

COMMENT

WHAT MAKES ORIGINALISM ORIGINAL?: A COMPARATIVE ANALYSIS OF ORIGINALISM AND ITS ROLE IN COMMERCE CLAUSE JURISPRUDENCE IN THE UNITED STATES AND AUSTRALIA

Adam A. Perlin*

INTRODUCTION

Originalism reflects humankind's desire to connect with the past and to understand that which came before us. But history is not a single concrete idea. Instead, history is something specific and unique to every individual and inevitably plays different roles in different people's lives. For some, history may be a prediction, offering lessons from which we must learn if we are to avoid the same mistakes as our predecessors. For others, history serves as a tangible link between the now and the then, dangling before us the tantalizing prospect of understanding how it is we arrived at where we are today.

Originalism, like the unique histories it reflects, will also mean different things to different people, or perhaps put more appropriately, to different national governing bodies. Each country, with its own past to discover and its own historical evolution, will struggle not only with the decision of whether historical analysis has any role in constitutional interpretation, but equally important, what that role should be and what form that role will take. It is these determinations that enable a single

* J.D. Candidate, University of Pennsylvania Law School, 2006; B.A. Brandeis University, 2003. I dedicate this comment to my parents, Norman and Bette Perlin, and to my sister and brother-in law, Jana and Jason Guber. Without their unwavering support and unflinching belief in me, this comment, and my success, would not have been possible. I would also like to thank Professors Matthew Adler and Harry Reicher for reading an early draft of this paper, and the editorial board of the UCLA Pacific Basin Law Journal for their invaluable comments and suggestions.

method of constitutional interpretation to operate very differently across cultural divides and which lie at the core of answering the question posed in the title of this paper, what makes originalism original?

This comment sets out to prove that although originalism may be adopted as a practicable constitutional theory by two different nations, the way it is adapted and applied in a particular country's legal system depends on the unique interplay between cultural and historical factors in that country.

The importance of originalism has become more pronounced as constitutional courts have increasingly relied on originalist notions as the basis for their decisions.¹ Too often, American scholars have viewed originalism through an American prism that inevitably leads to the conclusion that American originalism must be the *only* originalism.² This approach, however, is inherently flawed. Just as it is important to view the present in the context of the past, it is equally wise to view the American concept of originalism in a comparative context.

Through a greater understanding of our own originalist debate placed in the broader context of other federalist systems, Americans can gain a greater sense of how their own originalism developed and whether suitable alternatives exist. It is in light of this increasing reliance, and the lack of comparative studies in the area of originalism, that it is critical to reexamine the originalism debate and its practical application.

Section 1 of this comment creates a coherent definition of what originalism is and establishes who the relevant framers are for purposes of originalism in the United States and Australia. Section 2 explains the cultural and historical forces at play in the originalism debates in the United States and Australia. Finally, section 3 demonstrates the practical impact these cultural and

1. See Martin S. Flaherty, *Symposium Theories of Constitutional Self-Government: The Better Angels of Self-Government*, 71 *FORDHAM L. REV.* 1773, 1774 (2003) ("Originalism is now the prevailing approach to constitutional interpretation."); see also J. Christopher Jennings, *Madison's New Audience: The Supreme Court and the Tenth Federalist Visited*, 82 *B.U. L. REV.* 817, 872 (2002) (noting that in constitutional cases, "original meaning is to some degree always relevant"); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 613 (1999) (stating that "[o]riginalism is now the prevailing approach to constitutional interpretation").

2. See Mark Tushnet, *Book Review: The Universal and the Particular in Constitutional Law: An Israeli Case Study Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century*. By Pnina Lahav, 100 *COLUM. L. REV.* 1327, 1327 (2000) (stating that constitutional issues "ought to be treated comparatively but are in the United States too often either ignored or discussed in quite parochial terms"); see also J.M. Balkin & Sanford Levinson, *Commentary: The Canons of Constitutional Law*, 111 *HARV. L. REV.* 963, 964 (1998) ("The current study of constitutional law is too much centered on the opinions of the Supreme Court and lacks comparative and historical perspective.").

historical forces have had in shaping the constitutional contours of commerce clause jurisprudence in the United States and Australia.

1. ORIGINALISM

1.1 WHAT IS ORIGINALISM?

Originalism is perhaps best explained by dividing the concept into two distinct parts: intention and meaning.³ Original meaning “calls for judges to apply the rules of the written constitution in the sense in which those rules were understood by the people who enacted them.”⁴ Whereas original meaning must be derived from practical usage and application of the text, original *intention* pertains to the motivation and understanding that was applied by “the actors whose decisions produced the constitutional language whose meaning is at issue.”⁵

1.2. AMERICAN ORIGINALISM

American and Australian scholars have differed dramatically in defining *whose* originalist ideas should be invoked. In the United States, Joseph Biancalana has criticized originalism for overlooking the understanding which opponents of a constitution attach to its provisions.⁶ Original meaning, however, provides a possible answer to this critique, as it looks to the original *readers* of a constitution and therefore, incorporates the views and opinions brought to the debate not just by advocates of a constitution but by the citizens, polemicists, and convention delegates on both sides of the ratification issue.⁷ For advocates of original meaning, the key players are the members of the founding generation, not simply the members of the Constitutional Convention.

3. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 229-30 (1988); see also Paul Brest, *The Misconceived Quest for the Original Understanding*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 227 (Jack N. Rakove ed., 1990) (defining originalism as “adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters”).

4. Kay, *supra* note 3, at 230 (emphasis in original); see also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (stating that “[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it”).

5. ANTONIN SCALIA, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW—AN ESSAY 129, 141 (Amy Gutmann ed., 1997).

6. Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383, 383 (2002).

7. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 8 (1996).

Jack Rakove echoed this broad answer to the question of “who is a founder?” when he stated that although the voting public exercised no “authorial control over the content of the Constitution, and the only intentions they were ultimately allowed to exercise were to confirm or reject it in its entirety . . . [the] public debate was nevertheless very much concerned with how the manifold provisions of the Constitution were commonly or popularly understood.”⁸

The proposition that original meaning stands for, namely, a broad interpretation of the notion of our founders is well supported by the academic literature. For instance, historian Saul Cornell has written that it is only by looking at both the authors and the ratification debate that Americans can ever hope to understand their constitutional heritage.⁹

The broad notions of what constitutes a “founder” have been gaining force, even among non-originalists, as “judges and scholars opposed to the philosophy of originalism acknowledge that both sides in the original debate have something to contribute to our understanding of American constitutionalism.”¹⁰ It should come as no surprise, then, that increasingly, “judges and lawyers who might have once limited their investigations to *The Federalist* now routinely invoke the authority of Anti-Federalists.”¹¹

The lack of a consensus among the founding generation does not diminish the importance of the opposition’s and citizenry’s contributions to original understanding. Rather, the views that the opposition held and the influence they ultimately exercised over the public’s decision to ratify the Constitution are important pieces in reconstructing the puzzle of originalism.

The Anti-Federalists were a diverse group composed of elite, middling, and plebian politicians from all classes of American society.¹² Contrary to the typical portrayal of the Anti-Federalists as “a jumble of contradictory ideas,” these opponents to ratification shared common themes in their criticisms of the newly proposed government.¹³ The rallying cry of the Anti-Federalists consisted of five major complaints, namely the omission

8. *Id.*

9. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* 3 (1999); see also Brest, *supra* note 3, at 234 (answering the question of who constitutes a founding father as “the delegates to the Philadelphia Convention and the majorities or super-majorities of the participants in the ratifying conventions in nine states”).

10. CORNELL, *supra* note 9, at 4.

11. *Id.* at 3.

12. *Id.* at 47-48 (discussing Richard Henry Lee, Samuel Chase, and William Pe-trikin as exemplifying the class diversity of the Anti-Federalists).

13. *Id.* at 27.

of a bill of rights, the consolidationist/nationalist character of the new government, the charge of aristocracy, concerns about taxation, and fear of the creation of a standing army.¹⁴

Although the American people ratified the Constitution as presented by the Constitutional Convention, the impact of the Anti-Federalists in influencing the original meaning of the Constitution cannot be overstated. Not only did the Anti-Federalists force the Federalists to further elaborate on the textual meaning of the Constitution,¹⁵ but the Anti-Federalist arguments that the Constitution did not adequately protect the individual rights of the public from the federal government ultimately carried the day. Today, the arguments of the Anti-Federalists are enshrined in the first ten constitutional amendments drafted by James Madison and passed by the First Congress, the Bill of Rights.

1.3 AUSTRALIAN ORIGINALISM

In Australia, the country as a whole has approached originalism with a certain skepticism.¹⁶ Indeed, the notion of a framer has been construed even more narrowly than to include all those present at the Constitutional Convention, perhaps, in part, because the Australian Constitution was a product of three “relevant gatherings.”¹⁷

14. *Id.* at 28.

