19. Comparative approaches to constitutional history

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A. INTRODUCTION

An historical approach to constitutional interpretation draws upon original intentions or understandings of the meaning or application of a constitutional provision. Comparing the ways in which courts in different jurisdictions use history is a complex exercise. In recent years, academic and judicial discussion of "originalism" has obscured both the global prevalence of resorting to historical materials as an interpretive resource and the impressive diversity of approaches courts may take to deploying those materials.

This chapter seeks, in Section B, to develop a basic taxonomy of historical approaches. Section C explores in greater depth the practices of eight jurisdictions with constitutional courts or apex courts that engage in constitutional review: those of the United States, Canada, Germany, Australia, India, Hong Kong, Malaysia, and Singapore.

Because our selection of cases aims to be illustrative rather than exhaustive, we do not attempt to draw firm conclusions about the global use of constitutional history. Still, the qualitative evidence that follows hints at what might well be universal within constitutional judging: (1) the significance of history broadly understood, and (2) the limits on history's reach into contemporary rights conflicts.

B. THE USES OF CONSTITUTIONAL HISTORY

The use of constitutional history as an interpretive resource has received enormous attention from US scholars and relatively little attention from others (see Law 2015, 932). In the United States, discussion of the role originalist analysis should play in constitutional law has slain many trees, but originalism is defined in too many ways to retain significant descriptive power. What began as a primarily conservative movement with the aim of providing purportedly neutral criteria to restrain judges adjudicating controversial rights cases (see Scalia 1989) has since broadened considerably. Much recent work understands originalism in terms that permit its compatibility with judicial activism (see Barnett 2003), a progressive ideology (see Amar 2016), a robust doctrine of *stare decisis* (see Baude 2015, 2358–61), and even living constitutionalism (see Balkin 2011).

For that reason, we find it more fruitful to discuss the various ways in which courts around the world use "historical" analysis, without burdening their practices with the

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"originalism" label. The ways in which courts and individual judges may use constitutional history, and their reasons for doing so, are heterogeneous. Below we outline six variations that can help motivate a taxonomy of approaches to constitutional history. We group these variations into three categories: (1) Type of History, (2) Pattern of Usage, and (3) Type of Provision.

1. Type of History

i. Purposes or expectations?

A court may invoke history to identify the specific expectations that members of an earlier generation had as to how constitutional provisions would apply, or it may do so to identify the broader purposes or values that motivated the constitution. As in the domain of statutory interpretation, contemporaneous history helps to reveal the mischief the document meant to avoid or mitigate. We may contrast this approach with one that ties current interpretation to the specific ways through which the founding generation sought to vindicate the constitution's ends (see Scheppele 2013, 27).

Examples of purposive interpretation abound, including from courts not traditionally associated with historical argument. The German Constitutional Court has often invoked Germany's Nazi past as a "never again" aversive model that informs interpretation of the Basic Law (Germany's Constitution) (see Scheppele 2003). Justices of the South African Constitutional Court have referred to the nation's apartheid history in elucidating the concept of *ubuntu*,[1] which appears in the epilogue to the Interim Constitution and is translated loosely as the value of mutual interdependence.[2] In a Japanese Supreme Court case holding that a Shinto groundbreaking ceremony did not offend the separation of state and religion provided for in Article 20 of Japan's Constitution, dissenting judges made much of the history of state-sponsored religion following the 1868 Meiji Restoration (Beer and Itoh 1996).

Each of these examples invokes history to identify a problem the relevant constitution or its particular provisions was meant to remedy. Identifying that problem does not commit an interpreter to the view that current problems should be resolved just as the drafters or the ratifiers would have contemplated.

ii. Intention or meaning?

An inquiry into how a constitutional provision was historically understood might focus on the intentions of the provision's drafters, perhaps on the theory that a text means what its author intended it to mean (see Knapp and Michaels 1992, 187). Alternatively, that inquiry might focus on the meaning a hypothetical reasonable person would have given the text when it was adopted. Although intentionalist and original meaning-based approaches to constitutional history are often grouped together (see Scalia 1997, 28), they have radically different theoretical foundations and can produce different results.

For example, the US Supreme Court held in *Brown v. Board of Education* that the equality guarantee of the Fourteenth Amendment prohibited racial segregation in public

[1] Constitution of the Republic of South Africa Act, No. 200 of 1993, ch. 15, § 251(4).

[2] *See* S. v. Makwanyane, 1995 (2) SALR 391, ¶¶ 222–27 (Langa, J.); ¶¶ 263 (Mahomed, J.); ¶ 312 (Mokgoro, J.).

schools.[3] It is doubtful that the drafters of the Fourteenth Amendment contemplated that it would invalidate segregated schooling (see Klarman 1995), but the original meaning of "equal" arguably sanctions such progressive application (see Bickel 1955).

Jed Rubenfeld has described the key dichotomy in *Brown* as the difference between "application understandings" and "no application understandings" (see Rubenfeld 2005, 46). On Rubenfeld's view, a court should be bound by the applications to which the ratifying generation affirmatively committed the nation, but not by what that generation believed the commitment excluded (Rubenfeld 2005, 14). The South African Constitutional Court appeared to adopt a version of this view in *State v. Makwanyane*,[4] its first significant decision. There, the Court acknowledged that the Interim Constitution's negotiators had deliberately declined to prohibit capital punishment but nevertheless held that the death penalty was incompatible with the right to life guaranteed in Section 9.[5]

iii. Texts or backdrops?

At times it may be as important to know what institutions a constitution retained as to know what it created or changed. Stephen Sachs has coined the term "constitutional backdrops" to describe "rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change" (Sachs 2012, 1816). Sachs derives his examples from US constitutional tradition: Thus, the Supreme Court has drawn on Founding-era history to establish a constitutionally protected immunity from damages suits for states even in the absence of explicit constitutional language so providing.[6]

The concept of backdrops is relevant to historical inquiry in other jurisdictions as well. One recurring question is the scope and reviewability of prerogative powers exercised by the executive. For example, in a case involving whether the German president's exercise of the pardon power based on mercy was subject to judicial review under the Basic Law, judges of the Federal Constitutional Court drew on the history of the power of mercy under the monarchy and through the period of the Weimar Constitution.[7]

Historical inquiry is unavoidable in identifying a constitutional backdrop.[8] Even a court committed to evolving constitutional norms might have reason to invoke pre-constitutional history or drafting debates to ascertain how the constitution affected a traditional government power or custom.

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[3] 347 U.S. 483 (1954).

[4] 1995 (2) SALR 391.

[5] *Id*. ¶ 25. For contrasting reasoning, see the Singapore Court of Appeal decision in Yong Vui Kong v. Public Prosecutor [2010] 3 SING. L. REP. at [489], discussed in Section C.8, *infra*.

[6] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[7] 25 BVerfGE 352, ¶¶ 27–34 (1969).

[8] *See id.* at ¶ 22.

2. Pattern of Usage

i. Pluralist or dispositive?

Courts typically supplement discussion of historical meanings, purposes, or expectations with other modes of analysis, whether grounded in textual exegesis, prudential reasoning, established doctrinal frameworks, or prior precedent. We might distinguish a court that views history as one resource among many from one that regards the conclusions reached through historical analysis as dispositive or deserving of greater interpretive weight.

For example, the US Supreme Court's decision in *District of Columbia v. Heller*, which held that a Washington, D.C. prohibition on handgun possession contravened the Second Amendment,[9] frontloaded its opinion with an extensive inquiry into the historical meaning of the Amendment's text. Only after its historical discussion did the Court ask "whether any of [its] precedents forecloses" the conclusion it reached through historical analysis.[10] Placing history in this kind of privileged position, which is unusual even in US cases, reflects a different approach than one that views it as on par with or subordinate to other forms of analysis.[11]

ii. Interpretation or rhetoric?

