

3-15-2021

No Amendment? No Problem: Judges, “Informal Amendment,” and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States

John V. Orth

John Gava

Arvind P. Bhanu

Paul T. Babie

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [Judges Commons](#)

Recommended Citation

John V. Orth, John Gava, Arvind P. Bhanu, and Paul T. Babie *No Amendment? No Problem: Judges, “Informal Amendment,” and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States*, 48 Pepp. L. Rev. 341 (2021)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol48/iss2/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

No Amendment? No Problem: Judges, “Informal Amendment,” and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States

John V. Orth,* John Gava,** Arvind P. Bhanu*** & Paul T. Babie****

Abstract

This article considers the way in which judges play a significant role in developing the meaning of a constitution through the exercise of interpretive choices that have the effect of “informally amending” the text. We demonstrate this by examining four written federal democratic constitutions: those of the United States, the first written federal democratic constitution; India, the federal constitution of the largest democracy on earth; and the constitutions of Canada and Australia, both federal and democratic, but emerging from the English unwritten tradition. We divide our consideration of these constitutions into two ideal types, identified by Bruce Ackerman: the “revolutionary” constitutions of the United States and India, and the “adaptive establishmentarian” constitutions of Canada and Australia. In this way, we show that judicial informal amendment changes constitutional meaning in both revolutionary and adaptive settings. We conclude that whatever the origins of a federal democratic constitution, be it revolutionary

* John V. Orth is William Rand Kenan Jr. Professor of Law, University of North Carolina School of Law, University of North Carolina Chapel Hill, United States.

** John Gava is Adjunct Associate Professor of Law, Adelaide Law School, The University of Adelaide, Australia.

*** Arvind P. Bhanu is Professor of Law and Acting Director, Amity Law School, Delhi, India.

**** Paul T. Babie is ALS Professor of Property Law, Adelaide Law School, The University of Adelaide, Australia.

or adaptive establishmentarian, and whatever the background of the judges and the text with which they work, in the absence of formal amendment, judges use an image of the constitution to give and to change the meaning of a written text over time. This allows a constitution to adapt to changing social, economic, and political conditions where formal amendment, for whatever reason, proves difficult. But, in some cases, it might also leave a federal democracy with a constitution which the Framers did not intend. Whatever the outcome, though, the judges play a central role in the evolution of constitutional meaning over time, for good or for ill.

TABLE OF CONTENTS

I.	INTRODUCTION	344
II.	REVOLUTIONARY CONSTITUTIONS	360
	A. <i>United States: Inventing the Type</i>	361
	1. A Revolutionary Moment	362
	2. United States Supreme Court: Finding Rights	365
	B. <i>India: The Basic Structure of Rights</i>	372
	1. Machinery of Government	372
	2. Supreme Court of India: Pouring Content into Empty Vessels	378
III.	ADAPTIVE ESTABLISHMENTARIAN CONSTITUTIONS.....	384
	A. <i>Canada: Strong Central Government?</i>	385
	1. Confederation.....	387
	2. Judicial Committee of the Privy Council and the Supreme Court of Canada: Coordinate Federalism.....	392
	B. <i>Australia: States Triumphant?</i>	401
	1. Federation	402
	2. High Court of Australia: Consolidation of Federal Power	405
	a. <i>Was Centralization Inevitable?</i>	410
	b. <i>An Imperial, Centralized High Court</i>	415
IV.	CONCLUSION.....	420

“On all great subjects,” says Mr. Mill, “much remains to be said,” and of none is this more true than of the English Constitution. The literature which has accumulated upon it is huge. But an observer who looks at the living reality will wonder at the contrast to the paper description. He will see in the life much which is not in the books; and he will not find in the rough practice many refinements of the literary theory.¹

I. INTRODUCTION

While a constitution seeks to provide the terms by which government operates and the ways in which it might be limited in doing so, it typically uses open-ended language to achieve this objective, or fails altogether to provide guidance on some aspects of that operation. This paradox means that, in many cases, the meaning of a constitution and its provisions becomes the subject of choice about a diverse range of topics associated with governance and the protection of rights.² Who makes these choices?³ Every actor in a constitutional system bears responsibility for interpreting what a constitution means. That usually begins with those people holding offices pursuant to the constitution, but it can also involve policy makers and, indeed, even, perhaps especially, citizens (sometimes thought to be the source of the sovereignty from which a constitution and its institutions of government emerge,⁴ but

1. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 42 (2d ed. 1873).

2. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 22 (1985).

3. See David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *HARV. L. REV.* 1, 3 (2015) (presenting the anomalies in constitutional law that turn on who makes the call on interpretation).

4. See, e.g., N.C. CONST. art. I, § 2 (“All political power is vested in and derived from the people; all government of right originates from the people.”); U.S. CONST. pmbl. (“We the People . . . do ordain and establish this Constitution . . .”). This source of sovereignty is true, perhaps, of the American Constitutions (national and state) and of others like it, such as the Indian Constitution. The same theme is also apparent in the Canadian Constitution. See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 8 (3d ed. 2004) (“If you look behind the actual events that produced the American Constitution, it soon becomes evident there was plenty of fiction in the notion of [] ‘the people as a constituent power.’ The conventions that drafted and ratified these state and national constitutions excluded large elements of the population. Indeed, the American people as a constituent body capable of intentional agency had to be invented by the American founding fathers. But the point is that the invention worked. It produced a coherent and popular foundation myth, a myth that gained credibility after a civil war and the democratic evolution of the country.”). See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE:*

more typically, those upon whom a constitution is imposed from above).⁵ Constitutions, therefore, become what those actors choose them to be, through their understanding of what it means to them in a given set of circumstances, in a certain place, at a certain time.⁶ And a process of choice emerges to fill gaps in meaning, not only drawing upon a written text, if one exists, but also adding to it as choices accumulate.⁷ In this way, rather than a static document, a constitution becomes a living, dynamic framework or charter of government power and the limitations placed upon excesses in its exercise.⁸ This process may be invisible on the surface of a constitutional system, but it is always there, happening continuously.⁹

Each class of actors within a system, and indeed, each actor within each

THE CIVIL RIGHTS REVOLUTION (2014); BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 3–4 (2019) [hereinafter ACKERMAN, REVOLUTIONARY CONSTITUTIONS] (stressing the legal arbitrariness produced by the variance between low-level juries and bureaucrats to the elites at the top of the government); CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 117–18, 121–22 (2008) (explaining the revolutionary tensions between the Constitution and among different people before the United States Civil War); GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 3–12 (1971) (comparing definitions and criticisms of the interpretation of constitutional law in the English context).

5. See ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4. As with the American constitutions, there is a good deal of myth surrounding “top down” or “elite” constitutions, such as the English. See RUSSELL, *supra* note 4, at 7–8 (“In the course of history, highly elitist regimes have invoked the doctrine of popular sovereignty to justify their rule. This was surely the case in seventeenth-century England, when the parliamentary party justified resistance to Charles I by pitting popular sovereignty against the divine right of kings. The followers of Cromwell were too religiously devout to deny the sovereignty of God but they contended that God authorizes government through the people and thus sets the people above their governors. Popular sovereignty in this context, far from being the rallying cry of the great body of the English people, was a rhetorical device used by one section of the English ruling class to win popular support in its struggle against the royalists. It was, as Edmund S. Morgan has so neatly put it, ‘a question of some of the few enlisting the many against the rest of the few.’”) (quoting EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 169 (1988)). In Australia, “[t]he idea of the constitution[,] as a social covenant drawn up and ratified by the people is evident” because “[a]lthough [it] . . . was formally enacted by the British Parliament, it was first ratified by the Australian people through a referendum. In Australia there was never any doubt that the legitimacy of the Constitution depended on popular consent.” RUSSELL, *supra* note 4, at 9. See MARSHALL, *supra* note 4, at 58–59; ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 4–5, 54.

6. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–14, 401 (2d ed. 1972) (explaining the sets of incentives and disincentives that figure into decision-making by players in the law).

7. See *id.* at 492 (“Other constitutional rights, however, seem better explained simply as particularly durable forms of interest-group protection.”).

8. See *id.* (explaining the interplay of judicial activism and separation of powers).

9. LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 8–10 (2008).

class, holds a view that guides the way in which to choose the meaning of the constitution.¹⁰ We can call this view or understanding an “image of a constitution” held by each actor called upon to choose its meaning. William E. Conklin writes that a constitutional image “is a product of the legal community’s imagination. A constitution does not live except through the consciousness of a legal community. However separated from social/cultural practice, a shared consciousness makes persons feel as if they belong to a community.”¹¹ An image of a constitution “takes on a life of its own.”¹² Any given society may exhibit more than one such image; indeed, there may be many, depending on the actors, the time, the place, and so forth. These images become part of the “social imaginary” of a people—those governed by a particular constitution—“the ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations”; it “is that common understanding which makes possible common practices, and a widely shared sense of legitimacy.”¹³ The image of a constitution, itself part of the social imaginary, is the background knowledge, the common understanding used by actors to make choices about meaning.¹⁴ While “much of the world’s constitution-making has reflected the competing claims of the English concentration of powers and the American separation of powers,”¹⁵ it is nonetheless true that any one image of a constitution which may begin at one of these two poles, far from being fixed, is in fact the result of an entirely contingent set of background assumptions and norms, capable of shifting and changing over time and circumstance.¹⁶

Some constitutions, like that found in the United Kingdom, and to which

10. See *Posner*, *supra* note 6, at 495 (arguing that the constitution is designed to protect groups “sufficiently powerful to obtain constitutional protection for their interests”); see also Markus Böckenförde, Nora Hedling, & Winluck Wahiu, *A Practical Guide to Constitution Building*, INT’L IDEA 1, 49–50 (2011), <https://www.idea.int/sites/default/files/publications/a-practical-guide-to-constitution-building.pdf> (explaining how the meaning of constitutional language is informed by the actors in each system).

11. WILLIAM E. CONKLIN, *IMAGES OF A CONSTITUTION* 3 (1989).

12. *Id.*

13. CHARLES TAYLOR, *A SECULAR AGE* 171–72 (2007).

14. See *id.* at 172.

15. MARSHALL, *supra* note 4, at 1.

16. See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 333–34 (2018).

Walter Bagehot refers in the epigraph to this article, are “unwritten,” “the product of an organic development” of a “collection of laws, institutions, and political practices that have survived the test of time and are found to be useful by a people.”¹⁷ In this constitutional type, A.V. Dicey, its leading theorist, wrote that one finds “two sets of principles or maxims of a totally distinct character.”¹⁸ The first “are in the strictest sense ‘laws,’ since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common law) are enforced by the Courts.”¹⁹ The second “consist[s] of conventions, understandings, habits, or practices which . . . are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may . . . be termed . . . constitutional morality.”²⁰ As such, images of this type, the understanding of what the constitution is, and what it means, involves perhaps more choice exercised by a wider category of actors than one might find with a written text.²¹ That is what Bagehot meant in saying that there is “in the life much which is not in the books,” or, as Mill said, “much remains to be said.”²² Constitutional choices made by many actors, each with their own image of the unwritten charter, constitute the “rough practice” of the English Constitution, which is simply not evident from an understanding of the amalgam of laws, documents, and conventions which comprise it.²³

But most constitutions, at least those of liberal federal democracies, are written. These tend to follow the United States, which invented the written form, thereby “fundamentally transform[ing] the character of these instruments, expressly differentiating them from the [English] constitution . . . [so] long known and worshipped.”²⁴ According to Peter H. Russell:

The American constitutional style has been the most pervasive form of constitutionalism in the modern world. Indeed, the basic form of

17. RUSSELL, *supra* note 4, at 10.

18. A.V. DICEY, *THE LAW OF THE CONSTITUTION* 20 (J.W.F. Allison ed., 2013).

19. *Id.*

20. *Id.*

21. BAGEHOT, *supra* note 1, at 42–43.

22. *Id.* at 42.

23. See MARSHALL, *supra* note 4, at 3–12; A.V. DICEY, *COMPARATIVE CONSTITUTIONALISM* 17–18 (J.W.F. Allison ed., 2013); BAGEHOT, *supra* note 1, at 42–44.

24. GIENAPP, *supra* note 16, at 21.

the American Constitution, together with its underlying political theory, is comparable in its global influence to that of Roman law many centuries ago. It has been a particularly relevant and attractive model for societies making new, democratic beginnings after revolution, world war, or the withdrawal of empire.²⁵

And central to that style is a written text, contained in a very small number of clearly identifiable documents. Still, even reducing the number of constitutional materials to one or a very small number of formal, written texts does not mean that the constitution's meaning will necessarily be clear.²⁶ Indeed, just as in the English case, even in those jurisdictions where the constitution is "written," it still requires a good deal of constitutional choice exercised by a diversity of actors, drawing upon a diversity of images, to understand what it means.²⁷ In other words, the indeterminacy of a written text makes it necessary for others to take up a role in the process of defining what the constitution actually means, notwithstanding the existence of a seemingly "fixed" document.²⁸ What Mill said of an unwritten constitution equally describes a written one: Thus, here again, "much remains to be said."²⁹

While everyone draws upon an image of a constitution, the choices or interpretations of some actors will, of necessity, carry greater weight than others.³⁰ That, in turn, means that some *images* carry greater weight than others. The most obvious, and weightiest, use of a constitutional image in making choices about the meaning of a text, at least in the case of a written constitution, arises through the process of formal amendment.³¹ There, some

25. RUSSELL, *supra* note 4, at 9.

26. See RICHARD A. POSNER, HOW JUDGES THINK 97 (2010) ("Nothing is more common than for different people of equal competence in reasoning to form different beliefs from the same information."); Brandon J. Murrill, *Modes of Constitutional Interpretation*, CONG. RES. SERV. 1, 1–2 (Mar. 15, 2018), <https://fas.org/sgp/crs/misc/R45129.pdf> (explaining that the text of the U.S. Constitution itself is not always straightforward and requires interpretation, which comes in different methods).

27. See POSNER, *supra* note 26, at 98 (naming intuition, emotion, and preconception as some factors that influence judicial candor).

28. See generally GIENAPP, *supra* note 16, at 333–34; LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019); Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1 (2016–2017).

29. See generally BAGEHOT, *supra* note 1, at 42.

30. See POSNER, *supra* note 6, at 495 (describing the economics of groups wielding political power to seek constitutional protection for their interests).

31. See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 315 (2006) (noting that

larger group of actors, motivated by an agreed or shared image of a constitution, takes steps to implement the shared understanding in the form of an alteration to the written text.³² Of course, achieving that outcome sounds much easier than it is. Amendment is difficult and can take a very long time to achieve. The first version of the Equal Rights Amendment (ERA) to the United States Constitution (to ensure gender equality), for instance, traces its origins to 1923, and was only approved by the House and Senate and submitted to state legislatures for ratification pursuant to Article V of the U.S. Constitution between 1971 and 1972.³³ Congress set March 22, 1979, as the date for state legislatures to consider the ERA; by 1977, thirty-five of the necessary thirty-eight states had ratified.³⁴ But then it stalled, with the validity of attempts to extend the deadline called into question, and with five states voting to rescind ratification.³⁵ In January 2020, Virginia purported to ratify the amendment, long after the deadline for doing so had passed.³⁶ And so the ERA remains stalled.

Similarly, the 27th Amendment to the U.S. Constitution, which provides that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened,” has an equally curious history.³⁷ Indeed, there remains controversy as to its validity.³⁸ Congress submitted the proposed amendment to the states on September 25, 1789, along with eleven other proposals, ten of which became the Bill of Rights.³⁹ It was seemingly forgotten until a University of Texas undergraduate wrote a 1982 paper for a political science course in which it was claimed that the amendment could still be ratified.⁴⁰

the first ten amendments to the United States Constitution secured a broad range of vital liberties).

32. *See id.* (explaining that the Bill of Rights brought wide-ranging ramifications to large groups of citizens but specifically excluded others, particularly slaves).

33. *See ERA History*, ERA, <https://www.equalrightsamendment.org/history> (last visited Oct. 14, 2020).

34. *See Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited Oct. 14, 2020).

35. *See generally* JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT (2020).

36. *See* Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html>.

37. U.S. CONST. amend. XXVII.

38. *See* Evan Andrews, *The Strange Saga of the 27th Amendment*, HIST. (May 5, 2017), <https://www.history.com/news/the-strange-case-of-the-27th-amendment>.

39. *See id.*

40. *See id.*

That prompted a nationwide campaign resulting in the completion of the ratification process on May 5, 1992, 202 years and 223 days after submission to the states!⁴¹ The words of a former Australian Prime Minister, Sir Robert Menzies, perhaps best summarize the reality of amendment as a ready means of change in most written constitutional systems: “The truth of the matter is that to get an affirmative vote . . . on a[n amendment] proposal is one of the labours of Hercules.”⁴²

Thus, while constitutions may come into existence or be amended rapidly, both processes more often tend to take time, usually a great deal of it, with the result that what a constitution means is a matter of choices made by various classes of actors over a long period of time, often in response to shifting and changing constitutional images.⁴³ Peter H. Russell writes that:

The great conceit of constitution-makers is to believe that the words they put in the constitution can with certainty and precision control a country’s future. The great conceit of those who apply a written constitution is to believe that their interpretation captures perfectly the founders’ intentions. Those who write constitutions are rarely single-minded in their long-term aspirations. They harbour conflicting hopes and fears about the constitution’s evolution. The language of the constitution is inescapably general and latent with ambiguous possibilities. Written constitutions can establish the broad grooves in which a nation-state develops. But what happens within those grooves—the constitutional tilt favoured by history—is determined not by the constitutional text but by the political forces and events that shape the country’s subsequent history.⁴⁴

The “broad grooves” of a written constitution are established by the choices made as part of creation moments or formal amendment.⁴⁵ The

41. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 536–38 (1992); see also Matt Largey, *The Bad Grade That Changed the U.S. Constitution*, NPR (May 5, 2017), <https://www.npr.org/2017/05/05/526900818/the-bad-grade-that-changed-the-u-s-constitution>; Bill McAllister, *Across Two Centuries, a Founder Updates the Constitution*, WASH. POST (May 14, 1992), <https://www.washingtonpost.com/wp-srv/politics/special/pay/stories/co051492.htm>.

42. L. F. CRISP, *AUSTRALIAN NATIONAL GOVERNMENT* 40 (5th ed. 1983).

43. See Russell, *supra* note 4, at 7–11.

44. *Id.* at 34.

45. See Brady Harman, *Maintaining the Balance of Power: A Typology of Primacy Clauses in Federal Systems*, 22 *IND. J. GLOBAL LEGAL STUD.* 703, 711 (2015) (explaining that “broad grooves”

political forces that occur within those grooves are the product of choices made outside of creation or formal amendment.⁴⁶ And those choices are of an entirely different character, involving different actors or groups of them.⁴⁷

Unlike creation or amendment, then, a solitary citizen who chooses a particular course of conduct based upon a personal interpretation of the constitution may not always, or even often, be free to believe that that choice will be recognized, honored, or enforced by others. This may be true even of the choices made in unison by a sizable group of citizens. But there are other groups, and members of some other groups, who will be free to believe that their choices, their interpretations, their images will be given greater weight, will be recognized, honored, and enforced as binding not merely on the actor or actors who so chose, but on others, too.⁴⁸ Thus, a legislator or a member of executive government may legislate or develop policy, respectively, and the products of those processes will be enforceable against others, either as law or as government policy, or both.⁴⁹ Those choices become, to some extent, part of what the constitution means for all members of the society governed by it.⁵⁰

One finds an example of constitutional choices of legislators or members of the executive changing constitutional meaning in the institution of the Cabinet as part of Australia's executive government.⁵¹ Although neither the Prime Minister nor the Cabinet is mentioned in the Australian Constitution, the exercise of executive power over the course of Australian history has always been assumed to replicate that of the United Kingdom, where the head of the political party that can command a majority of the House of Commons becomes the Prime Minister.⁵² A Cabinet is, in turn, chosen from within that

are necessary because no constitution can be specific enough to provide answers for every emerging problem).

46. *See id.*

47. *See id.* at 714.

48. *See* Gabrielle Appleby & Adam Webster, *Parliament's Role in Constitutional Interpretation*, 37 MELB. U. L. REV. 255, 263–69 (2013) (describing how government actors are afforded the presumption that they individually speak for the people as to what the constitution means).

49. *See id.* at 276–77 (discussing that while legislators are legislating, it is necessary to internalize the constitutional rules to guide them in developing law and policy).

50. *See id.* at 258–60 (describing words in a constitution as “imperfect messengers” that legislators, both in the United States and Australia, take an oath to uphold).

51. *See id.* at 265 (explaining that the Australian Parliament exercises its legislative power, to which the executive and judiciary then give deference where non-justiciable constitutional questions are involved).

52. *See Prime Minister*, PARLIAMENTARY EDUC. OFFICE, <https://peo.gov.au/understand-our->

party or coalition of parties from within Parliament, which assumes command over the various ministries through which the executive rules.⁵³ As Bagehot noted, the “efficient secret” of the operation of the unwritten English Constitution was “the nearly complete fusion[] of the executive and legislative powers.”⁵⁴ Historically, both English and Australian practice followed the principle of Cabinet solidarity, where once a decision has been made by the Prime Minister and Cabinet, none of the members of the Cabinet questions that decision, whatever their views of the decision during Cabinet discussion.⁵⁵ More recently, at least in the United Kingdom during “Brexit”—the 2020 exit of the United Kingdom from the European Union—the principle began to fragment, with some members of Theresa May’s Cabinet taking opposing positions.⁵⁶ But whatever principle of Cabinet solidarity is followed in Australia, none of it is found in the Australian Constitution.⁵⁷ Instead, it is the product of legislative and executive constitutional choices, made over time, drawing upon an image, the result of which is that the text has come to mean something new.⁵⁸

Still, other groups of actors, whether the constitution is written or not, will have the final say, or the close-to-final say, in which choices, which images

parliament/parliament-and-its-people/people-in-parliament/prime-minister/ (last visited October 14, 2020) (explaining how a prime minister is chosen and that the Australian Constitution does not mention the role of prime minister). Similarly, the institution of the Cabinet appears nowhere in the United States Constitution, although it was “invented” by George Washington as part of the executive branch, drawing on English experience, albeit absent the fusion of executive and legislative government. See LINDSAY M. CHERVINSKY, *THE CABINET: GEORGE WASHINGTON AND THE CREATION OF AN AMERICAN INSTITUTION* 4–7 (2020). The American institution of the federal Cabinet at times assumed great historical significance. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* xvi–xviii (2005).