15. It was in response to the large contingency of Anti-Federalists in New York and their hostility towards the newly proposed federal government that prompted John Jay, James Madison, and Alexander Hamilton to write the *Federalist Papers*. Jay, Madison, and Hamilton hoped their essays under the pseudonym *Publius* would persuade the people of New York to send representatives favorable to the new Constitution to the ratifying convention. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 *ARK. L. REV.* 729, 815-16 (2005) (“The Federalist Papers . . . were addressed ‘to the people of the State of New York’ to secure a favorable vote in that state’s ratification convention.”).

16. It is important to note from the start that unlike in the United States where originalism has arguably played an integral role in the nation’s history in one form or another, whether by its revolutionaries, who saw themselves as restoring the original rights of Englishmen, its judges in interpreting the law, or its legislators in making the law, originalism in Australia was unheard of until the Australian High Court issued its 1988 landmark opinion in *Cole v. Whitfield*. See Hon. Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 *Mel. U. L. Rev.* 1, 10 (2000) (“But then in *Cole v Whitfield*, in an opinion of the entire Court in 1988, led by Mason CJ, the old legal rule was reversed. The books of the Convention debates were read in open court.”).

17. JOHN ANDREW LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 87 (1972). The first of such gatherings was the Melbourne Conference of 1890. The primary significance of the Melbourne Conference is that its members drafted the resolutions that directly led to Australia’s first constitutional convention in 1891. PARLIAMENT OF AUSTRALIA: SENATE: RECORDS OF THE AUSTRALASIAN FEDERAL CONFERENCE OF THE 1890s, <http://www.apf.gov.au/senate/pubs/records.htm>; see also *MAKING A NATION - TASMANIAN FEDERATION ONLINE*, <http://www.federation.examiner.com.au/federation/article.asp?id=48405> (stating that in

The leading historian and definitive scholar of the Australian Federation has been John Andrew La Nauze. The Australian High Court cited La Nauze extensively in *Cole v. Whitfield*, the first High Court case to utilize the convention debates in elucidating the meaning of constitutional text. La Nauze's work, *The Making of the Australian Constitution*, has also been heralded as unrivaled and "as the classic history of the drafting process."¹⁸

In his studies of the Australian conventions, La Nauze excluded many of the men who attended these milestone events from his taxonomical class of founding fathers. La Nauze bestowed the title upon forty men, those who actually spoke in the debates and influenced the document with their elocution.¹⁹ The remaining forty-four men, La Nauze "condemned to be content with the fact that they were simply delegates in 1890, 1891, or 1897-8."²⁰

The question of who the framers are reveals an important difference in the approach taken to originalism by the United States and Australia. The expansion of the American notion of a

addition to committing the colonial parliaments to the task of drafting a constitutional union, the Australasian Federation Conference, "laid the philosophical ground rules").

The second gathering was the first Australian constitutional convention, held in Sydney in 1891. The Sydney convention produced Australia's first constitution, borrowing from both the American and Canadian models. Although the convention managed to produce a constitution the colonial parliaments ultimately rejected it, partially out of suspicion for the legitimacy of the body that composed it. See Stephen A. James, *Original Intent: The Judicial Uses of History and Constitutional Interpretation in Australia and the United States*, 12 *IN PUB. INTEREST* 23, 38 (1992) ("[I]n the minds of many of the [Australian] people there was a vague feeling of distrust of the Constitution as the work of a body somewhat conservative in composition, only indirectly representative of the people, and entrusted with no very definite or detailed mandate by the Parliaments which created it.").

The forces urging a federal government remained undeterred and formed the Federal Leagues, which pressed for another constitutional convention, this time with directly elected delegates, thereby claiming a "democratic mandate." The third gathering, and the second Australian Constitutional Convention, produced a constitution which, unlike the U.S. Constitution, deals not only with the powers of the federal government, but also with the powers of the states and, in a separate chapter, the regulation of finance and trade. This time, the colonial parliaments all accepted the new federal constitution. See *id.* (explaining that the 1897 Convention claimed a "democratic" mandate in drafting the new constitution); see also *AUSTL. CONST.* ch. IV.

18. John Waugh, *Review Essay: New Federation History: The Centenary Companion to Australian Federation* Edited by Helen Irving, 24 *MELB. U. L. REV.* 1028, 1042 (2000).

19. LA NAUZE, *supra* note 17, at 89-102.

20. *Id.* at 102; see also James, *supra* note 17, at 40 ("The difficult task of identifying exactly who is to be counted a "Framer," . . . is equally – if not more so – a problem with regard to the creation of the Australian Constitution between 1890 and 1901. Were the "Framers" the fourteen delegates to the Melbourne Conference (1890)? The forty-five delegates at Sydney in 1891? The fifty delegates at the 1897-1898 Conventions?").

“founder” to include not only the participants in the Constitutional Convention but also their contemporaries offers one possible explanation for an original meaning type application of originalism. This is because an acknowledgement that it is not only the authors of the document who constitute the “founders,” but also the Anti-Federalists who did not attend the convention, the key players in the ratifying conventions, and the public who voted for representatives to the state ratifying conventions, inherently shifts the focus of the constitutional analysis away from the individual authors to the larger meaning attributed to the text by all the players of that period. Upon recognition of the important role that these non-authors played in influencing the meaning of the Constitution, intentionalism no longer makes sense.

In Australia, however, where originalism has focused on select key figures present at the constitutional conventions and the Australasian Federation Conference, original meaning would make less sense. Rather, Australians are more apt to rely on the debates and intent of the individual convention delegates, and hence, on intentionalism as a mode of constitutional interpretation.

What emerges from this context is not one definition of originalism composing two related, albeit distinct, prongs, but rather an American definition of originalism and an Australian definition of originalism.²¹

2. THE AMERICAN AND AUSTRALIAN DEBATE

The debate over originalism and the commerce clause is one that has raged in both the United States and Australia, but with very different outcomes. In the United States, original meaning has largely become the accepted method of originalist interpretation while Australia has opted for a more original intentionalist approach. This debate over the utility and method of originalism reveals the cultural factors at play in choosing a mode of constitutional interpretation.²²

21. This is not to suggest that both forms of originalism cannot be found in either of these countries. As noted later in the paper, Associate Justice Clarence Thomas on the U.S. Supreme Court currently subscribes to the theory of originalism best categorized as intentionalism. However, by far, the majority views of originalism in these countries today are categorized as original meaning originalism in the United States and as intentionalism originalism in Australia.

22. See Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1, 21 (1997) (arguing that criticisms of American originalism are often “inapplicable to the Australian context”); see also *Cole v. Whitfield* (1988) 165 C.L.R. 360, 405 (Austl.) (“We have not made earlier reference to the interpretation of the United States commerce clause because we do not consider that its interpretation provides any assistance in the elucidation of the meaning of s. 92. In so far as the context of earlier events and provisions is concerned, that meaning turns very

2.1 THE AMERICAN DEBATE

Defenses of originalism are rooted in a distinctly American culture that I believe explains why original meaning has historically been taken more seriously by the United States Supreme Court than its Australian counterpart. As early as the American Revolution, Americans were already recognizing the rhetorical and practical benefits of originalist type arguments. The founders did not want to appear as some “motley rabble of saucy boys” displeased with high taxes.²³ Rather, Americans drafted their cause as a preservation of British values and rights that the British themselves seemed to have distorted, if not abandoned.²⁴ It was, in a sense, the original meaning of their rights as Englishmen for which Americans saw themselves as fighting. In rebelling against the Crown, Americans believed they were remaining true to their British ancestry.²⁵

The sense, then, that Americans have a duty to carry out the principles that laid the foundation for our society is one ingrained in the American psyche and is evident in our constitutional jurisprudence. Originalism, both in its intentionalist and original meaning forms, incorporates this heritage. The Revolutionary generation did not simply create new rights, nor did they arbitrarily extract principles that fit their situation. These men looked to history, to the rights of man in England’s past, in deciding what rights they should properly possess. In this way, what the revolutionaries were arguing in 1776 bears great similarity to the modern application of originalism. Modern jurists must look to the past, to the founding generation, to effectuate their views on fundamental rights, morality, and governmental power.²⁶

largely on the history of the Australian federal movement and not at all on the commerce clause and its interpretation at the hands of the Supreme Court of the United States.”).

23. USA: BIOGRAPHY JOHN ADAMS V, <http://odur.let.rug.nl/~usa/P/ja2/about/bio/adams05.htm> (describing the American instigators/patriots that provoked the British soldiers in what became known as the Boston Massacre).

24. See The Declaration of Independence para. 2 (U.S. 1776) (listing grievances of the colonists and citing a history of “repeated injuries and usurpations” of their rights as Englishmen).

25. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 12-13 (The University of North Carolina Press 1969) (describing the colonists’ belief that it was “both the letter and the spirit of the British constitution which justified their resistance,” additionally stating, “This repeated insistence that [the colonists] were the true guardians of the British constitution, even enjoying it in greater purity and perfection than Englishmen themselves, lent a curious conservative color to the American Revolution.”) (internal citations omitted).

26. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (The U.S. Supreme Court’s “decisions have generally been faithful to the original meaning of the Confrontation Clause.”); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (interpreting the Fourth Amendment in view of its original meaning, and thus “construed in the light of what was deemed an unreasonable search and seizure when it was adopted”);

From the fruits of the tree of liberty fell the seeds of American originalism.

Unlike the framers of the Australian Constitution, the founders of the American Constitution often proffered reasons for why their interpretations should control throughout the ages, even if they rarely agreed on which reasons were correct. James Madison, upon whom Americans have bestowed the title, Father of the Constitution, used original intent to foster his arguments as early as the First Congress.²⁷ Madison believed that the Constitution was in many ways a contract among “unspecified ‘parties’ whose purposes were material to its meaning.”²⁸ Thus, as in any contract where a court must look to the “meeting of the minds” and discern the intent of the parties, so must any future court wishing to interpret the provisions of the Constitution.

James Iredell of North Carolina, a future Supreme Court Justice and signer of the Constitution, offered a different view. Iredell believed that future generations should look back on what motivated the framers because the Constitution could be judged “much better by the ideas of it entertained at the time, than by any ideas of [their] own.”²⁹ For Iredell, his contemporaries were the best acquainted with the reasons for the Constitution’s necessity and therefore their reasons for adopting specific provisions of the Constitution carried a weight that made their justifications paramount to the interpretation of any generation that might succeed them.³⁰

As critics of originalism point out, the views of these two men, both of whom were intimately familiar with the Constitution and influential in its creation, reveal two significant problems with analyzing original intent. First, neither man strictly adhered to either view and often changed his position to suit the political moment. Madison, in 1791, denounced the proposed Bank of the United States as inconsistent with his narrow interpretation of the “necessary and proper” clause of the Constitution. Yet, as President in 1816, Madison declined to veto the bank because “‘legislative precedent’ had resolved this constitutional issue, even though he continued to believe that this interpretation was wrong.”³¹

United States v. Lopez 514 U.S. 549, 552 (1995) (interpreting the Commerce Clause the Court stated, “We start with first principles.”).

27. Charles A. Lofgren, *The Original Understanding of Original Intent?*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 3, at 135.

28. RAKOVE, *supra* note 7, at 352.

29. *Id.* at 344.

30. *Id.*

31. Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1196 (2003).

Similarly, despite Iredell's view on the importance of original intent, in the context of a Bill of Rights, he "assumed that interpreters would have no useful sources to examine beyond the Constitution itself."³² Indeed, future generations "would not examine documentary evidence to reconstruct the debate to which he was contributing . . . [but would rather] read the Constitution as Federalists were reading it now, relying on its plain language and structure to ascertain its meaning."³³ Unlike his prior statements, Iredell here seems to endorse what would today be classified as textualism, in that he believed that the founders' intent should always control, but only as it was objectively manifested in the physical text of the Constitution.

Most modern day American academics have abandoned the kind of intentionalism that these founders espoused in their earlier careers³⁴ in favor of some notion of original meaning. Textualists, like Oliver Wendell Holmes, believed that a judge should not care at all what the legislature's intention was, but only what the words mean.³⁵ The goal of the textualist is to interpret language in the context that the words were understood at the time they were written.

In his fifth "Landholder" essay, Oliver Ellsworth of Connecticut, a signer of the Constitution, explained that a textualist approaches the language of the Constitution as "expressed with brevity, and in the plain common language of mankind."³⁶ For men like Ellsworth, "the people would have a role as well as a stake in interpreting the Constitution. Their *political* capacity to police its boundaries of power depended on the clarity of its language."³⁷ It was the text itself that should control, and the text that would "enable the people to know when government overstepped its proper authority."³⁸ More recently, Justice Scalia has ardently defended textualism as the proper approach to constitu-

32. RAKOVE, *supra* note 7, at 344.

33. *Id.*

34. See Brest, *supra* note 3, 230-31 ("[T]he intentionalist interprets a provision by ascertaining the intentions of those who adopted it. The text of the provision is often a useful guide to the adopters' intentions, but the text does not enjoy a favored status over other sources."). Intentionalism, however, is still relied upon by American Justices to lend support or credence to their opinions. See, e.g., *Lopez*, 514 U.S. at 552 (Justice Rehnquist's majority opinion rests part of its rationale on its effectuation of the Framers' intent).

35. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW—AN ESSAY*, *supra* note 5, at 1, 22-23; see also *id.* at 30 (citing Supreme Court Justices Frankfurter and Jackson as further criticism of the use of legislative history).

36. *Id.* at 30.

37. RAKOVE, *supra* note 7, at 345.

38. *Id.*

tional interpretation.³⁹ Scalia asserts that a true textualist rejects the use of legislative history⁴⁰ while giving full effect to the objective meaning of the words the framers would have attached to them.⁴¹ For Scalia, if an act was constitutional in 1791 it logically follows that the act must also be constitutional today.⁴²

Some scholars, like Robert Pushaw, however, continue to advocate for a type of inverse intentionalism and that it was the original intent of the Framers that their original intent *not* be binding, hence creating a "living constitution." Pushaw suggests that Madison's actions in 1816, and his reference to "legislative precedent" may well be interpreted to mean that it was the original intent of the founders that their motivations and purposes not apply.⁴³ It was, after all, Thomas Jefferson who wrote that future generations

ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.⁴⁴

The historian Gordon S. Wood and constitutional scholar Ronald Dworkin have both made similar arguments against the form of originalism defined as textualism. Yet neither of these scholars rejects originalism *in toto*. Rather, they counter originalist argument with originalist argument, another facet of the American debate and a testament to the unique position that originalism occupies in constitutional discourse.

Wood, for example, argues that although Americans originally mistrusted judicial power, the failure of the codification movement⁴⁵ and efforts to remove the interpretive powers of the

39. SCALIA, *supra* note 35, at 24.

40. *Id.* at 31.

41. SCALIA, *supra* note 5, at 141; *see also* Brest, *supra* note 3, at 230. ("Just as the textualist is not concerned with the adopters' idiosyncratic use of language, she is not concerned with their subjective purposes. Rather, she seeks to discern the purposes that a member of the adopters' society would understand the provision to encompass.")

42. SCALIA, *supra* note 5, at 141.

43. Pushaw, *supra* note 31, at 1196; *see also* RAKOVE, *supra* note 7, at 340-41 ("Originalism, then, is not only about the relation between the Constitution of 1787 and the constitutions of later periods; it is also about the relation between the interpretive predictions of 1787-88 and the interpretive processes that developed afterward.")

44. RAKOVE, *supra* note 7, at 367.

45. The codification movement was an attempt to place all laws in the form of legal "codes" that judges would simply apply, but not interpret, thus robbing the judiciary of its discretion, and thus the majority of its power. Thomas Jefferson was an early advocate of the codification movement, though the most famous attempt at

judiciary led to a “massive rethinking that took place in the 1780s.”⁴⁶ This newfound belief that it was, in fact, the state legislatures who “had become the main source of tyranny and injustice in the society,”⁴⁷ led to an increased willingness to look to the “once-feared judiciary as a principal means of restraining these wild and rampaging popular legislatures.”⁴⁸

With a renewed faith in judges, Wood describes the members of the Constitutional Convention as purposefully and consciously cloaking the judiciary with the very broad powers of discretion that began “the remarkable transformation of the judges from much-feared appendages of crown power . . . into an equal and independent entity in a modern tripartite republican government.”⁴⁹ Wood, therefore, takes the next logical step in concluding that the modern blurring of judicial and legislative lawmaking that most originalists rail against may actually be more consistent with notions of original meaning than the more conservative approaches currently adhered to by Justices Thomas and Scalia. As he concludes, “the enhanced judicial discretion and judicial lawmaking of the past three or four decades represents a change in degree, not one in kind. . . for good or for ill, judges have exercised that sort of presumably undemocratic authority from the very beginning of our history.”⁵⁰

Similarly, Dworkin argues that originalism, if it does not embrace the notion of evolution, is “dated” and “bizarre.”⁵¹ Like Wood, Dworkin contends that it was the original intent of the founders to create a living document. However, he does this based not on the historical record, like Wood, but rather from the text of the Constitution itself and the notion that the founders “knew how to be concrete when they intended to be If they had intended a dated provision, they could and would have written an explicit one.”⁵² Classifying himself as a semantic-textualist, Dworkin takes an abstract view of originalism that he summarizes as the notion that

key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or

codification before the movement died was David Dudley Field’s “Field Code” adopted in New York. See Scalia, *supra* note 35, at 11 n.9 (discussing a brief history of the codification movement).

46. Gordon S. Wood, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW—AN ESSAY*, *supra* note 5, at 49, 52.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 59.

51. Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW—AN ESSAY*, *supra* note 5, at 115, 121.

