

COSMOPOLITAN ORIGINALISM: REVISITING THE ROLE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

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The issue of consulting international law in the interpretation of national constitutions is polarising. Both in Australia and abroad, judicial and academic responses have lacked precision and subtlety. While originalists have decried the idea of using contemporary international law to construe constitutions, non-originalists have argued that constitutions should be updated to better reflect international human rights law. This article presents a middle road between two untenable extremes. It revisits the problematic association between originalism and localism, and explores the prospect of cosmopolitan originalism. While insisting upon fidelity to the text of the Australian Constitution, this article recognises that international law is a valuable interpretive resource. In order to challenge the reluctance of originalists to consult contemporary international law, this article outlines several pathways, compatible with moderate originalism, which permit recourse to international law. The role of the common law, the ambiguity inherent in constitutional texts and the distinctive features of international law help to overcome traditional originalist objections. This article finds that although originalism constrains the role which international law can play in constitutional interpretation, originalism is not a barrier to robust engagement with international law.

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I INTRODUCTION

[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.¹

[O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future ... with a mixture of curiosity and embarrassment.²

Several great divides shape the terrain of constitutional interpretation.³ The question of what role international law can play in construing national constitutions is a major fault line.⁴ Reactions have ranged from ‘cheers and applause to jeers and catcalls’, with the ‘cacophony reach[ing] its most feverish pitch in the realm of legal scholarship.’⁵ Even in the Australian constitutional context — largely ‘untouched by the [global] juggernaut of the human rights movement’⁶ — the use of international law in constitutional interpretation has triggered judicial and academic controversy. This article revisits that debate, specifically addressing the role of contemporary *international* law, as distinct from *foreign domestic* law.

Many responses to the issue of consulting contemporary international law in the interpretation of domestic constitutions have been plagued by a lack of precision. Some commentators have repeatedly failed to distinguish between international law and foreign domestic law.⁷ ‘Legal xenophobia’ — the view

¹ *Cohens v Virginia*, 19 US (6 Wheat) 264, 387 (Marshall CJ) (1821).

² *Al-Kateb v Godwin* (2004) 219 CLR 562, 629 [190] (Kirby J) (citations omitted).

³ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 38.

⁴ Brent Michael, ‘International Law in Constitutional Interpretation: A Theoretical Perspective’ (2012) 23 *Public Law Review* 197, 197.

⁵ Rex D Glensy, ‘Constitutional Interpretation Through a Global Lens’ (2010) 75 *Missouri Law Review* 1171, 1171–2. See also Roger P Alford, ‘Misusing International Sources to Interpret the Constitution’ (2004) 98 *American Journal of International Law* 57, 57–8.

⁶ Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 380.

⁷ Gorsuch J clearly conflates international law and foreign domestic law: see Anthea Roberts, ‘Pledging American Exceptionalism: US Supreme Court Justice Gorsuch on International Law’, *Opinio Juris* (Blog Post, 23 May 2017) <<http://opiniojuris.org/2017/05/23/33125/>>, archived at <<https://perma.cc/F55E-3MGL>>. See also Harold Hongju Koh, ‘International Law as Part of Our Law’ (2004) 98 *American Journal of International Law* 43, 53; Gerald L Neuman, ‘International Law as a Resource in Constitutional Interpretation’ (2006) 30 *Harvard Journal of Law and Public Policy* 177, 177–8; Glensy (n 5) 1177–8. Cf Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 105.

that international law should not influence domestic legal reasoning⁸ — may underly and explain this oversight. Polarisation of the debate has also seen supporters of the domestic application of international law ignore compelling reasons *against* the consultation of international law.⁹ Different theories which (allegedly) oppose the use of international law in constitutional interpretation, such as originalism and localism, have been conflated.

Yet, amid all this confusion, there is no doubt that Australia does indeed present a hard case for engaging international law in constitutional interpretation.¹⁰ Characterised by a devotion to cautious legalism and ‘dry legal argument’,¹¹ Australian jurists tend to limit the scope of judicial choice that inheres in the interpretation of legal materials, including the *Australian Constitution*.¹² Coupled with the doctrine of *stare decisis*, this has had a ‘subtle and formidable conservative influence.’¹³ Despite contemporary pressure to change this orthodox attitude, reliance on international law in constitutional interpretation continues to be ‘inhibited by ... the content of the *Constitution* and the prevailing interpretive approach.’¹⁴

Opposition to the use of international law in constitutional interpretation is especially strong among proponents of originalism.¹⁵ Although Australian

⁸ Kate Eastman, ‘Foreword’ in Stephen Tully, *International Law Practice Manual* (Lawbook, 2015) viii. See also Rosalind Dixon and Sean Lau, ‘The Gleeson Court and the Howard Era: A Tale of Two Conservatives (and Isms)’ in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 284, 294.

⁹ See, eg, Ernst Willheim, ‘Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation’ (2005) 6 *Asia-Pacific Journal on Human Rights and the Law* 1, 18.

¹⁰ Laura Thomas, ‘Can International Human Rights Law Have a Legitimate Influence on the Interpretation of the Australian Constitution?’ (2005) 14(1) *Polemic* 24, 24–5.

¹¹ Jeffrey Goldsworthy, ‘Australia: Devotion to Legalism’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 113, quoting Sir Garfield Barwick, *A Radical Tory: Garfield Barwick’s Reflections and Recollections* (Federation Press, 1995) 66; Jeffrey Goldsworthy, ‘Conclusions’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 321, 329–30.

¹² Goldsworthy, ‘Conclusions’ (n 11) 329–30; George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) 172–3.

¹³ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1, 5.

¹⁴ Saunders, *The Constitution of Australia* (n 7) 96, 106.

¹⁵ Amelia Simpson and George Williams, ‘International Law and Constitutional Interpretation’ (2000) 11 *Public Law Review* 205, 226; Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 461–3; Devika Hovell

judges are usually reluctant to embrace a general theory of constitutional interpretation¹⁶ — arguing that no ‘ism’¹⁷ or formula ‘can deliver all truth, all harmony, all simplicity’¹⁸ — originalism seems to have a unique hold on Australian constitutional jurisprudence.¹⁹

Originalism strives to maintain a strong connection between constitutional doctrine and text.²⁰ However, it is a mistake to think that originalism is necessarily conservative.²¹ Although this article does not aim to support either side of the originalist–non-originalist debate, it is fair to say that *moderate originalism*, espoused by Professor Goldsworthy, embodies the virtues of moderation.²² It strikes a careful balance between the literalism of

and George Williams, ‘A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa’ (2005) 29 *Melbourne University Law Review* 95, 97; Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010) 20.

¹⁶ See, eg, *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J); *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41] (Gummow J); *Wong v Commonwealth* (2009) 236 CLR 573, 582 [20] (French CJ and Gummow J); Gabriël Moens and John Trone, *Lumb, Moens and Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 8th ed, 2012) 30; Chief Justice Robert French, ‘Interpreting the Constitution: Words, History and Change’ (2014) 40 *Monash University Law Review* 29, 31. Cf Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 323.

¹⁷ French, ‘Interpreting the Constitution’ (n 16) 43.

¹⁸ Chief Justice Robert French, ‘Theories of Everything and Constitutional Interpretation’ (Speech, Constitutional Law Conference Dinner, University of New South Wales — Gilbert & Tobin Centre of Public Law, 19 February 2010) 5, quoting John D Barrow, *New Theories of Everything: The Quest for Ultimate Explanation* (Oxford University Press, rev ed, 2007) 246.

¹⁹ *Eastman v The Queen* (2000) 203 CLR 1, 41–51 [131]–[158] (McHugh J); Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1; Michael Longo, ‘Bringing International Human Rights Norms in: Constitutional Interpretive Methodology in Australia and Canada Compared’ (2012) 18(1) *Australian Journal of Human Rights* 115, 125; Lael K Weis, ‘What Comparativism Tells Us about Originalism’ (2013) 11 *International Journal of Constitutional Law* 842, 844–5, 853. But see *New South Wales v Commonwealth* (2006) 229 CLR 1, 301–4 [737]–[738] (Callinan J).

²⁰ George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 247.

²¹ Jeffrey Goldsworthy, ‘Interpreting the Constitution in Its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 695.

²² *Ibid* 678–9.

*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*²³ and pure, subjective intentionalism.²⁴

Given that the majority of the High Court is likely to remain moderately originalist — adopting a cautious purposive approach that construes the *Constitution*'s words in general terms consistent with original public meaning²⁵ — it is worthwhile examining the role which international law can play in constitutional interpretation through an *originalist* lens. That is the primary objective of this article.

To date, most of the justifications for consulting contemporary international law in constitutional interpretation have been *external* to the originalist framework.²⁶ Non-originalists have written prolifically in favour of using international law.²⁷ However, they (by definition) have adopted justifications *antithetical* to originalism. Non-originalists have frequently advocated for the convergence of international and domestic law, rallied against dualism and argued that constitutions should be 'updated' to better reflect international human rights law. In response, originalists have decried the idea of using contemporary international law to construe constitutions.

This article suggests that we should challenge originalists' offhand rejection of international law as a tool in constitutional interpretation. After all, why is it that originalists tend to so vehemently oppose consulting international law? Is it possible for originalists to engage international law without becoming *non-originalists*? Are there, perhaps, compelling reasons why originalists *should* consult contemporary international law? This article explores these questions by considering the ways in which originalists can have recourse to international law without contravening the principles of originalism.

²³ (1920) 28 CLR 129 ('*Engineers*').

²⁴ Greg Craven, 'The Crisis of Constitutional Literalism in Australia' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 1, 21; Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 20.

²⁵ Goldsworthy, 'Australia: Devotion to Legalism' (n 11) 152; Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 42, 64–5.

²⁶ David C Gray, 'Why Justice Scalia Should Be a Constitutional Comparativist ... Sometimes' (2007) 59 *Stanford Law Review* 1249, 1260; Vicki C Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement' (2007) 35 *Federal Law Review* 161, 181.

²⁷ See, eg, Michael Kirby, 'International Law: The Impact on National Constitutions' (2006) 21 *American University International Law Review* 327; Justice Michael Kirby, 'The Growing Impact of International Law on Australian Constitutional Values' (Australian Red Cross National Oration, University of Tasmania, 8 May 2008).

This exploration is animated by constitutional cosmopolitanism, ie the principle that no jurisdiction can be an island unto itself.²⁸ There is a growing consensus that the era of cosmopolitan constitutionalism has dawned²⁹ and that international and domestic cross-fertilisation is likely to increase.³⁰ In particular, it is difficult to ignore the development of international human rights law.³¹ While other countries have integrated international law into constitutional law by constitutionalising international instruments or adopting bills of rights, Australia's history of referenda makes such developments nearly impossible.³² For Australian lawyers, constitutional *interpretation* is key.

This article proposes that originalism and constitutional cosmopolitanism are not diametrically opposed to one another. *Cosmopolitan originalism* — the openness of originalism to international law — is not an oxymoron, but a plausible approach to constitutional interpretation. While stubbornly insisting upon fidelity to the *Constitution* as a legal text, cosmopolitan originalism recognises that international law is a valuable interpretive resource and challenges the refusal of originalists to consult it.

In exploring cosmopolitan originalism, this article contains two interrelated prongs. The first prong outlines three pathways by which constitutional interpreters can have recourse to international law materials in a manner consistent with the essential commitments of moderate originalism. The second prong examines the utility of international law, emphasising that international law materials can provide helpful guidance to constitutional interpreters. This article finds that although originalism constrains the role that international law can play in constitutional interpretation, originalism is not a barrier to robust engagement with international law.³³

²⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 211 (Stephen J); Chief Justice JJ Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150; Chief Justice RS French, 'Oil and Water? International Law and Domestic Law in Australia' (Brennan Lecture, Bond University, 26 June 2009) 2 [3].

²⁹ Jeffrey Goldsworthy, 'Introduction' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 1, 3.

³⁰ Glensy (n 5) 1219.

³¹ *Ibid* 1181. See James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 634.

³² Over 80% of constitutional referenda have failed: Michael Coper, 'Judicial Review and the Politics of Constitutional Amendment' in Rosalind Dixon and George Williams (eds), *The High Court, The Constitution and Australian Politics* (Cambridge University Press, 2015) 38, 39.

³³ This view is also supported by Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45, 54–5.

Part II of this article reflects on the nature of originalism and its capacity to accommodate constitutional change. Part III briefly canvasses the purpose, structure and status of contemporary international law and evaluates the current debate concerning the role of international law in constitutional interpretation. Part IV explores three pathways, consistent with originalism, which cautiously support the consultation of international law in constitutional interpretation. Part V considers the utility of international law as an interpretive aide.

II THEORIES OF CONSTITUTIONAL INTERPRETATION

A *National Context*

The *Australian Constitution* does not expressly mandate the principles according to which it should be interpreted.³⁴ Theories of constitutional interpretation are, therefore, ‘matter[s] of conviction based on some theory external to the *Constitution* itself’.³⁵ They encapsulate broader legal traditions and tacit assumptions. Yet, a theory of interpretation cannot be detached from the nature of the actual document to which it purports to give meaning. In Australia, although the *Constitution* occupies a special position in national jurisprudence,³⁶ it neither contains a comprehensive bill of rights nor stipulates the responsibilities of the government towards the people.³⁷ In this respect, Australia ‘stands alone among English-speaking nations’.³⁸ Yet, since

³⁴ Goldsworthy, ‘Australia: Devotion to Legalism’ (n 11) 115; Justice JD Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’ [2007] (Winter) *Bar News: The Journal of the NSW Bar Association* 12, 12; Longo (n 19) 127.

³⁵ *McGinty* (n 16) 230 (McHugh J) (emphasis added).

³⁶ *Polites v Commonwealth* (1945) 70 CLR 60, 78 (Dixon J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–18 [166] (Kirby J); Kristen Walker, ‘International Law as a Tool of Constitutional Interpretation’ (2002) 28 *Monash University Law Review* 85, 86.

³⁷ Sir Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597; Hovell and Williams (n 15) 99; Goldsworthy, ‘The Case for Originalism’ (n 25) 67. But see *Australian Constitution* ss 51(xxxi) (the Commonwealth can only compulsorily acquire property on ‘just terms’), 80 (limited right to trial by jury), 116 (freedom of religion), 117 (freedom from discrimination on the basis of state residence).