Judges in constitutional rights cases invariably serve a political function. Their audience is not merely the parties to the litigation—indeed, sometimes the parties are nonexistent or out of the case—but also includes a broader public. The values the judges articulate and the weights they assign to those values must resonate with the public if judge-made constitutional law is to endure. A constitutional judge's audience also and most immediately includes her colleagues on the bench, whom she must persuade in order to achieve a majority or to move the law in her preferred direction.

The burdens of persuasion may support a distinctly rhetorical invocation of history. As Ozan Varol has documented, for example, the Turkish Constitutional Court has used history to elucidate the views of Mustafa Kemal Atatürk, the founder of the Turkish Republic, in cases implicating Turkey's secular commitments (Varol 2011, 1239). Varol attributes this practice to a "cult of personality" around Atatürk, whom "the Turkish nation views … as a quasi-divine figure, a God-like war hero, and a foresightful President who led a battered nation from despair to glory" (Varol 2011, 1283). The imprimatur of such a figure is an important resource in constitutional argument quite apart from one's theory of interpretation (see Greene 2012).

Anonymous references to "the Convention" rather than to individual drafters tend to suggest that historical understandings are performing an interpretive rather than a rhetorical function.[12] Such references rely implicitly on a theory of constituent authority rather than on the celebrity of any historical actor. Likewise, one reliable sign

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[9] 554 U.S. 570 (2008).

[10] *Id.* at 619.

[11] An example would be the Indian Supreme Court, a multimodal court that makes common reference to the debates in the Constituent Assembly and particularly the words of B.R. Ambedkar. Section C.5, *infra*.

[12] *E.g.*, McCulloch v. Maryland, 17 U.S. 316, 356 (1819).

that the views of Founding-era figures are being invoked rhetorically is when the figure had no role, or only a symbolic one, in drafting the constitution. Consider the US case of *Wallace v. Jaffree*, in which Justice Rehnquist dissented from the invalidation of an Alabama law providing for a moment of silence in public schools, noting that President George Washington had proclaimed a public day of prayer.[13] He wrote archly: "History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause."[14] Rehnquist's message is clear, even though President Washington was not a significant constitutional drafter.

The rhetorical purchase of the constitution's drafting can cut both ways. Reference to the framers could carry negative weight if the constitution is not a source of national pride. As H.W.O. Okoth-Ogendo has emphasized, several post-colonial African leaders rejected Westminster- or French-influenced constitutions on the ostensible ground that those instruments established non-autochthonous institutions that failed to fit local political and social conditions (see Okoth-Ogendo 1993, 65, 68, 72).

3. Type of Provision

Not all constitutional provisions lend themselves equally to historical analysis (see Greene 2016). The architecture of the government, procedural technicalities, and historical compromises such as treaties are often intended by their drafters as complete statements of future application. By contrast, provisions announcing individual rights tend to be stated as principles or standards, which in their nature call for progressive development (Balkin 2011, 6–7).

We do well to pay some attention to this distinction. As we discuss below, the US Supreme Court under Chief Justice Earl Warren is often described as distinctly ahistorical in its constitutional approach, but that Court applied historical methods in cases relating to the constitutionally mandated structure of the political process.[15] Likewise, as we show below, the Supreme Court of Canada, a self-avowedly non-originalist court, has relied on the intentions of the drafters in cases involving specific compromises embedded within the Constitution.[16]

C. CASE STUDIES

Below, we discuss the use of history in eight jurisdictions. We note at the outset that seven of the eight are common law countries, with Germany the lone holdout. Part of the reason for this selection bias is that common law courts often publish decisions in English, which facilitates analysis for English-speaking scholars such as ourselves. Further, civil law courts tend toward a deductive, mechanical style of opinion writing that can frustrate identification of interpretive methods.

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[13] 472 U.S. 38 (1985).
[14] *Id.* at 113 (Rehnquist, J., dissenting).
[15] Section C.1, *infra*.
[16] Section C.2, *infra*.

1. United States

There is long-standing normative debate over the place of historical argument in US constitutional interpretation. In recent years, an analogous debate has arisen over the place of historical argument as a matter of positive constitutional practice. Justice Scalia frequently claimed that US courts were originalist for most of their history, but that the Supreme Court departed from that convention mid-century during the tenure of Chief Justice Warren (Scalia 1989, 852–4). William Baude has suggested that, understood in relatively broad terms, originalism fairly describes even current US practice (see Baude 2015; see also Sachs 2015). Others have argued that history plays little role in cases of any constitutional moment (see Strauss 2010).

In this section, we attempt to cut through this debate with the aid of the distinctions Section B articulates. We make three descriptive points. First, historical argument is an important mode of constitutional argument in the United States and can be an especially powerful mode of argument in dissent. Second, the Supreme Court frequently invokes the original understanding of constitutional provisions in cases involving specific provisions. Third, historical argument has not been an important mode of affirmative argument by Supreme Court majorities in modern individual rights cases.

One of the ways Americans, including American judges, argue about the meaning and requirements of the Constitution is by invoking history. Philip Bobbitt includes historical argument in his well-known taxonomy of "modalities" of constitutional argument in the United States, though he insists that it enjoys no lexical priority over other argument forms (see Bobbitt 1988). Historical argument has pointedly been used by dissenters to attack disfavored constitutional decisions—and over the last seven decades, three Supreme Court Justices—Hugo Black, Antonin Scalia, and Clarence Thomas—have placed the significance of constitutional history at the center of their judicial philosophies.

One can identify Supreme Court decisions that rely heavily on historical argument throughout the Court's history. For example, in the 1831 case of *Cherokee Nation v. Georgia*, Chief Justice John Marshall dwelled on the original expectations of the Constitution's drafters in holding that an Indian tribe is not a "foreign state" eligible to sue in federal court.[17] Marshall relied on specific intentions despite a long post-ratification history of treating the Cherokee as a foreign nation[18] and even though he seemed to believe that the equities of the suit weighed heavily in the Cherokee Nation's favor.[19]

The Court took the ostensible constraints of history no less seriously a generation later in the notorious case *Dred Scott v. Sandford*.[20] Scott, a slave suing for his freedom, went to federal court on the theory that the Constitution confers federal jurisdiction over suits "between citizens of different states."[21] The Court held that no

[17] 30 U.S. (5 Pet.) 1, 18–19 (1831).
[18] *See id.* at 16.
[19] *See id.* at 15.
[20] 60 U.S. 393 (1857).
[21] U.S. CONST. art. III, § 2.

descendant of African slaves could be a citizen of a state for federal constitutional purposes. Chief Justice Roger Taney's lead opinion is thoroughly originalist. It canvasses state practices at the time of the Constitution's enactment in an effort to establish that the drafters had not intended to include African Americans within the category of citizen and then argues that historical intentions fix the Constitution's meaning unless and until it is amended.[22] *Dred Scott* is often criticized for the inflexibility (and inaccuracy) of its historical argument (Greene 2011, 407), but Chief Justice Taney's methodology is not entirely out of place within the American constitutional tradition.