52. *Id.* at 121-22.

dated rules. . . . [T]he application of these abstract principles, to particular cases, which takes fresh judgment, must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.⁵³

In other words, the founders, when vague, were purposefully vague, consciously opting to outline broad principles to guide future judges in constitutional interpretation rather than create concrete static provisions. Therefore, for Dworkin, it is possible to be true to originalism (these broad principles) while also allowing the Constitution to evolve and grow with time, a notion Dworkin argues is different than saying the Constitution itself is subject to change.⁵⁴

Still others argue that originalism's appeal is derived from "the Revolutionary era [which] provides Americans with the one set of consensual political symbols that come closest to universal acceptance."⁵⁵ Originalism reaffirms these values, as Madison explained in *Federalist* 49, and preserves "that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."⁵⁶ In other words, originalism, much like arguments for *stare decisis*, creates an objective consistency by which society can operate.

Raoul Berger defends the doctrine of original intent more or less on the same grounds that Madison and Iredell did in the late 1780s, on the basis that the writer himself knows his own meaning best.⁵⁷ This notion of deference was echoed by the seventeenth-century scholar, John Selden, when he wrote that "Man's Writing has but one true Sense, which is what the Author meant when he writ it."⁵⁸ In other words, unlike critics of the doctrine, Berger rejects the notion that it is impossible to ascertain the subjective intent of the framers. Rather, he argues that the intent of the framers can accurately be "discovered and that [their intent] remains legally binding until a particular constitutional provision has been formally amended."⁵⁹

Jack Rakove has parsed the argument surrounding originalism as the conflict between two constitutions: the formal one adopted in 1787-1788 and its amendments and what he has

53. *Id.* at 122.

54. *Id.* at 122-23.

55. RAKOVE, *supra* note 7, at 367.

56. *Id.*

57. Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 699 (1996).

58. Berger, *supra* note 57, at 700 (quoting JOHN SELDEN, TABLE TALK 10 (Jacob Tonson 2d ed. 1696)).

59. Pushaw, *supra* note 31, at 1194.

termed the “working constitution,” which consists mainly of legislative and judicial precedent and public attitude and understanding that shape our federal system.⁶⁰ For Rakove, “the problem of originalism is about the relation between these two constitutions.”⁶¹ Rakove argues that originalism rests on two strong assertions, the “public understanding” of the Constitution, “as manifested in the words used [in the text] and in secondary materials”⁶² and that “original meaning is binding because it represents the highest exercise of popular sovereignty possible within the constitutional system.”⁶³

Finally, Justice Scalia has championed originalism because it “comports with the traditional understanding of the role of judges.”⁶⁴ Scalia argues that originalism avoids the subjective nature inherent in other forms of constitutional interpretation because “originalists know what they are looking for . . . whereas nonoriginalists are trying to decipher a Constitution which has a constantly changing meaning without agreeing on what principles should guide that evolution.”⁶⁵

Amidst the numerous rationales raised in favor of adopting originalism in the United States, albeit in different forms, a myriad of voices have risen to criticize and denounce the doctrine. What is perhaps most remarkable about the United States debate, however, is not the points of disagreement, however, but the general supposition and agreement that the framers are people to whom it is worth listening.

One common criticism of originalism is that it is a doctrine of convenience that is applied inconsistently and sporadically to bolster an argument. Even some of its staunchest defenders have conceded that the doctrine is difficult to apply in every situation, as

[t]here is no possibility, today, of adhering completely to the original constitutional design. Such a daring plan would require overturning . . . almost all of the vast network of federal legislation and regulation put in place in the last two-thirds of the twentieth century. It appears that the American people would be overwhelmingly against such a change and no court would attempt to force it upon them.⁶⁶

60. RAKOVE, *supra* note 7, at 339.

61. *Id.* at 340.

62. *Id.*

63. *Id.*

64. Pushaw, *supra* note 31, at 1194.

65. Scalia, *supra* note 35, at 45.

66. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 851 (2002).

Likewise, Pushaw has criticized Scalia for similar reasons, claiming that although he "is the most famous self-professed textualist, he often does not follow this approach because of practical judicial obligations."⁶⁷ To skeptics, originalism should not be ignored because the founders do not deserve our deference or our gratitude, but rather because of the potential for abuse. To them, textualism is "as permissive and as open to arbitrary judicial discretion and expansion as . . . other interpretive methods, if the text-minded judge is so inclined."⁶⁸ Indeed, as Pushaw submits, no Supreme Court Justice has ever been a committed originalist, nor can they be, because they lack the necessary time and training to do the requisite historical research.⁶⁹ Pushaw singles out the "originalists" of the Rehnquist court, Rehnquist, Scalia, and Thomas, and asserts that although they "have often cloaked themselves in an originalist mantle . . . no one who seriously engaged the historical record could embrace their interpretation of many constitutional provisions."⁷⁰ As has already been stated, however, Pushaw himself could be saddled with the broad label of "originalist" in arguing that it was the original intent of the framers that their intent not be binding.

Another criticism of American originalism is that it is impossible to determine the intent of a group with certainty if members of that group never recorded their opinions or, in the case of certain constitutional provisions, they were passed with little or no debate.⁷¹ Again, however, this critique goes more to the practicality of originalism, than a criticism of whether, if attainable, the original meaning should control.

Although its critics persist that any idea of an objective originalism is no more than a myth, historical arguments and references to the framers' intent remain viable and oft invoked sentiments in legal analysis. The debate in the United States centers not on whether originalism is properly utilized in law but to what degree it is helpful and to what extent plausibly accurate, in part because of the great respect Americans hold for the founding generation, and in part, because reliance on originalist arguments

67. Pushaw, *supra* note 31, at 1185; *see also* Lawrence H. Tribe, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW—AN ESSAY, supra* note 5, at 65, 81 ("I have taken comfort from the thought that despite what [Scalia] has said in these lectures about his understanding . . . he has in fact been guided by a conception . . . that embodies . . . a set of principles whose understanding may evolve over time. . ."); Dworkin, *supra* note 51, at 120 (arguing that Scalia has not been faithful to his self-proclaimed textualist approach).

68. Wood, *supra* note 46, at 63.

69. Pushaw, *supra* note 31, at 1197.

70. *Id.* at 1198.

71. *Id.* at 1195.

are an integral part of our history.⁷² As Paul Brest put it, the originalist

acknowledges that the text and original history are often indeterminate and that the elaboration of constitutional doctrine must often proceed by adjudication based on precedent, public values, and the like. But adjudication may not proceed in the absence of authorization from some original source, and when the text or original history speaks, it is clearly binding. The nonoriginalist treats the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decision-making.⁷³

Given America's devotion to "we, the people," not simply to the framers of the Constitution, it should come as no surprise that original meaning has become the preferred method of originalist interpretation. Original meaning is a product of America's distinct culture and history that lies at the root of American independence, the creation of the Madisonian system of checks and balances, the implementation of separation of powers, and the role of the judiciary in American law. It is Americans' devotion to the founding *generation* that has led most to reject intentionalism as elitist, and to instead focus on original meaning, the meaning ascribed to the constitutional text not just by the framers, but the members of the ratifying convention, the Anti-federalists, and the "people" themselves who voted for those representatives. As is evident even by the short synthesis of the originalist debate that has been laid out above, and as Ronald Dworkin has maintained, we are all originalists now, seeking to discover in one way or another precisely what the constitutional text originally meant.⁷⁴ But while Americans have largely framed the debate around original meaning, many other nations still struggle with other forms of originalism, and precisely what shape and character such interpretation should ultimately take.

2.2 THE AUSTRALIAN DEBATE

Unlike in the United States, "Australians hold their Founding Fathers of the 1890s, for all their achievement, in no special

72. Scalia, *supra* note 35, at 21 (suggesting that Judge Calabresi and Professor Eckridge's statements that originalism have *no* place are fringe arguments whose reasoning "will never, I promise, see in a judicial opinion the rationale for judicial lawmaking described").

73. Brest, *supra* note 3, at 252.

74. Tribe, *supra* note 67, at 67; see also Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, in *INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES AND INSTITUTIONS* 13, 23 (Charles J.G. Sampford & Kim Preston eds., 1996) (pointing out that Cass Sunstein and Bruce Ackerman both advocating founders' intent).

reverence or affection.”⁷⁵ Indeed, “many of them are already forgotten; few are quoted; . . . they tend to be regarded as just another generation of run-of-the-mill politicians.”⁷⁶ Some have even gone so far as to criticize originalism as little more than a form of misplaced ancestor worship.⁷⁷

In Australia, the debate has traditionally centered less on the type of originalism that should be implemented and more on whether originalism should be implemented at all. This historical skepticism towards originalism is important in understanding the more recent choices the Australian High Court has made on the subject.