³⁸ Appleby, Reilly and Grenfell (n 6) 380. See also Brian Galligan and FL (Ted) Morton, ‘Australian Exceptionalism: Rights Protection without a Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 17, 37.

its enactment, judges and scholars have debated which is the appropriate interpretive methodology to be applied to the *Constitution*.³⁹

B *Moderate Originalism*

Moderate originalism — the interpretive methodology around which this article revolves — emphasises the ‘character of the constitution as a *written legal instrument*, designed to ... provide a clear and formal embodiment of a legal agreement’.⁴⁰ Where interpreters depart from the original meaning, the purpose of enacting a written constitution is undermined.⁴¹ Understood as an ordinary binding legal agreement rather than as a grand founding document like its American counterpart, the *Australian Constitution* is fertile ground for cultivating an originalist approach.⁴² Goldsworthy’s propositions, which this article calls Originalist Principles 1–7, set out the basic tenets of moderate originalism as follows:

- 1 ‘[a] constitution ... necessarily has a meaning that pre-exists judicial interpretation of it’;
- 2 ‘to change the meaning of a law is to change the law’;
- 3 ‘[t]he original meaning of a constitution is neither its original literal meaning ... nor its originally intended meaning ... [I]t is, instead, its “utterance meaning”, which is determined by a restricted range of evidence ... of what its founders intended it to mean [ie its original public meaning]’;
- 4 ‘judges must not change the constitution ... by purporting to “interpret” it’;

³⁹ Some approaches, drawing on the British colonial tradition of statutory interpretation, favour literalism and formalism, while other approaches, inspired by the US Supreme Court, favour judicial creativity and take into account the special nature of the *Australian Constitution*. Although *Engineers* endorsed the former approach, it did not end the underlying disagreement: Jeffrey Goldsworthy, ‘The Constitution and Its Common Law Background’ (2014) 25 *Public Law Review* 265, 272–4.

⁴⁰ Jackson, *Constitutional Engagement in a Transnational Era* (n 15) 21 (emphasis added), citing Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, 2004) 103–9.

⁴¹ *Ibid* 21.

⁴² Weis (n 19) 842, 844–5.

- 5 '[a]ny judge who violated that requirement would flout the constitution itself, the rule of law, the principle of democracy, and ... the principle of federalism';
- 6 '[w]hen [the pre-existing] meaning is insufficiently determinate to resolve the case at hand ... [the judges'] duty is to act creatively and supplement it'; and
- 7 '[a]lthough judges must not deliberately change the constitution, there are ... ways in which constitutional law can and does legitimately evolve over time'.⁴³

Notably, these Originalist Principles do not expressly prohibit the consultation of international law. In fact, they do not refer to international law at all. Nonetheless, originalist objections to international law purport to draw on the Originalist Principles. The purpose of this article is to examine whether the consultation of international law is compatible with these propositions. Can constitutional interpreters consult international law while remaining faithful to the tenets of moderate originalism?

This question is especially relevant because the High Court has given moderate originalism consistent and, at times, highly vocal support.⁴⁴ In particular, McHugh J stood out as a proponent of moderate originalism.⁴⁵ Having said that, it is as yet unclear whether some of the current members of the Bench adhere to a particular interpretive theory.

⁴³ Goldsworthy, 'The Case for Originalism' (n 25) 42–3; see, eg, at 50; Richard S Kay, 'Original Intention and Public Meaning in Constitutional Interpretation' (2009) 103 *Northwestern University Law Review* 703; Lawrence B Solum, 'What Is Originalism? The Evolution of Contemporary Originalist Theory' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 12, 38.

⁴⁴ See, eg, *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196 (McHugh J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 144 (Heydon J); Weis (n 19) 846, 847–8. But see *Wong* (n 16) 604–5 [97] (Kirby J); Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, 7.

⁴⁵ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549–54 [35]–[49]; *Eastman* (n 19) 41–51 [132]–[158]; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 426–8; Dan Meagher, 'The "Tragic" High Court Decisions in Al-Kateb and Al Khafaji: The Triumph of the "Plain Fact" Interpretive Approach and Constitutional Form Over Substance' (2005) 7 *Constitutional Law and Policy Review* 69, 80; Goldsworthy, 'Australia: Devotion to Legalism' (n 11) 150–1. But see Heydon, 'Theories of Constitutional Interpretation' (n 34) 20–3.

C Accommodating Constitutional Change

Originalist Principle 7 posits that constitutional law can and does legitimately evolve over time. According to moderate originalism, even in scenarios where the meaning of a constitutional provision appears to be fixed, there are several avenues for interpretive evolution. This is noteworthy because some of the pathways to consulting international law outlined below entertain the prospect of making changes to the meaning of constitutional provisions.

One of moderate originalism's mechanisms for effecting constitutional change is based on the 'occasional need for judges to depart from the literal meaning of a constitutional provision to fulfill its original purpose'.⁴⁶ The original public meaning and the underlying values of a constitutional text take precedence over its literal meaning. While this mechanism is traditionally employed in the context of new physical realities⁴⁷ and technological developments, such as reading 'postal, telegraphic, telephonic, and other like services'⁴⁸ to include radio and television,⁴⁹ it can in principle also be employed where *social* or *moral* circumstances evolve.⁵⁰ Dworkin, who is (now) considered an originalist,⁵¹ explains that the First Amendment to the *United States Constitution*, containing such vital rights guarantees as the freedom of speech and the freedom of religion,

cannot be applied to concrete cases except by assigning some overall *point* or *purpose* to the amendment's abstract guarantee ... Contemporary lawyers and judges must try to find a political justification of the First Amendment that ...

⁴⁶ Goldsworthy, 'The Case for Originalism' (n 25) 62. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 97 [34] (Gaudron and Gummow JJ) ('*Aala*'); Heydon, 'Theories of Constitutional Interpretation' (n 34) 17; Jeffrey Goldsworthy, 'Constitutional Interpretation: Originalism' (2009) 4 *Philosophy Compass* 682, 690. See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 496 [23], 501 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁴⁷ *Eastman* (n 19) 44–5 [141] (McHugh J), discussing the views of Scalia J.

⁴⁸ *Australian Constitution* s 51(v).

⁴⁹ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262, 283–4 (Rich and Evatt JJ); *Jones v Commonwealth [No 2]* (1965) 112 CLR 206, 219 (Barwick CJ); *The Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, 432 (Kitto J), 438 (Taylor J), 439 (Menzies J); Willheim (n 9) 34; Heydon, 'Theories of Constitutional Interpretation' (n 34) 16–17; Williams, Brennan and Lynch (n 12) 196.

⁵⁰ Cf Michael (n 4) 208.

⁵¹ Jeffrey Goldsworthy, 'Dworkin as an Originalist' (2000) 17 *Constitutional Commentary* 49, 49.

provides a compelling reason *why* we should grant freedom of speech such a special and privileged place among our liberties.⁵²

Presumably, these ‘compelling reasons’ — to be discovered and applied in each era — should be attentive to evolving social and moral circumstances, such as the heightened tension between free speech and national security in the aftermath of 9/11.⁵³ In short, under this mechanism for constitutional change, interpreters safeguard the original purpose of a constitution by departing from the literal meaning of the text.

Moderate originalism also supports another mechanism for constitutional change. Put simply, the application of a constitution can legitimately change when that constitution is applied in new circumstances.⁵⁴ The meaning of the text is not altered or reinterpreted. Instead, reality changes and, with this, the practical scope and effect of a constitutional provision. Goldsworthy describes how, for instance, the application of the treaty-implementing limb of the external affairs power in s 51(xxix) of the *Australian Constitution* drastically expanded as the Commonwealth Government entered into a greater number of international treaties.⁵⁵ Although constitutional meaning did not change, constitutional law did.

Goldsworthy draws a further distinction, between *intended meaning* and *intended application*.⁵⁶ The former is relevant (and essential) to constitutional interpretation, while the latter is not:

The object is to clarify the meaning of the provisions which [the framers] enacted, and not to discover their beliefs about how those provisions ought to be applied. Those beliefs are not part of the *Constitution* and have no legal status.⁵⁷

In a similar vein, Heydon J remarked that the fact ‘that a particular application of the constitutional expression was not or would not have been foreseen

⁵² Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996) 199 (emphasis in original).

⁵³ See, eg, Geoffrey R Stone, ‘Free Speech and National Security’ (2009) 84 *Indiana Law Journal* 939, 952–5.

⁵⁴ Goldsworthy, ‘The Case for Originalism’ (n 25) 63–5.

⁵⁵ *Ibid* 63.

⁵⁶ *Ibid* 64. See also Goldsworthy, ‘Originalism in Constitutional Interpretation’ (n 19) 20, discussing the same mechanism but using the terms ‘enactment intentions’ and ‘application intentions’.

⁵⁷ Goldsworthy, ‘Originalism in Constitutional Interpretation’ (n 19) 20 (citations omitted).

in 1900' is not fatal to adopting that application.⁵⁸ In other words, contemporary judges are required to decide how a constitutional provision should be applied according to its true meaning, rather than slavishly deferring to whatever applications the lawmakers may have expected or desired.⁵⁹ This also affects objective moral categories of constitutional significance (discussed in more detail below). Thus, for example, in applying the 'Equal Protection' clause in the *United States Constitution's* Fourteenth Amendment, contemporary judges must make moral judgments, not factual judgments about the founders' beliefs,⁶⁰ even if this means applying the *Constitution* in a manner not contemplated by the founders. After all, national constitutions are meant to endure; they express powers 'in general propositions wide enough to be capable of flexible application to changing circumstances.'⁶¹

Democratic representation is another example of a moral category of constitutional significance. The founders provided that members of Parliament be 'directly chosen by the people,'⁶² yet commentators debate whether they intended, in doing so, to enact an abstract principle of [representative government], which should now be held to guarantee the right of women to vote.⁶³ The High Court is obliged to give effect to the intended meaning (the basic principle enshrined in the text), not the intended

⁵⁸ Heydon, 'Theories of Constitutional Interpretation' (n 34) 17 (citations omitted). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275 (Sir John Downer); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 283 (Isaac Isaacs); James A Thomson, 'Constitutional Interpretation: History and the High Court — A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309, 322 n 61; French, 'Interpreting the *Constitution*' (n 16) 32; Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 *Northwestern University Law Review* 549, 551–2.

⁵⁹ Goldsworthy, 'The Case for Originalism' (n 25) 64.

⁶⁰ Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 21–2.

⁶¹ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J). See also Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 19–21, 31–2; Goldsworthy, 'Constitutional Interpretation: Originalism' (n 46) 682, 690. Cf Saunders, *The Constitution of Australia* (n 7) 96. McHugh J also accommodates constitutional change by invoking Dworkin's distinction between 'concepts' and 'conceptions': Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 134, cited in *Re Wakim* (n 45) 552 [43] (McHugh J). See also *Eastman* (n 19) 49–51 [154]–[156] (McHugh J).

⁶² *Australian Constitution* s 24.

⁶³ Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (n 21) 709. See Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 47.

application (the founders' beliefs about how the provision would or should be applied in practice).⁶⁴

However, these mechanisms for accommodating constitutional change are affected by the 'level of generality' problem:

[D]ifferent interpreters will specify the principles underlying particular constitutional terms differently, some at an abstract level of generality, some at a more concrete level, and as a result will come up with different translations of the *Constitution's* original meaning.⁶⁵

That is to say, interpreters can dispute what actually comprises a given *underlying principle*, as opposed to its *application*. While neat in theory, in practice, the dividing line between principle X and the application of principle X is blurred. Although this difficulty may preclude originalists from effecting constitutional change in some instances, it also presents more general concerns about the nature of constitutional evolution, which is the subject of a separate, in-depth investigation beyond the scope of this article. In any event, moderate originalism accepts that

[t]here are many ways in which constitutions not only can but should be given a flexible interpretation, according to contemporary circumstances or values, which are consistent with moderate originalism and the principle of original, intended meaning.⁶⁶

III INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

A *The Purpose, Structure and Status of International Law*

Although some scholars characterise rights under international law as 'reflections of nonlegal principles that have normative force independent of

⁶⁴ See below Part IV(B)(3), discussing the potential of international law to illuminate the principle of representative government.

⁶⁵ Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 7, 37. See also AR Blackshield, 'The Law' (Conference Paper, Power in Australia: Directions of Change, The Australian National University, November 1981) 171, 174–8; Goldsworthy, 'Australia: Devotion to Legalism' (n 11) 152; David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, 2010) 353.

⁶⁶ Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 29.

their embodiment in law, or even superior to the positive legal system,⁶⁷ the legitimacy of international law *as law* has often been challenged.⁶⁸ According to John Austin, because international law does not emanate from a sovereign to an independent political society, it is not, strictly speaking, law.⁶⁹ Consequently, much criticism has been directed at the ‘alphabet soup’⁷⁰ of international law institutions. Yet, many commentators firmly maintain that international law deserves greater recognition in domestic contexts.⁷¹ Arguably, the Austinian perspective is antiquated and no longer reflects the global legal landscape. International law now constitutes a significant and widely recognised network of rules and binding obligations that, *inter alia*, protect human rights.

However, supporters of the domestic application of international law accept that international law functions very differently from municipal (domestic) law.⁷² International law lacks a foundational document, earning it the moniker of a ‘constitutional wasteland.’⁷³ It has no uber-legislature or uber-judiciary, contributing to the so-called ‘fragmentation of international law.’⁷⁴ Scattered across various treaties and customary law,⁷⁵ ‘[i]nternational law

⁶⁷ Gerald L Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863, 1868, quoted in Glensy (n 5) 1185.

⁶⁸ HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 209.

⁶⁹ John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832) 147–8. See also Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 4th ed, 2014) 20–1.

⁷⁰ This phrase appears in Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Irwin Law, 2nd ed, 2011) 529.

⁷¹ See French, ‘Oil and Water’ (n 28) 9 [16]–[18].

⁷² Glensy (n 5) 1227.

⁷³ Phillip Allott, ‘Intergovernmental Societies and the Idea of Constitutionalism’ in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 69, 92. But consider the *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) arts 1–3, as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009).

⁷⁴ Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553. See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006).