For example, historical argument factored heavily even in decisions of the relatively progressive Warren Court. That Court relied on documentary evidence of original meaning in *Powell v. McCormack*—involving the power of the House of Representatives to expel a member for corruption[23]—and in *Wesberry v. Sanders*—involving the constitutionality of creating numerically unequal congressional districts.[24] In *Powell*, which Chief Justice Warren wrote, the Court dismissed reliance on post-ratification congressional practices by stating that "[t]he relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent."[25]

The Warren Court's occasional reliance on history tends to refute the notion that historical argument has always had a conservative valence in US constitutional adjudication. Indeed, it remains true today that the Court's more liberal justices regularly invoke history. In *NLRB v. Noel Canning*, concerning the scope of the president's power to use a Senate recess to make executive appointments, Justice Stephen Breyer's majority opinion first determined that the original meaning of the appointments clause was ambiguous before feeling liberated to consider post-enactment political precedent.[26] In recent decisions concerning whether an independent commission could be empowered to create legislative districts and whether eligible voters was the basis for population equality between legislative districts, Justice Ruth Bader Ginsburg wrote majority opinions that began with Founding-era expectations before considering other arguments.[27]

The cases discussed above involve questions of constitutional structure. When we turn to the Constitution's individual rights provisions, we find a far more limited role for history. The Supreme Court's case law in the areas of antidiscrimination law, free speech, taking of private property, and due process—notably including rights to abortion and to same-sex marriage—does not typically engage with the original understandings of the Constitution's drafters (Greene 2016, 1639). With limited exceptions, most notably in *Heller*[28] and in certain areas of constitutional criminal

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[22] *Dred Scott*, 60 U.S. at 426.
[23] 395 U.S. 486 (1969).
[24] 376 U.S. 1 (1964).
[25] *Powell*, 395 U.S. at 547.
[26] 134 S. Ct. 2550 (2014).
[27] Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015); Evenwel v. Abbott, 136 S. Ct. 1120 (2016).
[28] *Heller*, 554 U.S. 570.

procedure,[29] the Court's approach in individual rights cases has been purposive and evolutionary.

2. Canada

The Supreme Court of Canada has openly disclaimed originalist methods. As Justice Frank Iacobucci wrote in *Ontario Hydro v. Ontario (Labour Relations Board)*: "This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution."[30] The Canadian Supreme Court has historically captured its progressive approach to interpretation via the image of a "living tree." The metaphor originated in a 1930 Privy Council opinion by Lord Sankey in which he declined to limit Canadian Senate eligibility to men notwithstanding that women would not have been considered "qualified persons" under the original expectations of the drafters of the relevant section of the British North America Act.[31] Since the adoption of the Charter of Rights and Freedoms in 1982, the Court has repeatedly emphasized that "[the] Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[32]

The Court made its devotion to progressive interpretation transparent in an early case on the constitutionality of a provincial law that made driving with a suspended license a strict liability offense.[33] The Supreme Court invalidated the law as a violation of section 7 of the Charter, which prohibits deprivation of liberty "except in accordance with the principles of fundamental justice."[34] The Charter's drafting history indicates that this language was intended to confer procedural rights only.[35] But Justice Antonio Lamer, writing for the Court, emphasized that Charter interpretation was to be "purposive,"[36] and should not depend on "the comments of a few federal civil servants."[37]

Notwithstanding its commitment to living tree interpretation, the Court has, on occasion, leaned heavily on the intentions of the Constitution's framers. It has done so most conspicuously in cases involving historical compromises that underwrite Canadian federalism and its relationship to indigenous tribes. For example, in a 2003 decision, a Manitoba Métis challenged his conviction for hunting deer out of season on unoccupied Crown land on the basis of a claimed immunity under the Manitoba

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[29] Crawford v. Washington, 541 U.S. 36 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[30] [1993] 3 S.C.R 327, 409 (Iacobucci, J., dissenting).

[31] Edwards v. Attorney-General for Canada [1930] A.C. 124 (P.C.).

[32] Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, ¶ 22.

[33] Reference re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486.

[34] Charter of Rights and Freedoms § 7.

[35] Minutes of the Proceedings and Evidence of the Spec. J. Comm. of the S. and of the H. of Commons on the Constitution of Canada, 1st Sess. of the 32d Parliament, 46:32 (1981) (statement of Barry Strayer, Assistant Deputy Minister, Dep't of Justice).

[36] *B.C. Motor Vehicle Act*, 2 S.C.R. at 511.

[37] *Id.* at 508.

Natural Resources Transfer Agreement (NRTA).[38] The case turned on whether a Métis counted as an "Indian" within the terms of the NRTA's hunting provisions. In deciding unanimously against the defendant, the Court relied on historical evidence showing that "the Métis were treated as a different group from 'Indians' for purposes of delineating rights and protections" within the NRTA,[39] and that the word "Indian" would not have been thought to include Métis when the NRTA was enacted.[40] The Court considered the broader purpose behind the NRTA's hunting provisions—they were based on "the view that Indians required special protection and assistance"[41]—but it bound itself to the historical application of this purpose rather than understanding it progressively: "Rightly or wrongly," the opinion states, "this view did not extend to the Métis."[42]

The Court's attention to history in *Blais* is not random or idiosyncratic. As the Court later clarified, the intentions of the framers of the NRTA appeared to be determinative because the interpretive question related "to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities."[43]

There are other occasions on which the Canadian Court has lingered on historical materials in cases involving specific agreements. In *Reference re Manitoba Language Rights*, for example, the Court held that constitutional provisions enacted in 1867 and 1870 requiring that provincial laws "shall" be published in English and French were mandatory even though Manitoba had been publishing laws only in English for nearly a century.[44] The Court analyzed uses of the words "shall" and "may" in the relevant acts and the views of the "drafters" of the British North America Act on the meanings of these words.[45] The Court declared invalid nearly all of Manitoba's laws but suspended its judgment temporarily for so long as it took for the legislature to enact new laws in both languages.[46]

Cases of this sort demonstrate that, as on other courts, part of the context relevant to determining the use of historical materials is the nature of the constitutional norm under review. Even so, outside of these discrete situations, the Canadian Supreme Court's rhetoric around what it identifies as originalism remains strongly oppositional (Miller 2009, 331).

3. Germany

Constitutional interpretation on the German Federal Constitutional Court (FCC) is often described as purposive or teleological. Donald Kommers has written that the Court's "focus … is often on the unity of the text as a whole from whence judges are to ascertain the aims and objects—i.e., the *telos*—of the Constitution" (Kommers 1991,

[38] R. v. Blais [2003] 2 S.C.R. 236. Provincial NRTAs are entrenched in the Canadian Constitution. *See* Constitution Act, 1930 (U.K.), 20–21 Geo. V., c. 26.
[39] *Id.* at ¶¶ 19–25.
[40] *See id.* at ¶¶ 27–9.
[41] *Id.* at ¶ 33.
[42] *Id.*
[43] Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, ¶ 30.
[44] [1985] 1 S.C.R. 721.
[45] *See id.* at ¶¶ 28, 32–3.
[46] *See id.* at ¶¶ 107–11.

844). The German approach is typically taken as emblematic of other European constitutional courts where, Michel Rosenfeld has remarked, "recourse to originalism is virtually nonexistent" (Rosenfeld 2004, 656).

There is no doubt that historical inquiry plays a relatively minor role in the opinions of the FCC (Kommers 1991, 844–5). Still, we can identify at least three ways in which history factors into the Court's opinions. First, it can play an evidentiary function in establishing the constitutional purposes that motivate the Court's teleological approach. Second, it may be used to understand the requirements of relatively specific structural provisions of the Basic Law. Third, it has been used to identify constitutional backdrops. We offer examples of each in turn.

The Court announced its teleological approach in the *Southwest State Case*, its earliest significant opinion.[47] In announcing its principles of judicial review, the Court declared that "[e]very constitutional provision must always be interpreted so as to render it compatible with the fundamental principles of the Constitution and the intention of its authors."[48] What distinguishes this conspicuous reference to drafters' intent from a narrow historical exegesis is the notion that particular clauses are always subordinate to the Basic Law's overarching principles.[49] German purposivism is tethered to the Constitution but the Court understands its subject at a high level of generality.