Sir Anthony Mason parsed the battle over proper constitutional interpretation largely as one between originalism and what he called “progressive interpretation,” or “living instrument” interpretation.⁷⁸ Although Mason never clearly identifies which side of the originalist/nonoriginalist debate he falls on, he is at least skeptical of originalism’s promises of constitutional clarity.⁷⁹ Mason acknowledges the “immediate appeal [of originalism] because it seems to acknowledge the decisive authority of the text”⁸⁰ but then declares that the doctrine “provides little illumination in the great majority of constitutional questions that arise for decision.”⁸¹ Although Mason seems at first more willing than his colleagues to entertain the benefits of originalism, he ultimately concludes that doctrinally it is “deceptive in that it claims very much more than it can deliver.”⁸²

One of the most blatant differences between the American approach and the Australian approach to originalism is found in the framers themselves. Unlike in the United States, where originalism was a deep rooted concept that the founders themselves often advocated, in Australia the founders were often nonoriginalists. The best, and most visible, example of this is Andrew Inglis Clark of Tasmania, someone of whom “there is ample evidence that he . . . directly affected [the Constitution’s] contents”⁸³ and who has been described as a leading member of the committee which prepared the original draft of the Austra-

75. LA NAUZE, *supra* note 17, at 86.

76. *Id.*

77. Kirby, *supra* note 16, at 1.

78. Mason, *supra* note 74, at 16.

79. *Id.* at 13 (arguing that it is all too obvious that the Framers did not foresee many of the questions, let alone provide in the text for the answers to them).

80. *Id.* at 15.

81. *Id.*

82. *Id.*

83. LA NAUZE, *supra* note 17, at 89-90.

lian Constitution.⁸⁴ Unlike his American counterparts, however, Inglis Clark believed that the Constitution

must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead but as declaring the will and intentions of the present inheritors and possessors of sovereign power . . . It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.⁸⁵

Unlike in the United States, where tradition and history inspired the use of originalism, Australian history suggests an inherent aversion to the principle.

In addition to the framers' rejection of originalism, many Australian scholars have reached the same conclusion. Stephen Donaghue argues that there is no reason that the mere decision to adopt the Constitution should also mean that the original intent of its framers shall remain forever "binding upon a new generation of people who have not voted for the Constitution, particularly as they have no direct power to initiate constitutional change."⁸⁶ Similarly, Haig Patapan has stated that "[t]he Australian High Court has in general rejected the use of extrinsic historical material in the interpretation of the Constitution."⁸⁷ Most recently, John M. Williams wrote that the "Constitution should not be subject to the crushing weight of the dead hand of the past. Indeed, as one framer noted, the Constitution's authority rests with those "'who are in the immediate presence of the problems to be solved' and not the 'will and intentions of men long since dead.'"⁸⁸ The Justices of the High Court have traditionally been equally resistant to adopting originalist arguments.⁸⁹ Justice Michael Kirby attacked originalism as both a break with Australian legal tradition⁹⁰ and as a constraint on the Constitution's ability to effectively serve the needs of contemporary Australians.⁹¹ Kirby argued that the evolutionary nature of the Constitution is inherent in the very facts of its development,

84. Kirby, *supra* note 16, at 10-11.

85. *Id.* at 11.

86. Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 *FED. L. REV.* 133, 144 (1996).

87. Haig Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia*, 25 *FED. L. REV.* 211, 211 (1997).

88. John M. Williams, 'Come in Spinner': *Section 90 of the Constitution and the Future of State Government Finances*, 21 *SYDNEY L. REV.* 627, 643 (1999).

89. Kirby, *supra* note 16, at 9 (referring to the form of constitutional interpretation that treats the Constitution as a living force and which has proved influential over the years with several justices of the High Court of Australia).

90. *Id.* at 5.

91. *Id.* at 7.

as over the course of twenty or thirty years the ultimate foundation of the legitimacy of the document changed from first, being derived from the Act of the Imperial Parliament at Westminster, to resting entirely in the sovereign rights of the people of Australia.⁹² For Kirby, the “Constitution was set free from its founders in 1901” and “belongs to succeeding generations of the Australian people. . . . The Australian Constitution belongs to the twenty-first century, not to the nineteenth.”⁹³

More recently, however, the Court has proved more willing to entertain originalist arguments. Chief Justice Gleeson, acknowledging that the “[i]ntention of the Legislature” is a “very slippery phrase,”⁹⁴ nevertheless continued that,

A search for the collective, subjective intention of the Framers of the Constitution would be impossible, and the individual subjective intention of any one of them, if it could be established, would not be relevant, because it would not advance any legitimate process of reasoning to a conclusion about the meaning of the text. Nevertheless, the drafting history of the Constitution, including the record of the Convention Debates, may be capable of throwing light on the meaning of a provision. Whether this will be so depends upon the nature of the problem of interpretation that arises, the nature of the information that is gained from the drafting history, and the relevance of that information to the solution of the problem. Whether information is capable of assisting in the rational solution, by a legitimate process of reasoning, of a problem about the meaning of the text, depends upon the nature of the problem, and the nature of the information.⁹⁵

Gleeson’s writing highlights an interesting paradox in the American/Australian debate. In America, where the founding generation as a whole enjoys a type of reverence, the debate has tended to focus on original meaning, rejecting the subjective intent of the framers. In Australia, however, where the founders are cast as ordinary politicians, originalism has been based on largely intentionalist grounds.

Professor Jeffrey Goldsworthy has argued that intentionalism is a preferential form of constitutional interpretation in Australian constitutional law and that scholars have incorrectly construed the High Court’s interpretation as rejecting originalist ideas.⁹⁶ Goldsworthy contends that scholars have been incorrect “to assert that ‘any theory of original intent stands in flat contradiction to the existing orthodoxy of constitutional interpretation

92. *Id.* at 6.

93. *Id.* at 12.

94. *Singh v. Commonwealth* (2004) 79 A.L.D. 425 (Austl.).

95. *Id.*

96. Goldsworthy, *supra* note 22, at 12.

in Australia.”⁹⁷ Goldsworthy concedes that the Court has turned its back on extreme versions of originalism such as that adopted in the United States, but that this problem is solved by advocating for what he has termed “moderate originalism.”⁹⁸ The three basic tenets of Goldsworthy’s moderate originalism are: First, that it limits the evidence of the founders’ intentions to evidence “which in 1900 was readily available to their intended audience”;⁹⁹ second, that “it holds only the founders’ ‘enactment intentions’ [as] relevant to the meaning of the Constitution”;¹⁰⁰ and third, that it “concedes that resort to the founders’ intentions cannot answer all, or probably even most, interpretive disputes of the kind which appellate courts are required to solve.”¹⁰¹

Although Goldsworthy makes a noble attempt to save originalism in Australia, his third criterion for moderate originalism appears a large concession to its critics that its practical usage is extremely limited in Australian jurisprudence. In addition, even Goldsworthy does not dispute that many of the High Court’s statements “are hard to reconcile with the principal of original, intended meaning” though Goldsworthy believes these to be the anomalies and “may have to be rejected as erroneous.”¹⁰²

The modern constitutional debate in Australia, however, seems to be shifting towards an acceptance of Goldsworthy’s notion that intentionalism, unlike original meaning, could be adapted for Australian law. As a result, originalist decisions issued by the U.S. Supreme Court and the High Court of Australia can be seen as a dialogue between these two Courts on the proper use of originalism, with intentionalism on the one hand and original meaning on the other.

But what are the differences, if any, in the types of originalism developed in the United States and Australia, and what are the different ways such constitutional interpretation operates in these countries? This paper will now move to a discussion of how these countries’ different forms of originalism have been applied to the commerce clause and how that application has impacted modern Commerce Clause jurisprudence.

97. *Id.* at 19.

98. *Id.*

99. *Id.* at 20.

100. *Id.*

101. *Id.*

102. *Id.* at 16.

3. COMMERCE CLAUSE JURISPRUDENCE

The use of originalism in Commerce Clause jurisprudence has become an increasingly important and visible topic since the United States Supreme Court's decision in *U.S. v. Lopez*. Invoking originalist arguments, the Supreme Court greatly narrowed Congress's Commerce Clause power. Not unimportantly, the Australian High Court chose the Commerce Clause context to first introduce the notion of intentionalism to Australian constitutional law in *Cole v. Whitfield* (1988). Given the highly controversial nature of originalism in the Commerce Clause context, it is important to reexamine how originalism is used differently by these two nations and how that difference has affected Commerce Clause jurisprudence.