⁷⁵ Shabtai Rosenne, ‘Where to Find the Law’ in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law: Perplexities of Modern International Law — General Course on Public International Law* (Brill, 1923–) vol 291, 51. See *Statute of the International Court of Justice* art 38.

is structurally unique.⁷⁶ Significantly, not all international instruments have the same status. Some were created as binding agreements, while others were not.⁷⁷ Identifying customary international law can be a difficult task, particularly when attempting to identify custom within international treaties. Some treaties were drafted to declare or enshrine existing international customary law; some treaties reflect nascent custom which, over time, crystallised into customary international law; other treaties, meanwhile, do not reflect customary international law and only bind the parties to them.⁷⁸

This article focuses on the following sources of international law: customary international law; universal treaties;⁷⁹ and major regional human rights treaties.⁸⁰ It also considers the jurisprudence of different bodies (including courts, tribunals and committees) which interpret and give practical effect to international instruments.⁸¹ Yet, it goes without saying that the normative status accorded to these various sources of international law is not uniform.⁸²

B *International Law and Municipal Law*

For the purposes of this article, a very brief description of the complex relationship between international law and municipal law must suffice. Anglo-American jurisprudence has traditionally supported a dualist approach to international law, requiring transformation, incorporation or ratification by

⁷⁶ Glensy (n 5) 1218. See also Alford, 'Misusing International Sources to Interpret the Constitution' (n 5) 57–9; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 3; French, 'Oil and Water' (n 28) 11 [19].

⁷⁷ The *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') was conceived of as a binding treaty, while the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*') was conceived of as a non-binding resolution.

⁷⁸ Yoram Dinstein, 'Treaty and Custom: The Basic Relationship' in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law: The Interaction between Customary International Law and Treaties* (Brill, 1923–) vol 322. See especially: at 346–7, 357–8, 371.

⁷⁹ See, eg, *ICCPR* (n 77).

⁸⁰ See, eg, *American Convention on Human Rights: 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

⁸¹ For example, the *ICCPR*'s monitoring body is the United Nations Human Rights Committee: see *ICCPR* (n 77) art 28. See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits)* [2010] ICJ Rep 639, 663–4 [66].

⁸² See David Clark, *Introduction to Australian Public Law* (LexisNexis Butterworths, 4th ed, 2013), 315.

domestic legislation in order to make international law domestically binding.⁸³ Although the *Australian Constitution* does not refer to dualism,⁸⁴ the High Court has maintained a strong commitment to the principle.⁸⁵ As a matter of law, Australian courts are required to apply Australian domestic law.⁸⁶ Yet, even in the absence of express legislative incorporation, international law has some domestic application. For example, legislation is presumed to be consistent with international law.⁸⁷ Nonetheless, in contrast to the ‘semi-permeable membrane’ separating international law from domestic law in the (still) Europeanised UK,⁸⁸ Australian dualism is fixed and unyielding.

C ‘Easy’ Cases: Express Licence to Consult International Law

Unlike Australia’s *Constitution*, the constitutional and quasi-constitutional frameworks of several common law jurisdictions — including South Africa, New Zealand⁸⁹ and the UK⁹⁰ — expressly sanction recourse to international

⁸³ *Ching v The King* (1948) 77 CLR 449, 478 (Dixon J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 298 (Toohey J), 315 (McHugh J); Willheim (n 9) 14–15; French, ‘Oil and Water’ (n 28) 6 [11]; Saunders, *The Constitution of Australia* (n 7) 104; Longo (n 19) 118; Appleby, Reilly and Grenfell (n 6) 347.

⁸⁴ Appleby, Reilly and Grenfell (n 6) 347.

⁸⁵ See Charlesworth et al, ‘Deep Anxieties’ (n 15) 446–50; Willheim (n 9) 14–16.

⁸⁶ *Australian Constitution* covering cl 5.

⁸⁷ *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J); *Polites* (n 36) 68–9 (Latham CJ), 77 (Dixon J), 81 (Williams J); Willheim (n 9) 16; Dan Meagher, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] *New Zealand Law Review* 465–6.

⁸⁸ David Feldman, ‘The Internationalization of Public Law and Its Impact on the UK’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 7th ed, 2011) 132, 142. See also James Crawford, ‘International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison’ (2009) 28 *Australian Year Book of International Law* 1, 20. But see the following in respect of the UK’s referendum to leave the EU: Ralf Michaels, ‘Does Brexit Spell the Death of Transnational Law?’ (2016) 17 (Brexit Supplement) *German Law Journal* 51; Graham Gee, Luca Rubini and Martin Trybus, ‘Leaving the EU? The Legal Impact of “Brexit” on the United Kingdom’ (2016) 22 *European Public Law* 51.

⁸⁹ The *New Zealand Bill of Rights Act 1990* (NZ) s 6 ‘breathed new life into both common law interpretive presumptions and ... appears to buttress the strength of the common law principle of legality ... and the presumption of [ICCPR] consistency’: Meagher, ‘The Common Law Presumption of Consistency with International Law’ (n 87) 481–3. See also Claudia Geiringer, ‘International Law through the Lens of Zaoui: Where Is New Zealand at?’ (2006) 17 *Public Law Review* 300, 318.

law.⁹¹ For example, the *Constitution of the Republic of South Africa Act 1996* (South Africa) ('*South African Constitution*') requires South African courts to consider international law when interpreting the South African bill of rights, which is contained in ch 2 of the *South African Constitution*.⁹² Interestingly, in Canada, notwithstanding the absence of an express licence to consult international law and Canada's basic adherence to dualism, international human rights treaties are used to elucidate parallel rights provisions contained in Canada's bill of rights.⁹³

However, the absence of an Australian bill of rights, let alone a constitutional provision expressly mandating recourse to international law, makes justifying the consultation of international law in Australia far more difficult. The *Australian Constitution* 'neither mentions international law nor the role such norms should play in the interpretive process.'⁹⁴ This virtual silence has left courts with the task of defining what role, if any, international law should play in constitutional interpretation.

⁹⁰ The *Human Rights Act 1998* (UK) s 3(1) requires legislation to be construed in a way that is generally compatible with the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). See Willheim (n 9) 19–20.

⁹¹ For other countries, see Neuman, 'Human Rights and Constitutional Rights' (n 67) 1898; Thomas (n 10) 24.

⁹² *Constitution of the Republic of South Africa Act 1996* (South Africa) s 39(1)(b). See Neuman, 'Human Rights and Constitutional Rights' (n 67) 1897; Hovell and Williams (n 15) 98, 113–14.

⁹³ *Canada Act 1982* (UK) sch B pt 1. See *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 40–1 [69]–[71]; *Suresh v Canada (Minister for Citizenship and Immigration)* [2002] 1 SCR 3, 5; Willheim (n 9) 21; Longo (n 19) 121–2. The *Constitution of India 1949* (India) also includes human rights guarantees and the Supreme Court of India refers to international human rights instruments in interpreting those constitutional guarantees: PP Rao, 'Permeation of Human Rights Philosophy into Municipal Law' (1998) 40 *Journal of the Indian Law Institute* 131, 132. The *United States Constitution* does contain a few provisions which openly refer to international law: arts I § 8 cl 10 (authorising Congress to 'define and punish ... Offences against the Law of Nations'), II § 2 cl 2 (authorising the President, with the advice and consent of the Senate, to 'make Treaties' and 'appoint Ambassadors').

⁹⁴ Hovell and Williams (n 15) 106–7. See also Michael (n 4) 197; Appleby, Reilly and Grenfell (n 6) 347.

D 'Hard' Cases: No Express Licence to Consult International Law

The lack of an express or implied licence to consult international law is the point of origin for debating this issue in Australia, just as it is in the US. The *Australian Constitution* (1901), like the *United States Constitution* (1789–1791), is old, at least compared with the *Canada Act 1982* (UK), the *New Zealand Bill of Rights Act 1990*, the post-Apartheid *South African Constitution* (1996) and the *Human Rights Act 1998* (UK).⁹⁵ The older constitutions of Australia and the US do not have internationally oriented interpretive mechanisms comparable to those in other English-speaking countries. The constitutions of Australia and the US were enacted decades and centuries, respectively, before scholars gave international law its contemporary significance. These constitutions clearly pre-date the advent of modern international law which, in light of the robust originalist traditions in Australia and the US, make it more difficult to justify recourse to international law.

While these conditions might discourage Australian and American constitutional interpreters from consulting international law, they demonstrate the acute relevance of American scholarship and case law to Australia's constitutional landscape. American precedent and commentary are key to analysing the role which international law can play in Australian constitutional discourse. Nonetheless, there are several very significant differences between the constitutions of Australia and of the US.

1 *Australia*

Australian judicial responses to the issue of consulting international law in constitutional interpretation have ranged from suggestions that constitutional law should conform to contemporary international law, to blanket refusals even to refer to it.⁹⁶ In *Al-Kateb v Godwin*,⁹⁷ the High Court considered whether the indefinite detention of a person refused permission to remain in Australia is prohibited by the *Commonwealth Constitution*. In light of the international human rights treaties which prohibit arbitrary detention, some members of the Bench consulted international law in interpreting the *Constitution*, much to the concern of some other members of the Bench.⁹⁸ The

⁹⁵ Although not a constitution, the *Human Rights Act 1998* (UK) has fostered British courts adopting a 'free-wheeling' interpretive approach: Goldsworthy, 'The Constitution and Its Common Law Background' (n 39) 271.

⁹⁶ See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 390–1 [961] (Callinan J).

⁹⁷ *Al-Kateb* (n 2).

⁹⁸ See Hovell and Williams (n 15) 96.

clash between Kirby J, attaching significant weight to international law, and McHugh J, refusing to do so, exhibited hitherto unseen vigour.⁹⁹

Kirby J lauded the advent of international human rights treaties which declare universal fundamental freedoms.¹⁰⁰ He argued that the *Constitution* ‘speaks to the international community’¹⁰¹ and that the ‘isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable.’¹⁰² Kirby J, of course, is a non-originalist and therefore did not purport to be bound by the Originalist Principles.

McHugh J, in stark contrast, is a staunch advocate of originalism. He argued that

courts cannot read the *Constitution* by reference to the provisions of international law that have become accepted *since the Constitution was enacted in 1900*. [Only] [r]ules of international law *at that date* might in some cases throw some light on the meaning of a constitutional provision.¹⁰³

According to McHugh J, post-1900 international law (and perhaps any post-1900 law) cannot shed light on the original public meaning of the *Constitution*. McHugh J maintained that the invocation of post-1900 international law amounts to overnight quasi-amendment of the *Constitution* and thereby contravenes the procedural requirement of a referendum in order to amend the *Constitution*,¹⁰⁴ violating Originalist Principles 2, 4 and 5.

McHugh J distinguished between later generations deducing new propositions from the words of the *Constitution* in light of domestic and international political, social or economic developments — which he sanctioned — and the proposition that ‘the *Constitution* must be read to conform to or so far as possible with the *rules* of international law’, which he rejected.¹⁰⁵ In response, Kirby J keenly observed that if McHugh J were correct in arguing that

⁹⁹ Willheim (n 9) 6–7.

¹⁰⁰ *Al-Kateb* (n 2) 623 [172]. Kirby J enunciated his own, non-originalist interpretive principle, not supported by any other High Court Justice: see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8; *Kartinyeri* (n 36) 417–19; Luke Beck, ‘What Is Kirby’s Interpretive Principle Really about?’ (2013) 87 *Australian Law Journal* 200, 202–3.

¹⁰¹ *Al-Kateb* (n 2) 624 [174].

¹⁰² *Ibid* 624 [175].

¹⁰³ *Ibid* 589 [62] (emphasis added).

¹⁰⁴ *Ibid* 592 [68], discussing *Australian Constitution* s 128: ‘Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the *Constitution* cannot hide the fact that, if that is done, the meaning of the *Constitution* is changed whenever that rule changes what would otherwise be the result of the case.’

¹⁰⁵ *Ibid* 592–3 [69], citing *Victoria v Commonwealth* (1971) 122 CLR 353, 395–7 (Windeyer J).

referenda are the only avenue for effecting constitutional change, then that same criticism could be directed at virtually any decision expounding new constitutional rights or duties¹⁰⁶ — decisions which McHugh J, a moderate originalist, would accept (pursuant to Originalist Principles 6 and 7).

Yet, McHugh J justified his refusal to countenance recourse to international law on other grounds as well. He warned that the consultation of international law may create a ‘loose-leaf’ constitution strewn across a multiplicity of international instruments.¹⁰⁷ McHugh J also cited the 1945 decision of *Polites* which held that international law does not limit the Commonwealth Parliament’s plenary power.¹⁰⁸ McHugh J argued that the rule of construction that statutes should be read consistently with international law does not apply to the *Constitution*.¹⁰⁹

Following *Al-Kateb*, Heydon J voiced his own disapproval of the use of international law in constitutional interpretation. According to Heydon J, both foreign domestic law and international instruments, such as the *International Covenant on Civil and Political Rights* (‘ICCPR’),

can have nothing whatever to do with the construction of the *Australian Constitution*. These instruments did not influence the framers of the *Constitution*, for they all postdate it by many years. It is highly improbable that it had any influence on them.¹¹⁰

This objection purports to be supported by originalism. Heydon J argued ‘that our law does not permit recourse to [modern foreign] materials’.¹¹¹ This objection to international law is even more sweeping than McHugh J’s objection. Heydon J objects not only to imposing constitutional conformity with modern international law, but to *any* recourse to modern international

¹⁰⁶ Ibid 625 [177].

¹⁰⁷ Ibid 594–5 [73]. ‘Gone are the days when the rules of international law were to be found in the writings of a few well-known jurists’: at 590 [63]. This, however, is not an originalist objection to the use of international law, but a more general characterisation of international law, which McHugh J sees as a shortcoming.

¹⁰⁸ *Polites* (n 36) 69 (Latham CJ), 74 (Rich J), 75 (Starke J), 78 (Dixon J), 79 (McTiernan J), 82–3 (Williams J). See *Horta v Commonwealth* (1994) 181 CLR 183, 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ); *Al-Kateb* (n 2) 591–2 [66]–[67] (McHugh J), approving *Kartinyeri* (n 36) 384–6 [98]–[101] (Gummow and Hayne JJ); French, ‘Oil and Water’ (n 28) 8–9 [16].

¹⁰⁹ *Al-Kateb* (n 2) 591 [66].

¹¹⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–5 [181].