On this view, history may be used to elucidate "the objective conditions out of which a constitutional value or provision arose" (Kommers 1991, 845). Take, for example, the *Concordat Case*, on the validity of a Lower Saxony law requiring nondenominational schools, which was in conflict with a 1933 Reich treaty with the Holy See. The opinion of the Second Senate contains much discussion of the events leading to the framing of the Basic Law.[50] Many actions of the *Länder* had ignored the educational requirements of the concordat both before and after the demise of the Third Reich, and the Court observed that the *Länder* wielded impressive political leverage in the ratification process.[51] This reality meant that the Basic Law had to "state expressly" any intention to obligate the *Länder* to adhere to the concordat (Kommers and Miller 2012). In articulating the context of German federalism, the Court noted that "the framers of the Basic Law" had to take the political advantages of the *Länder* as "faits accomplis" (Kommers and Miller 2012, 82). The Court recited constitutional history not to identify historical analogs to the case before it but to make the case for a broad principle of the *Länder* retaining legislative competence on all matters that the Basic Law does not expressly confer on the federation.

In light of the tragic events that form the historical background to the Basic Law, it is unsurprising that one of the principles whose purposes the German Constitution must vindicate is that the paradigmatic sins of the Nazi regime must "never again" be replicated (Scheppele 2013, 29). Thus, in the First German Abortion Decision, in which the Court invalidated a federal abortion liberalization law as insufficiently protective of

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47 1 BVerfGE 14 (1951).
48 *Id.*
49 *See id.* at 32.
50 The Federal Constitutional Court is divided into two "senates."
51 *Id.*

fetal life,[52] the First Senate opinion interpreted the right to life in terms that invoked the Holocaust as a negative model: "[T]he categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the 'destruction of life unworthy to live,' the 'final solution,' and the 'liquidations' that the National Socialist regime carried out as governmental measures."[53]

Like the US and Canadian Supreme Courts, the FCC has also used historical argument in cases involving constitutional provisions that represent specific structural requirements or historical compromises. In the *Parliament Dissolution Case*,[54] the Court had to decide whether a Chancellor with majority support in the *Bundestag* (Germany's principal legislative chamber) could use the Article 68 power to call for a vote of confidence as a strategic ploy to force new elections and obtain a stronger majority (Kommers and Miller 2012, 154–5). In seeking an answer, the Court zeroed in on "the genesis of Article 68."[55] Invoking specific meetings of the Parliamentary Council that drafted the Basic Law, the Court noted that Council members were aware of the dangers of early dissolution of parliaments,[56] but their greater fear was the governmental paralysis that would result from a weak Chancellor who could be replaced by the *Bundestag*.[57] The opinion is clause-specific and historically sensitive in just the way one would expect from a court interpreting a constitutional provision that helps to erect the nation's political architecture.

The FCC has also used history to uncover what elements of Germany's pre-constitutional law the Basic Law preserves. The Constitution requires this inquiry: Article 123 states that "[l]aw in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with [the] Basic Law."[58] In other words, the Constitution recognizes constitutional backdrops. For example, in a case involving the permissibility of secularizing a course offered by a theology professor, the Court noted that the protected status of theology faculties under pre-constitutional *Land* constitutions informed the meaning of constitutional silence on the matter: "The Parliamentary Council simply said nothing on this topic, and it cannot be concluded from this that there was a decision to the contrary, radically breaking with the existing German university tradition."[59]

Likewise, in a decision affirming the constitutionality of life sentences, the First Senate took notice of the fact that when the framers of the Basic Law abolished capital punishment, they assumed that life imprisonment was the available alternative.[60] The Court's dive into constitutional history was deep enough that it felt the need to add the disclaimer that history, though relevant, is not dispositive: "Neither original history nor

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[52] *See* Judgment of February 25, 1975, 39 BVerfGE 1 (translated in Robert E. Jonas and John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 JOHN MARSHALL J. PRAC. & PROC. 605 (1976)).

[53] *Id.* at 637.

[54] 114 BVerfGE 121 (2005).

[55] *Id.* at ¶ 136.

[56] *Id.* at ¶¶ 133–4.

[57] *Id.* at ¶ 136.

[58] Art. 123, The German Basic Law of 1949.

[59] 1 BVerfGE 462/06 (2008), ¶ 53.

[60] *See* 45 BVerfGE 187 (1977); Kommers and Miller 2012, 364.

the ideas and intentions of the framers are of decisive importance in interpreting particular provisions of the Basic Law" (Kommers and Miller 2012, 365).

4. Australia

We are aware of no constitutional or apex court that more consistently understands its role in terms of discerning the historical meaning of its constitution's language than the High Court of Australia. The canonical interpretive decision in Australia remains the *Engineers Case*, in which Justice Isaac Isaacs wrote that the Court's mandate was "faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed."[61] As Chief Justice Samuel Griffith, an important framer of the Australian Constitution, wrote in 1908, "whatever [a constitutional provision] meant in 1900 it must mean so long as the Constitution exists."[62]

Australian scholars and judges refer to the Court's methods as "legalism," and its methodological analog is British statutory interpretation (Goldsworthy 2006).[63] Prior to the High Court's 1988 decision in *Cole v. Whitfield*,[64] consultation of legislative debates was generally forbidden as a distraction from the original meaning of the text.[65] The "intention" the Court consistently refers to is that of the Constitution as a document, not the individual views of any particular drafters. Moreover, the Court has drawn a distinction, drawing on John Stuart Mill, between the static "connotation" and the "denotation" of the Constitution's words. The former remains unchanged whereas the latter may "extend" because of "changing events and attitudes."[66] For example, the section 51 power to legislate for trade and commerce applies to airplane regulation even though planes did not exist when the Constitution was drafted and ratified.[67] Finally, unlike some American originalists, Australian jurists have not typically described legalism as competing with *stare decisis*—a vibrant practice at the High Court—perhaps because the theory did not arise as a backlash to what were perceived as wrongly decided cases.

We discern at least two reasons for the persistence of legalism as a jurisprudential commitment of Australian jurists. First, the Australian Constitution was drafted as an English statute, and legalism reflects an internalization of British norms of statutory interpretation.[68] Second, Australia lacks a federal Bill of Rights, and judicial review of individual rights is not a significant part of the Australian constitutional order. Accordingly, the invitation to progressive constitutional application that individual rights adjudication typically offers is largely absent from the High Court's docket (see Weis 2013, 844–5).

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61 Amalgamated Soc'y of Engineers v. Adelaide Steamship Co. (1920) 28 C.L.R. 129, 142.
62 R. v. Barger (1908) 6 C.L.R. 41, 68.
63 *Amalgamated Soc'y of Engineers*, 28 C.L.R. at 148.
64 (1988) 165 C.L.R. 360.
65 *See* AG Vict. ex rel. Black v. Commonwealth (1981) 146 C.L.R. 559, 578.
66 King v. Jones (1972) 128 C.L.R. 221, 229.
67 *See* Australian Nat'l Airways Pty Ltd. v. Commonwealth (1945) 71 C.L.R. 29.
68 *See* Tasmania v. Commonwealth (1904) 1 C.L.R. 329, 338.

That being so, the past three decades have witnessed a highly public debate over the progressive capacity of Australia's constitutional culture. During the tenure of Chief Justice Anthony Mason, which began in 1987, the High Court liberalized its constitutional interpretive approach in several ways. First, as noted, it began to permit reference to legislative history. Today it is not uncommon for Australian courts to cite to the Australasian Convention Debates at Adelaide or to J.A. La Nauze's canonical history of the convention (Kirby 2000, 10). Second, the High Court began to accept the notion of justiciable implied constitutional rights, most notably the right of political communication.[69] Chief Justice Mason acknowledged that enforceable constitutional rights were not part of the original constitutional design but claimed that Australia's 1986 constitutional independence impliedly altered the relationship between Parliament and its constituents.[70]

Most scholars would agree that the Mason Court did not kill off Australian legalism, either because the Court backtracked under Chief Justice Murray Gleeson or because the Mason Court's departures were not so dramatic to begin with.[71] In the wake of the Mason Court, Justice Michael McHugh described the High Court as remaining invested in original meaning but characterized its originalism as "faint-hearted,"[72] willing to take social context into account rather than viewing history as an "interpretive straitjacket" (McHugh 2008, 22). Others, including frequent dissenters such as Justices Ian Callinan and Dyson Heydon, have suggested that the Court's approach is not much constrained by history, at least in individual rights cases (see Weis 2013).