3.1 THE UNITED STATES

The United States' Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁰³ The language seems straightforward enough, yet the history of judicial interpretation of the Commerce Clause in the United States is a long and complicated one, beginning with the Marshall Court's opinion, *Gibbons v. Ogden*, in 1824.¹⁰⁴ In *Gibbons*, Chief Justice John Marshall announced for a unanimous court, a broad reading of the Commerce Clause that stated: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."¹⁰⁵ In his usual flair, Marshall declared the language "among the states" as to mean "intermingled with," and as giving Congress expansive power to enact laws.¹⁰⁶ Following *Gibbons*, The Supreme Court first restricted Congress's ability to legislate under the clause¹⁰⁷ and then, in 1937, in the *Carolene Products* footnote, gave Congress extremely broad discretion to legislate under the umbrella of the Commerce

103. U.S. CONST. art. I, § 8, cl. 3.

104. The following history is not intended to be an all-inconclusive examination of the evolution of Commerce Clause jurisprudence. It is simply meant to provide the reader with some historical background prior the U.S. Supreme Court's opinions in *Lopez* and *Morrison* (United States v. Morrison, 529 U.S. 598 (2000)).

105. *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

106. *Id.* at 194.

107. See generally *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (narrowly defining Congress's commerce power); see also *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (same).

Clause¹⁰⁸ as was exemplified in the Supreme Court case *Wickard v. Filburn*. There, the Supreme Court held that economic activity that occurs entirely within a state may nonetheless be regulated by Congress because of its aggregate, or “substantial effect” on interstate commerce.¹⁰⁹ For almost sixty years, this broad power of Congress under the Commerce Clause went unchallenged.

In 1995, in *U.S. v. Lopez*, the Rehnquist Court departed from the Court’s nearly sixty years of laissez-faire jurisprudence and annunciated a modern, more limited, rule of what constitutes interstate commerce. *U.S. v. Lopez* stands today as the seminal case in modern American Commerce Clause jurisprudence. It is in regard to this decision that this article seeks to analyze the use of originalism in legitimizing the U.S. Supreme Court’s reentry into Commerce Clause jurisprudence and how originalism helped drive the Court to draw the conclusions that it did.

3.1.1 United States v. Lopez

The seemingly innocuous facts of the case begin with a twelfth grade student, Alfonso Lopez, Jr., who arrived at school with a concealed .38 caliber handgun.¹¹⁰ The gun was unloaded, but Lopez had five bullets on his person.¹¹¹ After being caught with the weapon and advised of his rights by the police, Lopez stated that he had been given the gun by another person so that he could sell it to a member of a gang to be used in a “gang war.”¹¹² Lopez was to receive \$40 for his services.¹¹³ The question before the Court was whether Congress could properly outlaw possession of a firearm in a school zone under its commerce power.¹¹⁴

An analysis of *Lopez* reveals the tension on the Court between different approaches to originalism in American constitutional jurisprudence. Writing for the majority, Justice Rehnquist based his analysis on what he gleaned as the original intention of the founders, as expressed by James Madison in *The Federalist*

108. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n. 4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution [But] [i]t is unnecessary to consider now whether legislation which restricts those political processes . . . is to be subjected to more exacting judicial scrutiny. . .”).

109. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

110. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff’d* 514 U.S. 549 (1995).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Lopez*, 514 U.S. at 552.

45.¹¹⁵ Indeed, the impact of originalism on the Court's thinking is underscored by the first sentence of the Court's analysis: "We start with first principles."¹¹⁶ The majority goes on to say that

The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'¹¹⁷

Having started out on intentionalist grounds, however, the majority abruptly changes course and proceeds along textualist lines, pointing to a consistent strain in all the Court's precedents from *Gibbons* to the present. As even the great Chief Justice John Marshall acknowledged, "the limitations on the commerce power are inherent in the very language of the Commerce Clause."¹¹⁸ Interpreting the language as the Court believes the words meant at the time of its adoption, the majority states that

comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.¹¹⁹

Although the majority begins with a cursory look to the intent of the framers, citing the *Federalist Papers* 45 and, in particular, Madison's own intent, the decision ultimately serves as a triumph of the textualist approach and a rejection of intentionalism, evidenced, in part, by Justice Scalia's joining the opinion without issuing a separate concurrence. Drawing upon the notion that the original meaning of the Commerce Clause implicitly excludes at least some intrastate activity, the Court moved to a discussion of where the line should be drawn, arguing that the proper distinction is whether an intrastate activity is commercial or non-commercial. To justify this distinction, the Court cited Chief Justice Marshall's opinions in *Gibbons*, *McCulloch v. Maryland*,¹²⁰ and *Marbury v. Madison*.¹²¹ The majority conceded that the economic/non-economic test will create "legal uncertainty"

115. *Id.*

116. *Id.*

117. *Id.* (citations omitted).

118. *Id.* at 553.

119. *Id.* (citing *Gibbons*, 22 U.S. at 194-95).

120. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (Cited by the majority in *Lopez* as evidence that the extent of congressional power as opposed to the boundaries of state power "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Lopez*, 514 U.S. at 566.).

but stated that such uncertainty is part of the original meaning of the Constitution as expressed in *Marbury*.¹²²

The majority rejected Justice Breyer's argument for a rational basis test, arguing that the elimination of legal uncertainty "would require us to conclude that that Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local."¹²³ Applying the economic/non-economic distinction, the Court held that mere *possession* of a firearm does not constitute economic activity and its regulation must therefore lie outside the constitutionally permissible bounds of Congress's commerce power.

Justice Kennedy's concurrence, joined by Justice O'Connor, arrives at the same conclusion albeit via different reasoning. Kennedy's opinion combines the semantic-textualist approach with an original meaning analysis. Rejecting intentionalism, Kennedy writes that,

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.¹²⁴

Kennedy seems to struggle first with accepting the majority's use of textualism, but ultimately favors his own interpretation because "the progression of our Commerce Clause cases from *Gibbons* to the present was not marked . . . by a coherent or consistent course of interpretation."¹²⁵ Kennedy embraces the idea that in ambiguous provisions such as the Commerce Clause, the framers actually intended to lay out abstract principles to guide future generations. In making what appears to be a Dworkinian argument, Kennedy states that

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal

121. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Cited by the majority in *Lopez* to demonstrate that the original constitutional mandate was for Congress to operate within a "framework of legal uncertainty." *Lopez*, 514 U.S. at 566.).

122. *Lopez*, 514 U.S. at 565.

123. *Id.* at 567-68.

124. *Id.* at 568 (Kennedy, J., concurring).

125. *Id.*

Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.¹²⁶

As Kennedy puts it, and Dworkin would certainly agree, it does not matter that the framers could not foresee the specific context in which the case arose, because modern analysis need only be consistent with the broader principles that the framers established, even if the current decision conflicts with the subjective intent the framers held at the time of the Constitution's adoption. Thus, Kennedy is able to concur in the result that the law outlawing possession of a firearm exceeded the constitutional limits of Congress's power.

Despite a very real commitment to semantic-originalism, Kennedy's opinion also emphasizes original meaning. Kennedy argues that principles of *stare decisis* and the deference traditionally afforded Congress in Commerce Clause jurisprudence¹²⁷ do not necessarily conflict with notions of original meaning.

Building upon the majority's statements on the original understanding of our legal framework, Kennedy elaborates that the founding generation understood that federalism would create legal uncertainty and that the courts were to be left a "significant role in maintaining the design contemplated by the Framers."¹²⁸

Kennedy dismisses "the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause" and defends the Court's decision as one "inferred from the constitutional structure."¹²⁹ Endorsing the majority's view that the statute constitutes an "intrusion on state sovereignty," Kennedy ends his concurrence with a strong declaration in favor of original meaning. "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce."¹³⁰

Like the majority, the dissenting opinions reject the use of intentionalism in commerce clause analysis. In the Court's strongest pronouncement against originalist interpretation, Justice Stevens writes that "[w]hether or not the national interest in

126. *Id.* at 575 (Kennedy, J., concurring) (citing *New York v. United States*, 505 U.S. 144, 157 (1992)).

127. *Id.* at 573 (Kennedy, J., concurring). Kennedy here cites *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), for establishing the "Court's definitive commitment to the practical conception of the commerce power" and that such "deference given to Congress has since been confirmed."

128. *Id.* at 575 (Kennedy, J., concurring).

129. *Id.* at 579 (Kennedy, J., concurring).

130. *Id.* at 583 (Kennedy, J., concurring).

eliminating that market would have justified federal legislation in 1789, it surely does today.”¹³¹

Similarly, Justice Breyer’s primary dissent has no use for originalism of any kind and argues that the majority’s decision is antithetical to the judicial doctrine of *stare decisis*. Invoking the weight of precedent and the specter of past cases, Breyer argues that “the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.”¹³² To Breyer, the flaws in the majority’s reasoning stem from more practical considerations and the resulting “legal uncertainty in an area of law that, until this case, seemed reasonably well settled.”¹³³

The only current member of the Court to embrace intentionalism is Justice Thomas. In his concurrence, Thomas rests his opinion almost entirely upon an intentionalist approach¹³⁴ and cites extensively and freely from the Debates in the Several State Conventions on the Adoption of the Federal Constitution¹³⁵ and from pamphlets and essays that the founders wrote on the subject.¹³⁶ Thomas takes issue with the very notion of the “substantial effects” test, which the majority accepts but limits. However, he ultimately concurs in the result.¹³⁷ For Thomas, “the comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution”¹³⁸ and lend credence to the suggestion that the “substantial effects” test should be reexamined as “something we can assume the Founding Fathers never intended.”¹³⁹ Thus, although Thomas concurs in the result, he is the lone voice in favor of intentionalism. Thomas believes that *Wickard* was decided wrongly and would confine Congress to the subjective intent of the framers and early definitions of commerce that were silent on the notion of a “substantial effects” test.