¹¹¹ Ibid.

law. Heydon J explained that the ‘proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities.’¹¹²

Heydon J conducted a headcount of High Court Justices who addressed the issue of consulting international law in constitutional interpretation, finding — unsurprisingly — a ratio of 21:1 in favour of his own opinion.¹¹³ Kirby J was the exception. In reality, however, the Justices’ positions are more nuanced. There is a spectrum of competing approaches among members of the High Court.¹¹⁴ Although Kirby, McHugh and Heydon JJ have retired from the Bench, this controversy remains unresolved.¹¹⁵

2 *United States*

America’s best known judicial interlocutors in this debate are (the late) Scalia J, vehemently opposed to the use of international law in constitutional interpretation, and Kennedy and Breyer JJ,¹¹⁶ who have been more accommodating. In *Roper v Simmons*, the US Supreme Court had to decide which punishments are ‘cruel and unusual’ under the Eighth Amendment to the *United States Constitution*.¹¹⁷ As part of the interpretive exercise, Kennedy J argued that the ‘overwhelming weight of international opinion’ is against imposing the death penalty on juveniles.¹¹⁸ He maintained, somewhat like Kirby J,¹¹⁹ that the ‘opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.’¹²⁰

Scalia J countered by arguing — in accordance with constitutional localism — that ‘the basic premise ... that American law should conform to

¹¹² Ibid (citations omitted).

¹¹³ Ibid. French CJ appeared to lend some support to Heydon J’s originalist outlook: French, ‘Oil and Water’ (n 28) 8 [14]. But see Saunders, *The Constitution of Australia* (n 7) 97–8, claiming that Heydon J is alone in his position: ‘in 2010 all but one of the Justices of the High Court are legalist, rather than originalist’.

¹¹⁴ See, eg, Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 50.

¹¹⁵ Fiona Wheeler and John Williams, “‘Restrained Activism’ in the High Court of Australia’ in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, 64.

¹¹⁶ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 47.

¹¹⁷ 543 US 551 (2005).

¹¹⁸ Ibid 578; Roger P Alford, ‘*Roper v Simmons* and Our Constitution in International Equipose’ (2005) 53 *UCLA Law Review* 1, 12.

¹¹⁹ See, eg, *Newcrest* (n 100) 657–8.

¹²⁰ *Roper* (n 117) 578.

the laws of the rest of the world ... ought to be rejected.¹²¹ Differences between American law and other laws should not be overlooked. Scalia J also defended his view on the basis of originalism.¹²² He maintained, as Stone observes, invoking Originalist Principle 3, that the *United States Constitution* should be interpreted 'according to its text, given meaning principally by reference to the public meaning it had at the time of its ratification in the late 18th century'.¹²³ For Scalia J, like McHugh J, it is *modern* foreign law (including international law) that has no place in constitutional interpretation. Scalia J set out his view in the following way:

I have no problem with reciting such interesting background, so long as the laws of those countries are not asserted to be relevant to the interpretation of our *Constitution*. ... modern foreign legal materials [including international law] can *never* be relevant to an interpretation of — to the *meaning* of — the *US Constitution*.¹²⁴

However, Scalia J did not support a blanket ban on international law; nor was he motivated by extreme localism. Scalia J's concerns were primarily originalist: by using foreign materials such as international law to interpret the *Constitution*, judges can effectively write a new constitution,¹²⁵ and thereby flout Originalist Principle 4. Before subjecting these originalist arguments to scrutiny, let us revisit some of the main objections to consulting international law in constitutional interpretation.

E Revisiting the 'Hard' Cases: Distinguishing Originalism from Localism

Many commentators who are dismissive of international law playing a role in constitutional interpretation draw heavily on constitutional localism, a theory inspired by legal nationalism and exceptionalism. Constitutional localism posits that foreign law embodies values which are genuinely different from

¹²¹ Ibid 624. Scalia J, however, is not an absolute localist. 'I probably use more foreign legal materials [to interpret the *United States Constitution*] than anyone else on the Court ... Of course they are all fairly *old* foreign legal materials, and they are all English': Antonin Scalia, 'Keynote Address: Foreign Legal Authority in the Federal Courts' (2004) 98 *American Society of International Law Proceedings* 305, 306.

¹²² Gray (n 26) 1256.

¹²³ Adrienne Stone, 'Comparativism in Constitutional Interpretation' (n 33) 48–9, discussing *Roper* (n 117) 607–8.

¹²⁴ Scalia, 'Keynote Address' (n 121) 307 (emphasis in original).

¹²⁵ Ibid 308.

those enshrined in national constitutions.¹²⁶ It suggests that the more distinctive the *national* values enshrined in a constitution, the less appropriate the citation of *international* sources.¹²⁷

Localism sees international law as irrelevant to domestic contexts.¹²⁸ Understanding constitutions to express national identity and impose standards ‘adapted to local conditions, reflective of the opinions and preferences of the local population,’¹²⁹ localists contend that supposedly ‘alien’ values should not influence national constitutional communities.¹³⁰ Scalia J, for example, maintained that ‘*American* conceptions of decency ... are dispositive’¹³¹ and cautioned against imposing ‘foreign moods, fads, or fashions’ on American law.¹³² He argued that American constitutional interpreters must keep in mind that ‘it is a Constitution *for the United States of America* that [they] are expounding’¹³³

Constitutional localism, however, carries far less weight when exported outside of the US. Its premise — that constitutions define and are defined by the local conditions of the society that they govern — is simply not shared by

¹²⁶ Kenneth Anderson, ‘Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks’ (2005) 118 *Harvard Law Review* 1255, 1267–81, cited in A Mark Weisburd, ‘Using International Law to Interpret National Constitutions: Conceptual Problems — Reflections on Justice Kirby’s Advocacy of International Law in Domestic Constitutional Jurisprudence’ (2006) 21 *American University International Law Review* 365, 368.

¹²⁷ Michael Wells, ‘International Norms in Constitutional Law’ (2004) 32 *Georgia Journal of International and Comparative Law* 429, 436; Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 63.

¹²⁸ *Ward* (n 96) 390–1 [961] (Callinan J), cited in Charlesworth et al, ‘Deep Anxieties’ (n 15) 463; *Roach* (n 110) 225 [181] (Heydon J); Koh (n 7) 52; Jackson, ‘Transnational Challenges to Constitutional Law’ (n 26) 162.

¹²⁹ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 56. Stone notes that Scalia J has been accused of a ‘militant provincialism’: at 55 n 47, citing Sanford Levinson, ‘Looking Abroad When Interpreting the US Constitution: Some Reflections’ (2004) 39 *Texas International Law Journal* 353, 358.

¹³⁰ Walker (n 36) 98; Hovell and Williams (n 15) 120–1.

¹³¹ *Stanford v Kentucky*, 492 US 361, 369 n 1 (Scalia J) (1989) (emphasis in original).

¹³² *Lawrence v Texas*, 539 US 558, 598 (Scalia J in dissent) (2003), quoting *Foster v Florida*, 537 US 990, 990 (Thomas J) (2002). See also *Roper* (n 117) 607–8 (Scalia J).

¹³³ *Thompson v Oklahoma*, 487 US 815, 869 (1988) (emphasis added). For instance, deference to the ICCPR on freedom of speech (art 19) would restrict the otherwise expansive constitutional protections contained in the First Amendment to the *United States Constitution*: Joan L Larsen, ‘Importing Constitutional Norms from a “Wider Civilization”’: *Lawrence* and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation’ (2004) 65 *Ohio State Law Journal* 1283, 1320; Weisburd (n 126) 367. See also *Stanford* (n 131) 369 (Scalia J), cited in Walker (n 36) 98.

all constitutional systems, including that of Australia.¹³⁴ But, somewhat counterintuitively, the absence of an Australian bill of rights might actually support the notion of distinct, *Australian* rights. Unlike the *United States Constitution* amends I–X (*United States Bill of Rights*) which shares much in common with other constitutions, the structural and institutional provisions of the *Australian Constitution* are unique,¹³⁵ perhaps strengthening the case for constitutional localism. In any event, it would be ironic if Australian originalists were to *unthinkingly* import American localism into Australian constitutional adjudication.¹³⁶

The important clarification, for the purpose of this article, is that *localism does not necessarily entail originalism*. A constitutional theorist could maintain that the *Constitution* is a ‘living tree’¹³⁷ — to be freely reinterpreted by each generation — and, at the same time, insist on the *Constitution*’s distinctive national values and, on the basis of localism, refuse to consult international law. Conversely, *originalism does not necessarily entail localism*. Originalism (it is often argued) posits that a source which post-dates the enactment of a constitution cannot have any bearing on the interpretation of that constitution. Localism posits that foreign sources are very different from national constitutions¹³⁸ and therefore must not, in any circumstances, influence the interpretation of a national constitution.¹³⁹ While both localism and originalism pose potential obstacles to consulting international law, they are not one and the same.

Although the Originalist Principles do not refer to international law, originalists may sometimes mistakenly equate originalism with localism. They may conflate originalism’s focus on text and meaning with localism’s focus on national context, and regard originalism as inherently anti-cosmopolitan. Some originalists almost unconsciously subscribe to the tenets of localism. Other originalists feel compelled to accept localism. Justice Aharon Barak, observed the strong association between originalism and localism:

¹³⁴ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 57.

¹³⁵ See, eg, *Australian Constitution* s 57.

¹³⁶ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 61.

¹³⁷ *Edwards v A-G (Canada)* [1930] AC 124, 136 (Lord Sankey LC); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 115 (Evatt J). See Longo (n 19) 119.

¹³⁸ See Anderson (n 126).

¹³⁹ Although originalism and localism are sometimes referred to as ‘*time* originalism’ and ‘*localist* originalism’ respectively, these terms fail to capture the fact that localism is not an offshoot of originalism (and vice versa).

One who accepts originalism ... *must* reach the conclusion that developments which took place ... in comparative law after the creation of the constitution ... are not relevant to the interpretation of that constitution ...¹⁴⁰

It is this marriage — between originalism and *accidental* localism — which this article seeks to dismantle. This article aims to confront the *originalist* (as opposed to localist) objections to international law¹⁴¹ and to demonstrate that originalists (assuming they are not also localists) can glean inspiration from international law materials which post-date the enactment of a constitution. Cosmopolitan originalism showcases this compelling alternative.

IV ORIGINALIST PATHWAYS TO CONSULTING INTERNATIONAL LAW

Justifying recourse to international law in the ‘hard’ cases — where there is no express constitutional licence to do so — is a challenge.¹⁴² Although originalist objections do not apply to legal materials that existed at the time of Australian federation and ‘informed then-contemporary understandings of constitutional language’,¹⁴³ the originalist case against engaging *contemporary* international law is formidable. If one accepts the premise that judges ‘are not

¹⁴⁰ Aharon Barak, ‘Comparative Law, Originalism, and the Role of a Judge in Democracy: A Reply to Justice Scalia’ (Speech, Fulbright Israel/USIEF 50th Anniversary Symposium: International Influences on National Legal Systems, The Hebrew University of Jerusalem, 29 January 2006) 13 (emphasis added). Barak maintains that it is purpose which most fundamentally animates the meaning of constitutional text: Stanley Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’ (2008) 29 *Cardozo Law Review* 1109, 1117–20.

¹⁴¹ For the avoidance of doubt, this article focuses on the temporal relevance of modern international law to an historical constitution and does not tackle pure localist objections to international law.

¹⁴² Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *Yale Law Journal* 1225, 1231–2; Larsen (n 133) 1298.

¹⁴³ Gray (n 26) 1259. See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 459–64 [33]–[48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ), cited in Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 53. See also *Boumediene v Bush*, 553 US 723, 843–9 (Scalia J in dissent) (2008), cited in Ganesh Sitaraman, ‘The Use and Abuse of Foreign Law in Constitutional Interpretation’ (2009) 32 *Harvard Journal of Law and Public Policy* 653, 687; Ingrid Brunk Wuerth, ‘International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered’ (2007) 106 *Michigan Law Review* 61, 82; Jackson, *Constitutional Engagement in a Transnational Era* (n 15) 134.

“statesmen”, appointed to fill the shoes of the founders¹⁴⁴ (Originalist Principles 2 and 4), engaging international law poses significant risks. The ‘weasel word “interpretation”¹⁴⁵ can provide judges with a ‘blank cheque ... to rewrite the constitution’.¹⁴⁶ Australian judges could overstep their constitutionally demarcated role.¹⁴⁷

These concerns, however, do not specifically relate to international law. The apparent dangers of unfettered judicial discretion could equally relate to the consultation of *any* extraneous material, even historical evidence of the framers’ objective intentions, a resource which originalists do not hesitate to consult.¹⁴⁸ Nevertheless, the Originalist Principles do not overtly endorse recourse to international law. With this in mind, let us ask the following questions: Can originalists — guided by the *Australian Constitution’s* original public meaning — consult contemporary, post-1900 international law? If so, in what circumstances?

I will now explore three pathways, appealing to moderate originalism and the utility of international law, which endorse recourse to international law. Together, these pathways embody cosmopolitan originalism.

A Pathway One: The Common Law Connection

Pathway One draws on the indirect relationship between constitutional interpretation and international law, the two of which are connected by the common law. In short, international law influences the common law, and the common law influences constitutional interpretation. This section will begin by considering how the common law influences constitutional interpretation.

¹⁴⁴ Jeffrey Goldsworthy, ‘Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 115, 141.

¹⁴⁵ Goldsworthy, ‘The Case for Originalism’ (n 25) 55.

¹⁴⁶ Goldsworthy, ‘Questioning the Migration of Constitutional Ideas’ (n 144) 141 (emphasis added).

¹⁴⁷ *Australian Constitution* ch III (establishing the separation of judicial power and constraining the role of judges). See, eg. James Allan, “Do the Right Thing” Judging? The High Court of Australia in *Al-Kateb*’ (2005) 24 *University of Queensland Law Journal* 1, 2; Meagher, ‘The Common Law Presumption of Consistency with International Law’ (n 87) 475, 477–8. In respect of the US, see Larsen (n 133) 1309; Gray (n 26) 1256–7.

¹⁴⁸ Hovell and Williams (n 15) 123.

