed that it requires.[36] Even if they believed that moral equality is consistent with separate but equal facilities, this particular understanding of equality is not dispositive.[37] What is dispositive, i.e., what the authors of the US Constitution

34. Miller, "Judicial Reasoning", *supra* note 1 at 368.

35. *Ibid*.

36. See US Const amend XIV.

37. See *Plessy v Ferguson*, 163 US 537 (1896). *Plessy v Ferguson* was a landmark decision of the US Supreme Court according to which racial segregation laws for public facilities are constitutional so long as the segregated facilities are equal in quality. This position came to be known as the "separate but equal" doctrine. See *ibid* at 552.

actually settled on, is the true moral principle that all persons, whatever their colour, race, sex, religion, and so on, are morally entitled to the same facilities. In committing himself to this view, Miller JA is wisely trying to distance himself from old school OIO, particularly that version of the theory according to which what is binding on interpreters includes not merely the principle the authors intended to incorporate, but the authors' understandings of what that principle requires or permits—the applications they believed that principle to have. On this understanding of OIO, if the authors of the American Constitution viewed flogging as neither cruel nor unusual punishment, then such a punitive response does not violate the Eighth Amendment of the US Constitution. If, according to the authors of the Fourteenth Amendment, the equal protection of the laws as consistent with separate but equal facilities, then 21st century constitutional interpreters in the United States are bound by that understanding. *Brown v Board of Education* was wrongly decided.[38]

But can Miller JA remain as distanced from old school OIO as he clearly wishes to be? I am not so sure. For consider this: after suggesting that what is binding on constitutional constructors is "what is included in the text"—by which he means, I take it, the incorporated (true) moral principle(s) upon which the authors settled—Miller JA goes on to expand the scope of that settlement to include "negatively, constitutional proposals that failed and other deliberate omissions".[39] Suppose one could establish that the authors of the Fourteenth Amendment deliberately chose not to include a ban on separate but equal facilities when they agreed on their Amendment. That would mean, I take it, that later courts are barred from interpreting or constructing the Amendment as imposing such a ban. This, despite the fact that the true principle(s) of equality actually do bar separate but equal facilities. In pursuing this route, Miller JA comes dangerously close to barring constitutional interpreters from understandings that conflict with the applications the authors had in mind when they came to their constitutional settlement. He runs the risk, in other words, of embracing old school OIO and rejecting what he seems to recognize elsewhere—that sometimes constitutional authors settle on highly abstract standards to incorporate in their constitution, and deliberatively leave it to subsequent interpreters to determine, in the often very different circumstances in which they find themselves, what those abstract moral principles truly require.

Where does this leave Miller JA? It leaves him with what may be, for him, an unhappy dilemma. Either he stands by his assertion that the settlement established in a constitutional provision incorporating a moral principle extends no further than what, in truth, that moral principle requires—which is presumably what the original semantic meaning of the provision demands—or

38. 347 US 483 (1954).

39. Miller, "Judicial Reasoning", *supra* note 1 at 368.

that the binding settlement excludes some of the applications the authors saw their incorporated moral principle as ruling out. In the former case, it is far from clear that his OPMO is not really just LC in different clothing, which at times Miller JA does seem to suggest.[40] In the latter case, this OPMO is vulnerable to many of the objections launched against early versions of OIO. If the authors of the US Eighth Amendment of the US Constitution did not believe that flogging amounts to cruel and unusual punishment, then regardless of whether in truth it does, no interpretation of that Amendment which fails to be consistent with that belief can be correct.

Concluding Remarks

In this paper, I set out to challenge Miller JA's claim that LC is theoretically and practically bankrupt. In this respect, he and I clearly disagree. Work is being done by common law constitutionalists on important questions concerning the nature of constitutions and on the natural limits of constitutional interpretation, even if Miller JA is correct that this work has largely gone unnoticed by Canadian judges and legal academics. Despite our differences, however, there is much on which Miller JA and I can agree. We share the belief that Canadian legal academics—and courts—would do well to pursue theoretical questions of constitutional interpretation much more vigorously than they have done thus far. We also agree that it is a mistake simply to dismiss Originalism out of hand, or to ascribe to all defenders of that view a largely discredited early version of OIO that most contemporary Originalists reject.[41] He and I also seem to agree on a proposition I defend elsewhere: that LC may very well be equivalent to any plausible version of Originalism.[42] Despite these points of agreement, I do want to insist on this caveat: just as it would be a mistake to dismiss Originalism out of hand, it would equally be a mistake to reject LC out of hand or to ascribe to all defenders of that view simple reliance on an underdeveloped metaphor. Once again, important work is being done by common law constitutionalists to flesh out the living tree metaphor first introduced in *Edwards*, much as equally

40. "The more supportable versions of [LC and Originalism], as some scholars argue, may draw close to each other in important respects and may be indistinguishable." See Miller, "Judicial Reasoning", *supra* note 1 at 361. Here Miller JA is drawing attention to WJ Waluchow, "The Living Tree" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 891 [Waluchow, "The Living Tree"].

41. As noted earlier, most contemporary Originalists reject OIO, but not all do so. See Alexander, *supra* note 4; Michaels, *supra* note 4.

42. See Waluchow, "The Living Tree", *supra* note 40.

important work is being done by contemporary Originalists to flesh out a more plausible version of their view.