131. *Id.* at 603 (Stevens, J., dissenting). Justice Stevens’s dissent comes close to espousing a progressive interpretation. It may be unfair, however, to categorize Stevens as a progressive interpreter due solely to his short dissent in *Lopez*, as it is only two paragraphs long.

132. *Id.* at 615 (Breyer, J., dissenting).

133. *Id.* at 630 (Breyer, J., dissenting).

134. *See id.* at 585 (Thomas, J., concurring) (Thomas writes, “Today, however, I merely support the Court’s conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means ‘radical.’”).

135. *Id.* at 586 (Thomas, J., concurring).

136. *Id.* at 590 (Thomas, J., concurring).

137. *Id.* at 559.

138. *Id.* at 592 (Thomas, J., concurring).

139. *Id.* at 589 (Thomas, J., concurring).

The interplay between the different Justices' opinions emphasizes the critical role originalism plays in American constitutional jurisprudence. It was the invocation of the founders' ideals that prompted the Court to review its own Commerce Clause analysis and it was this devotion to originalist ideals that led the Court to narrow Congress's regulatory authority under that clause. Justices less willing to follow the path of originalism found that Congress's expansive powers under the Commerce Clause were acceptable because of practice and tradition.

As *Lopez* proves, the debate over the proper form of constitutional interpretation in America has largely been between original meaning and what has been called the "living constitution" theory of interpretation. It is because of the Court's extensive reliance on originalism, however, that the dispute between intentionalism and original meaning becomes immediately relevant and important. If the Supreme Court is willing, as it did in *Lopez*, to use originalism as a basis for overturning decades of tradition, the choice over the mode of originalism may have as dramatic an impact as the choice regarding whether to use originalism at all. As Justice Thomas hinted at in his concurrence, the future showdown between intentionalism and textualism may come in the Court's willingness to "reconsider the substantial effects test in a future case."¹⁴⁰ Unlike the majority, Justice Thomas believes that "[a]t an appropriate juncture . . . we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school."¹⁴¹

From the *Lopez* decision, it is clear that American originalism, an originalism that focuses on original meaning, has the force to overturn congressional legislation and is arguably the most activist action a court undertakes. The distinct form of American originalism is one that has grown from a historical evolution that has embraced ever more inclusive definitions of "[w]e, the people." American originalism acknowledges that while the individual framers' subjective intent should not control, the principles of the founding generation provided the fundamental basis of our social and political system and are important if we are to interpret the Constitution in ways consistent with these principles to which Americans ostensibly still hold.

3.2 AUSTRALIA

Australia's Constitution actually contains two commerce clauses, Section 51, which declares that the legislative powers of

140. *Id.* at 602 (Thomas, J., concurring).

141. *Id.* at 602 (Thomas, J., concurring).

the Parliament include "trade and commerce with other countries, and among the States,"¹⁴² and Section 92, which states that "the imposition of duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."¹⁴³ Unlike in the United States, the Australian High Court has consistently taken an extremely limited view of Parliament's commerce power, rejecting the "substantial effects" test.¹⁴⁴ In 1988, in *Cole v. Whitfield*¹⁴⁵, the Australian High Court, for the first time in its history, used intentionalist arguments to interpret a constitutional provision, section 92 of the Australian Constitution.

3.2.1 *Cole v. Whitfield*

Cole v. Whitfield begins with less than enthralling facts for a decision that has proven to be of such great importance in Australian constitutional law. The case dealt with the interstate trade of crayfish from South Australia to Tasmania for the purpose of sale to the mainland and overseas markets.¹⁴⁶ The crayfish were of less than the prescribed size under the Sea Fisheries Regulations, though they were above the prescribed size under comparable regulations in South Australia.¹⁴⁷ The Court addressed whether the limitation on the size of the crayfish that might be sold in Tasmania but caught in South Australia created a discriminatory burden.¹⁴⁸ The defendants sought protection under the anti-discriminatory clause from section 92 of the Australian Constitution.¹⁴⁹

The unanimous opinion written by Chief Justice Mason opened the doors to intentionalist arguments and heavily cited the Convention Debates in analyzing section 92. Mason states:

Reference to the history of section 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards feder-

142. AUSTL. CONST. ch. I, pt. 5, § 51.

143. AUSTL. CONST. ch. IV, § 92.

144. See *The King v. Burgess* (1936) 55 C.L.R. 608, 628 (Austl.); see also *Attorney-General (W. Austl.) ex rel. Ansett Transp. Indus. (Operations) Proprietary Ltd. v. Australian Nat'l Airlines Comm'n* (1976) 138 C.L.R. 492, 509.

145. *Cole*, 165 C.L.R. at 381.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

ation from which the compact of the Constitution finally emerged.¹⁵⁰

At first glance, this language would seem to indicate a preference for original meaning, as it rejects the founding fathers' subjective intent for the "contemporary meaning of the language used."¹⁵¹ A careful reading of the opinion, however, shows that Mason actually rejected original meaning analysis and relied almost entirely on the subjective purpose of the framers and convention delegates. The unanimous opinion consistently invoked the speeches of the delegates to the constitutional convention and the provisions that were struck or proposed at the convention, all to arrive at the "primary purpose of s[ection] 92."¹⁵² At one point, Mason explicitly relies on the "intended meaning" of section 92 to hold that the "purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods, and communications across State boundaries."¹⁵³ In interpreting the remarks by two constitutional delegates, Alfred Deakin and Edmund Barton, the Court reasoned in intentionalist prose, that the "historical *object* of s. 92" was to preclude the imposition of protectionist burdens such as "those taxing or restricting imports in order to protect a State's own industry."¹⁵⁴ The Court then concluded that section 92 prohibits the discriminatory burdening of interstate trade for such protectionist reasons¹⁵⁵ and held that the aims of the Sea Fisheries Regulations of 1962 of the Fisheries Act are consistent with this constitutional goal.¹⁵⁶ The Court refused, however, to void the South Australian law, because it did not present a discriminatory burden of a trade protectionist nature.¹⁵⁷ The Court derived almost all of its historical analysis from the convention debates.

Despite what many have seen as a radical departure from the Court's previous reluctance to invoke original intent, however, the Court was cautious in its use of originalist arguments. Reflecting the historical aversion to originalism that Australians had traditionally harbored and the trepidations that Mason himself had displayed in his essay on *The Interpretation of a Constitution in a Modern Liberal Democracy*, he explains that the use of

150. *Id.* at 385.

151. *Id.*

152. *Id.* at 367 (emphasis added).

153. *Id.* at 391.

154. *Id.* at 367.

155. *Id.* at 408.

156. *Id.* at 410.

157. *Id.*

originalism, unlike in the United States, could not be freely invoked nor would it be applicable in every situation. For Mason and his colleagues, section 92 posed a unique problem in that it had “defied judicial attempts to define enduring criteria of its application, for its enigmatic text does not state the area of immunity which it guarantees.”¹⁵⁸ For Mason, originalism could only be invoked in the face of an ambiguity proven to be ambiguous through inconsistent judicial interpretation, a distinctly Australian take on the notion of originalism.¹⁵⁹

In contrast to the Court’s espousal of original meaning, the decision firmly rested upon the subjective intent of the framers. Even with its reliance on the Convention debates, however, the Court ultimately rejected a great expansion of Parliament’s power, instead simply stating that it was adopting “an interpretation prohibiting the discriminatory burdening of interstate trade.”¹⁶⁰ However radical *Cole* seems at first blush in its willingness to rely on intentionalist arguments, the ultimate result was that the Court refused to invalidate any of the laws under its consideration.¹⁶¹

3.2.2 Castlemaine Tooheys Ltd v. South Australia

The question of how lasting *Cole*’s use of original intent is, and its reach, with respect to commerce clause jurisprudence, remains in doubt. Just two years after *Cole*, in another section 92 case, *Castlemaine Tooheys Ltd v. South Australia*, the Australian High Court¹⁶² did not make any reference to the Convention Debates or to historical analysis. Rather, it merely cited *Cole* for its principle that a law which imposes a burden on interstate trade but does not give a domestic product a competitive or market advantage over the imported product is not a law which discriminates against interstate trade and commerce on protectionist grounds.¹⁶³ The Court, assuming *Cole*’s interpretation of section

158. *Id.* at 391.