5. India

The Indian Constitution's creation is indissolubly linked to a narrative of the nation's independence. "In the Indian constitutional imagination," Sujit Choudhry observes, "the Constitution marks a decisive and sharp break with the past and was a central element in the formation of the Indian polity" (Choudhry 2013, 3). Historical appeals resonate with India's constitutional project; the Constitution's starting point is usually invoked to identify the purpose behind the broader plan established at the founding (Choudhry 2013, 3). References to the framers of the Indian Constitution—particularly, its chief architect B. R. Ambedkar—are made to support arguments about these constitutional purposes.

The Indian Supreme Court's constitutional interpretation approach has been called "eclectic" (Chandrachud 2016, 73), although this has not appeared to erode public perception of the Court's institutional legitimacy. While the Court has not adhered to a consistent interpretive approach, constitutional history is present in Indian constitutional practice. We offer three such examples.

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[69] *See* Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106 [hereinafter *ACTV*]; *see also* Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104.

[70] *ACTV*, 177 C.L.R. at 138.

[71] For an example of the former view, see, e.g., Selway 2003. For the latter view, see e.g., McHugh 2008.

[72] Eastman v. The Queen (2000) 203 C.L.R. 1, 33; *cf*. Scalia 1989, 864.

Consider first the Supreme Court's 2015 decision in the *NJAC Case*.[73] Since the Court's 1993 judicial appointments decision,[74] judges are appointed to the Supreme Court and High Courts through a "collegium" system of appointments, in which the Chief Justice and other senior justices play a primary role. Parliament sought to replace this system with an appointments process led by a National Judicial Appointments Commission. Invoking the "basic structure" doctrine for only the fourth time in its history,[75] the Court struck down a constitutional amendment and a statute enacted to change the judicial appointments process. By a four to one majority, the Court declared the amendment unconstitutional for violating judicial independence, a part of the Constitution's basic structure.[76]

The focus on constitutional history in the *NJAC Case* is striking. The Attorney-General relied "emphatically" on the Constituent Assembly debates to argue that the Supreme Court's earlier judicial appointments judgments had been "diagonally opposite" to the "intent and resolve of the Constituent Assembly."[77]

In response, the Court repeatedly referred to the drafting debates to support its conclusion that judicial primacy in the appointment process is integral to judicial independence. Justice Kehar frequently mentioned Ambedkar's statements in arguing that the drafters had intended judicial appointments to be "shielded" from "political considerations."[78] Concluding that this was the framers' "true intent" behind the clause that the president appoint judges after "consultation" with the Chief Justice,[79] Justice Kehar declared that the word "consultation" could not "be assigned its ordinary dictionary meaning."[80]

Justice Lokur, too, paid close attention to history. Cautioning that "those who do not remember their past are condemned to repeat their mistakes,"[81] he employed historical arguments to assert that the understanding at the time was that the president should consult and defer to the chief justice.[82] In addition to the Constituent Assembly debates[83] and Ambedkar's views,[84] Justice Lokur referred extensively to other sources from the constitution-making period, such as memoranda submitted to the drafting committee[85] and Granville Austin's scholarly work.[86]

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[73] Supreme Court Advocates-on-Record Association v. Union of India (2015) 5 RAJ 350 [hereinafter *NJAC Case*].

[74] Supreme Court Advocates-on-Record Association v. Union of India (1993) 4 SCC 441.

[75] *See* L. Chandra Kumar v. Union of India (1997) 3 SCC 261; Minerva Mills v. Union of India (1980) 3 SCC 625; Indira Nehru Gandhi v. Raj Narain (1975) 1 Suppl. SCC 97.

[76] *NJAC Case*, 5 RAJ at ¶¶ 254–6 (Kehar, J.).

[77] *NJAC Case*, 5 RAJ at ¶¶ 17, 73, 124.

[78] *Id.* at ¶ 79.

[79] *Id.*; *see* INDIA CONST. art. 124.

[80] *NJAC Case*, 5 RAJ at ¶ 77 (Kehar, J.).

[81] *Id.* at ¶ 4 (Lokur, J.).

[82] *Id.* at ¶ 54.

[83] *Id.* at ¶¶ 34–53.

[84] *Id.* at ¶¶ 18–24.

[85] *See id.* at ¶¶ 31, 36, 38, 43, 45–50.

[86] *See id.* at ¶ 32.

Although the accuracy of the *NJAC Case* majority's historical claims has been contested,[87] the interpretive moves made by the majority are originalist. They are grounded in appeals to the framers' intent and the aims behind the Constitution's creation.

A second example of constitutional history being used in practice is the Delhi High Court decision in *Naz Foundation v. Government of Delhi*.[88] In 2009, the court held a penal code provision criminalizing same-sex activity unconstitutional for violating equality and liberty guarantees.[89] Appealing in soaring terms to the ideals behind the drafting of these constitutional liberties, it declared that "[t]hese fundamental rights had their roots deep in the struggle for independence."[90] Endorsing the idea of the Indian Constitution as "first and foremost a social document," the court viewed the Constitution's aim as achieving a "social revolution by creating an egalitarian society."[91] Using as a guide the constitutional morality "strongly insisted upon by Dr. Ambedkar in the Constituent Assembly,"[92] the Delhi High Court declared that it "would be against constitutional morality to criminalize homosexuals only on account of their sexual orientation."[93]

The *Naz Foundation* decision has been hailed as an illustration of "a comparative, engaged living originalism in practice" (Choudhry 2013, 18). What is clear is that the use of history in *Naz Foundation* is not in service of a rigidly textualist or specific application form of originalism. Rather, the court "reframed the concepts of originalism and morality to demonstrate how both ideas demanded the overturning of such laws" (Katyal 2010, 1465). In reaching its decision, the High Court "turned for help[] to an older moment, a moment of origin" (Bhan 2009, 94). The invocation of historical arguments go to the Constitution's overarching goals and sounds in the "conscience of the Constitution."[94]

In 2013, the Supreme Court overturned the Delhi High Court judgment in a panel decision which appears to pay little attention to constitutional history.[95] Yet, the Supreme Court's skepticism about relying on foreign experiences—associating LGBT rights claims with Western values[96]—speaks, in a sense, in the language of the Indian Constitution as an anti-colonial project.

Contrast the High Court's *Naz Foundation* judgment with the Supreme Court's narrowly originalist approach in *A.K. Gopalan v. Madras*.[97] In this 1950 case involving

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[87] *See, e.g.*, Sengupta 2011, 126; Chintan Chandrachud, Debating the NJAC Judgment of the Supreme Court of India: Three Dimensions, UK CONSTITUTIONAL LAW ASSOCIATION (2015), www.ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions/.

[88] (2009) 160 DLT 277 (Del) [hereinafter *Naz Foundation* (HC)].

[89] *Id.*; *see* PEN. CODE, art. 14; PEN. CODE, art. 21.

[90] *Naz Foundation* (HC), 160 DLT at ¶ 52.

[91] *Id.* at ¶ 80.

[92] *Id.* at ¶ 79.

[93] *Id.* at ¶ 80.

[94] *Id.* at ¶ 80.

[95] Koushal v. Naz Foundation, Civil Appeal No. 10972 of 2013.

[96] *Id.* at ¶ 52.

[97] (1950) 1 S.C.R. 88.

a constitutional challenge to preventive detention laws, the Court refused to interpret the Article 21 due process guarantee as containing any substantive protections.[98] Notably, in choosing to reject substantive due process in *Gopalan* the Court explicitly looked to the drafting history of Article 21.[99] India's constitutional framers had sought to avoid the American constitutional experience with substantive due process by amending the original wording of the Indian due process clause.[100] Justice Felix Frankfurter, no less, had warned the Indian constitutional drafters to avoid the risk of *Lochner*-esque economic libertarianism (Neuborne 2003, 479 n.21). Reflecting on the Court's decision, one commentator noted that "[a]s a matter of strict originalism, the *Gopalan* Court was probably justified in declining to read substantive protections in article 21" (Neuborne 2003, 479 n.21).