1 *The Common Law Influencing Constitutional Interpretation*

In Australia there exists a law which is antecedent to the *Constitution*, namely, the common law.¹⁴⁹ Although the *Constitution* is the ‘essential architecture of our legal universe ... [u]biquitous in that universe is the common law, which, as Sir Owen Dixon observed, supplies principles in aid of the interpretation of the *Constitution*.’¹⁵⁰ The common law also illuminates *substantive* concepts contained in the *Constitution*, such as the meaning of the phrase ‘trial by jury’.¹⁵¹

More specifically, some terms in the *Constitution* are taken to have referred in 1900 to a developing body of law such that they are capable of accommodating future developments in that body of law. For example, the interpretation of the words ‘copyrights, patents of inventions and designs, and trade marks’ in s 51(xviii) of the *Constitution* is not ‘to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark.’¹⁵² The High Court cautioned against those who ‘give insufficient allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms used in s 51(xviii).’¹⁵³ The *Constitution* was meant to endure and embrace the advent of new technology, together with associated developments in the common law.

The High Court has acknowledged that the interpretation of the *Australian Constitution* is influenced both by common law which existed at the time of

¹⁴⁹ Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 203–5; GA Kennedy, ‘Jesting Pilate and Other Papers and Addresses’ (1967) 8 *University of Western Australia Law Review* 109, 112–13; Goldsworthy, ‘The Constitution and Its Common Law Background’ (n 39) 265.

¹⁵⁰ French, ‘Interpreting the *Constitution*’ (n 16) 29, citing Sir Owen Dixon, ‘Marshall and the Australian Constitution’ (1955) 29 *Australian Law Journal* 420.

¹⁵¹ Goldsworthy, ‘The Constitution and Its Common Law Background’ (n 39) 274–5, discussing, inter alia, *Australian Constitution* s 80; *Cheatle v The Queen* (1993) 177 CLR 541, 552, 562. But Goldsworthy contrasts judges’ authority to unilaterally change the rules of property, contracts, torts etc with the ‘principles of statutory and constitutional interpretation [which] concern the interpretation of laws, created by other institutions possessing superior lawmaking authority, that the judges do not have authority to change (except perhaps in strictly limited ways ...)’: at 270. Goldsworthy also notes that ‘although the High Court may be able to revise common law interpretive principles to permit somewhat more creative interpretations of the *Constitution* ... the *Constitution* itself, informed by traditional common law practices, limits the extent to which this is permissible’: at 271.

¹⁵² *Grain Pool* (n 46) 495 [23]; Goldsworthy, ‘Interpreting the *Constitution* in Its Second Century’ (n 21) 707.

¹⁵³ *Grain Pool* (n 46) 495–6 [23].

its enactment and by common law which was established years (and decades) after its enactment. For example, in order to determine whether the denial of procedural fairness (natural justice) is a ground for granting the remedy of prohibition under s 75(v) of the *Constitution*, the Court examined the law in England at the time of the enactment of the *Constitution*.¹⁵⁴ The Court observed that the ‘law was in a state of development’¹⁵⁵ — emphasising the unsettled nature of common law — and reached its conclusion only after consulting English precedent that *post-dated* the enactment of the *Constitution*.¹⁵⁶ In order to properly carry out its function of interpreting the *Constitution*, the High Court had to consider *post-enactment* common law.

Another example is the High Court’s treatment of the word ‘alien’ in s 51(xix) of the *Constitution*.¹⁵⁷ In determining its meaning, a majority of the Court considered *pre-1900* common law.¹⁵⁸ However, if the word ‘alien’ is considered a ‘functional term’ according to moderate originalism (as are some other words in the *Constitution*, such as ‘jury’),¹⁵⁹ it is arguable that the Court could also examine *post-1900* common law in interpreting the word ‘alien’. While ‘alien’ had a distinct meaning in 1900, its ‘essential features are to be discerned with regard to the purpose which [it] was intended to serve.’¹⁶⁰ This underlying purpose draws on the common law. As the common law develops, interpreters can refine their understanding of that underlying purpose. The interpretation (and thus meaning) of the term changes in tandem with common law developments.

While this practice of interpreting constitutional text in light of common law developments might conceivably apply to only a limited category of words appearing in the *Constitution*, the words to which it does apply can be very

¹⁵⁴ *Aala* (n 46) 97 [34] (Gaudron and Gummow JJ).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 98–9 [36] (Gaudron and Gummow JJ) (citations omitted).

¹⁵⁷ See Part IV(A)(3) for more detailed discussion.

¹⁵⁸ *Singh v Commonwealth* (2004) 222 CLR 322, 342–4, 365–6, 376–8 (McHugh J), 395 (Gummow, Hayne and Heydon JJ), 437 (Callinan J); Goldsworthy, ‘The Constitution and Its Common Law Background’ (n 39) 275–6.

¹⁵⁹ Goldsworthy, ‘The Constitution and Its Common Law Background’ (n 39) 278. See generally Michael S Moore, ‘Law as a Functional Kind’ in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 188.

¹⁶⁰ *Ng v The Queen* (2003) 217 CLR 521, 526 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), discussing the term ‘jury’ in the *Australian Constitution* s 80. See also *Brownlee v The Queen* (2001) 207 CLR 278, 298 [54] (Gaudron, Gummow and Hayne JJ).

significant.¹⁶¹ Notably, there is a concern that judges may seek to artificially ‘develop’ the common law solely (and therefore illegitimately) in order to alter the meaning of constitutional words. In a judicial system like Australia’s — in which the High Court is both a constitutional court and a superior court of appeal — this ploy is not completely implausible. For example, a High Court justice could, in an intellectual property case, expand the scope of a given class of intellectual property in order that in a subsequent constitutional case they may read more broadly that class of intellectual property appearing in s 51(xviii) of the *Constitution*. High Court justices could ‘wag the dog’, altering the common law in order to reinterpret the meaning of constitutional text. Nevertheless, this concern does not undermine the basic premise that the common law influences constitutional interpretation.

2 *International Law Influencing the Common Law*

Now that it is established that common law developments can affect the meaning of the words in the *Australian Constitution*, how is this relevant to international law? The answer lies in the fact that the common law is highly malleable. It is ‘the body of law which the courts create and define.’¹⁶² In the words of Chief Justice Robert French, ‘when seriously contested interpretations are advanced in litigation and close scrutiny of the law is required, a degree of indeterminacy may become apparent.’¹⁶³ Judges make decisions and in doing so shape and re-shape the common law.

One tool which judges may use to help craft the common law is international law. Brennan J in *Mabo v Queensland [No 2]* said as follows:

The common law does not necessarily conform with international law, but *international law is a legitimate and important influence on the development of the common law*, especially when international law declares the existence of universal human rights.¹⁶⁴

In other words, international law influences the common law. It therefore follows that if international law can impact the common law, and the common

¹⁶¹ See, eg, ss 51 (‘for the peace, order and good government’), 80 (‘trial ... by jury’), 90 (‘customs ... excise’), discussed in Goldsworthy, ‘The Constitution and Its Common Law Background’ (n 39) 274–5.

¹⁶² *Momcilovic v The Queen* (2011) 245 CLR 1, 159 [399] (Heydon J). See Beck (n 100) 203.

¹⁶³ French, ‘Interpreting the *Constitution*’ (n 16) 29–30.

¹⁶⁴ (1992) 175 CLR 1, 42 (Brennan J) (emphasis added). See also *Dietrich v The Queen* (1992) 177 CLR 292, 300, 306 (Mason CJ and McHugh J), 321 (Brennan J), 360 (Toohey J); *Teoh* (n 83) 288 (Mason CJ and Deane J); French, ‘Oil and Water’ (n 28); Appleby, Reilly and Grenfell (n 6) 363.

law can impact constitutional interpretation, then international law can impact constitutional interpretation — albeit indirectly.

3 *The Common Law Connection in Action*

Let us consider several examples. I observed that the word ‘alien’ in s 51(xix) of the *Constitution* is meant to be understood by reference to the common law. I then established that the common law is impacted by, among other things, international law. Therefore, a contemporary international law definition of the word ‘alien’¹⁶⁵ may impact upon the meaning of the word ‘alien’ in the common law. Once this new meaning of ‘alien’ is adopted by the common law, it can then shine light on the meaning of the word ‘alien’ in the *Constitution*.

Accordingly, a broad international law definition of ‘alien’, such as a definition which covers both persons with a foreign nationality and stateless persons¹⁶⁶ or which encompasses both legal aliens and illegal aliens,¹⁶⁷ could in theory expand the Commonwealth’s legislative powers under s 51(xix) of the *Constitution*. Conversely, a narrow international law definition of ‘alien’, such as a definition that limits the category to only those persons ‘present within the territory of the state [and] excludes aliens who enter an embassy ... as well as aliens stopped on vessels located outside territorial waters’,¹⁶⁸

¹⁶⁵ The term ‘alien’ commonly refers to ‘a person who is not a citizen or a national of the country of his residence’: Won Kidane, ‘Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Union Law: A Comparative Analysis’ (2013) 27 *Emory International Law Review* 285, 287.

¹⁶⁶ *Draft Articles on the Expulsion of Aliens*, as contained in *Report of the International Law Commission on the Work of Its 64th Session*, UN Doc A/67/10 (2012) art 2(b), quoted in Sean D Murphy, ‘The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission’ (2013) 107 *American Journal of International Law* 164, 165.

¹⁶⁷ *Draft Articles on the Expulsion of Aliens* (n 166) arts 1–2. Cf *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2). *ICCPR* (n 77) art 13 protection is not available to ‘illegal entrants and aliens who have stayed longer than the law or their permits allow’: Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, UN Doc HRI/GEN/1/Rev.9 (11 April 1986) [9], cited in Office of the United Nations High Commissioner for Human Rights, ‘Expulsions of Aliens in International Human Rights Law’ (Discussion Paper, Geneva, September 2006) 11 <www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf>, archived at <<https://perma.cc/NSE6-DUBV>>.

¹⁶⁸ Sean D Murphy (n 166) 165, citing *Draft Articles on the Expulsion of Aliens* (n 166) art 1(1). But the term also includes ‘a person who is displaced across a border, perhaps due to a famine or an internal armed conflict’.

has the potential to contract the Commonwealth's legislative powers under s 51(xix).

International law can also inspire the expansion (or contraction) of the meaning of other constitutional terms. By virtue of a variety of international instruments, in particular the 1995 *Agreement on Trade Related Aspects of Intellectual Property* ('TRIPS'),¹⁶⁹ patent rights have been 'extended to virtually all subject matter ... including pharmaceutical products, chemicals, pesticides, and plant varieties'.¹⁷⁰ TRIPS also 'raised the levels of protection for copyright and trademark [and] extended coverage to trade secrets, design protection, and geographical indications'.¹⁷¹ Under international law, and by extension under the common law, it is hard to say that the terms 'copyright', 'patents', 'designs' and 'trade marks' have the same meaning today as they did in 1900. So too under s 51(xviii) of the *Constitution* (which refers to 'copyrights, patents of inventions and designs, and trade marks'). Today, these intellectual property terms capture a far broader range of goods, services and activities than they did in the past. The meaning of these terms in international law, in the common law and, therefore, in the *Constitution* has changed.

International law also impacts upon constitutional interpretation (via the common law) in the area of human rights. Significantly, once international human rights norms are crystallised into common law rights, they can be more easily translated into constitutional rights.¹⁷² In *Mabo*, the constitutional question about the existence and survival of native title hinged, in part, on whether by virtue of the common law doctrine of terra nullius the Crown had universal and absolute ownership of the disputed lands. Brennan J maintained that

[a]lthough the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with

¹⁶⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') art 27(1).

¹⁷⁰ Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003) 8.

¹⁷¹ Rochelle Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property' (2015) 36 *Michigan Journal of International Law* 557, 558.

¹⁷² Meagher, 'The Common Law Presumption of Consistency with International Law' (n 87) 478.

international law in order to provide the body of law to apply in a territory newly acquired by the Crown.¹⁷³

The impact of international law on the common law doctrine of terra nullius began long ago. In the late 18th century, international law expanded the scope of terra nullius in order to justify the practices of colonising states.¹⁷⁴ Two centuries later, international law was again employed to shape the common law — but this time it took a different tack. In 1975, a majority of the International Court of Justice (‘ICJ’) narrowly construed the doctrine of terra nullius, holding that the agreements between Spanish colonisers and local rulers indicated that Western Sahara did not at the time of colonisation belong to no-one (ie it was not terra nullius).¹⁷⁵ For Brennan J, this ICJ precedent demonstrated the enormous latent potential of international law to contribute, via the common law, to constitutional discourse. Brennan J concluded that the position at international law had changed and that inhabited land cannot be classified as terra nullius. International law clearly impacted on the common law doctrine at the heart of one of Australia’s most fundamental constitutional questions:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.¹⁷⁶

More generally, the High Court also emphasised international law’s capacity to introduce human rights principles into the common law, which may then feed into constitutional interpretation:

The opening up of international remedies to individuals pursuant to Australia’s accession to the *Optional Protocol to the International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the *Covenant* and the international standards it imports.¹⁷⁷

To sum up, Pathway One harnesses the dynamic force of the common law and its openness to international law. If international law can influence the common law, and the common law can influence constitutional interpreta-

¹⁷³ *Mabo* (n 164) 32.

¹⁷⁴ *Ibid* 33–4 (Brennan J).

¹⁷⁵ *Western Sahara (Advisory Opinion)* [1975] 1 ICJ Rep 12, 38–9. See *Mabo* (n 164) 41 (Brennan J).

¹⁷⁶ *Ibid* 41–2.

¹⁷⁷ *Ibid* 42 (citations omitted).

tion, then international law can influence constitutional interpretation. As *Mabo* and the other case studies demonstrate, this Pathway is well suited to Australia's common law and constitutional conditions, and can be added to the interpretive repertoire of moderate originalists.

B Pathway Two: International Law Resolving Ambiguity in Constitutional Texts

Pathway Two does not rely on the evolution of the common law in order to link constitutional interpretation to international law. Instead, Pathway Two draws on the nature of constitutional documents and the objective moral categories which they establish.