53. See *Parliament and Government*, UK PARLIAMENT, <https://www.parliament.uk/about/how/role/parliament-government/> (last visited Oct. 14, 2020) (discussing how the Cabinet is chosen).

54. BAGEHOT, *supra* note 1, at 48.

55. See PATRICK WELLER, *CABINET GOVERNMENT IN AUSTRALIA, 1901–2006* 78 (2007) (explaining that while freedom is accorded to ministers to speak their minds in party meetings, Cabinet solidarity is emphasized once a decision has been reached).

56. See Robert Brett Taylor, *Brexit and Collective Cabinet Responsibility: Why the Convention Is Still Working*, LSE (May 20, 2019), <https://blogs.lse.ac.uk/brexit/2019/05/20/brexit-and-collective-responsibility-why-the-convention-is-still-working/> (describing how some ministers’ public criticisms of Brexit have led Cabinet members to publicly criticize other Cabinet decisions).

57. See *Cabinet*, PARLIAMENTARY EDUC. OFFICE, <https://peo.gov.au/understand-our-parliament/parliament-and-its-people/government/cabinet/> (last visited October 14, 2020) (“Although it is an important part of Australia’s system of government, Cabinet is not mentioned in the Australian Constitution.”).

58. See *id.*

of a constitution will be final, binding upon all, subject to no appeal to a higher authority.⁵⁹ In those instances, short of formal amendment of the constitution, what those actors choose effectively *becomes* not only the authoritative image, the social imaginary, of the constitution, but also, and more importantly, the constitution itself.⁶⁰ The group of actors in any constitutional system that enjoys this deific power, of course, consists of judges⁶¹—those typically charged in some formal way by virtue of the text of the constitution with deciding what the constitution means. Still, we must remember that “Justices of the Supreme Court are quintessentially human”; they wield an awesome power, but they remain at the same time another group of human actors faced with choices about what the constitution means.⁶² While it remains a choice to be made, this power operates under many banners, most notably interpretation, construction,⁶³ or judicial constitutionalism.⁶⁴ Some distinguish interpretation from construction.⁶⁵ For those who draw the distinction, the former describes those instances in which judges face “constitutional language [that] is relevantly vague, ambiguous, or otherwise indeterminate,” thus requiring a “search for meaning” through the “exercise [of] partly independent normative judgment about how best to render determinate what the language left uncertain.”⁶⁶ Some scholars, advocating “originalism”—adherence to the “original . . . meaning of constitutional language”⁶⁷—use “construction to refer to the judicial function of resolving ambiguities and giving content to vague constitutional commands.”⁶⁸ For present purposes, though, no matter how much the judges themselves strenuously deny it,⁶⁹ or claim to be maintaining a fidelity to the meaning of

59. See POSNER, *supra* note 26, at 82 (“When deciding constitutional cases Supreme Court Justices are like legislators in a system in which there is no judicial power to invalidate statutes, and legislators once elected cannot be removed.”).

60. *Id.*

61. See THOMAS J. MCSWEENEY, *PRIESTS OF THE LAW: ROMAN LAW AND THE MAKING OF THE COMMON LAW’S FIRST PROFESSIONALS* 1, 27 (2020) (expounding on the general judicial role and its great antiquity).

62. LESSIG, *supra* note 28, at 4.

63. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 42–44, 67, 78, 134–35, 139 (2018).

64. See MARSHALL, *supra* note 4, at 73–96.

65. See FALLON, *supra* note 63, at 43, 139.

66. *Id.* at 43.

67. *Id.* at 134.

68. *Id.* at 43.

69. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1998).

the constitution and to their role in construing or interpreting it,⁷⁰ whether they call it construction, interpretation, or anything else, what judges do is choose, and their choices are the functional equivalent of amendment. What really matters is simply this: “[S]uch cases [of ambiguity] inevitably arise and . . . it is [the] task of [judges] to resolve them authoritatively.”⁷¹ In short, what in this article we call judicial choice is “informal amendment.”

A recent example of judicial choice in respect of the English Constitution came during the complex political machinations leading to Brexit.⁷² During the Parliamentary battle over the exit plan, the Conservative government, led by Boris Johnson, advised the Queen to prorogue, or suspend, the sitting of Parliament, which advice she relied and acted upon.⁷³ This was widely viewed as a political maneuver designed to prevent opportunity for Parliamentary debate over the proposed plan.⁷⁴ Unsurprisingly, this was challenged in the courts, with the dispute ultimately reaching the United Kingdom Supreme Court, which held the Queen’s prorogation to have been made in reliance on improper advice from the government, a finding which rendered the suspension invalid.⁷⁵ The Supreme Court wrote that while “the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it.”⁷⁶ The Conservative government was so incensed with this judicial intrusion into “political” matters that it has since made clear its intention to rein in the Supreme Court through the use of formal constitutional amendment of its powers.⁷⁷ This is an intriguing example of the clash of competing images of a constitution held by two groups of actors—the legislators and executive on

70. LESSIG, *supra* note 28, at 16–17.

71. FALLON, *supra* note 63, at 43.

72. *Judging the Judges: Why Pruning the British Judiciary’s Powers Will Prove Tricky*, ECONOMIST (February 20, 2020), <https://www.economist.com/britain/2020/02/20/why-pruning-the-british-judiciarys-powers-will-prove-tricky>.

73. See Stephen Castle, *Boris Johnson’s ‘Explosive’ Move to Get His Way on Brexit: Suspend Parliament*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/28/world/europe/boris-johnson-brexite-parliament.html>.

74. See *Parliament Suspension: Queen Approves PM’s Plan*, BBC NEWS (Aug. 28, 2019), <https://www.bbc.com/news/uk-politics-49493632>.

75. *R (on the application of Miller) v. The Prime Minister; Cherry and others v. Advocate General for Scot. (Scot.)*, [2019] UKSC 41, 1, 24.

76. *Id.* at 12.

77. *Judging the Judges*, *supra* note 72.

the one hand, and the judges on the other, in which the informal amendment of the latter may provoke a formal amendment initiated by the former.

In the case of a written constitution, judicial choice takes on ever greater importance. Why? Because, as Charles Evans Hughes famously said, “We are under a Constitution, but the Constitution is what the judges say it is”;⁷⁸ or, as Oliver Wendell Holmes put it: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁷⁹ There seems little doubt that judges do indeed, using an image, have the power to choose the meaning of a constitution, and by so choosing, bind the rest of us.⁸⁰ The only real dispute may be how judges can “justify, legally and morally, their claims to obedience.”⁸¹ Much has been said about this.⁸² Our objective in this article is not to address that issue. Instead, we seek to demonstrate that the reality of judicial choice, its impact on constitutional meaning, and the bindingness of that meaning on the entire polity, is common to any federal democratic constitutional system. Whatever judges might think or say they are doing, they are in fact informally amending the constitution, changing its meaning over time, often in opposition to what other groups, and sometimes even very large groups, of more than one class of actors might otherwise want.⁸³ We are not concerned here with any of the other choices—creation moments, formal amendment, or the interpretations of individuals, legislators, or the executive—we are concerned with the choices made by judges, and specifically, how those choices not only can, but do, change meaning.

The balance of this article is divided into two main parts. Parts II and III consider four written federal democratic constitutions: those of the United States, the first written federal democratic constitution; India, the federal constitution of the largest democracy on earth; and the constitutions of Canada and Australia, both federal and democratic, but emerging from the English

78. Charles Evans Hughes, *Speech Before the Elmira Chamber of Commerce*, in CHARLES EVANS HUGHES, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–1908 139 (1908).

79. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

80. See FALLON, *supra* note 63, at 45.

81. *Id.* at 44–45.

82. *Id.* For a brief snapshot of recent U.S. scholarship, see FALLON, *supra* note 63, at 45; GIENAPP, *supra* note 16, at 333–34; RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT (2020); LESSIG, *supra* note 28; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

83. See generally ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020).

unwritten tradition. There may be limits to a comparative assessment of these four constitutions. Compared to the United States, Canada, and India, for instance, Australia is a mainly homogenous country with largely artificial boundaries between the states. The United States had an experience with slavery, Jim Crow, and desegregation that was strongly regional and put demands on the United States Supreme Court that have no counterpart in the final appellate courts in the other three jurisdictions. Canada has a history of English and French colonization that has marked its politics and Constitution from its inception.⁸⁴ India is such a vast country with numerous and deeply complicated differences in culture, religion, and language, which means that the constitutional issues facing that country are non-translatable to the other jurisdictions.⁸⁵ All of that is true if one seeks lessons from any one jurisdiction for any one of the others. That is not our goal. Rather, we are concerned with the way in which the judges in each jurisdiction have played a significant role in changing the meaning of the constitutional text over time, and in circumstances unsupported by formal amendment. Judges in each jurisdiction clearly make choices that have the effect of informally amending, and so changing, the meaning of each of these constitutions.⁸⁶ In that sense, each of the jurisdictions we examine reveal strong similarities in the nature and exercise of the judicial role, which involves choices made on the basis of constitutional images.

We divide our consideration of these constitutions into two ideal types, both identified by Bruce Ackerman.⁸⁷ The first, “revolutionary,” is characterized by a “movement [that] makes a sustained effort to mobilize the

84. See generally Filippo Sabetti, *The Historical Context of Constitutional Change in Canada*, 45 LAW & CONTEMP. PROBS. 11 (1982) (explaining the history and background of Canada’s Constitution).

85. See *infra* Section II.B.1 (discussing the basic structure of rights in India’s Constitution).

86. For further reading on the United States, see generally FALLON, *supra* note 63; GIENAPP, *supra* note 16; LAZARUS, *supra* note 82; LESSIG, *supra* note 28; SUTTON, *supra* note 82; Kay, *supra* note 28. For further reading on India, see generally ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4; PARTHA CHATTERJEE, I AM THE PEOPLE: REFLECTIONS ON POPULAR SOVEREIGNTY TODAY (2019); MADHAV KHOSLA, INDIA’S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY (2020). For further reading on Canada, see generally CONKLIN, *supra* note 11. For further reading on Australia, see generally JAMES STELLIOS, ZINES’S THE HIGH COURT AND THE CONSTITUTION (6th ed. 2015).

87. Bruce Ackerman, *Three Paths to Constitutionalism—and the Crisis of the European Union*, 45 BRIT. J. POL. SCI. 705, 705 (2015) [hereinafter *Three Paths*] (canvassing all three types). Ackerman develops the first type in ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4. Two additional volumes are planned for the second and third ideal types.

masses against the existing regime. In most cases, this leads to bloody repression and the reinforcement of the status quo [Ultimately], revolutionary insurgents manage to sustain a struggle against the old order for years or decades before finally gaining political ascendancy.”⁸⁸ Ackerman also calls this the “Revolutionary Outsider scenario,” where “the establishment is overwhelmed by a revolutionary constitutional order.”⁸⁹ In Part II, then, we consider the revolutionary constitutions of the United States and of India.

The second ideal type, “adaptive establishmentarianism,” involves a political order . . . built by pragmatic insiders, not revolutionary outsiders. When confronting popular movements for fundamental change, the insider establishment responds with strategic concessions that split the outsiders into moderate and radical camps. Insiders then invite moderate outsiders to desert their radical brethren and join the political establishment in governing the country. This co-optation strategy culminates in landmark reform legislation that allows the “sensible” outsiders to join the establishment—and thereby reinvigorates the establishment’s claims to legitimate authority.⁹⁰

Ackerman also calls this type the “Responsible Insider scenario,” in which “the political establishment makes strategic concessions that undermine outsider momentum.”⁹¹ In Part III we examine two such constitutions, those of Canada and of Australia. We categorize the constitutions considered according to these two ideal types to make a simple but important point: The method by which a constitution comes into existence makes no difference to the role played by judges in exercising meaning-changing choice according to a particular image. Put another way, each of the constitutions we consider here, revolutionary and adaptive establishmentarian, reveal judicial activity that has taken the constitution well beyond its origins, whatever those might be.

Similarly, judicial choice which changes constitutional meaning touches

88. ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4.

89. *Id.* at 5–6.

90. *Id.* at 4. Ackerman defines a third ideal type, “elite,” which we do not consider here. *See id.* at 5–7.

91. *Id.* at 6–7.

every aspect of a constitutional text, either revolutionary or adaptive.⁹² Thus, judicial activity has changed meaning with respect to the machinery of government itself—in the case of each constitution we consider here, that means the operation of the separation of powers and of federalism—and of the ways in which government is limited in carrying out its functions, which achieves its purpose primarily through the promulgation and enforcement of individual rights and freedoms.⁹³ For that reason, rather than provide an exhaustive account of how judges have wrought these changes in meaning concerning every aspect of government and its limitations, we have identified one such change with respect to each jurisdiction, identifying a dominant image used by judges to do so.

Thus, in considering the United States and Indian constitutions, we examine the way in which judges have changed the meaning and application of fundamental individual rights and freedoms. As it concerns the United States specifically, that has been the result of using the power of judicial review to define the interaction of the federal and state constitutions in relation to rights protections. With India, this has been achieved through the use of provisions found in the Constitution which are expressly non-justiciable, but which the judiciary has used to redefine the meaning of justiciable rights and freedoms. And in the case of Canada and Australia, we demonstrate the way in which judges have altered the balance of federal power between the national and regional governments. In Canada, this has meant a diminution of federal power to the benefit of regional (provincial) governments; in Australia, the pendulum has swung the other way, from the regional, or state governments, towards the national government. In this way, in every case, we demonstrate how judges play a powerful role in changing constitutional meaning over time, and in respect of all aspects of governance established by the written text.

It is important to note, though, that this article represents a very specific form of comparative constitutionalism. Notwithstanding a judicial attitude that ranges between hesitance and outright hostility,⁹⁴ comparative

92. See TRIBE, *supra* note 2, at 21–28.

93. *Id.*

94. See, e.g., Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005); David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249 (2007); Noam Kolt, *Cosmopolitan Originalism: Revisiting the Role of International Law in Constitutional Interpretation*, 41 MELB. U. L. REV. 182 (2017); Jo Eric

constitutionalism represents an increasingly important scholarly endeavor⁹⁵ and approach to the teaching of public law generally.⁹⁶ Our aim here, though, is not so much to suggest any deep comparative value in looking at the substantive interpretations of specific provisions of a constitution for other jurisdictions, but instead to suggest that judges' choices about meaning influence the meaning of a constitution's text. And judges in every jurisdiction make choices about the meaning of their text, which has the practical effect of amending the constitution they are charged with interpreting and enforcing. We certainly do not attempt a summary of the totality of constitutionalism generally in each of the jurisdictions we consider. Our focus is a narrower concern with the role judges play in the informal amendment of the constitution through the use of an image to make a choice about meaning. So, while we understand there is much more that could be said about each of the four constitutions we consider, and much more that could be compared amongst them, we confine our study to the issue of judicial informal amendment. That is our modest comparative focus.

That limitation stated, in our conclusion we nonetheless offer some reflections on lessons learned from an exploration of the judicial role in evolving constitutional meaning in the four federal democracies considered. In each jurisdiction, a specific image of a constitution has motivated the work of the judges in choosing the meaning of the constitution. In the United States, drawing upon Oliver Wendell Holmes, Jr., judges have seen themselves as "expounders of the federal and state constitutions." In India, the courts have applied a "basic structure" image of the Constitution so as to "pour substantive content into the empty vessels" of express rights protections. In Canada, an image of "coordinate federalism" gave Canada a federal structure never intended by the Framers, and with which it lives to this day. Finally, in Australia, the High Court, using an image which gives a "generous and expansive reading to federal authority," converted what appeared to be a text

Khushal Murkens, *Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections*, 41 VERFASSUNG UND RECHT IN ÜBERSEE/LAW AND POL. AFR., ASIA AND LATIN AM. 32 (2008).

95. See, e.g., DICEY, *supra* note 23, at 17–18; Ngoc Son Bui, *Social Movements and Constitutionalism in Japan, South Korea, and Taiwan*, 14 ASIAN J. COMP. L. S51 (2019); Margit Cohn, *Comparative Public Law Research in Israel: A Gaze Westwards*, 14 ASIAN J. COMP. L. (2019).

96. See, e.g., Gary F. Bell, *The State of Comparative Law and its Teaching in Asia—An Introduction*, 14 ASIAN J. COMP. L. (2019); Maartje de Visser & Andrew Harding, *Mainstreaming Foreign Law in the Asian Law School Curriculum*, 14 ASIAN J. COMP. L. (2019); Arif A. Jamal, *Comparing the Teaching of Comparative Law: A View from Singapore*, 14 ASIAN J. COMP. L. (2019).

which allowed the colonies, the newly minted states, to retain their pre-federal constitutional power, into a constitution favoring the federal government.

Whatever the origins of a federal democratic constitution, be it revolutionary or adaptive establishmentarian, and whatever the background of the judges and the text with which they work, in the absence of formal amendment, judges use an image of that constitution to give and to change the meaning of that text over time. This allows a constitution to adapt to changing social, economic, and political conditions where formal amendment, for whatever reason, proves difficult. But, in some cases, it might also leave a federal democracy with a constitution that the Framers did not intend. Whatever the outcome, though, the judges play a central role in the evolution of constitutional meaning over time, for good or for ill.

II. REVOLUTIONARY CONSTITUTIONS

We divide our consideration of judicial choice in federal systems into two categories, drawing upon the groundbreaking work of Bruce Ackerman into the nature of constitutional government.⁹⁷ As we noted in the Introduction, Ackerman identifies three ideal types of constitution: revolutionary, adaptive establishmentarian, and elite.⁹⁸ Here, we consider revolutionary constitutions. In these sorts of systems, revolutionaries eventually prevail against an existing regime and gain political ascendancy, with the victory being reduced to writing in the form of a constitution.⁹⁹

The revolutionary type must be distinguished from the adaptive establishmentarian, which describes a political order forged through co-optation of insurgent outsiders by an existing regime.¹⁰⁰ Those on the inside of the existing regime take the pragmatic view that concessions can be made to the “sensible” outsiders such as to quell the unrest.¹⁰¹ As with the revolutionary type, this pragmatic “compromise” is reduced to writing in the form of a constitution which affirms the establishment claim to legitimate authority.¹⁰²

97. See generally *Three Paths*, *supra* note 87, at 705 (describing the groundbreaking work of splitting constitutional analysis into three types).

98. *Id.* at 705.

99. ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4.

100. *Id.* at 4.

101. *Id.* at 5.

102. *Id.* at 3–5; see also *Three Paths*, *supra* note 87, at 708.

And both revolutionary and adaptive establishmentarian can be contrasted with Ackerman's third ideal type, "elite," such as Japan's, which occurs where "the pressure of a massive popular uprising"¹⁰³ means that an "old system of government begins to unravel, but the general population stays relatively passive on the sidelines. The emerging power vacuum is occupied by previously excluded political and social elites, who serve as a principal force in the creation of a new constitutional order."¹⁰⁴ We do not deal with elite constitutions in this article, although our claim that judicial choice is present in all constitutional polities applies, too, in such cases.

America was the first to "invent" the revolutionary ideal type, which emerged as part of and in response to its late eighteenth-century revolutionary moment, as found first in the original colonies, later in the U.S. Constitution, and finally in those states which subsequently joined the union. Many other systems followed the American revolutionary model—notable examples include South Africa, France, Italy, Poland, Israel, and Iran.¹⁰⁵ In this Part, we consider another historically significant revolutionary type, that found in India's federal system, the largest democracy on earth.¹⁰⁶

A. *United States: Inventing the Type*

Bruce Ackerman writes about "Time One," a revolutionary moment in which there is "a sustained effort to mobilize the masses against the existing regime."¹⁰⁷ It may take years or even decades before the insurgents gain the upper hand, but it is always possible to find Time One—the moment in time in which the revolution which ultimately led to victory began.¹⁰⁸ America, of course, traces its origins to just such a revolutionary moment in the War of Independence, a Time One in which the American constitutions (both state and federal) began life.¹⁰⁹

Debate, of course, continues as to whether the War of Independence was in fact revolutionary, and as to the extent to which the United States

103. ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 6–7.

104. *Id.* at 6; *see id.* at 6–7 (giving examples of the elite type).

105. *Id.* at 3.

106. *See infra* Section II.B.

107. ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4.

108. *Id.*

109. *See* Howard Zinn, *A People's History of the American Revolution*, LIBCOM.ORG (Feb 21, 2011), <https://libcom.org/history/peoples-history-american-revolution>.

Constitution represents a manifestation of that “revolutionary” impetus; indeed, the Anti-Federalists argued that the Federalists at the time of the adoption of the United States Constitution were not really revolutionary at all, but anti-revolutionary, and that it was the former who were the true “revolutionaries” while the latter became “counter-revolutionaries.”¹¹⁰ For our purposes, though, America represents both the Time One in its own constitutional story, as well as the Time One of the revolutionary ideal type of constitution. For whatever may be the nature of its own revolution, there can be little doubt that it was revolutionary at least in the limited sense that what had never existed before existed following the War of Independence: A written constitution embodying some of the demands of an insurgent group which could not, in the end, be co-opted by the English political establishment.¹¹¹ In short, from the events surrounding the War of Independence, a written constitution was invented.¹¹² That is what we mean here by a revolutionary constitution.¹¹³ And this section explores that Time One, a revolutionary moment in the course of human history when the revolutionary type was invented.

The first part of this section briefly recounts the background to the American constitutional texts—the revolutionary moment which invented the written constitutional type. The second part examines one of the dominant images used by the United States Supreme Court to give meaning to the text that surrounds the meaning of rights.

1. A Revolutionary Moment

Before judges can exercise choice with respect to meaning, there must be a constitutional text. And written constitutions were new in eighteenth-century America. While English colonists were familiar with colonial

110. See Jeffrey Rogers Hummel, *The Constitution as Counter-Revolution: A Tribute to the Anti-Federalists*, 5 J. LIBERTARIAN ALLIANCE 1 (2007); see also HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES (reissued 2005); *Luther v. Borden*, 48 U.S. 1 (1849); *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125 (1987); Zinn, *supra* note 109.

111. See ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4; Zinn, *supra* note 109.

112. See Christian G. Fritz, *Recovering the Lost Worlds of America’s Written Constitutions*, 68 ALB. L. REV. 261, 269–70 (2005) (explaining that unlike the British constitution, a product of tradition, and those tracing origins to that system, America broke the mold by crafting a written constitution through a revolution).