159. It seems that this logic for invoking originalist arguments, that is, only in the face of a clearly ambiguous provision, may have less bite than at first appears. See *Cheng v. The Queen* (2000) 203 C.L.R. 248, 254-55 (Austl.) (relying on intentionalist arguments to analyze the constitutional right to trial by jury but failing to mention a history of ambiguity). It is difficult to know because the High Court has not turned to the convention debates or the history of section 92 in a commerce clause case since its decision in *Cole*.

160. *Cole*, 165 C.L.R. at 408.

161. See *id.* at 398 (interpreting the constitutional provision so as to respect the “fundamental importance” of the “express conferral of legislative power with respect to interstate trade”).

162. The same members composed the *Castlemaine Tooheys* Court as that of the *Cole* Court, save one. Justice Ronald Wilson resigned from the High Court in 1989 and was succeeded by Justice Michael Hudson McHugh.

163. *Castlemaine Tooheys Ltd. v. South Australia*, (1990) 169 C.L.R. 436, 454.

92 to be correct, declined to revisit the interpretive question and went on to distinguish the current case as factually being on a different footing because the law in *Castlemaine Tooheys* involved brewing companies that “were disadvantaged” such that “South Australian brewers [were given] a competitive or market advantage,” a clear violation under section 92.¹⁶⁴

3.2.3 APLA Ltd. v. Legal Services Commissioner

Although the *Castlemaine Tooheys* Court assumed, without discussion, that *Cole*'s interpretation of the commerce clause was correct, it failed to affirm its intentionalist reasoning. This is significant in light of the Court's most recent case interpreting section 92, *APLA Ltd. v. Legal Services Commissioner*.

In *APLA Ltd.*, the Australian High Court addressed whether a law prohibiting lawyers from advertising services for personal injury claims violated section 92 of the Australian Constitution.¹⁶⁵ In *APLA*, the Court held that promotion of legal services by way of paid advertising constitutes interstate trade and commerce, but that because it is not protectionist, it fails the *Cole* test.¹⁶⁶ *Cole* had drawn a distinction between the notions of “interstate trade and commerce” and “interstate intercourse” but had declined to define “interstate intercourse.”¹⁶⁷ The *APLA* court went further, stating that communication through advertising constitutes intercourse, leading the Court to the more interesting question of how intercourse is to be defined.¹⁶⁸

What is most surprising, however, is that in the four separate opinions composing the majority in *APLA*, not one referred to a single historical fact in arguing the proper interpretation of the language “interstate intercourse.” Furthermore, although each Justice cited *Cole* and proclaimed its correctness regarding interstate trade and commerce, each declined *Cole*'s invitation to utilize the convention debates in making their argument.

Chief Justice Gleeson's opinion, joined by Justice Heyden, states that “[t]he reasoning in *Cole v. Whitfield* denied that the guarantees of freedom of intercourse and of freedom of trade

164. *Id.* at 467.

165. *APLA Ltd. v. Legal Services Commissioner of New South Wales* [2005] H.C.A. 44, 1.

166. *Id.* at 37.

167. See *Cole*, 165 CLR at 393 (“It is not necessary now to consider the content of the guarantee of freedom of various forms of interstate intercourse. Much will depend on the form and circumstance of the intercourse involved. But it is clear that some forms of intercourse are so immune from legislative or executive interference that, if a like immunity were accorded to trade and commerce, anarchy would result.”).

168. *APLA*, [2005] H.C.A. at 38.

and commerce were co-extensive, raising the problem of where that leaves intercourse which is part of trade and commerce.”¹⁶⁹ Despite the distinction between interstate commerce and interstate intercourse, however, Gleeson chose not to turn to the convention debates to determine the test for whether a regulation violates interstate intercourse. Rather, the test is a simple one of reasonableness, employed to determine “whether the impediment to such intercourse imposed by the regulations is greater than is reasonably required to achieve the object of the regulations.”¹⁷⁰ Gleeson concluded that because the measures in this case were reasonable, the law could stand.¹⁷¹

Like the Chief Justice, his High Court colleagues seemed to struggle to strike a balance between citing *Cole* and evading it. Justice Gummow, in seeking to construe the law “in the light of *Cole v. Whitfield*” nonetheless relied exclusively on precedent other than *Cole* to argue that the law prohibiting legal services constituted a valid exercise of parliamentary power.¹⁷² Justice Hayne, seemingly applying equal deference to *Cole*, also refused to turn to the convention debates in analyzing interstate intercourse. Hayne instead focused on *Cole*’s holding that laws with a protectionist effect should be struck down. For Hayne, the distinction between interstate commerce and interstate intercourse ultimately came down to an “economic criterion.”¹⁷³ Lastly, Justice Callinan based his opinion on the text of the provisions and argued that the laws were non-discriminatory and should therefore be upheld.¹⁷⁴

Although, in all fairness, each Justice stated that the parties had not called upon the Court to revisit *Cole*, the failure of any Justice to rely on *Cole*’s intentionalist language nor to invoke the convention debates in resolving the constitutional question left open in *Cole*, namely what is interstate intercourse, reveals the Australian High Court’s persistent hesitancy to rely on originalist arguments. In *Castlemaine Tooheys* and now in *ALPA, Ltd.*, the High Court’s silence has spoken volumes.

The High Court has been careful to consistently reaffirm the *Cole* principle, seemingly to leave the door open to such intentionalist arguments, but it has equally consistently failed to apply them in any commerce clause case since. Moreover, the limiting language in *Cole* itself coupled with the silence of the *Castlemaine Tooheys* Court have contributed to the Australian model

169. *Id.* at 37 (internal citation omitted).

170. *Id.* at 38.

171. *Id.* at 38-39.

172. *Id.* at 160-180.

173. *Id.* at 408.

174. *Id.* at 463.

of originalism, an intentionalist approach reserved for those situations where a history of ambiguity exists and, if the language of other cases is any indication,¹⁷⁵ which may be useful only in an advisory posture.

4. CONCLUSION

The *Lopez* and *Cole* decisions exemplify the different ways in which originalism may operate across cultural divides. It is only because of an American tradition that original meaning is the preferred method of originalism and that it is able to operate to overturn congressional legislation. It is this American devotion to the founding generation and its tradition of inclusiveness that has led it to adopt a method of constitutional interpretation that reflects, not simply the views of the framers, but a broader understanding of "we, the people."

It is for similar cultural reasons that Australia has rejected original meaning and has instead favored intentionalism. The brand of intentionalism that the High Court has adopted projects the traditional skepticism that Australians have harbored towards notions of originalism. As Jeffrey Goldsworthy points out, Australian intentionalism "concedes that resort to the founders' intentions cannot answer all, or probably even most, interpretive disputes of the kind which appellate courts are required to solve."¹⁷⁶

But does this choice of originalism make a difference? The answer is clearly yes. Only in the United States, where originalism is an essential part of the nation's historical tradition could it provide an independent basis for justifying the exercise of judicial power in an area the Supreme Court had retreated from for over five decades. In addition, American originalism may be used, as it was in *Lopez*, to depart from longstanding tradition and overturn an act of Congress if it conflicts with originalist val-

175. In *Cheng v. The Queen*, the Court, via Chief Justice Gleeson, confronted the validity of a criminal statute in interpreting section 80 of the Australian Constitution. Although the Court cited *Cole* for its use of the convention debates, the Court curiously stated that the "consideration that governs the meaning of the constitutional text is the ascertainment, with the eyes of the present generation, of the essential characteristics of the text read as a constitutional charter of government. We are not chained to the expectations of 1900." *Cheng*, 203 C.L.R. at 322.

Discarding all auspices of original meaning, the *Cheng* Court affirmed the intentionalist approach used in *Cole*, speaking to the "expectations of 1900." Unlike the Court in *Cole*, however the *Cheng* Court was unwilling to assert that the Court must necessarily be bound by such intentionalist arguments, stating that "the framers of the Constitution did not intend, nor did they enjoy the power to require, that their subjective expectations, wishes or hopes should control all succeeding generations of Australians who live under the protection of the Constitution." *Id.* at 321.

176. Goldsworthy, *supra* note 22, at 20.

ues. It would be difficult to see any such role for originalism in Australia, where to date, the Court has limited it to very particular circumstances and it has merely been used to uphold existing legislation.

One can argue at great length about whether the consequences of originalism in these cases have produced the “correct” result for law and society. But what is indisputable is the influence that each nation’s history and culture have on a country’s willingness to adopt originalism. This is not to suggest that there is no choice over originalism, or that cultural factors somehow inevitably dictate the method of originalism a particular country will adopt, as there are powerful voices in America calling for intentionalism and similar voices of dissent in Australia calling for the discontinuance of originalism.

It is, at least in part, because of these voices of dissent that comparative analysis is so important. In determining whether to accept, reject or develop a distinct approach to originalism, it is vital that nations understand that originalism is about a choice. It is only through studying what has worked elsewhere and why that a country will be able to determine the proper role of originalism in its own constitutional framework. In this way, the decision over originalism is itself ultimately a reflection of that nation’s own unique history and traditions, making a nation’s brand of originalism truly original.