1 Identifying Ambiguity

Originalists accept that the historical record does not always yield satisfactory answers to constitutional questions.¹⁷⁸ Goldsworthy maintains that 'resort to the founders' intentions cannot answer all ... interpretative disputes'.¹⁷⁹ He explains that if relevant 'evidence of those intentions does not resolve a dispute, then judges may be forced to act creatively, and ... stipulate what the disputed provision *should* thenceforth be taken to mean'.¹⁸⁰ Goldsworthy recognises the 'enormous scope for legitimate judicial creativity when the *Constitution* is ambiguous, vague or internally inconsistent'.¹⁸¹ In these situations — where judges exercise discretion and *make* constitutional law — there is a significant opening for international law.¹⁸²

However, this opening hinges on how broadly or narrowly one defines the range of the circumstances which grant interpreters a 'creative licence'. What exactly constitutes 'ambiguity'? How easily is ambiguity discovered? When, therefore, are interpreters entitled to act creatively? These questions touch upon the crux of originalism. After all, once the meaning of the *Constitution* is found to be determinate, originalists are obliged to accept that meaning.¹⁸³

¹⁷⁸ Adrienne Stone, 'Comparativism in Constitutional Interpretation' (n 33) 53–4.

¹⁷⁹ Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 20.

¹⁸⁰ *Ibid* (emphasis added); Goldsworthy, 'The Case for Originalism' (n 25) 61.

¹⁸¹ Goldsworthy, 'Originalism in Constitutional Interpretation' (n 19) 29. See also Goldsworthy, 'Constitutional Interpretation: Originalism' (n 46) 689; Goldsworthy, 'The Case for Originalism' (n 25) 62.

¹⁸² See Goldsworthy, 'Questioning the Migration of Constitutional Ideas' (n 144) 140–1.

¹⁸³ Goldsworthy, 'The Case for Originalism' (n 25) 60.

Unlike non-originalists, who take a very broad view of ambiguity,¹⁸⁴ moderate originalists recognise that judges are not entitled to reinterpret a constitutional provision which has a determinate meaning in order to improve or update it.¹⁸⁵ Judges must not read ambiguity into situations where the original public meaning, in light of historical evidence, is unequivocal or highly persuasive. At the same time, they must ‘take care not to assert greater determinacy of meaning than can be borne by the available evidence.’¹⁸⁶ However, even within the originalist school, there are different opinions over just how easily ambiguity is identified.¹⁸⁷ But, in any event, all originalists accept that there are circumstances which do give rise to some ambiguity. This ambiguity ushers interpreters into the ‘construction zone.’¹⁸⁸

2 The Construction Zone

Where there is no predetermined ‘right answer’ to an interpretive question,¹⁸⁹ and the meaning of the *Constitution* appears ambiguous, legal effect must still be given to the *Constitution*.¹⁹⁰ This process is called ‘construction’ — constitutional meaning must be *constructed*.¹⁹¹ As with the interpretation of any legal text, such as a contract, there is constructional choice.¹⁹² Interpreters must *choose* between reasonable alternatives. This choice is ‘an inescapable aspect of the exercise of judicial power.’¹⁹³

¹⁸⁴ Goldsworthy, ‘Interpreting the *Constitution* in Its Second Century’ (n 21) 681; Michael Kirby, ‘Domestic Courts and International Human Rights Law: The Ongoing Judicial Conversation’ (2010) 6 *Utrecht Law Review* 168, 178; Longo (n 19) 126.

¹⁸⁵ Goldsworthy, ‘The Case for Originalism’ (n 25) 61.

¹⁸⁶ Keith E Whittington, ‘On Pluralism within Originalism’ in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 70, 81.

¹⁸⁷ Kirk (n 16) 359; Balkin, ‘Framework Originalism and the Living Constitution’ (n 58) 550, 557; Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) 21; Brendan Lim, ‘Review Essay: An Australian Reads “Living Originalism”’ (2012) 34 *Sydney Law Review* 809, 814.

¹⁸⁸ Lawrence Solum, ‘Originalism and Constitutional Construction’ (2013) 82 *Fordham Law Review* 453, 453.

¹⁸⁹ Williams, Brennan and Lynch (n 12) 175.

¹⁹⁰ Lawrence Solum, ‘The Interpretation–Construction Distinction’ (2010) 27 *Constitutional Commentary* 95, 98.

¹⁹¹ Keith E Whittington, ‘The New Originalism’ (2004) 2 *Georgetown Journal of Law and Public Policy* 599, 611–12.

¹⁹² Willheim (n 9) 33.

¹⁹³ French, ‘Interpreting the *Constitution*’ (n 16) 30.

Obviously, that choice, being exercised where the law is ambiguous or indeterminate, is not governed by ‘the law’.¹⁹⁴ Interpreters are free to consider contemporary values.¹⁹⁵ It is in this context that the norms of international law can be particularly relevant. International law is of course a repository of contemporary values.¹⁹⁶ International law also expounds many fundamental human rights.¹⁹⁷ However, it goes without saying that international law cannot itself *create* the initial ambiguity which permits interpreters to enter the construction zone. The initial ambiguity ‘must be otherwise apparent’.¹⁹⁸

The freedom to utilise this interpretive construction zone and effect constitutional change is supported by the belief that the constitutional drafters did not robotically write in vague generalities.¹⁹⁹ Alfred Deakin, who played a lead role in drafting the *Australian Constitution*, made the following observation:

[D]rawn ... of necessity ... on simple and large lines, [the *Constitution*] opens an immense field for exact definition and interpretation. Our *Constitution* must depend largely for the exact form and shape which it will hereafter take upon the interpretation accorded to its various provisions.²⁰⁰

Deakin’s ‘simple and large lines’ were designed to enliven constructional choice,²⁰¹ albeit within the confines of originalism. That choice sanctions the adoption of values from disparate legal sources, including international law. Thus, where historical resources do not clearly elucidate the *Constitution*’s

¹⁹⁴ Williams, Brennan and Lynch (n 12) 176.

¹⁹⁵ Goldsworthy, ‘The Case for Originalism’ (n 25) 61.

¹⁹⁶ *Newcrest* (n 100) 657–8 (Kirby J); *Baker v The Queen* (2004) 223 CLR 513, 558–9 [134] (Kirby J). See also Kirby, ‘International Law: The Impact on National Constitutions’ (n 27) 359.

¹⁹⁷ Walker (n 36) 95, citing *Kartinyeri* (n 36) 418 (Kirby J).

¹⁹⁸ *Ibid.*

¹⁹⁹ Robertson (n 65) 356. This should not be confused with an actual, subjective intention that international law be consulted.

²⁰⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin), quoted in Greg Craven, ‘Heresy as Orthodoxy: Were the Founders Progressivists?’ (2003) 31 *Federal Law Review* 87, 114. ‘[T]he legislative powers of the Congress were expressed “in general terms”, so as “to provide [not] merely for the exigencies of a few years, but ... to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence”’: *Grain Pool* (n 46) 495 [22], citing *Martin v Hunter’s Lessee*, 14 US 304, 326 (Story J) (1816).

²⁰¹ See generally French, ‘Interpreting the *Constitution*’ (n 16) 35–6.

words, there is an opening for international law — which originalists are free to exploit.²⁰²

3 *International Law Giving Content to Objective Moral Categories of Constitutional Significance*

Pathway Two to consulting international law, which harnesses constructional choice, is particularly significant when it comes to interpreting the objective moral categories enshrined in national constitutions. In this context, ambiguity is commonplace. Provisions that guarantee rights are ‘invariably abstract and vague.’²⁰³ Notably, ‘the ambiguity of language is compounded the bigger ... the idea and the more enduringly it is expressed.’²⁰⁴ Because of the vagueness of these moral (as opposed to technical) provisions,²⁰⁵ judges almost always have discretion in determining their meaning. These provisions give constitutional interpreters the keys to enter the construction zone and, in turn, consult international law.

Let us begin by examining several US constitutional provisions which were crafted ‘to embed in the text ... a defined set of timeless and objective norms.’²⁰⁶ One of these provisions is Article VI, which stipulates, among other things, that ‘no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.’ The ban on religious tests is a ‘powerful testament to the idea that [religious] convictions were deemed irrelevant to holding public office.’²⁰⁷ This is buttressed by the ‘Establishment’ and ‘Free Exercise’²⁰⁸ clauses in the First Amendment.²⁰⁹ The First Amendment also enshrines freedom of speech, securing for citizens a right that was

²⁰² Of course, there may also be an opening to consult other interpretive guides, apart from international law. Part V therefore explores the distinct utility of international law.

²⁰³ Goldsworthy, ‘Questioning the Migration of Constitutional Ideas’ (n 144) 140–1.

²⁰⁴ Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Function of the Constitution’ (Sir Maurice Byers Memorial Lecture, New South Wales Bar Association, 7 April 2009) 4. See also Michael (n 4) 215.

²⁰⁵ But see Goldsworthy, ‘Originalism in Constitutional Interpretation’ (n 19) 43.

²⁰⁶ Gray (n 26) 1263.

²⁰⁷ Jack N Rakove (ed), *The Annotated US Constitution and Declaration of Independence* (Harvard University Press, 2009) 212–14.

²⁰⁸ *Ibid* 222–4.

²⁰⁹ The *Australian Constitution* s 116 contains similar wording, but it has been interpreted differently: Michael Hogan, ‘Separation of Church and State: Section 116 of the Australian Constitution’ (1981) 53 *Australian Quarterly* 214, 218–19; Stephen McLeish, ‘Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ (1992) 18 *Monash University Law Review* 207, 208, 223.

previously reserved only for legislators²¹⁰ — a vital expression of a timeless political freedom. Objective norms can indeed be found throughout the *United States Bill of Rights*. The Fifth Amendment, for example, cements several basic individual rights. Rakove explains that it ‘combines three fundamental common-law rights relating to criminal prosecutions ... with an expansive statement of the idea of “due process of law” and protection for the basic right of property’.²¹¹

[B]y echoing the basic trinity of the natural rights to life, liberty, and property, Madison converted this narrow legal requirement into a broader affirmation that government actions affecting the rights of individuals must conform to established standards of legality.²¹²

According to Rakove, the final component of the Fifth Amendment, the ‘Takings’ clause (‘nor shall private property be taken for public use, without just compensation’)

reflected Madison’s fear that popularly elected legislatures would show little respect for basic rights of property — or rather, that they would favor the economic interests of the many over the vested rights and larger holdings of the few.²¹³

These provisions demonstrate that the founders placed a strong emphasis on underlying values. Although the ‘Takings’ clause does not define ‘private property’, delineate what constitutes ‘taking’ or clarify what is ‘just compensation’, it does clearly embody a set of values, namely, the individual’s right to property and limitations on the government’s authority to infringe that right.

As the *United States Bill of Rights* indicates, the US founders were moral realists who believed in the existence of enduring values.²¹⁴ They expressed these values in abstract language, which naturally became the subject of judicial interpretation. Importantly, the founders also believed that new moral insights can, and should, refine the judiciary’s understanding of those enduring values.²¹⁵ Thus, for example, in order to understand the meaning of

²¹⁰ Rakove (n 207) 223–4.

²¹¹ Ibid 232–3.

²¹² Ibid 232.

²¹³ Ibid.

²¹⁴ Suzanna Sherry, ‘The Founders’ Unwritten Constitution’ (1987) 54 *University of Chicago Law Review* 1127, 1127, 1132, cited in Larsen (n 133) 1310.

²¹⁵ See Mark V Tushnet, ‘When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-US Law’ (2006) 90 *Minnesota Law Re-*

‘cruel’ in the Eighth Amendment (‘nor [shall] cruel and unusual punishments [be] inflicted’), interpreters are tasked with discovering the *contemporary* content of an objective moral category — cruelty — rather than simply uncovering the founders’ subjective beliefs about what cruelty meant in 1791.²¹⁶ Moderate originalism suggests that

if we read the abstract clauses ... to say what their authors intended them to say ... then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require.²¹⁷

In other words, the founders intended to enact general, non-static principles, referable to community standards.²¹⁸ In order to properly uphold these principles, present-day courts must examine contemporary community standards. Community standards do not only reflect objective moral categories; they are also constitutionally mandated points of reference.

I argue that international law can help constitutional interpreters discover contemporary community standards.²¹⁹ International law can act as a ‘moral yardstick’²²⁰ to reveal the contemporary content of a constitution’s objective moral categories. For example, the US Supreme Court held that the Eighth Amendment requires that any criminal punishment must satisfy a proportionality test²²¹ and accord with ‘evolving standards of decency.’²²² Interna-

view 1275, 1279–80; Gray (n 26) 1262–3. But see Alford, ‘*Roper v Simmons* and Our Constitution in International Equipose’ (n 118) 16–21.

²¹⁶ Gray (n 26) 1264–5.

²¹⁷ Ronald Dworkin, ‘Comment’ in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 115, 126 (emphasis in original). But see *Roper* (n 117) 629 (Scalia J), rallying against the US Supreme Court interpreting the Eighth Amendment as ‘a mirror of the passing and changing sentiment of American society’.

²¹⁸ Dworkin, *Freedom’s Law* (n 52) 7–9; Alford, ‘*Roper v Simmons* and Our Constitution in International Equipose’ (n 118) 11.

²¹⁹ *Roper* (n 117) 575 (Kennedy J); *Graham v Florida*, 560 US 48, 81–2 (2010); Hilary Charlesworth, ‘The High Court on Constitutional Law: The 2004 Term’ (2005) 28 *University of New South Wales Law Journal* 1, 4; Michael (n 4) 209–10, 212. See also *Atkins v Virginia*, 536 US 304, 316 n 21 (2002).

²²⁰ Michael (n 4) 210.

²²¹ See, eg, *Harmelin v Michigan*, 501 US 957, 997 (Kennedy J) (1991), cited in Alexander A Reinert, ‘Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment’ (2016) 94 *North Carolina Law Review* 817, 827.

²²² *Trop v Dulles*, 356 US 86, 101 (Warren CJ) (1957), quoted in Reinert (n 221) 827.

tional law, of course, contains a rich jurisprudence on proportionality²²³ and on the constantly evolving standards required to protect human dignity.²²⁴ International law reflects modern, dynamic understandings of these moral categories, which the US Supreme Court held to be an appropriate constitutional benchmark.

Another example of an objective moral category whose interpretation is influenced by community standards is the right to effective legal counsel under the Sixth Amendment to the *United States Constitution*. The Sixth Amendment, which guarantees the rights of the accused in criminal prosecutions, has — in an effort to advance the underlying, objective principle of protecting the accused — adapted to changing legal and institutional conditions. As criminal proceedings have become progressively less trial-oriented, the US Supreme Court has expanded the scope of the provision to apply more broadly to pre-trial conduct.²²⁵ Given that several international instruments elaborate on the elements of the right to fair legal proceedings (including pre-trial conduct)²²⁶ — benchmarks which reflect the global community's moral standards — these international instruments could help illuminate the contemporary meaning of the Sixth Amendment.