113. *Id.* at 270.

charters, which they sometimes referred to as their constitutions, they understood the charters as essentially blueprints of government.¹¹⁴ For their rights and liberties they looked elsewhere: to a few fundamental English statutes like the Habeas Corpus Act and to the common law more generally. But decades of conflict with Britain led to a demand for a formal guarantee of rights in addition to a mere arrangement of offices. It is indicative that soon after independence in 1776, the new state of North Carolina adopted a declaration of rights *before* it adopted a state constitution—although the latter incorporated the former by reference.¹¹⁵

During the dozen years from independence to the adoption of the U.S. Constitution, the several states pioneered modern constitutionalism. An enduring link was forged in public consciousness between civil rights and the framework of government, to the point that today most Americans look to the Constitution for the protection of their rights.¹¹⁶ Two operational questions about the new documents demanded immediate answers. First, how did a constitution relate to ordinary legislation?¹¹⁷ Was it amendable by a simple legislative majority, as with England’s unwritten constitution and Virginia’s first state constitution?¹¹⁸ Second, if the constitution was not amendable by ordinary legislation—as determined, for example, in North Carolina in 1787—how could it be amended?¹¹⁹ The answer in North Carolina: In the absence of an express amendment process, the state constitution can only be amended by a convention of the people.¹²⁰

114. See, e.g., Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217, 223 (2007) (describing how Maryland colonists viewed their charter as a blueprint for the province’s government).

115. See JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 43–93 (2d ed. 2013). Today the Declaration of Rights, largely unchanged since 1776, appears as Article I of the North Carolina Constitution. *Id.* at 45.

116. See GIENAPP, *supra* note 16, at 2 (“The Constitution’s outsized role in shaping American identity has likewise made it an object of fascination and debate. Lacking the ethnic or political foundations of other nations, the United States has been uniquely yoked to its constitutional order.”); Peter Brandon Bayer, *Deontological Originalism: Moral Truth, Liberty, and, Constitutional Due Process: Part II—Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, 43 T. MARSHALL L. REV. 165, 250–51 (2019) (remarking on the Constitution’s truly novel dual function as a governmental framework and safeguard of the people’s liberties).

117. See MARSHALL, *supra* note 3, at 3, 73–74.

118. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 125 (William Peden ed., 1954) (“[T]he ordinary legislature may alter the constitution itself.”).

119. See *Bayard v. Singleton*, 1 N.C. (1 Mart.) 5 (1787).

120. 22 THE STATE RECORDS OF NORTH CAROLINA 47–49 (Walter Clark ed., 1894); see also ORTH & NEWBY, *supra* note 115, at 13 (discussing North Carolina’s process for passing amendments).

Over the next two and a half centuries, amendments to the states' declarations (or bills) of rights have been relatively rare, usually declaring additional rights in times of perceived threats.¹²¹ It is the operating details of government that have most often needed changing. In North Carolina, the first amendment to the state's constitution concerned a minor adjustment to representation in the state's House of Commons.¹²²

Benefitting from state experience, the drafters of the U.S. Constitution in 1788 included a specific amendment process (Article V), but two points are noteworthy. First, certain provisions were embedded that were not subject to amendment, including those concerning the slave trade until 1808, apportionment of direct taxes, and (crucially) representation in the Senate.¹²³ Second, the amendment process seemed to be designed to reduce the chances of successful amendment (probably to protect sectional interests, particularly slavery) by requiring two-thirds of both houses of Congress to propose and three-fourths of the states to ratify.¹²⁴

Not unlike the colonial charters, the federal Constitution as originally drafted and adopted was primarily a framework of government, leaving the declaration of rights to the state constitutions. But by then, a national consensus had emerged that no constitution was complete without a guarantee of rights.¹²⁵ Overwhelming demand for a federal Bill of Rights led to the rapid adoption of the first ten amendments in 1791, which largely replicated the rights protected by state constitutions.¹²⁶ Held to apply only to acts of the federal government, the federal Bill of Rights still left much of the work of protecting civil rights to the states.¹²⁷

In 1803, the U.S. Supreme Court in the celebrated case of *Marbury v. Madison*¹²⁸ settled the question of the relationship between the federal

121. See Gerard N. Magiolocca, *The Bill of Rights as a Term of Art*, 92 NOTRE DAME L. REV. 231, 237–38 (2016) (showing the first states' Bills of Rights as being centrally linked to state constitutions and making abstract claims about governments that speak to the centrality of thought around inherent freedoms).

122. STATE RECORDS, *supra* note 120, at 53–54 (reprinting a state amendment from 1789).

123. U.S. CONST. art. I, §§ 2, 3, 8, 9.

124. U.S. CONST. art V.

125. See Warren E. Burger, *Pondering the Bill of Rights*, 48 BENCH & B. MINN. 26, 26 (1991) (“Popular grass roots support for express declarations of fundamental rights became evident . . . very early during the closely fought struggle for the Constitution’s ratification.”).

126. See *id.* (noting James Madison’s crafting of the Bill of Rights was patterned after Virginia’s Declaration of Rights).

127. *Barron v. Maryland*, 32 U.S. (7 Pet.) 243, 247–48 (1833).

128. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and

Constitution and ordinary legislation. The Constitution was “law,” such that it was subject to judicial construction, but it was not a “law” such that it could be amended by ordinary legislation.¹²⁹ Formal amendment was possible only by the procedure established in Article V. No formal amendments to the federal Bill of Rights have ever been adopted, and the only amendments to the text of the federal Constitution in the next seventy years concerned details, however important politically, of government operation: federal court jurisdiction (Amend. XI in 1795) and the process of presidential election (Amend. XII in 1804). No further amendments to the federal Constitution were adopted until the results of the Civil War necessitated a rebalancing of the powers of the states and the nation.

The Eleventh Amendment, the first amendment adopted after the Bill of Rights, reversed a U.S. Supreme Court ruling that held a state liable in federal court on a contract between a state and a citizen of another state.¹³⁰ Rather than alter the wording of the constitutional text, the Amendment directs federal courts to construe it differently in the future: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹³¹ Perhaps this inadvertently foreshadowed the means by which the law of the Constitution was largely to be developed over the ensuing centuries—judicial choice, or construction, subject only to occasional correction by formal amendment.¹³²

2. United States Supreme Court: Finding Rights

Before the Civil War, judicial construction of constitutions, both state and federal, was comparatively rare.¹³³ In the states, the issues concerned the

duty of the judicial department to say what the law is.”).

129. *Id.* at 178–80 (noting that “[t]he judicial power of the United States is extended to all cases arising under the [C]onstitution” and ultimately holding that “a law repugnant to the constitution is void”).

130. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793); see JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 12–20 (1987).

131. U.S. CONST. amend. XI.

132. See, e.g., *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, *vacated on re-argument*, 158 U.S. 601 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

133. See Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1266–67 (2009) (“There were sixty-two cases between 1789 and 1861 in which the U.S.

details of guarantees contained in the declarations of rights, such as trial by jury, but more often the courts were called upon to adjudge the respective powers of state officers.¹³⁴ During this period, federal judicial interpretation clarified the mechanics of national government.¹³⁵ Decisions first resolved the distribution of power among the branches of the federal government (legislative, executive, and judicial)¹³⁶ and, secondly, the distribution of power between the federal government and the states.¹³⁷

After the Civil War, judicial explication of the constitutional text steadily increased as new social conditions raised new questions.¹³⁸ Attention now shifted from the proper distribution of government power to restraints on that power.¹³⁹ It is indicative that the best-known legal treatise in the post-bellum period was Thomas Cooley's *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, which was first published in 1868 and periodically updated until the end of the century.¹⁴⁰ By far the most significant limitation concerned the legal

Supreme Court substantively evaluated the constitutionality of federal statutory provision.”); *id.* at 1270 (“[T]he Supreme Court generally refrained from evaluating the constitutionality of the national legislature during this period.”).

134. See Laurence Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 39 (Mar. 1988) (“In the states, judicial review followed, more or less, the same general course of development that it followed in the U.S. Supreme Court.”).

135. See Whittington, *supra* note 133, at 1267 (“Defining and enforcing the scope of congressional authority was a routine part of the Court’s business from early in the nineteenth century.”).

136. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803); *United States v. Burr*, 8 U.S. (4 Cranch) (C.C.D. Va. 1807) 455 (demonstrating the right of the judiciary to require production of documents). For a discussion of the contrasting approaches to judicial power in these two cases, see JOHN V. ORTH, *HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT?: AND OTHER ESSAYS ON LAW AND THE CONSTITUTION* 43–49 (2006).

137. *E.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (expanding Congress’s ability to pass laws in cases regarding creations of a bank if those laws have legitimate ends and the means are appropriate); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (affirming Congress’s power to regulate interstate commerce within the boundaries of states).

138. See Darren R. Latham, *The Historical Amenability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 238 (2005) (noting the increased amendment proposals of the era were driven by issues such as emancipation, state sovereignty, and reconstruction).

139. See, *e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1872) (evaluating the protection of the Privileges and Immunities Clause of the Fourteenth Amendment against state action).

140. See Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (3d ed. 1874); Illian Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 823–24 (2020) (noting the importance of this treatise because it was published contemporaneously with the Fourteenth Amendment and contains a uniquely substantial compilation of state constitution cases).

requirement of “due process of law.”¹⁴¹ Although the Fifth Amendment had guaranteed due process in actions by the federal government, the most contentious issues concerned the guarantee in the Fourteenth Amendment of due process against state action.

While due process was always recognized to require procedural regularity in government action, it eventually came to include substantive protections against government abuse as well.¹⁴² In an 1877 U.S. Supreme Court case, Justice Samuel Miller asked rhetorically: “[C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such?”¹⁴³ Answering his own question, Justice Miller responded: “To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.”¹⁴⁴

Beginning in the late nineteenth century, the rights protected against state abuse by federal courts were progressively increased by reading the specific guarantees of the federal Bill of Rights into the due process clause of the Fourteenth Amendment, a development commonly known as “incorporation.”¹⁴⁵ Conventionally thought to have begun with an 1897 U.S. Supreme Court decision that applied the federal prohibition of government taking of private property without just compensation to the states,¹⁴⁶ incorporation at first served to protect economic rights against government regulation.

Perhaps the most controversial decisions at this time concerned the attempted regulation of private contracts, particularly contracts of employment. In the notorious case of *Lochner v. New York* (1905), the Supreme Court declared unconstitutional a state statute limiting the hours of

141. See generally JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* (2003).

142. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 408 (2010) (concluding that “due process” encompasses both procedural and substantive process because “[b]y 1868, a recognizable form of substantive due process had been embraced by courts in at least twenty of the thirty-seven then-existing states as well as by the United States Supreme Court and the authors of the leading treatises on constitutional law”).

143. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877).

144. *Id.*

145. James W. Ely, *Due Process Clause*, HERITAGE FOUND., <https://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause> (last visited Oct. 16, 2020) (describing the idea of “incorporating” the Bill of Rights into the Due Process Clause and discussing case law surrounding this idea’s increased acceptance).

146. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234–35 (1897).

labor for bakers to sixty hours a week or ten hours a day.¹⁴⁷ Such decisions were justified as protections of “freedom of contract.”¹⁴⁸ Although the right to contract was sometimes explained as an aspect of protected liberty (“liberty of contract”) or of protected property (a proprietary right in one’s own labor), judicial protection of contract may be seen as an informal amendment, adding contract to the trinity of “life, liberty, and property” expressly named in the due process clauses of state and federal constitutions.¹⁴⁹

State courts were not behind in construing their state constitutions. In *Ives v. South Buffalo Railway Co.*, for example, New York’s highest court struck down an early workers’ compensation statute for violating due process by imposing liability for industrial accidents on employers without fault.¹⁵⁰ Although the fault-principle in tort law had not emerged until well into the nineteenth century,¹⁵¹ the court anachronistically insisted that “[w]hen our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another.”¹⁵²

Informed observers realized that the courts were, perhaps unconsciously, altering the constitution in the process of construing its terms. In Oliver Wendell Holmes’s trenchant words: “[P]eople who no longer hope to control the legislatures . . . look to the courts as expounders of the Constitutions, and . . . in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago.”¹⁵³

147. *Id.*

148. *Id.*

149. See generally John V. Orth, *Contract and the Common Law*, in THE STATE AND FREEDOM OF CONTRACT 44–65 (Harry N. Scheiber ed., 1998). Contract was not a well-developed legal concept at the time of the drafting of the U.S. Constitution. *Id.* at 44; see also JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (1790) (an early book devoted to the subject of contracts); WILLIAM WETMORE STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (2 vols. 1844) (discussing contracts from an American perspective).

150. 94 N.E. 431 (N.Y. 1911).

151. See *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 295–96 (1850) (“We think, as the result of all the authorities, the rule is correctly stated . . . that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable.”); see also G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 14–16 (1985).

152. *Ives*, 94 N.E. at 439.

153. Holmes, *supra* note 79, at 467–68; see also OLIVER WENDELL HOLMES, THE COMMON LAW 35–36 (1881) [hereinafter HOLMES, COMMON LAW] (“Every important principle which is developed by

Economic depression in the 1930s and popular support for previously untried means of economic organization made conflict with this expansive understanding of due process inevitable. A collision with the elective branches subsequently led the justices to disavow economic substantive due process. In 1936, the Supreme Court declared that it would defer to the Legislature: “[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis”¹⁵⁴ If judicial construction added the protection of contract to the due process clauses, it could also remove it.¹⁵⁵ A year later, Chief Justice Charles Evans Hughes acknowledged that, in fact, “[t]he Constitution does not speak of freedom of contract.”¹⁵⁶

But the judges soon found their way back to liberal interpretations of the text. If the old constitutionalism was concerned with economic freedom, the new constitutionalism was solicitous of noneconomic rights. Eventually, a right to privacy, like freedom of contract earlier, was discovered in the words of the Due Process Clause.¹⁵⁷ Progressively, over the late twentieth and early twenty-first centuries, the right to privacy was expanded to protect practices such as contraception,¹⁵⁸ homosexual acts,¹⁵⁹ and same-sex marriage¹⁶⁰—rights that could hardly have been imagined by those who drafted and ratified the Constitution—leading to vigorous debate about the proper approach to constitutional interpretation.

“The problem with modifying the U.S. Constitution by interpretation rather than amendment,” as Judge Jeffrey Sutton has pointed out, “is that each change increases the gap between our foundational charter and its

litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.”).

154. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

155. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–93 (1938) (recognizing that freedom of contract is not absolute).

156. *Id.* at 391.

157. *See id.* (“The Court . . . expanded a line of cases applying heightened judicial scrutiny to laws threatening certain rights to ‘privacy.’”).

158. *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965).

159. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

160. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

meaning.”¹⁶¹ Bridging that gap can be done only by accepting an evolving constitution, adapted to changing conditions by judicial interpretation.¹⁶² Connecting the latest interpretation to the text is a series of decisions, each extending the reach of the former, to the point that “the precedents shape the text, rather than the other way around.”¹⁶³

Critics of what is conceived as judicial overreach insist on emphasizing the original meaning of the text.¹⁶⁴ Stressing the operational aspects of the Constitution, these critics emphasize that the text itself provides a means for “updating” the Constitution by legislative action or formal amendment.¹⁶⁵ No precedent, however well connected to prior decisions, can contradict the text—otherwise a written constitution would have no significance.¹⁶⁶ More serious is the complaint that using due process to expand the meaning of the text is an invitation to a judicial majority to write its own preferences into the Constitution.¹⁶⁷ Freedom of contract to one generation of judges is what the right to privacy is to another.¹⁶⁸

As the Bill of Rights was incorporated in the Fourteenth Amendment, the state declarations of rights—the original models of protected rights—were eclipsed.¹⁶⁹ But while state constitutions were overshadowed, they never

161. SUTTON, *supra* note 82, at 213.

162. Strauss, *supra* note 3, at 4–5 (speaking of constitutional provisions as precedent, like the common law, which “are expanded, limited, qualified, reconceived, relegated to the background, or all-but ignored, depending on . . . judgments about the direction in which the law should develop”).

163. *Id.* at 17.

164. See David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 299 (2005) (stating that in originalism “the interpreter does not make controversial judgments about morality and policy; his or her job is to implement the judgments made by someone else”).

165. See U.S. CONST. art. V (providing a process for amendment).

166. See Strauss, *supra* note 3, at 5 (“It is true that the Supreme Court would never ‘overrule’ a provision of the text, in the way it might overrule a precedent. But the anomalies—instances in which the text has been effectively overridden by later developments—suggest that there is less to this difference than meets the eye.”).

167. See *Roe v. Wade*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (“I find nothing in the language or history of the Constitution to support the Court’s judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.”).

168. Williams, *supra* note 142, at 411, 411 n.7.

169. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977) (discussing the effect of the Supreme Court’s Fourteenth Amendment decisions on the work of state courts).

disappeared as a source of constitutionalism, in part because of the different concerns of state and national governments.¹⁷⁰ The Supreme Court's controversial decision in 2015 to recognize a right to same-sex marriage, *Obergefell v. Hodges*,¹⁷¹ came a dozen years after the Massachusetts Supreme Judicial Court led the way with a similar decision based upon the state constitution.¹⁷²

State legislation, too, can supplement or facilitate the operation of the constitution's terms. When the U.S. Supreme Court decided in *Kelo v. City of New London* that a city could take one person's private property and turn it over to another private owner in the interest of economic development, many states responded with legislation limiting the power of condemnation.¹⁷³ In other states, court decisions or amendments to the state constitutions put the limitations beyond the reach of simple legislative majorities.¹⁷⁴

American constitutionalism today is a complex mixture of written text and judicial interpretation. While national and international attention usually focuses on the federal Constitution and decisions of the U.S. Supreme Court, state constitutions, state supreme courts, and state legislatures remain a significant source of American constitutionalism.¹⁷⁵ The image of the constitutions animating American judicial choice might best be captured by the Holmesian belief that the courts were the "expounders of the Constitutions," and whether these interpretations have been narrow and originalist, or broad and liberal, the result has been the same: A change, perhaps incremental, but certainly discernible over time, in the meaning of the original text.¹⁷⁶ This movement has been most pronounced in the understanding of the restraints imposed upon the power of the state—the

170. *Id.* at 491.

171. 576 U.S. 644, 675 (2015).

172. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); see *Obergefell*, 576 U.S. at 663 (citing state decisions, including *Goodridge*, and observing that "the highest courts of many States have contributed to this ongoing dialogue [concerning the recognition of same-sex marriage] in decisions interpreting their own State Constitutions").

173. 545 U.S. 469, 482, 489–90 (2005); see also Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 802–03 (2008).

174. See Eagle & Perotti, *supra* note 173, at 802–03.

175. See Brennan, *supra* note 169, at 495; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) ("The common object of state interpretive efforts is American constitutionalism.").

176. Holmes, *supra* note 79, at 467–68; see also HOLMES, COMMON LAW, *supra* note 153, at 31–32.

federal and state governments, especially through the use of the incorporation of the Bill of Rights through the Fourteenth Amendment to apply to the states.

A number of constitutional systems have drawn upon the American revolutionary experience, which gave birth to the modern written constitution with its entrenched and judicially enforceable protection of fundamental rights and freedoms. These “revolutionary” constitutions, as we have seen, resulted in insurgent outsiders gaining the political ascendancy, enshrining their demands in the framework of governmental power.¹⁷⁷ In the next section, we examine a historically significant example which followed in the footsteps of the American paradigm: the federal democracy of India.

B. *India: The Basic Structure of Rights*

The Indian Constitution, a revolutionary type, follows the American example.¹⁷⁸ Its primary aim is a framework of governmental power.¹⁷⁹ Yet, unlike the American experience, the Framers, from the outset, conscious of the punitive way in which such power might be exercised through the historic experience of English imperial rule, recognized the importance of limiting that power in an entrenched set of fundamental rights.¹⁸⁰

In this section, we provide, first, an overview of the Framers’ motivations for a constitution—a machinery of government that would balance the power of the state with the rights of the people, following the long revolutionary struggle against British Imperial power. From there, we turn to the dominant image used by the Supreme Court of India to give effect to the rights provisions found there—the basic structure of the constitution as providing the judges with empty vessels into which substantive content could be poured.

1. Machinery of Government

The 1949 Indian revolutionary moment, which brought independence from English Imperial power, gave birth to a Constitution in 1950 that, like its counterparts in other countries, took its lead from the United States,

177. See ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 4, 3–4.

178. *Id.* at 54.

179. *Id.* at 62–63.

180. *Id.*; see Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 *AM. U. INT’L L. REV.* 413, 428 (1998) (“India’s particular history shaped the fundamental rights.”).

forming a self-contained written document.¹⁸¹ As a charter emerging from the people providing for the “machinery” of government and for the protection of fundamental human rights, the Indian Constitution in that sense followed the example set by the American Constitution.¹⁸² Thomas Paine’s understanding of American constitutional government summarizes the aspirations of the Indian Framers, too: “A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right. A constitution is a thing *antecedent* to a government; and a government is only the creature of a constitution.”¹⁸³ The Framers of the Indian Constitution, schooled by the long struggle for independence, sought to enshrine a balance between state power in ordered government and the protection of the fundamental human rights of the people.¹⁸⁴ They foreshadowed this in the Preamble:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC¹⁸⁵] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the

181. See ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 4, at 54–76.

182. See *id.* at 58 (discussing the development of the Indian revolution and the novel, westernized method of governance); see also Sripati, *supra* note 180, at 423–24 (noting the American Constitution’s direct influence on the Indian Constitution’s fundamental rights and power structure).

183. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 2 (1947) (quoting Thomas Paine, *The Complete Works of Thomas Paine*, 302–03, 370).

184. C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 *DENV. J. INT’L L. & POL’Y* 195, 196–203 (2005) (delineating the intent of the Framers of the Indian Constitution to create a balance between government power and the people’s fundamental human rights).

185. India Const. pmb., *amended by* The Constitution (Forty-Second Amendment) Act, 1976, s. 2, by substituting the “SOVEREIGN DEMOCRATIC REPUBLIC” (w.e.f. 3-1-1977) with “SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC”).