Later, in *Maneka Gandhi v. Union of India*,[101] the Court rejected the *Gopalan* Court's due process approach, recognizing an implied substantive due process right and endorsing an expansive, purposive approach to interpreting fundamental rights that paved the way for the Indian Supreme Court's assertive role in rights protection. Accordingly, the *Gopalan* Court's narrow approach to due process and originalism has receded in Indian constitutional jurisprudence even as the Supreme Court has cemented its powerful institutional position in Indian constitutional governance.

Constitutional interpretation in India is pluralistic, not predominantly focused on history. Nevertheless, when invoked, the power of historical arguments sounds in the broader ideals of India's constitutional project.

6. Hong Kong

Since coming into force on July 1, 1997, as part of Hong Kong's "one country, two systems" constitutional arrangement, Hong Kong's Basic Law has been a fault line of tension between the Hong Kong Court of Final Appeal and the Standing Committee of the National People's Congress of the People's Republic of China. The contestation over the Basic Law exemplifies the broader conflict between these two systems of different ideological, cultural, and legal traditions in modern Hong Kong (Chan 2014, 170).

Drafted by committee members who were approved by the Standing Committee and drawn mostly from mainland China, the Basic Law codified policies in accordance with the 1984 Sino-British Joint Declaration, which provided for Hong Kong to operate with a high degree of autonomy upon its transfer to China. It came into effect in 1997 when Hong Kong became a Special Administrative Region under Chinese sovereignty. While Hong Kong courts are authorized to interpret provisions of the Basic Law, the final power to interpret the Basic Law is vested in the Standing Committee.[102]

Despite the political climate in which it operates, the Court of Final Appeal has "ascended" (Ip 2016, 565) into the role of "custodian of the constitution" (Chen and Lo

[98] *Id.* at 107–10.
[99] *Id.* at 110–11.
[100] *Id.* at 111.
[101] (1978) 2 S.C.R. 621.
[102] XIANGGANG JIBEN FA art. 158.

2014, 390). The Court has generally favored a purposive approach toward interpreting the Basic Law, focused on the text, and has been skeptical of narrowly conceived historical claims tied to the original intent of the Basic Law drafters.[103] According to the Court, the Basic Law is "a living instrument intended to meet changing needs and circumstances"[104] and ascertaining its "true meaning" requires considering "the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context."[105] The Court's approach is in line with traditions of common law constitutionalism familiar to the Hong Kong legal system (Ip 2016, 593).

The Standing Committee, however, has not hesitated to refer to the original intent of the Basic Law's drafters in interpreting the constitutional document and has relied on legislative materials related to the drafting of the Basic Law (see Young 2007, 16). In its 1999 Basic Law Interpretation, the Standing Committee referred to the written opinion of a preparatory committee in 1996 as evidence of the original intent,[106] and declared that "the interpretation of Court of Final Appeal [was] not consistent with the legislative intent."[107]

The Court of Final Appeal refused to adopt the original intent approach endorsed by the Standing Committee. In 2001, the Court declared that the task of the courts "is not to ascertain the intent of the lawmaker on its own."[108] "Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear," wrote the Chief Justice, "the courts are bound to give effect to the clear meaning of the language."[109] A court should not "on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear."[110] After this case, as Eric Ip observes, "Hong Kong judges seemed to have no obligation to follow the Standing Committee's arbitrary claims of 'original' intent" (Ip 2016, 583).

In light of the composition of the committee that drafted the Basic Law, it is unsurprising that the Hong Kong courts have strenuously sought to avoid interpretation based on the framers' intent. As Albert Chen has remarked: "If the original intent were to be given effect to, does this mean that the Basic Law would have to be interpreted in accordance with mainland Chinese thinking, assumptions, values and interest?" (Chen 2000, 421).

Writ large, though, the conflicts over Hong Kong's Basic Law are not simply over disparate interpretive methods but also between different institutional interpreters. Which forms of historical argument have salience—and with whom—depends greatly on Hong Kong's political and historical context in which two systems co-exist within one country.

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[103] *See* Ng Ka Ling v. Director of Immigration (1999) 2 H.K.C.F.A.R. 4.

[104] *Id.* at ¶ 73.

[105] *Id.* at ¶ 74.

[106] The Interpretation by the Standing Comm. of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law (adopted on June 26, 1999).

[107] *Id.*

[108] Director of Immigration v. Chong Fung Yuen (2001) 4 H.K.C.F.A.R. 211, 223.

[109] *Id.* at 225.

[110] *Id.*

7. Malaysia

Constitutional history is frequently invoked in debates over the place of religion in Malaysia's constitutional order. Contemporary politics and adjudication divide over whether the Malaysian state is secular or Islamic. On August 31, 1957, the Malayan Constitution came into force when the Federation of Malaya gained independence from the British. Six years later, the 1957 *Merdeka* Constitution would become the basis for the Federal Constitution of Malaysia when Singapore and the Borneo states of Sabah and Sarawak joined the Malayan Federation to create the new nation of Malaysia. Much of the debate has centered over the Article 3(1) declaration that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony …"[111]

Growing Islamization in Malaysia's political discourse over the past three decades has challenged the established understanding at the Constitution's creation that Article 3(1) would not undermine the Constitution's secular foundation (see generally Fernando 2006).[112] Historical arguments have featured prominently in the legal and political battleground. Proponents of Malaysia's Islamization have employed historicist rhetoric to expand Islam's constitutional scope (see Tew 2014, 801–18). Secularists, in response, have sought to defend the Constitution's secular basis by recourse to the original understanding of Article 3(1).

Initially, constitutional arguments relied on the intent of the framers to establish the Malaysian Constitution's secular foundations. In a landmark 1988 decision, the Supreme Court (later renamed the Federal Court) made clear its focus of inquiry: "The question here is this: Was this the meaning intended by the framers of the Constitution?"[113] It concluded that Malaysia's constitutional and drafting history showed that Islam's role was confined only to "rituals and ceremonies."[114] Two years later, the Supreme Court again affirmed the Constitution's secular basis after seeking to "ascertain … what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted. …"[115]

Those wishing to prioritize Islam's constitutional position, however, have mobilized historical arguments to promote Islam's supremacy. In *Meor Atiqulrahman*,[116] for example, the High Court constructed a historical account of the constitutional bargain to argue that the framers had intended to secure Islam's dominant position as a result of the social contract struck at the founding.[117] And in *Lina Joy*, the High Court insisted that allowing Muslims to convert out of Islam "would result in absurdities not intended

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[111] FED. CONST. (MALAY.), art. 3(1).

[112] *See, e.g.*, REPORT OF THE FEDERATION OF MALAYSIA CONSTITUTIONAL COMMISSION at ¶ 11.

[113] Che Omar bin Che Soh v. Public Prosecutor (1988) 2 MALAYAN L.J. 55, 56.

[114] *Id.* at 56–7.

[115] Teoh Eng Huat v. Kadhi Pasir Mas (1990) 2 MALAYAN L.J. 300, 301.

[116] Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi (2000) 5 MALAYAN L.J. 375 (High Court, Seremban).

[117] *Id.* at 385; *see also id.* at 384.

by the framers …"[118] Although these historical accounts have been criticized as "revisionist" (see Thio and Neo 2006, 681–3), what is notable is these courts' insistence on using historical arguments to support an expansive interpretation of Article 3(1) despite established Supreme Court precedent confining its scope.