Although the ambiguity in these various moral categories makes a strong case for consulting international law, there are some counterarguments. Scalia J strongly resisted changes to constitutional meaning inspired by post-enactment international law.²²⁷ Nevertheless, and despite being accused of 'abdicat[ing] to eighteenth-century views',²²⁸ Scalia J noted that

²²³ See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, tr Doron Kalir (Cambridge University Press, 2012); Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *Yale Law Journal* 3094, 3096.

²²⁴ See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, tr Daniel Kayros (Cambridge University Press, 2015) 34–9.

²²⁵ Justin F Marceau, 'Embracing a New Era of Ineffective Assistance of Counsel' (2012) 14 *University of Pennsylvania Journal of Constitutional Law* 1161, 1162–3.

²²⁶ See, eg, Human Rights Committee, *General Comment No 32: Article 14 — Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007), cited in Martha F Davis, 'Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law' (2013) 122 *Yale Law Journal* 2260, 2274–5.

²²⁷ Scalia, 'Keynote Address' (n 121) 307; Gray (n 26) 1259.

²²⁸ Gray (n 26) 1271. See Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws' in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3, 38.

[t]he practices of other nations ... can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our *Constitution* as well.²²⁹

On the basis of this judgment, Scalia J does not seem to bar interpreters from consulting international law where it can illuminate the *United States Constitution's* underlying moral categories. Nevertheless, Pathway Two does depend on there being some scope for effecting constitutional change. As discussed above, moderate originalism incorporates mechanisms for effecting constitutional change (Originalist Principle 7). One such mechanism involves the distinction between 'intended meaning' and 'intended application intentions'. Assuming that interpreters can identify the intended meaning of a given provision, ie the underlying principle of the provision, international law can be instructive when it comes to *applying* that principle. Consider the principle of representative government in the *Australian Constitution*.²³⁰ While the structure and history of the *Australian Constitution* establish the abstract principle of representative government,²³¹ international instruments, such as art 25 of the *ICCPR*, which elaborates on the right to vote, could shed light on how that basic democratic principle should be implemented in practice.

4 *Comparing Constitutions*

Before concluding that international law can illuminate moral categories of constitutional significance, it is important to consider whether the above arguments apply equally to all national constitutions. Is ambiguity more pervasive in some constitutions than in others? Do all constitutions establish objective moral categories and/or mandate recourse to community standards (which potentially engage international law)?

The short answer is that ambiguity is unavoidable. However, a dry, legalistic constitution, such as the *Australian Constitution*, is probably less amenable to Pathway Two than the loftier *United States Constitution*. The open-textured language and principles of the *United States Constitution* and, in particular, the *United States Bill of Rights* favour reliance on international law,²³² whereas the tighter, more technical provisions in the *Australian*

²²⁹ *Thompson* (n 133) 869 n 4 (Scalia J).

²³⁰ See Part IV(B)(3) for more detailed discussion.

²³¹ Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 508.

²³² Craven, 'The Crisis of Constitutional Literalism in Australia' (n 24) 21.

Constitution do not. Nevertheless, the ambiguity inherent in the constitutionalisation of *any* moral principle has the potential to support recourse to international law. Although the implementation of Pathway Two ultimately depends on the particular constitutional provision in question, it is useful to compare the situation in Australia to that in the US.

(a) *United States*

The *United States Constitution* is ‘aspirational, describing the politico-ethical contours of the nation and moral limitations on governmental authority.’²³³ It is couched in grand language, ‘touching on universal norms of decency and right.’²³⁴ In order to give meaning to its amorphous provisions, interpreters must have recourse to extra-constitutional values.²³⁵ For example, as discussed above, the term ‘cruel and unusual punishment’ in the Eighth Amendment is value-laden rather than dry and legalistic.²³⁶ In the US, ‘the mythology of the judicial process as a value-free application of determinate pre-existing legal rules [has] never had quite the same impact as in Australia.’²³⁷ Abstract moral principles abound, paving the way for originalists to consult international law.

The argument that international law can give content to the objective moral categories established by the *United States Constitution* is further strengthened by the observation that the founders actually *intended* or *expected* that international law would be used in constitutional interpretation. This argument has been employed in order to justify international law supplying substantive content to the *United States Constitution*,²³⁸ particularly

²³³ Gray (n 26) 1261, citing *United States Constitution* Preamble, amends V, VIII, XIV § 1.

²³⁴ *Ibid*, citing Dworkin, *Taking Rights Seriously* (n 61) 133, 185–6. The *United States Constitution* exists to ‘form a more perfect Union’, ‘establish Justice’, ensure ‘Tranquility’, ‘promote the general Welfare’, and ‘secure the blessings of Liberty’: *United States Constitution* Preamble, quoted in Gray (n 26) 1261. South Africa’s *Constitution* and *Bill of Rights* also aim to entrench ‘an objective, normative value system’: *Carmichele v Minister of Safety and Security* [2002] 4 SA 938, 961 (Ackermann and Goldstone JJ) (Constitutional Court), quoted in Hovell and Williams (n 15) 102.

²³⁵ Michael (n 4) 211, 213. See, eg, *United States Constitution* amend XIV (‘due process’).

²³⁶ Jeremy Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010) 186–261; Michael (n 4) 212, quoting Chief Justice Robert French, ‘Home Grown Laws in a Global Neighbourhood: Australia, the United States and the Rest’ (2011) 85 *Australian Law Journal* 147, 158.

²³⁷ Williams, Brennan and Lynch (n 12) 176.

²³⁸ Nadine Strossen, ‘Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis’ (1990) 41 *Hastings Law Journal* 805, 825, 827–8; Randall R Murphy, ‘The Framers’ Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment

where the founders intended to constitutionalise precepts of natural law, that is, pre-legal norms of positive morality.²³⁹ However, this intention-based argument is more relevant to *intentionalist* originalism than to *objective* (moderate) originalism, which is the basis for cosmopolitan originalism and the conceptual framework for this article.

Returning to *moderate* originalism, it has been suggested that America's founders did not expect judicial interpretations of timeless natural law rights to remain static.²⁴⁰ Given the natural law foundations common to both American individual rights (enshrined in the *United States Constitution*) and international law, the founders *expected* that both would evolve together, if not symbiotically.²⁴¹ As US constitutional law developed, it could impact international law, and vice versa.²⁴² This indeed occurred where, for example, the *United States Constitution* inspired and served as a model for various international instruments.²⁴³ Some commentators have even observed that 'the notion of universal rights, as enshrined in several international law texts, is merely a reiteration of the concept of individual rights under [US] domestic law'.²⁴⁴ Conversely, developments in international law might have been expected to colour or shape US constitutional jurisprudence. Analogised to a family, natural law is the parent; constitutional law and international law are its two children. Coming from the same stock, the two children are expected, if not obliged, to come to each other's assistance.²⁴⁵ These observations, however, all hinge on America's ideologically-charged (constitutional) history

Rights' (1992) 21 *Stetson Law Review* 423, 460; Larsen (n 133) 1309; Koh (n 7) 47, discussing Scalia J's judgment in *Thompson* (n 133) 830, 868 n 4; Neuman, 'International Law as a Resource in Constitutional Interpretation' (n 7) 180–1. Larsen, however, proceeds to reject this argument: Larsen (n 133) 1310–18.

²³⁹ Austin, *The Province of Jurisprudence Determined* (n 69) 141–3; Stewart Jay, 'The Status of the Law of Nations in Early American Law' (1989) 42 *Vanderbilt Law Review* 819, 822; G Edward White, 'The Marshall Court and International Law: The Piracy Cases' (1989) 83 *American Journal of International Law* 727, 728; Larsen (n 133) 1310; Neuman, 'International Law as a Resource in Constitutional Interpretation' (n 7) 181; Glensy (n 5) 1240.

²⁴⁰ Sherry (n 214) 1164; Randall R Murphy (n 238) 431–2.

²⁴¹ Strossen (n 238) 825, 827–8; Larsen (n 133) 1312–13; Glensy (n 5) 1232–3.

²⁴² But see Larsen (n 133) 1312.

²⁴³ Koh (n 7) 54, discussing the *UDHR* and the *ICCPR*.

²⁴⁴ Glensy (n 5) 1232 (citations omitted). The interpretation of the *United States Constitution* faces many of the same challenges as international law, including deciding how to give practical effect to abstract ideals expressed in broad, sweeping language.

²⁴⁵ See *United States v Then*, 56 F 3d 464, 469 (Calabresi J) (2nd Cir, 1995), quoted in Sarah K Harding, 'Comparative Reasoning and Judicial Review' (2003) 28 *Yale Journal of International Law* 409, 410: 'the US Supreme Court has so far failed to "learn from [its] children"'.

and the actual text of the *United States Constitution*, both of which contain powerful rights declarations and guarantees.

(b) *Australia*

Compared with the *United States Constitution*, the *Australian Constitution* is uninspiring.²⁴⁶ It has been called ‘a prosaic document expressed in lawyer’s language’,²⁴⁷ due in part to its different historical pedigree.²⁴⁸ Compared to ‘the panoply of values expressed in the *United States Constitution*, [Australia’s] *Constitution* ‘is [a] relatively minimalist ... steel skeleton.’²⁴⁹ Unlike Canadian and European constitutional documents which expressly establish a right to freedom of expression,²⁵⁰ the *Australian Constitution* at best *implies* such a right through its structure and text.²⁵¹ As a result of its bare bone text, ‘there is comparatively less need for [Australian] judges to make wide-ranging value judgments in constitutional interpretation,’²⁵² limiting the opportunities for consulting international law.

However, French CJ observed that ‘[c]onstitutional words almost always offer choices to the court because they tend to be pitched at a high level of generality,’²⁵³ which, even in the Australian context, call for moral value judgements. Read as an ‘integrated and rational whole ... in the light of the historical intentions and understandings of its framers, it [is] increasingly apparent that the [Australian] *Constitution* provides for the establishment of

²⁴⁶ Weis (n 19) 844.

²⁴⁷ Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 8. See also Jeffrey Goldsworthy, ‘Constitutional Cultures, Democracy, and Unwritten Principles’ [2012] *University of Illinois Law Review* 683, 685.

²⁴⁸ Weis (n 19) 850; Beck (n 100) 208.

²⁴⁹ Michael (n 4) 211. See *Roach* (n 110) 172–3 (Gleeson CJ); Sir Owen Dixon, ‘Two Constitutions Compared’ in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 100, 102.

²⁵⁰ *Canada Act 1982* (UK) sch B pt I s 2(b); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 10.

²⁵¹ *Theophanous* (n 44) 148 (Brennan J) regarding the *implied* freedom of political communication.

²⁵² Michael (n 4) 212.

²⁵³ French, ‘Home Grown Laws in a Global Neighbourhood’ (n 236) 157; Michael (n 4) 215.

certain ... goals,²⁵⁴ such as the separation of judicial power.²⁵⁵ While these goals, supported by structural and institutional provisions, are more technical and legalistic than their American, Canadian or European counterparts, they still possess a moral dimension. The separation of judicial power, whilst grounded in the structure and the text of the *Australian Constitution*,²⁵⁶ embodies broader constitutional values, such as democracy and the rule of law.²⁵⁷ According to the Australian Bar Association, an independent judiciary — protected by the separation of judicial power — is ‘a keystone in the democratic arch. ... If it crumbles, democracy falls with it.’²⁵⁸

Although the *Australian Constitution* is less overtly value-laden than its American counterpart, it does enshrine fundamental moral and political precepts, some of which are referable to community standards. In *Rowe v Electoral Commissioner*,²⁵⁹ in which a majority of the High Court struck down legislation restricting the time in which a person could enrol to vote, French CJ observed that

[t]he content of the constitutional concept of ‘chosen by the people’ [in ss 7 and 24 of the *Constitution*] has evolved since 1901 and is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law. ... Implicit in that authority was the possibility that the constitutional concept would acquire ... a more democratic content than existed at Federation. That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished ... its evolution [is] linked ... to ‘the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth.’²⁶⁰

²⁵⁴ Peter A Gerangelos et al, *Winterton’s Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 3rd ed, 2013) 1391–2.

²⁵⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

²⁵⁶ *Kable v DPP (NSW)* (1996) 189 CLR 51, 100–4 (Gaudron J); Rebecca Ananian-Welsh and George Williams, ‘Judicial Independence from the Executive: A First-Principles Review of the Australian Cases’ (2014) 40 *Monash University Law Review* 593, 602–3.

²⁵⁷ Ananian-Welsh and Williams (n 256) 594.

²⁵⁸ *Ibid*, quoting Australian Bar Association, ‘The Independence of the Judiciary’ (Statement, March 1991) [2.2]. See also Richard Ekins, ‘Human Rights and the Separation of Powers’ (2015) 34 *University of Queensland Law Journal* 217, 217, 236.

²⁵⁹ (2010) 243 CLR 1.

²⁶⁰ *Ibid* 18 [18], quoting *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ); cf at 89 [266] (Heydon J in dissent). Cf James Allan, ‘The Three

To be clear, these constitutional provisions and the democratic values they underpin appeal to contemporary community standards:

The term ‘common understanding’ ... is not to be equated to judicial understanding. Durable legislative development of the franchise is a more reliable touchstone. It reflects a persistent view by the elected representatives of the people of what the term ‘chosen by the people’ requires.²⁶¹

Although French CJ tied the meaning of the *Constitution* to the interpretation of the legislature, the community standards of the Australian public (whom the legislature represents) are also relevant to the meaning of the *Constitution*. However, French CJ’s reference to the ‘the people’ is a reference to the Australian people, not the international community. But, assuming that the *Constitution*’s evolving democratic content constitutes an objective moral category — a timeless but context-sensitive principle of universal suffrage — then international law can animate that content and illuminate the contemporary meaning of its democratic franchise.²⁶²

However, Pathway Two, both in Australia and in the US, is not hazard-free. It faces three noteworthy, though not insurmountable, obstacles. First, the concept of natural law is, at the very least, controversial. Perceptions of law as ‘independent of the human institutions that create it’²⁶³ — a ‘transcendental’²⁶⁴ ‘brooding omnipresence in the sky’²⁶⁵ — which lawyers discover in international law are no longer widely accepted. Second, assuming that objective moral categories do exist, interpreters might illegitimately attribute to the framers an intention to create an objective moral category in relation to a particular constitutional provision without first consulting the historical record to verify that such a category exists.²⁶⁶ Third, interpreters may identify

“Rs” of Recent Australian Judicial Activism: *Roach, Rowe* and (No)’riginalism’ (2012) 36 *Melbourne University Law Review* 743, 775–7.