[unity and integrity of the Nation¹⁸⁶];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.¹⁸⁷

Thus, while the Indian Constitution gives effect to and makes possible the state power necessary for the machinery of ordered government,¹⁸⁸ the exercise of such authority is circumscribed by limitations, in the form of individual rights, exercisable by citizens against the state (which, according to Article 12, “includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”).¹⁸⁹ Part III of the Indian Constitution contains a framework¹⁹⁰ which enshrines the panoply of civil and political rights, enforceable against the state in the exercise of its power of governance, as found in Articles 2–21 of the Universal Declaration of Human Rights (UDHR).¹⁹¹ And the paramountcy of the fundamental rights is confirmed by Article 13, which provides, in part, that:

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such

186. *Id.* (amending the Constitution with The Constitution (Forty-second Amendment) Act, 1976, s. 2, to substitute “unity of the Nation” (w.e.f. 3-1-1977) for “unity and integrity of the Nation”).

187. *Id.*

188. INDIA CONST. pts. V–XV, XVIII–XXII.

189. *Id.* art. 12.

190. *Id.* pt. III. The rights protected are: equality (INDIA CONST. arts. 14 (equality before law), 15 (prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth), 16 (equality of opportunity in matters of public employment), 17 (abolition of untouchability), and 18 (abolition of titles)); freedom (Arts. 19 (speech), 20 (conviction for offenses), 21 (life and personal liberty), 21A (education), and 22 (arrest and detention)); against exploitation (Arts. 23 (prohibition of human trafficking and forced labor) and 24 (prohibition of employing children in factories)); religion (Arts. 25 (freedom of conscience and free profession, practice, and propagation of religion), 26 (freedom to manage religious affairs), 27 (as to payment of taxes for promotion of any particular religion), and 28 (attendance at religious instruction or religious worship in certain educational institutions)); and, culture and education (Arts. 29 (interests of minorities), and 30 (minorities to establish and administer educational institutions)). *Id.*

191. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.¹⁹²

To the extent that they are inconsistent with the fundamental rights found in Part III, Article 13 establishes that all such laws and executive orders are void; Article 32 provides not merely a remedy for such violation, but it also provides that such remedies themselves are fundamental rights.¹⁹³ This latter provision, through the power of judicial review conferred by Part V, Chapter IV, allows the Supreme Court a say in the meaning of the fundamental rights of Part III.¹⁹⁴

Yet, just as the American Constitution was revolutionary in the sense that nothing like it had yet existed in the course of human history, the Indian charter, too, was revolutionary for another reason.¹⁹⁵ It contains an innovation unseen even in those federal democratic constitutions which have followed the American model, such as those we consider in this article¹⁹⁶: The Indian Constitution depends for its existence and operation upon a number of unwritten assumptions about those provisions which provide for federalism and the separation of powers,¹⁹⁷ socialism and secularism,¹⁹⁸ the protection of fundamental rights and freedoms,¹⁹⁹ and accountable and transparent government through free elections.²⁰⁰ As with any constitution, unwritten systematic and structural understandings of the meaning of fundamental concepts underpin the written provisions and “give coherence to the [Indian] Constitution . . . [as] an organic whole.”²⁰¹ But because their revolutionary experience instilled in them a deep distrust of the state and its power over individuals, the Framers went further, adding an intriguing innovation to the

192. INDIA CONST. art. 13, §§ 1–2.

193. *Id.*; *id.* art. 32.

194. *See id.* art 32; *see also id.* pt. V, ch. IV.

195. *See* ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 61–63, 559–61, 592.

196. *See id.* at 61–63.

197. INDIA CONST. pts. V–XV, XVIII–XXII.

198. *Id.* pmb1.

199. *Id.* pts. III, IVA.

200. *Id.* pt. XV.

201. *M. Nagraj v. Union of India*, AIR 2007 SC 71 (India); *see also* 1 DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 17 (14th ed., 2011).

operation of and interplay between the Constitution's express provision of state power and individual rights.²⁰²

Part IV of the Indian Constitution, a radical innovation unseen in similar democratic federal texts, contains a set of "Directive Principles of State Policy" ("Directive Principles").²⁰³ Typically considered to be the keystone of these Directive Principles, Article 38 prescribes that the state must promote the welfare of the people through securing and protecting a social order in which social, economic and political justice inform all the institutions of national life.²⁰⁴ It provides that:

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.²⁰⁵

The Articles (36–51) of Part IV thus contain a set of principles in the form of duties on the part of the state which it must follow in both the administration

202. See ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 4, at 61 (highlighting the Indian government's approach to formulating a progressive Constitution that simultaneously remembers past oppression and works toward a freer future).

203. INDIA CONST. arts. 38 (securing a social order for the promotion of welfare of the people), 39A (promoting equal justice and free legal aid), 40 (organization of village panchayats), 41 (enumerating a right to work, to education, and to public assistance), 42 (securing just and humane conditions of work and maternity relief), 43 (promoting a living wage for workers), 43A (securing participation of workers in management of industries), 44 (specifying a uniform civil code for citizens), 45 (providing for free and compulsory education for children), 46 (promoting the educational and economic interests of scheduled castes, scheduled tribes and other weaker sections), 47 (stating the duty of the state to raise the level of nutrition and the standard of living and to improve public health), 48 (organization of agriculture and animal husbandry), 48A (securing the protection and improvement of environment and safeguarding forests and wildlife), 49 (protecting monuments and places and objects of national importance), 50 (separating the judiciary from the executive), and 51 (promoting international peace and security).

204. *Id.* art. 38, §§ 1–2, *amended by* The Constitution (Forty-fourth Amendment) Act, 1978.

205. *Id.*

and in the making of laws.²⁰⁶ These Directive Principles embody the aspiration of the Indian Constitution to establish a welfare state pursuing the ideals of socio-economic justice rather than a mere police state.²⁰⁷

Article 37, however, provides that:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.²⁰⁸

As such, while non-justiciable, the Directive Principles prescribe the positive duties owed by the state to the people.²⁰⁹ More than mere moral precepts, the principles are constitutional obligations imposed upon the executive and the legislative to ensure to the people the fundamental rights contained in Part III.²¹⁰ And so, while the judiciary cannot compel the state to perform these duties, it is clear that the state bears a special responsibility to the people to act according to the Directive Principles, albeit remaining “free to decide the order, the time, the place and the mode of fulfilling them.”²¹¹ Having gained power pursuant to the Constitution, both the executive and the legislative branches of government are bound to respect the Directive Principles as the foundation of all executive and legislative action.²¹² While the Framers might have intended the Directive Principles to be precatory words as opposed to enforceable rights concerning good governance, the judiciary has used those words quite differently, and in quite creative ways.

206. *Id.* pt. IV.

207. *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India); *see Union of India v. Hindustan Dev. Corp.*, (1993) 3 SCR 128 (India) (noting the Constitution’s attempt to make a welfare state through the Directive Principles); *see also BASU*, *supra* note 201, at 629.

208. INDIA CONST. art. 37.

209. *Bharati*, AIR at 1461.

210. INDIA CONST. pt. IV; *id.* pt. III (highlighting the fact that the Directive Principles are “not enforceable by any court,” but are part of the government’s responsibility to uphold fundamental rights found in Part III).

211. SUBHASH C. KASHYAP, *OUR CONSTITUTION: AN INTRODUCTION TO INDIA’S CONSTITUTION AND CONSTITUTIONAL LAW* 153 (5th rev. ed. 2011).

212. *Id.*

2. Supreme Court of India: Pouring Content into Empty Vessels

Article 368 of the Constitution provides, in part, that:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.²¹³

Yet, while Article 368 vests the Parliament of India with the power of amendment—by which it might itself supplement any of the Directive Principles of Part IV, or apply any of those provisions to the operation of the fundamental rights contained in Part III—the Framers clearly understood the role an independent judiciary plays in exercising the power of judicial review as a means of adaptation to changing circumstances.²¹⁴ The power of judicial review in Part V, Chapter IV, exercised by the Supreme Court—judicial constitutionalism or judicial amendment—acts as an important limitation upon governmental power as established by the Indian Constitution.²¹⁵ And, over the course of post-independence history the Supreme Court has made frequent and active use of the fundamental rights contained in Part III to constrain the power of government, both federal and state, established by the Indian Constitution.²¹⁶

The Supreme Court has not stopped, though, at the elaboration of Part III rights in its effort to balance the power of the state as against the individual.²¹⁷ Rather, the Court has made and makes use of the non-justiciable Directive Principles to extend those rights, creating a category of duties owed by the

213. INDIA CONST. art. 368, § 1, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1971; *id.* art. 368, § 5.

214. *See id.* pt. V, ch. IV; *see* Kumar, *supra* note 184, at 220.

215. *Karnataka v. Dr. Praveen Bhai Thogadia*, AIR 2004 SC 2081 (India) (“Welfare of the people is the ultimate goal of . . . the Constitution.”).

216. *See* Kumar, *supra* note 184, at 196–97.

217. *See, e.g., Kerala v. Thomas*, (1976) 1 SCR 906 (India) (emphasizing the importance of Part III of the Constitution and applying it broadly to the case at hand).

government to the people, in addition to the express individual rights of the people against state power.²¹⁸ While facially non-justiciable, the Supreme Court treats the Directive Principles as supplements to the enumerated fundamental rights, so as to impose duties upon the government to establish the welfare state envisioned by the Preamble, characterized by social and economic justice.²¹⁹ In this way, it is the Court, and not the Parliament, that has acted as the vanguard in balancing the power of the state with the rights of the individual as a component of the basic structure of the Indian Constitution and as a primary tool of achieving the constitutional goals of a welfare state as envisioned by the Preamble.²²⁰

Over time, the Supreme Court's approach has resulted in the positive duties contained in Part IV being used to modify the meaning of the fundamental rights contained in Part III.²²¹ Articles 41,²²² 45,²²³ and 46²²⁴ of the Directive Principles, for instance, have together been interpreted to impose a positive duty on the state to provide for the education of its citizens.²²⁵ As a result of the Court's use of Part III and Part IV to impose positive obligations on the government, the Parliament formally amended the constitutional text to include Article 21(A), which affirms that "[t]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."²²⁶ Thus, what began in the Directive Principles as a positive duty towards citizens to provide the conditions necessary for education has been converted, through the judicial

218. See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 40–41 (2009) (denoting the Supreme Court's use of the Directive Principles to expand the individual rights of the people).

219. See *Thomas*, 1 SCR at 906; see *M.C. Mehta v. Union of India*, (1991) 1 SCR 866 (India).

220. *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India).

221. See *Thomas*, 1 SCR at 906 ("The unanimous ruling there is that the Court must wisely read the collective Directive Principles of Part IV into the individual fundamental rights of Part III, neither Part being superior to the other!").

222. India Const. art. 41 ("The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to . . . education . . .").

223. *Id.* art. 45, amended by The Constitution (Eighty-sixth Amendment) Act, 2002 ("The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years.").

224. *Id.* art. 46 ("The State shall promote with special care the educational and economic interests of the weaker sections of the people . . .").

225. See Vijayshri Sripathi & Arun K. Thiruvengadam, *India: Constitutional Amendment Making the Right to Education a Fundamental Right*, 2 INT'L J. CONST. L. 148, 149–50 (2004).

226. INDIA CONST. art. 21A, amended by The Constitution (Eight-sixth Amendment) Act, 2002.

exercise of judicial review, into a positive right to education.²²⁷

The Supreme Court uses the Directive Principles of Part IV as part of a wider dialogue²²⁸ or conversation between the executive, the legislative—which must exercise its power of governance according to those principles—and the judiciary, which bears responsibility for ensuring compliance with those principles through the enforcement of the fundamental rights found in Part III.²²⁹ This integration of the Directive Principles and the fundamental rights, unforeseen by the Framers, has nonetheless given the Supreme Court of India an expanded power to determine the meaning and content of the fundamental rights found in Part III.²³⁰ In *Maneka Gandhi v. Union of India*, the Court observed that the fundamental rights of Part III comprise “the basic values cherished by the people” of India since Vedic times, and that they operate “to protect the dignity of the individual and create conditions in which” it is possible for every person to flourish to the fullest extent.²³¹ In so finding, the Court has established a “pattern of guarantee[s]” which imposes negative obligations upon the state not to encroach upon individual liberty.²³²

Using the otherwise non-justiciable Directive Principles as a guide, then, the Supreme Court treats the fundamental rights of Part III as “empty vessels into which each generation must pour its content in the light of its experience.”²³³ The origins of this approach can be traced to the 1950 decision in *A.K. Gopalan v. State of Madras*,²³⁴ in which the Supreme Court considered the meaning of the expression “procedure established by law” found in Article 21, which provides that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”²³⁵ In its decision, the Court rejected an argument that would have given the relevant words substantive meaning, such that a person’s liberty might not be curtailed unless

227. See Sripathi & Thiruvengadam, *supra* note 225, at 152–53.

228. See Mahendra Pal Singh, *Constitution as Fundamental Law: Preserving its Identity with Change*, 3 JINDAL GLOBAL L. REV. 21, 26 (2011) (discussing the importance of checks and balances within the Indian government, and how the judiciary must adhere to its boundaries as a check on the Parliament and the executive).

229. See *id.* at 24.

230. See *id.* at 26; see also Robinson, *supra* note 218, at 6.

231. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (India).

232. *Id.*

233. *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India); see KASHYAP, *supra* note 211, at 162.

234. *A.K. Gopalan v. State of Madras*, Union of India, (1950) SCR 88 (India).

235. *Id.*; INDIA CONST. art. 21.

it satisfied a test of reasonableness, fairness and justness.²³⁶ The Supreme Court rejected such an interpretation which might be permitted through the use of surrounding provisions (such as Articles 14 and 19) as a means of interpreting Article 21; it did this on the basis of the mutual exclusivity of Articles.²³⁷ Moreover, the Court found that in adopting Article 21, the Framers had rejected the words “due process of law,” which would have incorporated a meaning closer to the American substantive due process, in favor of “procedure established by law,” a doctrine of English origin which supported the narrower interpretation taken by the Court.²³⁸ Thus, rather than providing substantive protection, the Court narrowly construed Article 21 as merely a guarantee against executive action unsupported by law.²³⁹

It was not until 1970 that the Supreme Court adopted the “empty vessels” approach to interpretation of the fundamental rights in Part III.²⁴⁰ From *Rustom Cavasjee Cooper v. Union of India*²⁴¹ to its decision in *Maneka Gandhi v. Union of India*,²⁴² the Court reversed the *A.K. Gopalan v. State of Madras* position with respect to Article 21 and took the view that the right thereby protected extended to cover governmental action which was intended to curtail personal liberty.²⁴³ And the Court extended that interpretation to surrounding provisions, such as Articles 14 and 19, on the basis that the Constitution established a code which was not constrained by the doctrine of mutual exclusivity of its Articles.²⁴⁴ The Court wrote that:

The law must, therefore, now be taken to be well settled that article 21 does not exclude article 19 and that even if there is a law prescribing a procedure for depriving a person of “personal liberty” and there is consequently no infringement of the fundamental right conferred by article 21, such law, in so far as it abridges or takes away any fundamental right under article 19 would have to meet the

236. See *Gopalan*, SCR at 88.

237. *Id.*

238. *Id.*

239. *Id.*

240. See *Rustom Cavasjee Cooper v. Union of India*, (1970) 3 SCR 530 (India).

241. *Id.*

242. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (India).

243. See *id.*; *Cooper*, 3 SCR at 530; *A.K. Gopalan*, SCR at 88.

244. See *Gandhi*, 2 SCR at 621.

challenge of that article.²⁴⁵

Thus, a law depriving a person of “personal liberty” has not only to stand the test of Article 21, but that of Articles 19 and 14.²⁴⁶ In this way, over the course of Indian federal history, the Supreme Court has used the “empty vessels” interpretive technique—which rejects mutual exclusivity between Parts and Articles—in its approach to Part IV so as to allow it to supplement the meaning of fundamental rights. As such, the Court allows the Indian Constitution to develop as the welfare state envisaged by the Preamble.²⁴⁷ The Supreme Court has brought about a form of social and economic democracy which allows the directives of Part IV to be implemented through filling with content the “empty vessels” of rights in Part III.²⁴⁸ While the precise mechanics of achieving it might not have been what the Framers thought they had established, their vision of the Indian Constitution, as one of checks and balances placed upon the power of the state, has been given effect by the Court.²⁴⁹

Perhaps the best example of the Supreme Court giving effect to the vision of a balance of state power and individual rights, albeit in a way unforeseen by the Framers, is the adoption in 1973 of the “basic structure theory.”²⁵⁰ Using this theory, the Supreme Court held that the amending power contained in Article 368 does not permit Parliament to alter the basic structure or framework of the Indian Constitution, for it “cannot legally use the Constitution to destroy itself,” as “the personality of the Constitution must remain unchanged.”²⁵¹ From this foundational principle of immutability, the Court has filled with content the “empty vessels” found in the express provisions which form the basic structure of the Indian Constitution: the

245. *Id.*

246. *See id.*; Francis Coralie Mullin v. Union Territory of Delhi, Administrator, (1981) 2 SCR 516 (India) (“[T]he procedure prescribed by the law must be reasonable, fair and just . . . and not arbitrary, whimsical or fanciful.”).

247. India Const. pmb.; *see* P.A. Inamdar v. Maharashtra, AIR 2005 SC 3226 (India) (quoting the Indian Constitution’s statements that “justice, liberty, equality and fraternity, including social, economic and political justice, [are] the golden goals set out in the Preamble.”).

248. *See Gandhi*, 2 SCR at 621; *see also* Jilubhai Nanbhai Khachar v. Gujarat, AIR 1995 SC 142 (India).

249. *See Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India) (emphasizing the checks and balances in the Indian Constitution).

250. *Id.*; *see also* Robinson, *supra* note 218, at 27–34.

251. *See BASU*, *supra* note 201, at 2235–36.

supremacy of the Constitution²⁵² and its corollaries, democracy,²⁵³ the rule of law,²⁵⁴ separation of powers,²⁵⁵ judicial review,²⁵⁶ federalism,²⁵⁷ and the independence of the judiciary²⁵⁸ in balancing fundamental rights and the directive principles,²⁵⁹ the objectives specified in the Preamble,²⁶⁰ especially secularism,²⁶¹ the underlying principles of fundamental rights,²⁶² including freedom and dignity of the individual²⁶³ and equality,²⁶⁴ and the essence of other fundamental rights,²⁶⁵ most significantly social and economic justice as part of the welfare state.²⁶⁶

As with most federal democratic constitutions, the express provisions of the Indian Constitution contain both the machinery of government and the limitation of the exercise of state power through the protection of fundamental individual rights.²⁶⁷ In addition to those elements of the basic structure, the Framers also provided a set of non-justiciable Directive Principles for the exercise of government power.²⁶⁸ It is through the interpretation and application of those Directive Principles, in a way unforeseen by the Framers, and using an image of the Constitution as a series of “empty vessels” into which it must pour substantive content, that the Supreme Court has played a central role in limiting and decentralizing state power.²⁶⁹ The judiciary has sought to strengthen the basic structure of the Constitution through adaptation to changing socio-economic circumstances and evolving values over time.²⁷⁰

252. *Bharati*, AIR at 1461.

253. *Kuldeep Nayar v. Union of India*, (2006) 7 SCC 1, 153 (India).

254. *See I.R. Coelho v. Tamil Nadu*, AIR 2007 SC 861 (India); *Indra Sawhney v. Union of India*, (1992) Supp. 2 SCR 454 (India); *Indira Nehru Gandhi v. Rajnarain*, (1976) 2 SCR 347 (India).

255. *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).

256. *Id.*

257. *Id.*

258. *Shri Kumar Padma Prasad v. Union of India*, (1992) 2 SCC 428 (India).

259. *Minerva Mills v. Union of India*, (1981) 1 SCR 206 (India).

260. *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India).

261. *Bommai*, AIR at 1918.

262. *I.R. Coelho v. Tamil Nadu*, AIR 2007 SC 861 (India).

263. *Bharati*, AIR at 1461; *Bommai*, AIR at 1918.

264. *Raghunathrao Ganpatrao v. Union of India*, (1993) 1 SCR 480 (India).

265. *Waman Rao v. Union of India*, (1981) 2 SCR 1 (India).

266. *Bharati*, AIR at 1461.

267. *See id.*

268. *See INDIA CONST.* pt. IV; *see KASHYAP, supra* note 211, at 153.

269. *Bharati*, AIR at 1461.

270. *See Kerala v. Thomas*, (1976) 1 SCR 906 (India).

It has accomplished this through the filling of those “empty vessels,” the fundamental rights of Part III, with content, so as to meet the aspirations of the people, the ultimate source of sovereignty, and to provide restraints against the state’s power.²⁷¹

Revolutionary constitutions, with their framework of government limited by entrenched rights, as we have seen, are not the only written type.²⁷² The adaptive establishmentarian represents the second major ideal type.²⁷³ The next Part examines two of these, the Constitutions of Canada and that of Australia.

III. ADAPTIVE ESTABLISHMENTARIAN CONSTITUTIONS

We outlined the distinguishing features of Bruce Ackerman’s three ideal constitutional types—revolutionary, adaptive establishmentarian, and elite—in Part II. In this Part, we consider two adaptive establishmentarian constitutions, those in which political order emerges from a period of struggle against an existing regime, but which falls short of outright insurrection leading to a revolutionary constitution.²⁷⁴ Instead, in this type, pragmatic insiders concede to sensible outsiders so as to arrive at a constitutional compromise which affirms the establishment claim to legitimate authority.²⁷⁵

The unwritten English Constitution, over the course of its long history, represents the paradigmatic example of adaptive establishmentarianism, having influenced a number of other constitutions:²⁷⁶ New Zealand and many others in Scandinavia, Latin America, and Asia.²⁷⁷ Here, we examine two such constitutions, those of Canada and of Australia. Both emerged from concerns with the status quo in the pre-Confederation Canadian dominions

271. INDIA CONST. pt. III; *id.* pmb. (noting that the Preamble forms the source from which the Constitution comes, namely, “We the People of India”); *see also* S.R. Chaudhari v. Punjab, AIR 2001 SC 2707 (India) (“The very concept of responsible Government and representative democracy signifies Government by the People [T]he sovereign power which resides in the people is exercised on their behalf by their chosen representatives and for exercise of those powers the representatives are necessarily accountable to the people.”).

272. *See* ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 3–4.

273. *Id.* at 4.

274. *See generally id.* (stating that under adaptive establishmentarianism, the struggle results in reforming legislation and not a revolution).

275. *Id.*

276. *See* RUSSELL, *supra* note 4, at 7–8.

277. ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 4–5.

and the pre-Federation Australian colonies.²⁷⁸ Revolution was never really in the air in either Canada or Australia, but in both cases, concerns were of sufficient importance for the Imperial Parliament in the United Kingdom to take seriously the popular call for a new federal order.²⁷⁹ Federalism itself, however, meant something very different in each case, leading to contrasting views of the balance of governmental power as between the national or federal governments and the regions—provinces in Canada and states in Australia.

A. Canada: Strong Central Government?

Unlike the other constitutions considered in this article, Canada's is not a unitary document.²⁸⁰ Instead, it is a composite of legislative and executive acts spanning a century and a half, consisting of two principal documents—the British North America Act, 1867 (now the Constitution Act, 1867)²⁸¹ and the Constitution Act, 1982²⁸²—and a number of secondary enactments and ancillary English statutes²⁸³ which, together, comprise the Constitution Acts

278. See *infra* Sections III.A, III.B; see also see J.M. Bennett, *The Making of the Australian Constitution*, 45 AUSTL. Q. 122, 123 (1973) (quoting J.A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 4 (1972)) (“[A]fter 1850 it was certain that no scheme of federal government would ever be imposed by Britain upon the Australian colonies, if they wanted one, they would have to work it out for themselves.”).

279. See ACKERMAN, REVOLUTIONARY CONSTITUTIONS, *supra* note 4, at 4–5.

280. See Joseph Miller, *A Constitution for Canada*, 6 RESOURCE NEWS 5, 5 (1982) (describing how the Constitution of Canada is made up of little “bits and pieces” of legislation along with changing constitutional acts).

281. This began life as the British North America Act, 1867, 30 & 31 Vict., c 3 (U.K.), and was renamed the Constitution Act, 1867 by the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). The Constitution Act, 1982: (i) provides that the “Act may be cited as the Constitution Act, 1982,” and that the Constitution Acts be collectively called the Constitution Acts, 1867 to 1982 (§ 60); (ii) adds the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 c 11 (U.K.)); (iii) recognizes and affirms the existing rights of the First Nations peoples of Canada (Part II of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 c 11 (U.K.)); (iv) provides an amending procedure for the Constitution Acts, 1867 to 1982 (Part VI of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 c 11 (U.K.)); and (v) (a) amends § 1 of The British North America Act, 1867 so as to re-name it the Constitution Act, 1867; (b) repeals and replaces § 20 of the Constitution Act, 1867 with § 5 of the Canadian Charter of Rights and Freedoms; (c) repeals §§ 91(1) and 92(1) of the Constitution Act, 1867; and (d) adds a new § 92A (§§ 50, 51, 53, and sch. 1).

282. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

283. Manitoba Act, 1870, S.C. 1870, c 3 (Can.); Rupert's Land and North-Western Territory Order, 23 June 1870 (U.K.); British Columbia Terms of Union, 16 May 1871 (U.K.); The British North America Act 1871, 34 & 35 Vict. c 28 (U.K.); Prince Edward Island Terms of Union, 26 June 1873 (U.K.); Parliament of Canada Act 1875, 38 & 39 Vict. c 38 (U.K.); Adjacent Territories Order, 31 July

of Canada (we refer to this amalgam as “the Constitution of Canada,” unless we are referring to one of the principal or ancillary documents, in which case we refer to such document by its title).²⁸⁴ Those searching for the historical origins of the Constitution of Canada find them in the 17th century colonizing activities of the French and English on the North American continent,²⁸⁵ and in the American constitutional experience.²⁸⁶

In this section, we look at the strong centralized federalism which the Canadian Framers thought they had created in the Constitution of Canada, itself an important image. But what the Framers thought they had created was not what the judges initially charged with its interpretation—the Judicial Committee of the Privy Council (“J.C.P.C.”), a constituent body of the United Kingdom Imperial Parliament—thought they found when choosing the meaning of the text. Instead, using what has come to be known as a vision of coordinate or co-equal federalism—or what we call the image of coordinate federalism—the members of the J.C.P.C. changed the meaning of the Framers’ handiwork, making it something quite unlike the controlling image relied upon by the Framers.²⁸⁷

1880 (U.K.); Constitution Act 1886, 49 & 50 Vict. c 35 (U.K.); Canada (Ontario Boundary) Act 1889, 52 & 53 Vict. c 28 (U.K.); Alberta Act, S.C. 1905, c 3 (Can.); Saskatchewan Act, S.C. 1905, c 42 (Can.); Constitution Act 1907, 7 Edw. 7 c 11 (U.K.); Constitution Act 1915, 5 & 6 Geo. 5 c 45 (U.K.); Constitution Act, 1930, 20 & 21 Geo. 5 c 26 (U.K.); Statute of Westminster 1931, 22 Geo. 5 c 4 (U.K.); Constitution Act 1940, 3 & 4 Geo. 6 c 36 (U.K.); Newfoundland Act 1949, 12 & 13 Geo. 6 c 22 (U.K.); Constitution Act 1960, 9 Eliz. 2 c 2 (U.K.); Constitution Act 1964, 12 & 13 Eliz. 2 c 73 (U.K.); Constitution Act, 1965, S.C. 1965, c 4, Part I (Can.); Constitution Act, 1974, S.C. 1974–75–76, c 13, Part I (Can.); Constitution Act (No. 2), 1975, S.C. 1974–75–76, c 53 (Can.); Constitution Amendment Proclamation, 1983, SI/84–102, (1984) C. Gaz. II, 2984 (Can.); Constitution Amendment, 1993 (N.B.), SI/93–54, (1993) C. Gaz. II, 1588 (Can.); Constitution Amendment, 1993 (P.E.I.), SI/94–45, (1994) C. Gaz. II, 2021 (Can.); Constitution Amendment, 1997 (Nfld. Act), SI/97–55, (1997) C. Gaz. II, Extra No 4 (Can.); Constitution Amendment, 1997 (Que.), SI/97–141, (1998) C. Gaz. II, 308 (Can.); Constitution Amendment, 1998 (Nfld. Act), SI/98–25, (1998) C. Gaz. II, Extra No 1 (Can.); Constitution Act, 1999 (Nun.), S.C. 1998, c 15, Part II (Can.); Constitution Amendment, 2001 (Nfld.), SI/2001–117, (2001) C. Gaz. II, Extra No 6 (Can.); Fair Representation Act, S.C. 2011, c 26, §§ 2, 14, 15, 17–20 (Can.); Proclamation of 1763 (U.K.); Supreme Court Act, R.S.C. 1985, c S-26 (Can.); Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada, 1947 (Can.); English Bill of Rights, 1689, 1 W. & M. Sess. 2 c 2 (U.K.); Act of Settlement, 1701, 12 and 13 Will. 3 c 2 (U.K.).

284. See R.S.C. 1985, app II (listing Canada’s constitutional acts and documents).

285. See generally W.P.M. KENNEDY, *THE CONSTITUTION OF CANADA: AN INTRODUCTION TO ITS DEVELOPMENT AND LAW* (2014 rev. ed., 1922).

286. LESLIE ZINES, *CONSTITUTIONAL CHANGE IN THE COMMONWEALTH* 77 (1991).

287. See RUSSELL, *supra* note 4, at 40; *Judicial Review and Federalism, in LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA* 219, 219 (F.L. Morton ed., 1985).

1. Confederation

By the 17th century, European colonial activities had created “two societies, one almost exclusively French and the other predominantly English . . . differentiated by race, language, laws and religion”²⁸⁸ in the northern half of North America. The eventual English military victory over the French, however, failed to produce a political settlement; rather, it entrenched political discord and conflict.²⁸⁹ The history of Canada ever since has been an effort to overcome the deep divisions which trace their origins to the existence of the two societies, French and English,²⁹⁰ as well as a third society, that of the First Nations peoples. This last group, persecuted during the colonial period, has since been recognized as integral to any ongoing compact.²⁹¹ The Constitution of Canada, the product of the mid-19th Century “Confederation movement,” was an attempt to reconcile at least the division between French and English.²⁹²

Proponents of Confederation—the “Fathers of Confederation,” or the Framers—sought union among the provinces of Canada—predominantly English Canada West (modern Ontario), largely French Canada East (modern Quebec), New Brunswick, and Nova Scotia.²⁹³ The preferred vehicle for union was an amalgam of two English traditions, the monarchy and

288. DONALD CREIGHTON, *THE EMPIRE OF THE ST. LAWRENCE: A STUDY IN COMMERCE AND POLITICS* 1–3 (1958).

289. See CONTEMPORARY QUEBEC: SELECTED READINGS & COMMENTARIES 579–694 (Michael D. Behiels & Matthew Hayday eds., 2011) (discussing the modern discord and the ongoing Quebec, and now western Canadian, secessionist movements); MICHAEL WAGNER, *ALBERTA: SEPARATISM THEN AND NOW* (2009); *Quebec Separatism Is Dormant, but the Politics of Division Is More Alive Than Ever*, *GLOBE & MAIL* (Nov. 7, 2019), <https://www.theglobeandmail.com/opinion/editorials/article-quebec-separatism-is-dormant-but-the-politics-of-division-is-more/>; *Jason Kenney Is Feeding the Wexit Flame. He May Not Be Able to Control the Fire*, *GLOBE & MAIL* (Nov. 15, 2019), <https://www.theglobeandmail.com/opinion/editorials/article-jason-kenney-is-feeding-the-wexit-flame-he-may-not-be-able-to-control/>.

290. See A.L. Burt, *Is There a Deep Split Between French and English Canada?*, *AM. HIST. ASS'N.*, [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-47-canada-our-oldest-good-neighbor-\(1946\)/is-there-a-deep-split-between-french-and-english-canada](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-47-canada-our-oldest-good-neighbor-(1946)/is-there-a-deep-split-between-french-and-english-canada) (last visited Oct. 19, 2020) (stating that “preserving and encouraging harmonious relations between French Canada and English Canada” has been a “great and permanent problem of the country”).

291. PETER H. RUSSELL, *CANADA’S ODYSSEY: A COUNTRY BASED ON INCOMPLETE CONQUESTS* 125–66 (2017).

292. See *id.* at 9; KENNEDY, *supra* note 285, at 301–02.

293. See DONALD CREIGHTON, *THE ROAD TO CONFEDERATION: THE EMERGENCE OF CANADA, 1863–1867* (2012); RUSSELL, *supra* note 4, at 12–33; KENNEDY, *supra* note 285, at 283–321.

Parliament, and one American, constitutional government.²⁹⁴ In contemplating union, however, the existing provinces were “[un]willing to relinquish the degree of political autonomy and self-government to which they aspired, and to be subsumed under a single unitary state.”²⁹⁵ A principal tenet of the American constitutional model, federalism, seemed to offer a compromise.²⁹⁶

The Framers were anxious, though, “to avoid what they considered to have been the near fatal weakness of the central government in American federalism.”²⁹⁷ In the eyes of the Framers, the impotence of the central or federal government, when coupled with the state’s retention of residual power,²⁹⁸ rendered federalism

a suspect and sinister form of government [T]he United States could scarcely be considered a convincing advertisement for federalism. The republic was, in fact, convulsed by a fearful civil war . . . which seemed to prove that a federal union was a divisive form of government which might very readily break up as a result of its own centrifugal pressures. The “federal principle,” as British Americans called it then, was usually regarded as a highly potent political drug, which might prove efficacious in the cure of certain constitutions, but which must be administered in small doses, with great precautions, and never without a readily available antidote. The obvious corrective to the disruptive forces of “states rights” was a strong central government; and this the Fathers of Confederation were determined to create. British American union, they admitted, would have to be federal in character; but at the same time it must also be the most strongly centralized union that was possible²⁹⁹

“The primary error at the formation of [the U.S.] constitution,” John A. Macdonald, one of the Framers and the first Prime Minister of Canada, said, “was that each state reserved to itself all sovereign rights, save the small

294. See RUSSELL, *supra* note 291, at 6; RUSSELL, *supra* note 4, at 9–11.

295. See Morton, *supra* note 287, at 219.

296. See *id.*

297. *Id.*

298. *Id.* at 219 n.1; ZINES, *supra* note 286, at 77 n.3 (referring to W.P.M. KENNEDY, STATUTES, TREATIES AND DOCUMENTS OF THE CANADIAN CONSTITUTION 558–59 (2d ed., 1930)).

299. DONALD CREIGHTON, CANADA’S FIRST CENTURY 10 (1970).

portion delegated. We must reverse this process by strengthening the general government and conferring on the provincial bodies only such powers as may be required for local purposes.”³⁰⁰ The Framers, so they thought, reserved the residual power to the federal government.³⁰¹ In Confederation, “the triumph of the federal idea was not endangered by attempting anything like a balanced distribution of legislative power”;³⁰² the Constitution Act, 1867 “confer[red] limited exclusive power on the Provinces, leaving all the residue to the federal Government.”³⁰³ As the leading historian of Confederation, Donald Creighton, explained, “[t]he Provinces and the Dominion were not to be coordinate in authority . . . ; on the contrary . . . the provincial governments were to be subordinate to the central government.”³⁰⁴ In the result, the Framers believed that they had bequeathed Canada “a highly centralized form of federalism,”³⁰⁵ “a political society organized on a federal basis, with a system of parliamentary government under the [English] Crown.”³⁰⁶

Section 91 of the Constitution Act, 1867 thus contains a very broad legislative power for the federal government, as well as the power to disallow or reserve provincial laws in sections 53–57 and 90.³⁰⁷ It also provides a list of exclusive provincial powers in section 92, the most important of which have been sub-section (13), “Property and Civil Rights in the Province,” and sub-section (16), “Generally all Matters of a merely local or private Nature in the Province.”³⁰⁸ The Framers thought that enumerating provincial powers would ensure their subordination to the federal power.³⁰⁹ The opening words of section 91 seemingly emphasize that subordination:

91. It shall be lawful for the Queen, by and with the Advice and

300. *Id.* at 10–11.

301. *Id.* at 11.

302. KENNEDY, *supra* note 285, at 436.

303. ZINES, *supra* note 286, at 77.

304. Creighton, *supra* note 299, at 11. While it involves a complex history, very broadly, “Dominion” or “Dominion of Canada” remains the formal name of the modern nation, distinguishing the pre-Confederation Province of Canada (comprising Canada West and Canada East) from the post-Confederation union of the Provinces of Canada, Nova Scotia, and New Brunswick: from 1950, without formal legal change, “Dominion” fell into disuse, leaving simply “Canada.” See ALAN RAYBURN, NAMING CANADA: STORIES ABOUT CANADIAN PLACE NAMES 17–22 (2001).

305. See Morton, *supra* note 287, at 219; see RUSSELL, *supra* note 4, at 34–52.

306. RUSSELL, *supra* note 291, at 9.

307. See Constitution Act 1867, 30 & 31 Vict. c 3 §§ 53–57, 90–91 (U.K.).

308. *Id.* at § 92.

309. See CREIGHTON, *supra* note 299, at 11.

Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say³¹⁰

310. Constitution Act 1867, 30 & 31 Vict. c 3 at § 91. Section 91, in full, provides:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . .

1. Repealed.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

Section 91 then sets out a list of twenty-nine exclusive powers of the Parliament of Canada intended to provide greater certainty to the scope of the federal residual power contained in “peace, order, and good government [“POGG”] of Canada,” in respect of matters not otherwise exclusively conferred upon the provinces or not otherwise contained within the express federal power.³¹¹ It was by dint of the POGG power that the Framers believed that they were creating a strong centralized federal government.³¹²

But the Framers could not have foreseen three developments which would if not undo their handiwork, at least drastically undermine its integrity. First, while the Constitution Act, 1867 still contains the federal powers of disallowance and reservation, over time, a convention of non-use developed in relation to their exercise;³¹³ those powers are simply no longer used, if they ever were.³¹⁴

When the Constitution Act, 1867 was enacted, it was scarcely doubted that the United Kingdom Parliament had plenary power to legislate for the colonies,³¹⁵ and this power was exercised on the basis of proposals made by the Framers which emerged from the Confederation movement.³¹⁶ The United Kingdom Parliament omitted, however, an internal amending formula.³¹⁷ It simply assumed that to the extent necessary, amendment would follow the same process as enactment: Colonial proposals would be made to and enacted

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. *Id.*

311. ZINES, *supra* note 286, at 77.

312. RUSSELL, *supra* note 4, at 34–52.

313. Morton, *supra* note 287, at 220.

314. RUSSELL, *supra* note 4, at 47.

315. BARRY L. STRAYER, CANADA’S CONSTITUTIONAL REVOLUTION 1 (2013).

316. *Id.*; Morton, *supra* note 287, at 217.

317. RUSSELL, *supra* note 291, at 152; KENNEDY, *supra* note 285, at 445–58; *see also* STRAYER, *supra* note 315, at 1–4.

by the United Kingdom Parliament.³¹⁸ So it was for the first forty years of Confederation,³¹⁹ before Imperial deferral disintegrated following the First World War.³²⁰ In fact, it would be over 100 years before the Constitution of Canada would have its own amending formula, enacted as part of the United Kingdom Constitution Act, 1982.³²¹

This second difficulty made possible the third.³²² The Framers thought that by using general words in section 91 they had left, albeit not through formal amendment, “[r]oom . . . for constitutional progress and for the development of a theory of constitutional law related as far as possible to the social and political growth of the people.”³²³ This room for progress would come through the work of judges, charged with the interpretation of the constitutional text; the Framers assumed that judges, using the power of judicial review, would work out the meaning of the Constitution Act, 1867.³²⁴ The problem, though, was that what the Framers had thought so clear—a strongly centralized federal government—was not nearly so obvious to the judges.³²⁵ And so, where the Framers thought that their vision of federalism would simply be given further effect by the judges, the Constitution of Canada would in fact come to mean something very different.³²⁶

2. Judicial Committee of the Privy Council and the Supreme Court of Canada: Coordinate Federalism

While the Canadian Parliament acted swiftly to establish the Supreme Court of Canada pursuant to sections 101 and 129 of the Constitution Act, 1867,³²⁷ the J.C.P.C., a body of the United Kingdom Parliament which had

318. See STRAYER, *supra* note 315, at 1–2 (claiming that this was “established constitutional doctrine”).

319. *Id.* at 2.

320. *Id.* at 2–3.

321. See STRAYER, *supra* note 315, at 4; see also *supra* note 281 (listing the process by which this was effected).

322. See KENNEDY, *supra* note 285, at 435–36.

323. See *id.* (contending that the Framers deliberately left interpretation to the courts).

324. See TRIBE, *supra* note 2 (acknowledging that all actors—legislators, judges, and, yes, even the people—within a constitutional polity—have choices to make about constitutional meaning).

325. See Morton, *supra* note 287, at 222–23 (discussing various judicial interpretations reducing the federal government’s power).

326. See *id.* at 219 (claiming that the original federal design was “modified considerably” by judicial review).

327. See Supreme Court Act, R.S.C. 1985, c S-26 (originally enacted as an Act to establish a

served as the final court of appeal for the pre-Confederation provinces, and which, by virtue of the Colonial Laws Validity Act, 1865 (U.K.), served to ensure the consistency of Imperial law throughout the British Empire,³²⁸ remained the final court of appeal for Canada until 1949.³²⁹ Using the power of judicial review—which the Framers assumed would operate to give effect to the meaning of the Constitution Act, 1867³³⁰—the J.C.P.C. drastically altered the distribution of powers the Framers thought they had established, and made a deep and profound impact upon the very shape of Canadian federalism, the effects of which continue to be felt today.³³¹

Because the J.C.P.C. treated the Constitution Act, 1867 as an ordinary Imperial statute,³³² it had available to it two interpretive approaches.³³³ The first, a “rule rationalist”³³⁴ or “literal or grammatical emphasizing of the words found in statutes and constitutional documents,”³³⁵ posits that “the meaning of a rule inheres from within the words of the rule itself.”³³⁶ This barred “resort

Supreme Court, and a Court of Exchequer, for the Dominion of Canada, S.C. 1875, c 11); *see also* Constitution Act 1867, 30 & 31 Vict. c 3 (U.K.).

328. *See* William S. Livingston, *Abolition of Appeals from Canadian Courts to the Privy Council*, 64 HARV. L. REV. 104, 106 (1950); *see* ZINES, *supra* note 286, at 77; *see also* *Role of the JCPC*, JUD. COMM. PRIVY COUNCIL, <https://www.jcpc.uk/about/role-of-the-jcpc.html> (last visited Oct. 20, 2020) (discussing how the J.C.P.C. continues to play this role today for a number of Commonwealth countries, as well as the United Kingdom’s overseas territories, Crown dependencies, and military sovereign base areas).

329. Supreme Court Act, 1949, 13 Geo. 6 c 37 (Can.); An Act to amend the Criminal Code 1933, 23 & 24 Geo. 5 c 53, § 17 (Can.) (upheld in *British Coal Corp. v. The King*, [1935] AC 500 (PC)); British North America (No. 2) Act, 1949, 12, 13 & 14 Geo. 6 c 81 (U.K.); *see* PETER McCORMICK, CANADA’S COURTS 73–75 (2014); *see* RUSSELL, *supra* note 4, at 41; *see* Livingston, *supra* note 328, at 109–10; *see* Frank MacKinnon, *The Establishment of the Supreme Court of Canada*, 27 CAN. HIST. REV. 258, 258–274 (1946).

330. Traceable in the United States to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Australia, too, looks to *Marbury v. Madison* as a source of judicial review. *See, e.g., Australian Communist Party v Commonwealth*, (1951) 83 CLR 1, 263. On the power in Canada, *see* JOHANNE POIRIER, THE ROLE OF CONSTITUTIONAL COURTS, A COMPARATIVE LAW PERSPECTIVE: CANADA: THE SUPREME COURT 8–9 (2019); RUSSELL, *supra* note 4, at 43–45; Morton, *supra* note 287, at 220–21; M. F. Mackintosh & T. L. Babie, *Judicial Review of Labour Relations Board Decisions and the Effect Given to Privative Clauses*, 2 U. B. C. L. NOTES 672 (1958).

331. *See* Morton, *supra* note 287, at 219; *see* RUSSELL, *supra* note 4, at 40.

332. *See* *Edwards v. Canada (AG)* (1929), [1930] 1 D.L.R. 98, 104, 106–107 (Can., P.C.) (interpreting the word “persons” in the Constitution Act, 1867, section 24).

333. *See* William R. Lederman, *Thoughts on Reform of the Supreme Court of Canada*, in 2 CONFEDERATION CHALLENGE 295, 295 (Ontario Advisory Committee on Confederation ed., 1970).