Judges alarmed by this expansion of Islam's position have fought back on originalist turf. In his *Lina Joy* dissenting opinion, Justice Malanjum asserted that the courts had a duty to uphold an individual's religious freedom.[119] Significantly, the Justice viewed *his* interpretation as faithful to the framers' intent: "Sworn to uphold the Federal Constitution, it is my task to ensure that it is upheld at all times by giving effect to what I think the founding fathers of this great nation had in mind when they framed this sacred document."[120]

Recourse to constitutional history has also been used to advocate a purposive interpretation of the Constitution's fundamental liberties.[121] Its proponents exhort "a liberal approach in order to implement the true intention of the framers" of the Constitution.[122] They seek to empower the courts to protect constitutional rights from legislative infringement by *expanding* the scope of enforceable rights and support drawing implied rights from the Constitution's text and founding principles.[123]

Strikingly, historical argument in Malaysia is usually employed by political liberals in support of a rights-expansive constitutional adjudication approach not associated with judicial constraint. Secularists routinely reach back to the Constitution's founding premises to argue for more robust protection of individual constitutional rights.

Originalist discourse in Malaysia is characterized by a focus on the intent of the framers and constitutional history, rather than textual meaning. Historical evidence is viewed favorably as an extrinsic interpretive aid to determine the actual intentions of individual framers.[124]

Constitutional history in Malaysia has not been confined to the courts, but has a distinctly popular dimension (see Tew 2014, 813–14). Secularists and Islamists battle so deeply over the history surrounding Malaysia's constitutional founding because it is, in essence, a struggle over the nation's identity. Constitutional history provides a means by which to articulate narratives about the country's founding (see Evans 2009, 438). Historical argument in judicial and popular discourse has potency because of its role in linking constitutional narrative with national identity.

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[118] Lina Joy v. Majlis Agama Islam Wilayah & Anor (2004) 2 MALAYAN L.J. 119, [18]. *See* FED. CONST. (MALAY.), art. 11(1) ("Every person has the right to profess and practice his religion …").

[119] Lina Joy v. Majlis Agama Islam Wilayah Persekutuan (2007) 3 ALL MALAY. REP. 585, 623[53]–24[53].

[120] *Id.* at 619[23].

[121] *See, e.g.*, Sivarasa Rasiah v. Badan Peguam Malaysia & Anor (2010) 2 MALAYAN L.J. 333, ¶¶ [22]–[23].

[122] Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan (1996) 1 MALAYAN L.J. 261, 288; *see also* Lee Kwan Woh v. Pub. Prosecutor (2009) 5 MALAYAN L.J. 301, 312.

[123] *See, e.g.*, *Sivarasa Rasiah* (2010) 2 MALAYAN L.J. 333; Muhammad Hilman bin Idham v. Kerajaan Malaysia (2011) 6 MALAYAN L.J. 507.

[124] *See, e.g.*, Zambry bin Abd Kadir v. Mohammad Nizar bin Jamaluddin (2009) 5 MALAYAN L.J. 464, 534 (CA).

8. Singapore

Unlike Malaysia's Constitution, conceived on the heady road to independence, Singapore's constitutional origins emerged from more pragmatic circumstances. Singapore achieved independence from Britain when it joined the Federation of Malaysia in 1963. The union was unhappy and brief. In August 1965, Singapore separated from the Federation to become a sovereign state, and the Singapore government cobbled together a working constitution from several documents.[125] Although much of the Singapore Constitution is based on Malaysia's Constitution, it is distinct in several ways; for example, Malaysia's Islamic constitutional clause has no Singaporean counterpart.

The prevailing approach to constitutional interpretation by the Singapore courts has been characterized by strict legalism and a highly deferential stance toward the political branches of government (see Neo 2016, 3–6). In light of Singapore's lack of a momentous constitutional founding moment, it is unsurprising that judicial appeals to history have not featured prominently in its constitutional jurisprudence. That is, until the Singapore apex court's heavily originalist decision in *Yong Vui Kong v. Public Prosecutor*,[126] which involved a constitutional challenge to the mandatory death penalty brought by an appellant convicted of drug trafficking.

The Singapore Court of Appeal unanimously rejected the argument that the mandatory death penalty constituted an inhuman punishment that violated the right to life guaranteed by Article 9(1) of Singapore's Constitution.[127] The Court's opinion is self-consciously originalist, focusing on the text and framers' intent. It refused to find an implied prohibition against inhuman punishment, reasoning that the framers had deliberately omitted to include such a prohibition.[128] The Court took the lack of any explicit prohibition against inhuman punishment in Singapore's Constitution as evidence of the framers' original understanding.[129]

The Court's focus on the framers' original intent is striking, particularly since Singapore's Constitution is based on the 1957 Independence Malayan Constitution, which was drafted by a constitutional commission chaired by Britain's Lord Reid.[130] Despite the oddity of relying on the original intent of another nation's constitutional drafters (see Yap 2016, 120), Chief Justice Chan Sek Keong emphasized that the Reid Commission had *not* recommended a prohibition against inhuman treatment, even though such a provision existed in the European Convention on Human Rights at the time.[131] Such an "omission … was clearly not due to ignorance or oversight" on the

[125] Singapore's 1965 Constitution was a composite of its amended State Constitution, the Republic of Singapore Independence Act, and the applicable provisions of Malaysia's Federal Constitution.

[126] (2010) SGCA 20.

[127] CONST. OF THE REP. OF SING. art. 9(1) ("No person shall be deprived of his life or personal liberty save in accordance with law").

[128] *Yong Vui Kong*, SGCA 20 at [60]–[75].

[129] *Id.* at [61].

[130] *Id.* at [62].

[131] *Id.*

drafters' part.[132] Therefore, to find such an implied prohibition would be "to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions."[133] The Court also noted that Singapore's Constitutional Commission had convened in 1966 and had proposed adding an inhuman treatment prohibition, but that the "proposal was ultimately rejected by the Government."[134] As such, it was "not legitimate for [the] court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969. …"[135]

The Singapore Court maintained its focus on constitutional history in two subsequent cases involving the same appellant. In 2011, the Court drew on the "legislative history of the clemency power in this jurisdiction" to conclude that the Constitution "excludes any role for the President's personal discretion" in the exercise of clemency.[136] The Court also rejected another appeal on the grounds that there was "no evidence in the historical record" to indicate that the original understanding of the right to life prohibited corporal punishment.[137]

The originalist approach employed by the Singapore Court of Appeal bears little resemblance to the appeals to history displayed across the border in Malaysia. Constitutional interpretation in Singapore is heavily formalist, and its originalist jurisprudence is no exception. The *Yong* Court's narrowly textualist approach to original understanding is in service of judicial deference.[138]

Judicial invocation of constitutional history reflects the Singapore Court's deferential approach to the political branches. The Court employs originalist arguments prudentially: It is concerned with constraining judicial discretion and ensuring deference toward legislative majorities. The manner in which historical arguments are employed in Singapore is unsurprising in light of its constitutional culture, which reflects "a predominant constitutional pragmatism" (Thio 2012). The Singapore Court's reliance on history is in service of judicial deference, focused on text, and has little popular appeal outside the courts.

D. CONCLUSION

The uses and practices of constitutional history vary across different comparative contexts. We have offered a number of distinctions that an observer may draw in describing a particular court's use of constitutional history. We have also described the practices prevalent within eight jurisdictions that have a constitutional court or an apex court that engages in constitutional review. Our selection of jurisdictions, while interstitial, shows that the salience of constitutional history is contingent on a nation's political and historical traditions and is often also connected to temporal socio-cultural

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132 *Id.*
133 *Id.* at [59].
134 *Id.* at [64].
135 *Id.* at [72].
136 Yong Vui Kong v. Attorney-General (2010) 2 SLR 1189, [174].
137 Yong Vui Kong v. Public Prosecutor (2010) SGCA 11, [23].
138 *Yong Vui Kong*, SGCA 20 at [49], [52].

elements. For instance, historical arguments appear to thrive in constitutional cultures where there is popular identification with the narratives associated with the constitution's founding, like the United States and Malaysia.