334. CONKLIN, *supra* note 11, at 173–74.

335. Lederman, *supra* note 333, at 295.

336. CONKLIN, *supra* note 11, at 174.

. . . to any of the historical materials recording the intentions of the Fathers of Confederation.”³³⁷ Instead, using this approach, “the [judge’s] duty is to learn, describe, and apply the rules impartially, neutrally, scientifically, and passively.”³³⁸ Alternatively, one could take a “sociological [approach], which insists that constitutional words and statutory words must be carefully linked by judicially noticed knowledge and by evidence to the ongoing life of society.”³³⁹

With few exceptions,³⁴⁰ the J.C.P.C. took the first approach, leading W.P.M. Kennedy to conclude “that, in the overwhelming majority of [cases], the *ratio decidendi* depended on reasoning entirely divorced from external sources or references,”³⁴¹ including the Framers’ intentions in proposing the enactment of the Constitution Act, 1867.³⁴² In *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, for instance, the J.C.P.C., using the rule rationalist approach, stated the effect of the Constitution Act, 1867 this way:

The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy.³⁴³

And, in the *Labour Conventions Reference*:

337. Peter H. Russell, LEADING CONSTITUTIONAL DECISIONS 11 (Peter H. Russell ed., 4th ed. 1987).

338. CONKLIN, *supra* note 11, at 173.

339. Lederman, *supra* note 333, at 295. This is not unlike the approach taken by Chief Justice John Marshall, who found that the constitution is a law, but that the judges should always remember that “it is a *constitution* we are expounding.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

340. See, e.g., *Edwards v. Canada (AG)*, [1930] 1 D.L.R. 98, 106–07 (Can. P.C.); *James v Commonwealth* (1936) 55 CLR 1, 43–44 (Austl. PC).

341. W.P.M. Kennedy, *The British North America Act: Past and Future*, 15 CAN. B. REV. 393, 394 (1937).

342. *Id.* at 393 (finding it “reasonably clear that, whatever the intentions of the ‘fathers’ of the Canadian federation may have been, the courts will seek those intentions from the British North America Act itself”).

343. *Liquidators of the Mar. Bank of Can. v. Receiver Gen. of N.B.*, [1892] A.C. 437, 441 (Can. P.C.).

the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status . . . [Canada] incurs obligations they must, . . . when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.³⁴⁴

By far the greatest diminution of federal power came in the treatment of the POGG power itself, in respect of which the J.C.P.C. developed three narrowly constrained doctrines for its invocation. The J.C.P.C. propounded the first, the Emergency Doctrine, in *Russell v. The Queen*, which held that the POGG power could be relied upon to ensure order throughout Canada,³⁴⁵ and in *Attorney General of Canada v. Attorney General of Alberta* (“*Board of Commerce Case*”), which allowed its invocation in times of war and famine.³⁴⁶ In *John Deere Plow Co. v. Wharton*, the J.C.P.C. established the Gap Doctrine, or Purely Residual Matters Doctrine, to cover those matters which were not enumerated, either in section 91 or in section 92, but which would have been placed within federal legislative competence had the Framers turned their minds to the question.³⁴⁷

The National Concern Doctrine, or National Dimensions Doctrine, traces its origin to the *Local Prohibition Case*, in which Lord Watson L.J. wrote that “some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition, in the interest of the Dominion”; POGG could only be invoked in respect of “such matters as are unquestionably of Canadian interest and importance.”³⁴⁸ Lord Watson L.J. concluded that “[t]o attach any other construction of the general

344. *Canada (AG) v. Ontario (AG) (Labour Conventions Reference)*, [1937] A.C. 326, 353–54 (Can. P.C.).

345. (1882) 7 App. Cas. 829 (Can. P.C.).

346. [1922] 1 A.C. 191 (Can. P.C.); *see also* AG of Can. v. AG of Alta. (*1916 Insurance Reference*), [1916] 1 A.C. 589 (Can. P.C.); *Fort Frances Pulp & Power Co. v. Man. Free Press*, [1923] A.C. 695 (Can. P.C.); *Toronto Elec. Comm’rs v. Snider*, [1925] A.C. 396 (Can. P.C.); *Proprietary Articles Trade Ass’n v. AG of Can.*, [1931] A.C. 310 (Can. P.C.); *Canada (AG)*, A.C. at 326; *AG of B.C. v. AG of Can. (Natural Products Marketing Act Reference)*, [1937] A.C. 377 (Can. P.C.).

347. [1915] A.C. 330 (Can. P.C.).

348. *AG of Ont. v. AG of Can. (Local Prohibition Case)*, [1896] A.C. 348, 361 (Can. P.C.).

power . . . would . . . practically destroy the autonomy of the provinces.”³⁴⁹ Fifty years later, in *Ontario (AG) v. Canada Temperance Federation*, Viscount Simonds agreed, writing that the POGG power may be invoked only in relation to a matter which “goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.”³⁵⁰

Over time, the J.C.P.C. developed these three doctrines, in the process whittling away the federal residual power, and progressively turning what the Framers thought was a centralizing constitutional text into, first, a power-sharing arrangement between the federal and provincial governments and then, finally, into one in which the provinces held the balance of power. In so doing, the J.C.P.C. shifted that balance away from the federal government and to the provinces, giving the latter power they likely never thought they would have in the initial constitutional compact.³⁵¹

One might think that the strengthening of the provinces through the J.C.P.C.’s interpretations of sections 91 and 92 has given the subnational provincial constitutions greater prominence and supported expanding provincial power (not unlike the development in American “constitutional law” advocated by Judge Sutton, wherein both the national and the state constitutions would become much stronger).³⁵² It has not. Instead, the importance of the provincial constitutions—already limited following Confederation—has continued to dwindle.³⁵³ Peter Price writes that:

In this regard, Canada is rather unusual compared to other federal states around the world. Most other subnational jurisdictions have some form of a constitution that provides a clear legal and political apparatus. American and German states and Swiss cantons, among the world’s oldest federal jurisdictions, have formal constitutions. Australian states, perhaps the most analogous jurisdictions to Canadian provinces, each have a written constitution, many of which have been subject to formal amendment. It is clearly established that

349. *Id.*

350. [1946] A.C. 193, 205 (Can. P.C.).

351. See RUSSELL, *supra* note 4, at 47–52. Whether the Constitution Act, 1867 was a compact of the founding provinces is debatable. See *id.*

352. See Peter Price, Provincializing Constitutions: History, Narrative, and the Disappearance of Canada’s Provincial Constitutions, 9 PERSP. ON FEDERALISM 31, 32–52 (2017).

353. See *id.*

Australian states entered the Commonwealth of Australia as distinct constitutional jurisdictions maintaining their separate constitutions and constitutional lineages. Section 106 of the Australian constitution recognizes “The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission of the State.” The explicit recognition of the continuation of state constitutions is vital to understanding Australian federalism, and constitutional scholars there have noted that “the colonies were deliberately called ‘States’ and not merely ‘provinces’ to indicate their status as constituent self-governing political communities.” While state constitutions have not been popularly ratified, they nevertheless form an important element of the constitutional architecture of modern Australia.³⁵⁴

Unlike America and Australia, where states existed as distinct and discrete constitutional entities with their own formal constitutions prior to federal union, and continued in force after it, the provinces in Canada were little more than political divisions holding scant power and virtually no formal constitutional existence prior to Confederation.³⁵⁵ The pre-Confederation constitutions of Ontario, Quebec, Nova Scotia, and New Brunswick, to the extent that they existed, were much more like the unwritten English Constitution, comprising “a myriad of statutes, conventions, royal instructions, and orders in council . . . [and] [m]ost important among these is the principle of responsible government, which remains the foundation of parliamentary democracy in Canadian provinces but which is not spelled out in any particular constitutional document.”³⁵⁶ As we have already seen, the Fathers of Confederation saw the provinces as nothing more than a necessary evil on the road to the ultimate goal: a unitary state federal in name only.³⁵⁷ This should have meant the disappearance of any notion of provincial constitutions having an ongoing role to play in Canadian federalism.³⁵⁸

354. *Id.* at 36 (internal citations omitted) (quoting NICHOLAS ARONEY, PETER GERANGELOS, SARAH MURRAY & JAMES STELLIOS, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA: HISTORY, PRINCIPLE, AND INTERPRETATION* 608 (2015)).

355. *See id.* at 37.

356. *Id.*

357. *Id.* at 49–50.

358. *Id.* at 51.

Indeed, the true outcome of the J.C.P.C.'s work, accepting the arguments put by "provincial rights" advocates, has not been the strengthening of the provincial constitutions, but rather, a singular focus only on the content of section 92, especially the meaning of "property and civil rights" in sub-section (13).³⁵⁹ This has prompted Price to conclude that:

The irony here is that the preoccupation of the provincial rights advocates on the adjudication of the [Constitution Act, 1867] contributed to a constitutional culture focussed almost exclusively on that legislation. By focussing on the meetings of [English] law lords in central London, the defence of provincial rights became refracted almost exclusively th[r]ough the adjudication of the act—of "the constitution"—and less through the claims to inherited constitutional identities.³⁶⁰

As such, the possibility of a U.S. Sutton-like "51 imperfect solutions" for Canadian constitutional law, at least in relation to federalism if not rights, seems highly improbable at best.³⁶¹

And since the abolition of J.C.P.C. appeals, the Supreme Court of Canada, having assumed its modern role as final appellate court, has made only modest advances in attempting to restore the Framers' vision of a strong, centralized federalism.³⁶² The specter of the J.C.P.C. continues to haunt the current approach to the POGG power. Consider the currently accepted meaning given to the federal residual power by the Supreme Court of Canada in *The Queen v. Crown Zellerbach Canada Ltd.*:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the [POGG] power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although

359. *Id.* at 49–50.

360. *Id.* at 52.

361. See SUTTON, *supra* note 82, at 1–6.

362. See *Capital Cities Commc'ns v. C.R.T.C.*, [1978] 2 S.C.R. 141 (Can.); *Pub. Serv. Bd. v. Dionne*, [1978] 2 S.C.R. 191 (Can.); *CIGOL v. Gov't of Sask.*, [1978] 2 S.C.R. 545 (Can.); *Cent. Can. Potash v. Gov't of Sask.*, [1979] 1 S.C.R. 42 (Can.).

originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.³⁶³

The J.C.P.C.'s hand in shaping the structure of Canadian government and the balance of the distribution of powers remains evident in these *Crown Zellerbach* tests, which in turn structure the relationship between the federal government and the provinces as they grapple with contemporary challenges.³⁶⁴

On September 22 and 23, 2020, the Supreme Court of Canada heard and reserved judgment in the combined appeals of *Attorney General for Saskatchewan v. Attorney General of Canada*³⁶⁵ and *Attorney General of Ontario v. Attorney General of Canada*,³⁶⁶ which concern provincial challenges from Saskatchewan, Ontario, and Alberta to a federal attempt to invoke the POGG power to legislate a national carbon tax.³⁶⁷ The Saskatchewan and Ontario Courts of Appeal found that the object of the

363. [1988] 1 S.C.R. 401, 431–32 (Can.).

364. ZINES, *supra* note 286, at 79.

365. S.C.C. Doc. No. 38663 (Can.).

366. S.C.C. Doc. No. 38781 (Can.). In the same term, the Supreme Court of Canada dismissed leave to appeal in *AG of B.C. v. AG of Can.*, which involved a dispute over jurisdiction with respect to environmental protection legislation enacted by a province, and whether the powers set out in sections 91 and 92 of the Constitution Act, 1867 remain “watertight compartments.” S.C.C. Doc. No. 38682 (16 Jan. 2020). The British Columbia Court of Appeal had held that the provincial legislation was inoperative as beyond section 92 jurisdiction. *See Reference re Envtl. Mgmt. Act (B.C.)*, 2019 B.C.C.A. 181 (Can.).

367. Greenhouse Gas Pollution Pricing Act, S.C. 2018, c 12, § 186.

legislation—ensuring a minimum national price on greenhouse gas emissions in order to encourage their mitigation—was an issue of national concern and thus within the POGG power;³⁶⁸ the Alberta Court of Appeal disagreed, and found the legislation unconstitutional.³⁶⁹ In the Saskatchewan Court of Appeal, the majority wrote that:

This fundamental reality is perhaps somewhat obscured in areas like the regulation of GHG emissions where the constitutional boundaries between federal and provincial authority might be somewhat unclear and where there is at least some room for both levels of government to legislate. Nonetheless, the basic point remains the same. The scope of Parliament’s constitutional authority is not dependent on how or whether a province has exercised its own exclusive jurisdiction. Conversely, and putting the doctrine of paramountcy to the side, the scope of a province’s constitutional authority is not dependent on how Parliament has or has not exercised its jurisdiction.³⁷⁰

But, while the scope of the federal power may not be dependent on the exercise of provincial power, the very fact that the former must identify a national concern is a product of the J.C.P.C.’s lasting influence upon the exercise of the POGG power. The National Concern Doctrine—a test first propounded by Lord Watson L.J. over 120 years ago—devised to encourage a balanced coordinate federalism, continues to provide the touchstone by which the federal government’s residual POGG power may be exercised.³⁷¹ And yet the J.C.P.C.’s image of “balanced coordinate federalism,” as we have seen, is nothing like how the Framers understood the distribution of powers in the Constitution Act, 1867.³⁷² The Framers would no doubt be astounded to learn that over 150 years after the Confederation movement, intended to

368. Reference re Greenhouse Gas Pollution Pricing Act, 2019 S.K.C.A. 40 (Can.); Reference re Greenhouse Gas Pollution Pricing Act, 2019 O.N.C.A. 544 (Can.).

369. Reference re Greenhouse Gas Pollution Pricing Act, 2020 A.B.C.A. 74 (Can.).

370. Reference re Greenhouse Gas Pollution Pricing Act, 2019 S.K.C.A. 40, para. 67 (Can.).

371. See *R. v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401, 431–32 (Can.) (describing the hurdles the federal government must overcome before invoking the POGG powers).

372. See KENNEDY, *supra* note 285, at 393 (highlighting that the courts will interpret the Constitution Act, 1867 as they please, whether or not that matches the original intentions of the Framers); see also André Lecours, *Dynamic De/Centralization in Canada, 1867–2010*, PUBLIUS: J. OF FEDERALISM 57, 60–61 (2017) (explaining the features of the Constitution Act, 1867 that showed “that the intent of the Fathers of Confederation was to have a rather centralized federation”).

centralize power in a strong federal government, the Canadian courts—a product of that movement—would still be debating whether the federal government ought to be the dominant power and the provinces the subordinate in that federal relationship.³⁷³ In Canada, the work of judges has had a profound and lasting impact upon the meaning of the text of the Constitution of Canada, with scarcely a thought of formal amendment.³⁷⁴

Australia illustrates the reverse of the Canadian experience. Whereas the Canadian Framers thought that they had created a strong central government, their Australian counterparts believed that they had retained the power of the regions—the colonies, or post-Federation states—in their compact.³⁷⁵ The judges, however, saw it differently, resulting in the slow but steady Australian federal march from state power to federal centralization.

B. Australia: States Triumphant?

In this section, we provide a short outline of the structure of the Australian Constitution before turning to the ways in which the High Court of Australia—the final appellate court—has exercised the power of judicial review to allow for fiscal and legislative dominance of the federal or Commonwealth government, at the expense of state power. The High Court has done this through a use of judicial power (choice) by which it created itself as the peak of a national—as distinct from a federal—legal system. This in turn allowed it to impose an image of a constitution animated by an almost reflex-like assumption that increasing centralization and federal control was necessary.

Of course, the judicial power informally to amend is not the only way in which the Constitution’s meaning has changed over time.³⁷⁶ Political developments, too, have led to what might be called the Imperial Prime

373. See Lecours, *supra* note 372, at 60–61 (explaining the Framers’ intent to centralize power in the federal government by giving Parliament the power “to reserve and disallow provincial legislation”); see also Reference re Greenhouse Gas Pollution Pricing Act, 2019 S.K.C.A. 40, para. 67 (Can.) (illustrating the continued uncertainty about the strength of the central government).

374. See Lecours, *supra* note 372, at 66 (“Constitutional amendments have been the instrument of change only in two cases.”); see also *supra* Section III.A and discussion therein (discussing at length the dramatic effects judges have had on the Constitution of Canada without needing a formal amendment).

375. See Price, *supra* note 352, at 36 (noting that the language of the Australian Constitution suggests the drafters’ intent to retain power in the states); see also *infra* Section III.B.2.

376. See R.F.I. Smith, *The Political Change in Australia*, 8 ECON. & POLITICAL WKLY. 1068, 1068–71 (June 16, 1973) (discussing some of the non-judicial changes to the Australian government).

Ministership.³⁷⁷ These political developments, while not directly tied to judicial review, have nonetheless brought about profound changes in the nature of the Commonwealth government. Yet, as important as these political developments have been to the nature of the modern Australian polity, they are not our concern. Instead, we look at the judges.

1. Federation

The Australian Constitution came into operation on January 1, 1901, after a decade-long Federation process involving the leading politicians and jurists in all six colonies.³⁷⁸ The Constitution, in legal form, was a chapter of a law passed by Britain’s Imperial Parliament.³⁷⁹ There was no revolutionary break in the political and legal links between the newly formed nation and the mother country.³⁸⁰ Instead, what emerged was an adaptive establishmentarian text providing for the continued existence of the six former colonies, now called “states,” and their previous constitutions.³⁸¹ The new Commonwealth Parliament—consisting of a Senate with equal representation for each state and a House of Representatives made up of representatives which in number mirrored the respective population of each of the states—was given an extensive list of legislative powers, including immigration, inter-state trade, and corporations.³⁸² These powers were held concurrently with the otherwise untrammelled legislative powers of the states.³⁸³ In cases of inconsistency between Commonwealth and state legislation, the Commonwealth was to prevail.³⁸⁴

377. *See id.*

378. *See* BRIAN GALLIGAN, *POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA* 5 (1987) (“The political history of the Australian nation from its federation in 1901 to the present day has seen the working out of two separate and opposing sets of forces which have tended to produce stability on the one hand and conflict on the other.”).

379. Commonwealth of Australia Constitution Act, 63 & 64 Vict. c 12, s 9.

380. *See* GALLIGAN, *supra* note 378, at 5; *see also* ARONEY ET AL., *supra* note 354, at 8 (describing the historical origins of the Australian Constitution and its continued link to Britain).

381. *See* GALLIGAN, *supra* note 378, at 5; *see also* ARONEY ET AL., *supra* note 354, at 5. *See generally* ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 4, at 4 (describing the adaptive establishmentarian framework).

382. *See* Kelly Buchanan, *National Parliaments: Australia*, LAW LIBR. CONGRESS (Jan. 2016), <https://www.loc.gov/law/help/national-parliaments/australia.php> (explaining the structure of the Australian government).

383. *See id.*

384. *See id.* “Commonwealth of Australia” is the constitutionally prescribed name for Australia,

The Constitution followed the American model, not only in creating a federal polity, but also, at least in form, following the U.S. Constitution in elaborating a separation of legislative, executive, and judicial powers for the new Commonwealth.³⁸⁵ Unlike the United States, however, but like the Canadian, the Australian Constitution melded English notions of Parliamentary government onto the formal scheme of the separation of powers.³⁸⁶ This meant that the executive government would be led by a Prime Minister drawn from Parliament, as is the case in Britain.³⁸⁷ The government of the day needs to command a majority in the House of Representatives.³⁸⁸

Unlike the Constitution of Canada, the Australian Constitution contained from the beginning an internal amending formula in section 128, which requires that a proposed amendment be passed as law by the Parliament and then put to the electors.³⁸⁹ Approval of an amendment requires the vote of a majority of the electors, and a majority of the electors in a majority of states.³⁹⁰ To date there have been forty-four proposed amendments put to the Australian people with eight being carried.³⁹¹ Changes include the schedules of voting for the Senate and the replacement of senators who might have died or retired, and amendments allowing the Commonwealth to take on the debts of the states, to pass laws for a wide range of social services, to recognize Aboriginal and Torres Strait Islander peoples in the Constitution, to provide for voting

and continues to be used to refer to the national or federal government of Australia. *See* Commonwealth of Australia Constitution Act, 63 & 64 Vict. c 12, s 3.

385. *See* GALLIGAN, *supra* note 378, at 23 (“The spirit and character of the federal system of government that the tough-minded Americans invented in 1787 inspired the Australian founders in the 1890s . . .”).

386. *See id.* at 23.

387. *See* Buchanan, *supra* note 382 (“Under the parliamentary system, members of the federal executive, including the Prime Minister, who is the head of the executive branch of government, are drawn from those elected to the Parliament.”).

388. *See id.* (explaining that the party who holds the majority in the House of Representatives “assumes the Government”).

389. *Constitution Alteration*, PARLIAMENT AUSTL., https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Constitution_alteration (last visited Oct. 21, 2020) (explaining the Australian constitutional amendment process); *see also* Australian Constitution s 128.

390. Australian Constitution s 128 (“And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen’s assent.”).

391. *See* Scott Bennett, *The Politics of Constitutional Amendment*, Parliament Austl. (June 23, 2003), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0203/03rp11 (stating that of the 44 referenda since 1906, only eight amendments have passed).

rights for Territory residents, and to set an age limit of seventy years for all federal judges, including High Court judges.³⁹²

The common reaction to this high failure rate is to bemoan the difficulty posed by section 128—recall Menzies “labours of Hercules” comment.³⁹³ Another way to look at it, though, is to accept that the people have spoken.³⁹⁴ Thus, it perhaps is more interesting to look at some of the proposed amendments that failed. A series of amendments were proposed to give the Commonwealth power to legislate for industrial relations, to legislate for antitrust and restrictive trade practices, and to extend Commonwealth powers over corporations,³⁹⁵ interstate trade and commerce, and aviation and other forms of transport.³⁹⁶ All these amendments, pursued from 1911 to 1937, and largely but not wholly promoted by Labor governments, failed.³⁹⁷ It was the judges, through informal amendment, who ultimately conferred on the Commonwealth Parliament virtually all the powers that the people had denied them in formal attempts to change the Constitution.³⁹⁸

The federal form of the Constitution was not sympathetic to the goals of the Australian Labor Party, which has been the major proponent in Australia since the Federation for increased centralized powers in the Commonwealth and for major welfare and redistributionist policies.³⁹⁹ In the words of Brian Galligan, this was a matter of timing as much as anything else:

It is the supreme irony of Australian politics that the federal constitution and the Labor party were formed in the same decade, but that the constitution was put in place just before Labor became a major political force. The constitution was the mature achievement of the older order of nineteenth-century colonial politics, and the

392. Commonwealth of Australia Constitution Act, 63 & 64 Vict. c 12, s 9, Australian Constitution, s 13, 15, 51, 72, 105. See also Alysia Blackham, *Judges and Retirement Ages*, 39 MELB. U. L. REV. 738 (2016).

393. See *supra* note 42 and accompanying text.

394. See LESLIE FINLAY CRISP, AUSTRALIAN NATIONAL GOVERNMENT 41 (5th ed. 1983) (stating that after the Parliament votes, the vote is given to the people as to whether the amendment will be added).

395. *Huddart Parker v Moorehead* (1908) 8 CLR 330, 330.

396. See GALLIGAN, *supra* note 378, at 88.

397. See Bennett, *supra* note 391.

398. See James Stellios, *The Centralization of Judicial Power*, 42 FED. L. REV. 357, 358 (2014).

399. See GALLIGAN, *supra* note 378, at 24.

institutional embodiment of its liberal capitalist spirit.⁴⁰⁰

It is an even more “supreme irony” that the Constitution as written through the agency of judicial review now resembles what the Labor Party would have wanted in 1901, despite the popular rejection of most of the amendments it desired aimed at increasing Commonwealth powers and achieving its welfare and redistributionist goals.⁴⁰¹ What Labor failed to get from the people, it ultimately got from the High Court.⁴⁰²

2. High Court of Australia: Consolidation of Federal Power

Even though not mentioned in the Australian Constitution, the High Court quickly claimed the power of judicial review to declare the constitutional validity of legislation passed by the Commonwealth and the states.⁴⁰³ In one of the first cases heard after the establishment of the High Court, the three founding judges (who were also three of the founding fathers)—Griffith, Barton, and O’Connor, as the first Chief Justice and its two Puisne judges respectively—stated that it was “the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power.”⁴⁰⁴ This view has never seriously been questioned by the High Court, and Fullagar J in the *Communist Party Case*⁴⁰⁵ described the principle of judicial review enunciated in *Marbury v. Madison*⁴⁰⁶ as “axiomatic.”⁴⁰⁷ And it seemed to be consistent with the expectations of the founding fathers.⁴⁰⁸ In a recent article questioning both the origin and scope of judicial review in Australia, Ronald Sackville argues that the deliberate omission of a Bill of Rights from the Australian Constitution clarified what judicial review meant during the 1890s and in the Constitution:

400. *Id.*

401. *See id.* at 252; *see also* Bennett, *supra* note 391.

402. *See* GALLIGAN, *supra* note 378, at 252.

403. *See id.* at 43, 46 (explaining how the High Court used judicial review to decide on fundamental political issues, yet the power of judicial review was not expressly included in the Australian Constitution).

404. *D’Emden v Pedder* (1904) 1 CLR 91, 117–18.

405. *Australian Communist Party v Commonwealth* (Communist Party case) (1950–51) 83 CLR 1.

406. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

407. *Communist Party case*, 83 CLR 1, 262.

408. Ronald Sackville, *The Changing Character of Judicial Review in Australia: The Legacy of Marbury v Madison*, 25 PUB. L. REV. 245, 255 (2014).

It was therefore likely . . . that judicial review would essentially involve the High Court acting as an arbiter in disputes between the Commonwealth and the States. In essence, its role would be to supervise the allocation of legislative powers between the components of the Federation.⁴⁰⁹

And indeed, in its first few years, the High Court interpreted the Constitution to reflect a federal (states' rights) view of that document.⁴¹⁰ The High Court quickly adopted interpretative tools—the doctrines of implied immunities and implied prohibitions—designed to protect the states from being overly affected by Commonwealth laws and to ensure that in establishing the reach of the Commonwealth Parliament's legislative powers, care would be taken to determine what the states' powers in a particular area were and then allocate the Commonwealth the residue.⁴¹¹ Thus, in *Huddart Parker v Moorehead* Commonwealth legislation aimed at controlling restrictive-trade practices ran afoul of a High Court majority that denied any Commonwealth control over activities associated with intrastate trade, which was held to be solely the domain of state legislative power.⁴¹²

But a change of personnel and the experience of World War I led the Court to an interpretation that privileged the Commonwealth's enumerated heads of legislative power over that of the states.⁴¹³ This period of deference to state legislative powers came to a halt in 1920 with the *Engineers Case*.⁴¹⁴ There, the High Court determined, as a general rule, that when considering the reach of Commonwealth legislative power, the proper course was to give the words in the grant of legislative power a natural and generous reading without initially reserving to the states any area of legislative power.⁴¹⁵ This approach continues to this day.⁴¹⁶

409. *Id.*

410. GALLIGAN, *supra* note 378, at 84. The Australian High Court is the ultimate court of appeal for all constitutional litigation in Australia. Stellios, *supra* note 398, at 362–63. Unlike the U.S. Supreme Court, its jurisdiction does not only cover the Constitution and all federal legislation but also appeals from the state supreme courts on state legislation, and on private law not covered by federal legislation. *Id.*

411. *See* GALLIGAN, *supra* note 378, at 80.

412. *Huddart, Parker & Co. v Moorehead* (1908) 8 CLR 330, 333.

413. *See* GALLIGAN, *supra* note 378, at 95.

414. *Amalgamated Soc'y of Eng'rs v Adelaide Steamship Co.* (1920) 28 CLR 129, 132–38.

415. *See id.*; *see* GALLIGAN, *supra* note 378, at 98–100.

416. *See* GALLIGAN, *supra* note 378, at 97–98.

Over time, the shift from deference to the states to one of federal preference has given the Commonwealth almost total fiscal control over the states and the ability to legislate on almost any topic.⁴¹⁷ The movement has been incremental. Partly this is because judicial review is a reactive process—the High Court had to wait for cases to come before it.⁴¹⁸ But more importantly, in conjunction with this judicial reactivity, for the first seventy or so years of the Federation, the various Centre-Right governments that governed for the majority of that period were not constitutionally adventurous.⁴¹⁹ It was left-leaning Labor⁴²⁰ governments during World War I, the doomed Scullin government at the outset of the Great Depression, and the much more active Curtin and Chifley governments (1941–1949) that provided many of the most controversial constitutional cases before the High Court.⁴²¹ Those Labor governments had very strong beliefs about the importance of centralized political power and were very serious about the provision of welfare, the organization, and even nationalization of parts of the free market.⁴²² Despite the continued adherence to the *Engineers* principle, the High Courts of that period were not sympathetic to these goals.⁴²³

One exception to this during the war years is instructive of the general trend: The High Court accepted a Labor government scheme to deprive the states of their practical power to levy income tax, a policy which has essentially continued to this day.⁴²⁴ The Commonwealth had already exerted some financial control over the states through the operation of section 96, the “Grants Power.”⁴²⁵ While this might have been thought to be akin to an

417. See Stellos, *supra* note 398, at 358 (asserting that the High Court’s broad constitutional interpretation in favor of the Commonwealth created an unbalanced federal fiscal power).

418. See GALLIGAN, *supra* note 378, at 2.

419. See *id.* at 94–95, 105–06, 118–19 (discussing the ways in which these various governments used the Constitution in attempts to enact legislative initiatives).

420. See *id.* at 94–95. At its inception, it was called the “Australian Labour Party,” but in 1918 the spelling was changed to “Labor.” *Australian Labor Party*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Australian-Labor-Party> (last visited Oct. 22, 2020).

421. See *id.* at 118–19.

422. See Stellos, *supra* note 398, at 358.

423. See GALLIGAN, *supra* note 378, at 119. Although both are somewhat dated, the following two books provide illuminating coverage for the periods up to 1960 and 1984, respectively. See GEOFFREY SAWER, *AUSTRALIAN FEDERALISM IN THE COURTS* (1967); see also GALLIGAN, *supra* note 378, at 184.

424. See *South Australia v Commonwealth* (1942) 65 CLR 373; see also *Victoria v Commonwealth* (1957) 99 CLR 575.

425. This section reads: “During a period of ten years after the establishment of the Commonwealth

emergency power granted to the Commonwealth government to help states in financial difficulty from time to time,⁴²⁶ this section quickly became a vehicle for the Commonwealth to fund the states on terms provided by the Commonwealth.⁴²⁷ These terms often forced the states, if they wished the money, to carry out programs that the Commonwealth wanted pursued but for which they lacked legislative power.⁴²⁸ With the High Court accepting the Commonwealth's political scheme to centralize the collection of income tax, the Commonwealth's fiscal dominance was further entrenched.⁴²⁹

However, by the 1970s both the Labor Party and the High Court had changed. The Labor Party had moved on from its desire to nationalize industries and the High Court became even more favorably disposed to giving the Commonwealth Parliament wider powers.⁴³⁰ Landmark cases in the areas of foreign affairs and the corporations powers have created a situation where the Commonwealth has not total, but far-reaching legislative control over nearly all aspects of life in Australia.⁴³¹ This, combined with a revolution in the interpretation of the trade and commerce power in section 92⁴³² and further restrictions of the states' capacities to raise revenue, has meant that the Commonwealth government's financial dominance, although not total, is certainly paramount to the states' activities.⁴³³

and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit."

426. See JOHN QUICK & ROBERT GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (1976). This is the view put forward by the authoritative annotation of the Constitution published in the same year of Federation, 1901. *Id.*

427. See *Stellios*, *supra* note 398, at 358.

428. *Id.*; see GALLIGAN, *supra* note 378, at 143.

429. See GALLIGAN, *supra* note 378, at 124.

430. See *id.* (stating that the High Court began to be more accommodating of the Labor Party's initiatives and generally expanded the Commonwealth's legislative powers).

431. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (explaining the external affairs power (section 51 (xxix)); *Commonwealth v Tasmania* (1983) 158 CLR 1; *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468 (explaining the corporations power (section 51 (xx))); *Commonwealth v Tasmania* (Tasmanian Dams Case), (1983) 158 CLR 1; *N.S.W. v Commonwealth* (2006) 229 CLR 1.

432. This section provides that "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." Unfortunately for everyone involved, it has never been entirely clear what that absolute freedom was meant to protect. See *Cole v. Whitfield* (Tasmanian Lobster case) (1988) 165 CLR 360 (discussing different interpretations of "absolutely free trade" and finding "the records of the movement towards federation, to some of which we now refer, do not establish that the notion of absolutely free trade and commerce had any precise settled contemporary content").

433. See *Tasmanian Lobster Case*, 165 CLR 360 (discussing section 92); *Ha v New South Wales* (1997) 189 CLR 464 (discussing the states' capacity to raise revenue). The irony of the present

It must be recognized that this judicial transformation of the Constitution was carried in line with the desires of successive Commonwealth governments of both Labor and conservative persuasions, especially from the 1970s.⁴³⁴ An increasingly centralist High Court was generally working in line with increasingly centralist Commonwealth governments of all political persuasions.⁴³⁵

While the High Court has continually asserted that the states are constitutionally protected from the government, this is more a matter of form than substance.⁴³⁶ As we have seen, the legislative powers and financial freedom of the states have been drastically diminished by the centralist bias of the High Court since 1920.⁴³⁷ While the High Court has consistently argued that the political and bureaucratic institutions of the states are protected by the Constitution, it has not accepted the idea that to be truly protected they need substantive legislative powers.⁴³⁸ And yet, despite this shift from arbiter to Commonwealth champion, the states have not withered away; indeed, in an age of increasing governance of more and more aspects of life, they still

constitutional position of section 92 is that now that the Labor Party could probably nationalize industries without breaching section 92, it no longer wants to do so. See Stellos, *supra* note 398, at 358 (internal footnotes omitted); see also *Fact Check: Are Labor's Policies Socialist?* ABC News (Sept. 19, 2019, 1:53 PM), <https://www.abc.net.au/news/2017-09-20/fact-check3a-are-labor27s-policies-socialist3f/8948552> ("Labor is not proposing nationalism of Australian industries.").

434. See generally GALLIGAN, *supra* note 378, at 171 ("Nationalization was the Labor government's ultimate weapon that it reverted to when less severe measures seemed ineffective."). The author later discusses High Court cases decided at the end of the 1970s and early 1980s, finding the High Court "allow[ed] extensive scope for commonwealth action by interpreting broadly grants of power," and "mov[ed] to the progressive Labor side of politics." *Id.* at 240, 245.

435. See *id.* at 250 (stating that the High Court's decisions "produced a persistent, if irregular, incremental centralization of constitutional power that roughly paralleled Australia's growth to nationhood").

436. See *id.* at 260. The author asserts that the Court's recent decisions have "left the federal government with virtually unlimited formal powers." *Id.*

437. See *id.* at 110 ("The *McArthur* decision (1920) had left the states in an impossible position because it interpreted the 'absolute' freedom of interstate trade and commerce guaranteed by section 92 in a literal and expansive manner, but applied the section solely against state interference with interstate trade and commerce.").

438. See *N.S.W. v Commonwealth* (2006) 231 ALR 1, 149 (holding the Commonwealth constitutionally limited the workplace relations legislation powers of the states under the Amending Act). Justice Kirby dissented, asserting there must be federal balance between the powers of the Constitution and the states, reasoning that the Constitution does not "suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society." *Id.* at 326 (Kirby, J., dissenting). Justice Callinan also dissented, arguing the act "trespass[ed] upon essential functions of the States." *Id.* at 400 (Callinan, J., dissenting).

constitute an important residue of political power.⁴³⁹ The pronounced increase in governance in all advanced economies has meant that even with drastically reduced powers, the states still profoundly affect the day-to-day lives of their citizens.⁴⁴⁰ The political, as distinct from the constitutionally granted, powers of the states are still considerable. It is clear, however, that today, Commonwealth legislative and fiscal dominance continues. The states are subservient, with the day-to-day relationship between them depending on the political skills of the main political actors at both levels, the timing of elections, and the relative economic health of each state compared to each other and to the Commonwealth.

a. Was Centralization Inevitable?

It might be argued that in an age of globalization, centralization was inevitable, and that the High Court was merely reflecting political realities instead of making concrete choices. A comprehensive response to such a claim cannot be given here, but an examination of just one of the Commonwealth's legislative powers will show how the High Court's choices were not inevitable and did not necessarily lead to optimal outcomes in a globalized world.

Under section 51(v), the Commonwealth has the power to legislate for "postal, telegraphic, telephonic, and other like services."⁴⁴¹ By reading this power in an expansive fashion, the High Court removed the states from having a political role in the regulation of the various forms of media, press, broadcast and, as is likely, the internet.⁴⁴² In other words, political federalism was denied the chance of achieving a harmonized and *better* regulation of the media across Australia. This began in 1935 with *The King v Brislan; Ex parte*

439. See generally Scott Bennett, *The Politics of the Australian Federal System*, PARLIAMENT AUSTL. 1, 18–19, 28 (Dec. 1, 2006), <https://www.aph.gov.au/binaries/library/pubs/rb/2006-07/07rb04.pdf> (discussing how cooperation between the federal government and the states remains important for the function of the Australian federation and how the states still run large governmental apparatuses, which would make eradication of the states difficult).

440. See generally EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL ENQUIRY (2007) (studying modern American governance and how it is broadly applicable to Australia and many other countries).

441. Australian Constitution s 51.

442. See Bennett, *supra* note 439, at 4 (stating that the textual ambiguity of section 51 allowed the High Court to "gradually increase central government power").

Williams (“*Brislan’s case*”),⁴⁴³ where the Court was faced with the question of whether a law requiring a license to listen to radio broadcasts came within the power given to the Commonwealth pursuant to section 51(v) of the Constitution, and in particular, whether radio broadcasting was one of the “like services” of that section.⁴⁴⁴ The majority justices, Chief Justice Latham, and Justices Rich, Evatt, Starke, and McTiernan, thought that it was, and that therefore, the Act was validly enacted.⁴⁴⁵ For the majority, “like services” envisaged communication in a broad sense and not strictly limited to interpersonal communication.⁴⁴⁶ In dissent Justice Dixon argued that the law under question was not validly enacted because section 51(v) only gave power over interpersonal communication, and therefore, was not a “like service.”⁴⁴⁷

Brislan’s case thus set the scene for Commonwealth control of the media, and in *Jones v Commonwealth [No 2]*⁴⁴⁸ the High Court accepted that section 51(v) allowed the Commonwealth to create the Australian Broadcasting Commission,⁴⁴⁹ with the majority following *Brislan’s case* in accepting that “like services” in section 51(v) included radio and TV transmissions, and that this included the power to create the publicly owned Australian Broadcasting Commission.⁴⁵⁰ In *Herald & Weekly Times Ltd v Commonwealth*,⁴⁵¹ the High Court held that Commonwealth laws which imposed conditions upon the holding of commercial TV licenses and prohibited certain conduct in relation to such licenses were validly enacted under section 51(v), giving effect to

443. *R v Brislan; Ex parte Williams (Brislan’s case)* (1935) 54 CLR 262.

444. *Id.* at 264.

445. *Id.* at 280, 282, 294–95.

446. *Id.*

447. *Id.* at 293 (Dixon, J, dissenting).

448. *Jones v Commonwealth [No 2]* (1964) 112 CLR 207.

449. This is now called the Australian Broadcasting Corporation (“ABC”). *ABC History*, ABC News, <https://about.abc.net.au/abc-history/> (last visited October 22, 2019). The ABC (as it is commonly called in Australia) is a public broadcaster in radio, TV, and internet. *Id.* In 1929 the ABC was formed by the Commonwealth government as a publicly owned broadcaster of independent radio broadcasts throughout Australia. *Id.* On July 1, 1932, the ABC was set up as a publicly owned broadcaster based on Britain’s BBC model. *Id.*

450. *Jones*, 112 CLR 207, 219, 222–23, 225–28, 237, 243–45. Justice Menzies dissented because his analysis of *Brislan’s case* showed that the mere preparation of radio and TV broadcasts was not within the power given under section 51(v) which, in his view, was limited to broadcasting. *Id.* at 230–33 (Menzies, J., dissenting). Justice Windeyer applied *Brislan’s case* but noted that if not bound by that authority he would have accepted Justice Dixon’s understanding of the operation and limits of section 51(v). *Id.* at 237.

451. *Herald & Wkly. Times Ltd v Commonwealth* (1966) 115 CLR 419.

*Brislan's case and Jones.*⁴⁵²

Recently, Paul Kildea and George Williams summarized the Commonwealth's power of regulating print and electronic media by concentrating on the extensive powers available to it under sections 51(v) and (xx).⁴⁵³ As we have seen, the former gives the Commonwealth wide-ranging powers over radio and TV broadcasting, and it is likely that the High Court will extend this to regulation of the internet.⁴⁵⁴ As also noted above, in a series of landmark decisions commencing in the 1970s, the High Court gave its imprimatur to extensive regulation of trading, financial, and foreign corporations.⁴⁵⁵ It is this power which Kildea and Williams suggest could be used by the Commonwealth to regulate the print media, an activity otherwise controlled by the states.⁴⁵⁶

Viewed from 2020, it might be argued that there was a certain inevitability about these decisions.⁴⁵⁷ One might imagine most constitutional law scholars in Australia laughing at the notion that radio and TV broadcasting could be effectively regulated by the states, and that this is even more the case when we consider the powerful media companies that now dominate the press, radio, and TV.⁴⁵⁸ The laughs would, one suspects, extend to guffaws regarding the idea of the states trying to regulate Facebook, Google, Amazon, and the rest of the new titans of the internet age.⁴⁵⁹ The defenders of the centralization of governmental powers would argue that the media barons would have had even more sway over six weak state governments than they had over a far stronger Commonwealth government.⁴⁶⁰ This would be the case if the states went at it alone. But what if the states and the

452. *Id.* at 432.

453. Paul Kildea & George Williams, *The Constitution and Commonwealth Proposals for New Media Regulation*, 18 MEDIA & ARTS L. REV. 2, 8 (2013).

454. *Id.* at 11.

455. *Id.* at 13.

456. *See id.* at 15.

457. *See generally* Bennett, *supra* note 439, at 15–17 (noting that societal change such as internal migration, the growth of cities, the changing needs of business, and international events have naturally led to increased centralization).

458. *See* Kildea & Williams, *supra* note 453, at 10, 16 (discussing cases in which the Court found that the TV and media industries should be regulated by the Commonwealth and not the states).

459. *See* Lesley Hitchens, *Australian Media Reform—Discerning the Policy*, 30 U.N.S.W. L.J. 246, 251 (2007) (citing the new media growth as presenting new issues for regulation).

460. *See generally* Rob Harding-Smith, *Media Ownership and Regulation in Australia*, CENTRE FOR POL'Y DEV. ISSUE BRIEF (2011) (analyzing the dangers of the concentration of media ownership on Australian democracy).

Commonwealth agreed to a joint approach to media regulation, thus ensuring that there would be no legislative lacunae? If that track had been pursued there would have been much more transparency and much less opportunity for media barons to deal with just one government.⁴⁶¹ Given that for most of Australia's history the state and Commonwealth governments have been made up of various and competing conservative and Labor governments, there would have been less opportunity for one side of politics to do a "deal" and too many people involved to avoid leaks if one were attempted.⁴⁶² In other words, a more strictly federal approach to media regulation would have provided far more transparency and much less likelihood of corrupt political "deals" favoring the government of the day.⁴⁶³

What did Australia experience? From the earliest days of the Federation, strong media figures played a significant and oversized role in political affairs.⁴⁶⁴ From Keith Murdoch's meddling in Australia's war efforts in WWI,⁴⁶⁵ to Frank Packer's involvement with the new Menzies government in 1950,⁴⁶⁶ and to the later even more significant political relationships of their sons, Kerry Packer and especially Rupert Murdoch, Australia has had a history of serious interference by media barons in political affairs.⁴⁶⁷ In the 1980s, the conservative Fraser Coalition government

461. See generally Harding-Smith, *supra* note 460 (describing the influence on "the power of the owners of the news media who were prepared to trade uncritical coverage for favorable policy decisions").

462. See generally *id.* "[F]ormer [Australian] Prime Minister Malcolm Fraser suggested that high levels of media concentration made it particularly difficult for politicians to resist the temptation to give in to pressure from owners" because the "pressure is coming from one or two extraordinarily dominant media owners." *Id.*

463. See *id.* (noting how a "political consequence of highly concentrated media ownership" is "the extent to which it can empower media owners to influence media regulation in their own favour").

464. See Harding-Smith, *supra* note 460 ("Influential relationships between media owners and politicians have been recorded as far back as the 1930s.").