Other factors that influence the use of history might be easier to predict. For example, we suspect that frequent amendment might tend to dull references to the original constitutional design (though it might also spur dialogue about the constitution's core commitments, as in the case of India's basic structure doctrine). Frequent amendment might diminish the rhetorical purchase of the initial framers. Similarly, repeated experience with the contentious process of constitutional drafting may make drafter worship less likely and might educate the public about the compromises that inform constitutional design. We also suspect that caseload or financial pressures may limit a court's ability to conduct in-depth historical research and therefore affect its use of history as an interpretive resource.

Still, while particular uses of history may depend on idiosyncratic features of the constitutional culture, our examples indicate that history is broadly relevant even in jurisdictions that disclaim its significance, and has limited reach even in jurisdictions that herald its importance. The variations in the uses of constitutional history across comparative systems stem from the particularities of the political, historical, and cultural context in which those practices are located.

REFERENCES

Amar, Akhil Reed. 2016. *The Constitution Today*. New York, NY: Basic Books.
Balkin, Jack M. 2011. *Living Originalism*. Cambridge, MA: Harvard University Press.
Barnett, Randy E. 2003. *Restoring the Lost Constitution*. Princeton, NJ: Princeton University Press.
Baude, William. 2015. "Is Originalism Our Law?" *Columbia Law Review* 115: 2349–408.
Bhan, Gautam. 2009. "On Freedom's Avenue." In *Right That Dares Speak Its Name*. Bangalore: Alternative Law Forum.
Bickel, Alexander M. 1955. "The Original Understanding and the Segregation Decision." *Harvard Law Review* 69: 1–65.
Bobbitt, Philip. 1988. *Constitutional Interpretation*. Hoboken, NJ: Blackwell Publishing.
Chan, Johannes. 2014. "Hong Kong's Constitutional Journey 1997–2001." In *Constitutionalism in Asia in the Early Twenty-First Century*, edited by Albert H.Y. Chen. Cambridge: Cambridge University Press.
Chandrachud, Chintan. 2016. "Constitutional Interpretation." In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta. Oxford: Oxford University Press.
Chen, Albert H.Y. 2000. "The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives." *Hong Kong Law Journal* 30: 380–431.
Chen, Albert H.Y and P.Y Lo. 2014. "The Basic Law Jurisprudence of the Court of Final Appeal." In *Hong Kong's Court of Final Appeal: The Development of Law in China's Hong Kong*, edited by Simon N. M. Young and Yash Ghai. Cambridge: Cambridge University Press.
Choudhry, Sujit. 2013. "Living Originalism in India? 'Our Law' and Comparative Constitutional Law." *Yale Journal of Law and Humanities* 25: 1–22.
Evans, Carolyn. 2009. "Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia." *Emory International Law Review* 23: 437–68.
Fernando, Joseph M. 2006. "The Position of Islam in the Constitution of Malaysia." *Journal of Southeast Asian Studies* 37: 249–66.
Goldsworthy, Jeffrey. 2006. "Australia: Devotion to Legalism." In *Interpreting Constitutions: A Comparative Study*, edited by Jeffrey Goldsworthy. New York, NY: Oxford University Press.
Greene, Jamal. 2011. "The Anticanon." *Harvard Law Review* 125: 379–475.
Greene, Jamal. 2012. "The Case for Original Intent." *George Washington Law Review* 80: 1683–706.

Greene, Jamal. 2016. "Rule Originalism." *Columbia Law Review* 116: 1639–704.
Ip, Eric C. 2016. "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty." *Washington International Law Journal* 25: 565–96.
Katyal, Sonia K. 2010. "The Dissident Citizen." *UCLA Law Review* 57: 1415–76.
Kirby, Hon. Justice Michael. 2000. "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" *Melbourne University Law Review* 24: 1–14.
Klarman, Michael J. 1995. "*Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell." *Virginia Law Review* 81: 1881–936.
Knapp, Steven and Walter Benn Michaels. 1992. "Intention, Identity and the Constitution: A Response to David Hoy." In *Legal Hermeneutics*, edited by Gregory Leyh. Berkeley, CA: University of California Press.
Kommers, Donald P. 1991. "German Constitutionalism: A Prolegomenon." *Emory Law Journal* 40: 837–74.
Kommers, Donald P. and Russell A. Miller. 2012. *Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, NC: Duke University Press.
Law, David S. 2015. "Judicial Comparativism and Judicial Diplomacy." *University of Pennsylvania Law Review* 163: 927–1036.
McHugh, Michael. 2008. "The Constitutional Jurisprudence of the High Court: 1989–2004." *Sydney Law Review* 30: 5–26.
Miller, Bradley W. 2009. "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada." *Canada Journal of Law and Jurisprudence* 22: 331–54.
Neo, Jaclyn Ling-Chien. 2016. "Introduction." In *Constitutional Interpretation in Singapore*. New York, NY: Routledge.
Neuborne, Burt. 2003. "The Supreme Court of India." *International Journal of Constitutional Law* 1: 476–510.
Okoth-Ogendo, H.W.O. 1993. "Constitutions Without Constitutionalism: Reflections on an African Political Paradox." In *Constitutionalism and Democracy: Transitions in the Contemporary World*, edited by Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley. Oxford: Oxford University Press.
Rosenfeld, Michel. 2004. "Constitutional Adjudication in the United States and Europe: Paradoxes and Contrasts." *International Journal of Constitutional Law* 2: 633–68.
Rubenfeld, Jed. 2005. *Revolution by Judiciary*. Cambridge, MA: Harvard University Press.
Sachs, Stephen E. 2012. "Constitutional Backdrops." *George Washington Law Review* 80: 1813–88.
Sachs, Stephen E. 2015. "Originalism as a Theory of Legal Change." *Harvard Journal of Law and Public Policy* 38: 817–88.
Scalia, Antonin. 1989. "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57: 849–66.
Scalia, Antonin. 1997. *A Matter of Interpretation*. Princeton, NJ: Princeton University Press.
Scheppele, Kim Lane. 2003. "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Cultural Influence Through Negative Models." *International Journal of Constitutional Law* 1: 296–324.
Scheppele, Kim Lane. 2013. "Jack Balkin Is an American." *Yale Journal of Law and Humanities* 25: 23–42.
Selway, Brad. 2003. "Methodologies of Constitutional Interpretation in the High Court of Australia." *Public Law Review* 14: 234–50.
Sengupta, Arghya. 2011. "Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Inquiry." *Indian Journal of Constitutional Law* 5: 99–126.
Strauss, David A. 2010. *The Living Constitution*. Oxford: Oxford University Press.
Tew, Yvonne. 2014. "Originalism at Home and Abroad." *Columbia Journal of Transnational Law* 52: 780–895.
Thio, Li-Ann. 2012. *A Treatise on Singapore Law*. Singapore: Academy Publishing.
Thio, Li-Ann and Jaclyn Ling-Chien Neo. 2006. "Religious Dress in Schools: The Serban Controversy in Malaysia." *International and Comparative Law Quarterly* 55: 671–88.
Varol, Ozan O. 2011. "The Origins and Limits of Originalism: A Comparative Study." *Vanderbilt Journal of Transnational Law* 44: 1239–98.
Weis, Lael K. 2013. "What Comparativism Tells Us About Originalism." *International Journal of Constitutional Law* 11: 842–69.
Yap, Po Jen. 2016. "Uncovering Originalism and Textualism in Singapore." In *Constitutional Interpretation in Singapore*, edited by Jaclyn Ling-Chien Neo. New York, NY: Routledge.

Young, Simon. 2007. "Legislative History, Original Intent, and the Interpretation of Basic Law." In *Interpreting Hong Kong's Basic Law: The Struggle for Coherence*, edited by Hualing Fu, Lison Harris, and Simon N. M. Young. New York, NY: Palgrave Macmillan.

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