465. Tony Wright, *Sir John Monash Was Familiar with the Brush-Off 100 Years Ago*, SYDNEY MORNING HERALD (Apr. 17, 2018, 11:45 PM), <https://www.smh.com.au/politics/federal/sir-john-monash-was-familiar-with-the-brush-off-100-years-ago-20180413-p4z9gw.html>.

466. Bridget Griffen-Foley, *Press Proprietors and Political Pundits: The Media and Politics in Postwar Australia*, Nat'l Lib. Austl. (Dec. 6, 2003), <https://www.nla.gov.au/bridget-griffen-foley/press-proprietors-and-political-pundits-the-media-and-politics-in-postwar-australia>.

467. See Jonathan Mahler & Jim Rutenberg, *How Rupert Murdoch's Empire of Influence Remade the World*, N.Y. TIMES MAG. (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump.html> ("In Australia, where Murdoch's power is most undiluted, his outlets had led an effort to repeal the country's carbon tax—a first for any nation—and pushed out a series of prime ministers whose agenda didn't comport with his own.").

amended the broadcasting law to enable a non-resident citizen (Rupert Murdoch was by then based in London and New York) to control a TV licence after Murdoch bought Ten. And, after Murdoch became a US citizen (losing his Australian citizenship in the process) Labor approved his foreign takeover of his father's old company, the *Herald & Weekly Times*, in 1987, transforming the Sydney-based News into the dominant national player.⁴⁶⁸

These were extraordinary moves indeed and attest to the strength of the relationship between Rupert Murdoch and the national government of the time, and the lengths to which the Fraser government was willing to go to keep Murdoch happy.⁴⁶⁹ But it wasn't only the conservative side of politics that tied its fortunes to Murdoch.⁴⁷⁰ As Robert Manne reports, while the Hawke Labor government was contemplating new media ownership rules, Bob Hawke as Prime Minister openly supported Murdoch to spite those Hawke saw as media enemies of the Labor Party.⁴⁷¹ Paul Keating, the Treasurer and soon to be Prime Minister, felt the same way:

Keating was not merely a passive supporter of the Murdoch takeover. By secretly providing Murdoch with inside information about the government's proposed new media laws—where the ownership of television and newspapers was to be separated—Keating actively sought to bury the *Herald and Weekly Times*, to thwart Fairfax's ambitions and to facilitate News Corp's domination of the Australian press.⁴⁷²

One should take a moment just to see how breathtakingly corrupt these actions were and how they show that both sides of politics sold their souls to Rupert Murdoch.⁴⁷³ By the end of the 20th century, Murdoch owned two-thirds of Australia's metropolitan press, an unhealthy situation given that

468. Jack Vening, *The Rich History of Murdoch Political Meddling*, CRIKEY (Oct. 5, 2018), <https://www.crikey.com.au/2018/10/05/rupert-murdoch-political-meddling/>.

469. *See id.* (noting that the relationship between the Fraser government and Rupert Murdoch was not perceived as negative until a political shift in 1992 and 1997).

470. *See* Robert Manne, *Why Rupert Murdoch Can't Be Stopped*, THE MONTHLY (Nov. 2013), <https://www.themonthly.com.au/issue/2013/november/1383224400/robert-manne/why-rupert-murdoch-can-t-be-stopped#mtr>.

471. *See id.*

472. *Id.*

473. *See id.*

Murdoch is “an ideologue who has a proven track record of political manipulation and who demands that his newspapers across the globe remain committed to his views, as all 173 did, for example, during the 2003 invasion of Iraq.”⁴⁷⁴

The point of this lengthy discussion of the close relationship of media barons and various Commonwealth governments is to show the deplorable results that are associated with centralized control of the media in Australia.⁴⁷⁵ Could it have been any worse if the High Court had held that radio and TV broadcasting were matters for state governments, and if the High Court had not read the corporations power as expansively so that regulation of the press remained a state matter?⁴⁷⁶ No definite answer can be given to these questions, but a plausible case can be made that had the Commonwealth not been given control over the media, press, and broadcast, Australia might have ended up with a less corrupt history of relationships between medial barons and government.⁴⁷⁷ In other words, centralization was neither inevitable nor ideal.

b. An Imperial, Centralized High Court

Still, the High Court’s approach to judicial review, with its concomitant incremental but inexorable movement to greater powers for the Commonwealth—while perhaps not entirely destroying the states—has meant that the staple of constitutional litigation in Australia, the demarcation disputes around legislative power between the states and the Commonwealth, no longer has the importance it once had.⁴⁷⁸

New vistas and avenues for constitutional litigation now occupy the

474. *Id.* Media monopolies are not only an Australian phenomenon. See Paranjoy Guha Thakurta, *Curbing Media Monopolies*, 48 *ECON. & POL. WKLY.* 10, 10–14 (2013).

475. See Manne, *supra* note 470 (reiterating a warning about Murdoch, stating that “[t]he effective control of the media is the first step on the road to controlling the values and future direction of our society”).

476. See generally Thakurta, *supra* note 474, at 10 (stating several organizations have “argued why the domination of particular groups over different sections of the mass media . . . is unhealthy for media plurality in particular and democracy in general”).

477. See Manne, *supra* note 470 (“The truth is sad and salutary. News Corp’s domination of the press is a threat to Australia’s democracy.”).

478. See Bennett, *supra* note 439, at 5 (“Over time, as our understanding of federal nations has grown, we have seen an increasing frequency and range of central intervention in the supposedly separate and protected powers of territorial governments, irrespective of how the constitution was constructed.”).

Court; these might be grouped, as Sackville does, into three categories.⁴⁷⁹ The first category is the High Court expansion of the scope of judicial review to cover administrative action, at both the Commonwealth and state levels, so that neither now can immunize administrative decisions against a rather flexible understanding of jurisdictional error.⁴⁸⁰

Second, the High Court has embarked on the creation of a due process clause or “a truncated bill of rights” that has been drawn from the Court’s understanding of the separation of powers in the Australia Constitution.⁴⁸¹ Since Federation, the High Court has insisted on a clear distinction between judicial power on the one hand, and legislative and executive powers on the other.⁴⁸² Courts are seen as the only depository of judicial power and, therefore, they cannot exercise non-judicial powers.⁴⁸³ The result has been the creation of Bill of Rights of a sort:

A Ch III court exercising the judicial power of the Commonwealth cannot be required to act in a manner which compromises the reality and appearance of the court’s independence and impartiality, as this denies basic procedural fairness to a party or departs, without proper justification, from the principle of open justice. Nor can a Ch III court be deprived of the power to order the release from custody of a person who is unlawfully detained. And since judicial power cannot be vested in bodies other than Ch III courts, the adjudication and punishment of criminal guilt under a law of the Commonwealth is exclusively reserved to the courts.⁴⁸⁴

Although the state constitutions do not embody the separation of powers, the High Court, in perhaps the worst reasoned judgment in its history, *Kable v Director of Public Prosecutions (NSW)*,⁴⁸⁵ proclaimed that state courts were to be treated in the same way as federal courts, with all the protections and freedoms that attach to the latter.⁴⁸⁶ The High Court has not been hesitant to

479. See Sackville, *supra* note 408, at 257.

480. *Id.*

481. *Id.* at 257–58. In the Australian Constitution, the legislative power of the Commonwealth is covered in Chapter I, the executive power in Chapter II, and the judicial power in Chapter III.

482. See Sackville, *supra* note 408, at 257–59.

483. See *id.*

484. Sackville, *supra* note 408, at 258 (internal citations omitted).

485. *Kable v Dir. of Pub. Prosecutions (NSW)* (1996) 189 CLR 51.

486. *Id.* at 56.

find Commonwealth and state legislation invalid as interfering with the judicial process.⁴⁸⁷ As Sackville notes, the High Court’s reasoning in this area “shares some of the characteristics of a constitutional court interpreting an express bill of rights incorporated in a written constitution.”⁴⁸⁸

Finally, the High Court has found an implied freedom of political communication drawn from the text and structure of the Constitution.⁴⁸⁹ As Sackville notes, the test drawn by the High Court is vague and has led to the invalidation of both Commonwealth and state legislation in a distinctly “counter-majoritarian fashion,” replacing the considered and publicly discussed laws of elected Parliaments in favor of the views of unelected judges.⁴⁹⁰ When it is remembered that in Australia there never has been a real threat that the general population would be denied the capacity to discuss politics in a robust fashion, it becomes clear that one unfortunate consequence of this implied right is that it protects large media companies rather than the general population. It is not exactly clear that this is a movement forward for freedom in Australia.

But these are not the only ways in which the High Court has sought power.⁴⁹¹ James Stellios makes a persuasive case that the High Court has increased the centralization of judicial power itself within Australia.⁴⁹² He notes that through a variety of mechanisms, the High Court has interpreted the judicial power granted in Chapter III of the Constitution in a way that has emasculated the federal aspects of the relationship between the High Court and the state courts.⁴⁹³ One way in which this has been done is through the notion of “accrued jurisdiction.”⁴⁹⁴ Federal jurisdiction applies to “matters.”⁴⁹⁵ When proceedings are brought before a court and there are state and federal claims at issue, the High Court has taken, in Stellios’s words, a

487. See Sackville, *supra* note 408, at 259 (stating that “the invalidation of laws by reason of the incompatibility doctrine has proved not to be a rare phenomenon”).

488. Sackville, *supra* note 408, at 259.

489. See *id.* This implied freedom owes its genesis, but not its ultimate form, to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and to *Australian Cap. Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

490. Sackville, *supra* note 408, at 260.

491. See Stellios, *supra* note 398, at 357 (noting the High Court developed “other rules of interpretation that allow expansive readings of federal heads of legislative power”).

492. *Id.*

493. *Id.* at 362.

494. *Id.* at 363.

495. See Australian Constitution ss 75, 76, 77.

“relaxed approach for determining whether federal and state claims form part of the same ‘matter’”⁴⁹⁶ and a liberal attitude in determining whether the claims can be severed, with the result being more and more cases, including state-based claims, decided by an exercise of federal judicial power because of the accrued federal jurisdiction.⁴⁹⁷

Another way in which the High Court has centralized judicial power is by imposing constitutional limitations which, in form, only apply to federal courts but are now imposed upon state courts through creative High Court decisions.⁴⁹⁸ Through the operation of *Kable*⁴⁹⁹ and subsequent cases,⁵⁰⁰ the High Court has limited the capacity of the state governments to design their own court and dispute resolution mechanisms.⁵⁰¹ As Stellios notes, these developments have meant that “there has also been increased potential for federal control” over the practice and procedure of the state courts.⁵⁰²

But, as the telemarketers say, there is more. As noted above, the Australian Constitution provided for the High Court to be the ultimate court of appeal for both federal and state courts.⁵⁰³ One consequence of this is that there would be greater uniformity in the development of the common law in Australia compared to, for example the United States.⁵⁰⁴ There, the state courts are free to develop the common law in divergent ways, although the Supreme Court has interpreted the Bill of Rights and the various powers given to the Congress and the President in ways which have broadened the jurisdiction of the Supreme Court and other federal courts.⁵⁰⁵

Still, the High Court has interpreted its position in the judicial hierarchy in Australia in ways that maximize its control of the state courts and minimize the capacity of those state courts to develop the common law.⁵⁰⁶ As Stellios

496. Stellios, *supra* note 398, at 364.

497. *Id.*

498. *Id.* at 368 (explaining the “federal separation of judicial power principles apply as limitations on the federal Parliament only”).

499. See *Kable v Dir. of Pub. Prosecutions (NSW)* (1996) 189 CLR 51.

500. See, e.g., *Kirk v Indus. Relations Comm’n of N.S.W.* (2010) 239 CLR 531; see also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

501. *Id.* at 371.

502. Stellios, *supra* note 398, at 372.

503. Stellios, *supra* note 398, at 363.

504. *Id.* at 374 (explaining the “centralizing pattern can also be seen in the increased uniformity in the legal rules applied in federal and state courts”).

505. *Id.* at 375.

506. *Id.*

notes, the High Court's grab for power has meant that it sees the legal system in Australia as a unitary, not a federal one.⁵⁰⁷ The High Court has argued that there is only one common law in Australia and that state courts should not see their role as independently developing the common law, subject to appeal to the High Court, but rather as lower ranked courts with a limited capacity to develop the law.⁵⁰⁸ Since the High Court now essentially chooses which cases will come before it, this direction to the state courts amounts to a declaration that the development of the law is primarily a matter for the High Court, with the state courts being given the basic minimum role in developing the law.⁵⁰⁹ As Stellios argues, this has reduced the capacity of the states to develop the common law.⁵¹⁰ As he says, there is an irony that as the J.C.P.C. came to accept that the common law could and should develop differently in different parts of the British Commonwealth, the High Court moved to reduce the capacity of the state courts to develop the common law.⁵¹¹ In short, the High Court has crafted a national legal system, with itself at the apex, out of a federal legal system created in the Constitution.⁵¹²

The High Court adopted, early in the federal history of Australia, an image of its Constitution which gives a natural and generous reading to Commonwealth power, thereby converting what appeared to be a text which allowed the states to retain their pre-federal constitutional power, changing the meaning of the constitution into one favoring the federal government.⁵¹³ Thus, while the Constitution is little changed in written form from its origins in 1901, the "living reality" of the Constitution has been so transformed that it bears little relation to the Constitution established in 1901.⁵¹⁴ What was originally conceived as a strong federal structure has over the years become a

507. *Id.* at 377–78.

508. See *Lipohar v The Queen* (1999) 200 CLR 485, 505–10. See especially the joint judgment of Justices Gaudron, Gummow, and Hayne. *Id.* Chief Justice Gleeson and Justice Kirby were more cautious about the effect of accepting that there was one common law in Australia. *Id.* at 500–01, 551–52. Justice Callinan devoted much of his judgment to an explanation of why there was not one common law in Australia. *Id.* at 573–84.

509. Stellios, *supra* note 398, at 363.

510. *Id.* at 378.

511. *Id.* at 376; see *Farah Constr. Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (representing the High Court view on this matter).

512. Stellios, *supra* note 398, at 383.

513. See *Amalgamated Soc'y of Eng'rs v Adelaide Steamship Co.* (1920) 28 CLR 129, 132–38; see also GALLIGAN, *supra* note 378, at 98–100.

514. See Stellios, *supra* note 398, at 387; Bagehot, *supra* note 1.

strongly centralized polity in legislative, executive, and judicial power.⁵¹⁵

IV. CONCLUSION

The use of foreign constitutional texts and interpretations has a mixed record in most final appellate courts.⁵¹⁶ The apparent usefulness of such extra-jurisdictional materials seems to wax and wane.⁵¹⁷ Some may see such materials, in substantive terms, as having limited utility; conversely, others may see them as providing deep insight into the fundamental values a constitutional text seeks to achieve.⁵¹⁸ What we hope to have shown here is not so much that there is comparative value in looking at the substantive interpretations of specific provisions of a constitution for other jurisdictions, or of the choices of meaning made by judges in any one jurisdiction. In the final analysis, they are merely choices about a particular text, whatever changes in meaning for that text they might bring about.⁵¹⁹ What interests us is the simple fact that judges in every jurisdiction do the same thing—they make choices about the meaning of their text—and that that has the practical effect of amending the constitution they are charged with interpreting and enforcing. It matters little, in other words, to those beyond the relevant jurisdiction that Indian judges have poured substantive content into the empty vessels of rights, or that American judges did much the same, or that United Kingdom or Canadian judges found a coordinate federalism, or that Australian judges found a strongly centralized one. Those choices can have little practical relevance outside the jurisdictional boundaries in which they were made. What matters is that every judge understood their role the same way—motivated by an image of a constitution, choices were made about what the text meant, which changed it over time.⁵²⁰

515. *See id.* at 376.

516. *See* Peter Roudik, *The Impact of Foreign Law on Domestic Judgments*, LAW LIBR. CONGRESS 1, 20 (Mar. 2010), <https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf> (noting the differences in France and Canada regarding constitutional documents and appeal processes).

517. *See id.* at 20 (stating the difficulties that arise with inconsistent measures).

518. *See* Stelliios, *supra* note 398, at 385 (explaining the limitations of the “infiltration of the separation of judicial power values of independence and impartiality”).

519. *See* Stelliios, *supra* note 398, at 377 (acknowledging that the choices regarding a text can change the meaning of it).

520. *See* Stelliios, *supra* note 398, at 377 (acknowledging the different views judges have and how that impacts the legal standards in the court); *see also* Thomas Jipping, *The Constitution Doesn't Mean*

This article shows how judges in the final appellate courts of federal democratic systems make use of images of a written constitution—images much of their own making—not only to give, but also, more importantly, to change, constitutional meaning.⁵²¹ In each of the four jurisdictions we considered, final appellate courts created an image of a constitution, and then assiduously relied upon that image to give and to change meaning, in each case taking the constitution well beyond what its Framers thought they had created—well beyond the founding image.

In the United States, the image has been one that focuses to a great extent on the development of a jurisprudence of rights, in respect of which, as Marshall said, “[i]t is emphatically the province and duty of the judicial department to say what the law [meaning the Constitution] is.”⁵²² Holmes put it more succinctly, writing that the judges are the “expounders of the Constitutions.”⁵²³ This has resulted not only in the courts providing the content of the rights found in the Bill of Rights, but also in the incorporation of those rights into the guarantee against the power of the states in the Fourteenth Amendment. However one chooses to look at this, the effect is the same: The meaning of the original text has been modified over time to establish the meaning of the rights protected and the scope of their application.⁵²⁴ And all of this has happened without the text of the Bill of Rights itself ever having been formally amended.

In India, an image of rights as empty vessels forming the basic constitutional structure allowed the Supreme Court to fill the express justiciable provisions of the Indian Constitution with substantive content using as a guide the non-justiciable Directive Principles.⁵²⁵ In this way, the Supreme Court used the express provisions of the Indian Constitution to impose limitations upon the exercise of state power made possible by the

Whatever Judges Think It Does, HERITAGE FOUND. (Apr. 7, 2020), <https://www.heritage.org/the-constitution/commentary/the-constitution-doesnt-mean-whatever-judges-think-it-does>.

521. See Stellios, *supra* note 398, at 365 (acknowledging the long-term impact derived from a court’s decision); see also, e.g., Morton, *supra* note 287, at 219.

522. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

523. See Holmes, *supra* note 79, at 467–68; see also HOLMES, *supra* note 153, at 31–32.

524. See Jack M. Balkin, *Constitutional Change and Interpretation in the United States: The Official and the Unofficial*, JUS POLITICUM, <http://juspoliticum.com/article/Constitutional-Interpretation-and-Change-in-the-United-States-The-Official-and-the-Unofficial-1088.html> (last visited Oct. 22, 2020) (explaining that judges have to decide what the words of the Constitution mean).

525. See KASHYAP, *supra* note 211, at 162 (explaining how the Directive Principles are not just a religious declaration but an instrument to be used in legislative action).

machinery of government.⁵²⁶ The Supreme Court did this by making use of provisions which the Framers expressly intended to be non-justiciable, precatory words aimed at the executive and legislative branches of government, but used by the judges in novel and unforeseen ways.⁵²⁷ The Supreme Court has thereby played a central role in limiting and decentralizing state power, providing new meaning to the written text in the absence of formal amendment.

In Canada, the J.C.P.C. turned the Canadian Constitution into a text in which a balance of federal and provincial power—coordinate federalism—gained the ascendancy over the Framers’ image of a strong central government.⁵²⁸ Using an image that seemingly bore no relationship at all to what the Framers intended, both in their clearly expressed intentions and in the written text they produced, judges in Canada diminished the strength of the federal POGG power almost to nothing, bolstering the power of the provinces at every turn.⁵²⁹ The Framers had no doubt which government ought to be dominant.⁵³⁰ The judges saw it very differently, relying on an unexpressed, theoretical understanding of federalism that never bore any resemblance to Canadian reality.⁵³¹ Formal amendment, moreover, played no part whatsoever in the change of constitutional meaning.

In Australia, we found a Constitution that is federal in formal terms, but strongly centralist in real terms, according to the image used by the High Court.⁵³² There, relying on a natural and generous reading of Commonwealth power, the High Court converted what appeared to be a text which allowed the colonies, the newly minted states, to retain their pre-federal constitutional power, and converted its meaning into a Constitution favoring the federal government.⁵³³ Such an approach would no doubt have pleased the Framers of the Canadian Constitution, if only that were the text the Australian judges were using.

526. See Kumar, *supra* note 184, at 196–97.

527. See Kesavananda Bharati v. Kerala, AIR 1973 SC 1461 (India).

528. See Morton, *supra* note 287, at 219 (noting that the Constitution established a highly influential form of federalism).

529. See *id.* at 221 (stating that Canadian judges used statutory interpretation techniques for constitutional interpretation).

530. See *id.* at 219; see RUSSELL, *supra* note 4, at 40.

531. See Kennedy, *supra* note 341, at 393–94.

532. See Stellios, *supra* note 398, at 357.

533. See *Amalgamated Soc’y of Eng’rs v Adelaide Steamship Co.* (1920) 28 CLR 129, 132–38; see also GALLIGAN, *supra* note 378, at 98–100.

We are left, then, with an important conclusion involving the work of judges in a federal democratic system, no matter how that Constitution might have come into existence. Whatever the origins of the Constitution—revolutionary or adaptive establishmentarian—and whatever the background of the judges and the text with which they work, what they do tends to coalesce around an image of a Constitution. That image, in turn, is used in the first instance to give meaning, but more importantly, to change meaning over time. That meaning might change in positive terms, in circumstances where formal amendment either proves politically impossible or takes too long in responding to changing socio-politico-economic conditions.⁵³⁴ That seems to have been the case in the interpretation of rights in the United States and in India.⁵³⁵ But it might also change meaning in ways which the Framers never intended, even in the face of changing circumstances. That seems to have been the case in Canada and Australia.⁵³⁶ Whatever the outcome, though, the judges have much to do with getting there.

534. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing judicial review for the Supreme Court); *see also* *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India) (using the non-justiciable Directives Principles to establish a welfare state pursuing the ideals of socio-economic justice).

535. *See, e.g.,* *Marbury*, 5 U.S. at 177; *see also* *Bharati*, AIR 1973 SC at 1461.

536. *See id.*; *see also* Morton, *supra* note 287, at 219.

[Vol. 48: 341, 2021]

No Amendment? No Problem
PEPPERDINE LAW REVIEW