²⁶¹ *Rowe* (n 259) 18 [19] (French CJ) (citations omitted).

²⁶² See, eg, Steven Wheatley, ‘Democracy in International Law: A European Perspective’ (2002) 51 *International and Comparative Law Quarterly* 225, 237–8; Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 *Leiden Journal of International Law* 209, 215–18, discussing the *UDHR* and *ICCPR*.

²⁶³ *Weisburd* (n 126) 369.

²⁶⁴ *Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co*, 276 US 518, 533 (Holmes J) (1928), quoted in *Weisburd* (n 126) 369.

²⁶⁵ *Southern Pacific Company v Jensen*, 244 US 205, 222 (Holmes J) (1917), quoted in *Weisburd* (n 126) 369.

²⁶⁶ Keith E Whittington, ‘Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation’ (2000) 62 *Review of Politics* 197, cited in Goldsworthy, ‘Interpreting the Constitution in Its Second Century’ (n 21) 709.

ambiguity where there is none, illegitimately entering the construction zone and granting themselves a creative licence to freely reinterpret a constitution. These concerns culminate in critics viewing the objective moral categories of constitutional significance as a potential *carte blanche* for free-wheeling moral adjudication and non-originalist purposivism.²⁶⁷ Interpreters might altogether disregard a constitution's original meaning and liberate themselves from textual and historical fidelity, effectively repudiating originalism. This criticism, however, is blinkered. As established above, moderate originalism both accommodates changes to constitutional meaning and *requires* constitutional interpreters to act creatively in certain circumstances. And, it is only in *these* circumstances that Pathway Two purports to operate — thereby avoiding these overstated Scalian concerns.

C Pathway Three: Discerning Engagement with International Law

The following pathway to consulting international law operates even in the absence of ambiguous or abstract constitutional language. Pathway Three proposes that citations of international law which exhibit a discerning and selective approach to international law — as opposed to enthusiastic adoption — avoid many originalist objections. The more critical and discriminating the reference to international law, the weaker the originalist objection to it.²⁶⁸ In the words of Scalia J,

[c]omparative study is useful ... not as a convenient means of facilitating judicial updating of the US *Constitution*, but as a source of example and experience that we may use, democratically, to change our laws — or even if it is appropriate, democratically to change our *Constitution*.²⁶⁹

Constitutional interpreters have much to learn from the legal reasoning and practice of international law. Where interpreters treat international law as a source of example and experience and do not purport to alter the meaning of a constitution on the basis of international law, it is plain that they do not violate the Originalist Principles. Therefore, it is permissible for an originalist to consult international law in order

²⁶⁷ Alford, '*Roper v Simmons* and Our Constitution in International Equipose' (n 118) 9–10; Beck (n 100) 208–9.

²⁶⁸ Adrienne Stone, 'Comparativism in Constitutional Interpretation' (n 33) 59–60.

²⁶⁹ Scalia, 'Keynote Address' (n 121) 310. But see *Roper* (n 117) 624 (Scalia J).

to get a better understanding of a problem before her — to gain perspective on a question by learning how it was answered somewhere else and with what result, or to facilitate resolving a problem by *considering* solutions that have occurred to others ...²⁷⁰

The operative word is ‘considering’. Rather than deferring to or embracing international law, interpreters can consider international law with a detached and discerning pose. This article calls such consultation of international law — unquestionably compatible with originalism — *discerning engagement*. Discerning engagement is comprised of two different avenues for consulting international law, each of which Larsen addressed in some detail.²⁷¹

1 Expository Consultation

The first of these avenues is expository consultation. Constitutional interpreters can use international law to ‘contrast and thereby *explain* a domestic constitutional rule.’²⁷² International law does not alter or displace existing constitutional interpretation; international law simply *explains* and *clarifies* it. By comparing domestic constitutional provisions to parallel international law provisions, interpreters can better understand the former by juxtaposing it with the latter. As judges do not purport to reinterpret a constitution (Originalist Principle 4), this use of international law should arouse little controversy among originalists.²⁷³

Let us consider two examples of expository consultation. In the US, courts could compare rights enshrined in the *United States Bill of Rights* with corresponding provisions in international instruments. So, for instance, in interpreting the freedom of speech guarantee in the First Amendment, interpreters could cite parallel *ICCPR* provisions.²⁷⁴ Interpreters would compare and contrast these two *very different* formulations of the right to freedom of speech.²⁷⁵ Instead of reinterpreting the First Amendment to conform to *ICCPR* standards (as non-originalists may propose), interpreters would merely *expose* the differences between the two iterations of freedom of

²⁷⁰ Weisburd (n 126) 366 (emphasis added).

²⁷¹ Larsen (n 133) 1288–91.

²⁷² *Ibid* 1288 (emphasis added). Larsen discusses *Raines v Byrd*, 521 US 811, 828–9 (1997), in which the US Supreme Court compared the US standing doctrine to that of European constitutional courts, ‘explaining what the United States law of standing *is* by contrasting it with an example of what it is *not*’: at 1289 (emphasis in original).

²⁷³ Weisburd (n 126) 366.

²⁷⁴ See *ICCPR* (n 77) art 19.

²⁷⁵ See n 133 for a more detailed discussion.

speech — and, in doing so, they would better clarify the existing meaning of the First Amendment.

In the Australian context, Kitto J in 1965 contrasted the ‘trade and commerce’ power in s 51(i) of the *Australian Constitution* with the textually similar ‘Commerce’ clause in the *United States Constitution*.²⁷⁶ Kitto J held that, on account of the differences between the constitutional mandates of federal government in the two jurisdictions, an element of the US Supreme Court’s ‘Commerce’ clause jurisprudence could not be applied in Australia.²⁷⁷ Although that case related to foreign domestic law (namely US law), the type of consultation (expository consultation) could equally apply to international law. If anything, the pronounced differences between domestic constitutional law and international law make international law an even starker point of contrast than foreign domestic law. International law could therefore be an insightful counterpoint to the dry, lawyerly *Australian Constitution*. Critics, however, take a different view on this stark contrast:

To learn that Orthodox Jews put hats on when entering their holy places is totally and utterly irrelevant with regard to what counts as acceptable ‘hat behaviour’ when entering Catholic churches.²⁷⁸

Whether or not persuasive, this observation does not challenge the originalist credentials of expository consultation. It merely questions its utility. In response, as demonstrated above, using international law as a counterpoint to domestic constitutional law can be highly instructive. In addition, expository consultation tempers the enthusiasm of cosmopolitan originalists and fosters a healthy and prudent scepticism towards the role of international law in constitutional interpretation. Instead of seeing international law as something to always be embraced, this avenue subjects international law to criticism on a case-by-case basis. *Contrast*, as opposed to *convergence*, is key. In expository consultation, international law illuminates existing constitutional meaning; it does not purport to change it.

2 *Empirical Consultation*

The second avenue of discerning engagement suggests that interpreters may consult international law in order to predict what effect a proposed constitu-

²⁷⁶ *United States Constitution* art 1 § 8 cl 3.

²⁷⁷ *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 113–15, discussed in Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 59.

²⁷⁸ Levinson (n 129) 361.

tional interpretation might have in practice.²⁷⁹ International jurisdictions serve as testing grounds for domestic constitutional courts.²⁸⁰ Before adopting a novel or risky interpretation, domestic courts can learn from international jurisdictions which have already experimented with a similar interpretation (perhaps of an equivalent international instrument). These international law ‘experiments’ can provide up-to-date empirical data to (risk-averse) domestic constitutional interpreters.²⁸¹ In particular, international law can help predict whether a given interpretation will actually achieve the desired outcome and advance the underlying constitutional objective.²⁸²

For example, where a constitutional provision ‘requires courts to measure the extent to which a law burdens some behavior (speech, religious practice, commerce ...), the experience of foreign states with similar rules should be relevant.’²⁸³ In *Theophanous v Herald & Weekly Times Ltd*,²⁸⁴ a landmark High Court case which implied a freedom of political communication from the *Australian Constitution*, Deane J examined the practical effect of the limitations on the defamation defence established in the US Supreme Court case of *New York Times Co v Sullivan*.²⁸⁵ His Honour observed the so-called ‘chilling effect’ of *Sullivan* in the US.²⁸⁶ Consequently, in deciding the Australian case, he insisted upon an ‘*unqualified*’ rule precluding defamation actions by public officials²⁸⁷ — eager to avoid the adverse effects which he witnessed abroad. Although *Theophanous* dealt with foreign domestic law, international law could arguably play a similar role and provide constitutional interpreters with useful empirical data and experience.²⁸⁸

²⁷⁹ Larsen (n 133) 1289, 1299–300, citing *Washington v Glucksberg*, 521 US 702 (1997).

²⁸⁰ Richard A Posner, *How Judges Think* (Harvard University Press, 2010) 353. Other nations’ experience can ‘cast an empirical light on the consequences of different solutions to a common legal problem’: *Printz v United States*, 521 US 898, 977 (Breyer J) (1997) (emphasis added).

²⁸¹ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 59.

²⁸² Larsen (n 133) 1289, 1299–300.

²⁸³ Eric A Posner and Cass R Sunstein, ‘The Law of Other States’ (2006) 59 *Stanford Law Review* 131, 138 n 34; Jackson, *Constitutional Engagement in a Transnational Era* (n 15) 135. See Goldsworthy, ‘Questioning the Migration of Constitutional Ideas’ (n 144) 140–1.

²⁸⁴ *Theophanous* (n 44) 185–6, discussed in Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 59 n 63.

²⁸⁵ 376 US 254 (1964).

²⁸⁶ *Theophanous* (n 44) 185.

²⁸⁷ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 59 n 63 (emphasis added).

²⁸⁸ *Knight v Florida*, 528 US 990, 997 (Breyer J) (1999), cited in Koh (n 7) 46.

While Scalia J objected to ‘using foreign legal materials for interpretive purposes’, he sanctioned examining ‘the consequences of foreign legal practices for interpretive purposes.’²⁸⁹ Consider, for example, where interpreters cite international law as evidence of an ‘unsuitable approach or ... a pitfall to be avoided.’²⁹⁰ If a particular interpretation had adverse effects in an international law jurisdiction, undermining citizens’ rights, then international law, in this instance, would demonstrate what is an *unsuitable* approach. It would indicate to constitutional interpreters *what not to do* in the course of applying a national constitution domestically.

However, empirical consultation faces one originalist objection. Despite the caution which empirical consultation exhibits in approaching international law, the attempt to predict what effect a proposed constitutional interpretation may have in practice is arguably consequentialist or pragmatic, rather than originalist. Critics might suggest that empirical consultation looks to consequence, not meaning; it preferences the outcomes of a given interpretation over the original meaning of the text. More concerning, it could purport to reinterpret a constitution in light of empirical observations, ignoring its original meaning (Originalist Principles 4 and 5). Empirical consultation, according to critics, prioritises practical effect at the expense of fidelity to the framers’ intentions.

However, this criticism can be rebutted. Firstly, once interpreters enter the construction zone and acquire their creative licence,²⁹¹ consequentialist reasoning is not necessarily off-limits. Secondly, and more importantly, empirical consultation is about investigating whether a proposed interpretation will actually advance the underlying constitutional value; in order to do so, empirical consultation examines the practical effect of a proposed interpretation. Therefore, assuming the underlying constitutional value accords with an originalist reading of a constitution, empirical consultation is a vehicle for fulfilling that underlying value. Empirical consultation gives effect to originalism; it does not undermine it.

To conclude this discussion of Pathway Three, it is worth noting that discerning engagement not only avoids originalist objections to the consulta-

²⁸⁹ Scalia, ‘Keynote Address’ (n 121) 307 (emphasis added). See also Jackson, ‘Transnational Challenges to Constitutional Law’ (n 26), arguing that this kind of deliberation-enhancing consultation should be uncontroversial.

²⁹⁰ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 60. See generally Sujit Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *Indiana Law Journal* 819.

²⁹¹ See Part IV(B), discussing Pathway Two.

tion of international law, but also sidesteps some localist concerns. By striking a ‘careful balance between obtaining value from international consideration of fundamental principles and attention to one’s own domestic context’,²⁹² discerning engagement neuters the localist concern that interpreters will irresponsibly import foreign norms into domestic constitutional law. Advocating caution and sobriety, discerning engagement recognises (and relies on) the significant differences between national constitutions and international law. Discerning engagement is, therefore, an important avenue for originalists to consult international law and an essential ingredient in cosmopolitan originalism.

V THE UTILITY OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

So far, this article has mainly explored whether it is *possible* for constitutional interpreters to consult international law while remaining within the confines of originalism. I answered this question in the affirmative, outlining three distinct Pathways for originalists to consult international law. Part V now considers whether international law *should* inform constitutional interpretation.

Given that judges usually resort to consulting at least some extrinsic material or interpretive aide,²⁹³ including textbooks, philosophical treatises or foreign domestic law,²⁹⁴ it is helpful to compare the utility of these resources to the utility of international law. It goes without saying that each resource has particular features, advantages and disadvantages. In the case of international law, its utility is tied to the particular Pathway being used. In any event, international law critics maintain that ‘international materials play a role that could equally be played by law review articles, political science texts ... novels or poetry.’²⁹⁵ Here are some reasons to reject this scepticism.

²⁹² See Hovell and Williams (n 15) 121, citing *Prinsloo v Van der Linde* [1997] 3 SALR 1012. See also Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 59–60.

²⁹³ French, ‘Interpreting the *Constitution*’ (n 16) 37.

²⁹⁴ Michael (n 4) 203.

²⁹⁵ Weisburd (n 126) 366.

A Universality and Transnational Dialogue

International law is the body of law which comes closest to expressing a set of universally accepted norms.²⁹⁶ It has been noted that the ‘establishment of a core, inviolable set of human values through various international law treaties has been so successful ... that no individual or nation seriously argues against them.’²⁹⁷ Assuming this is correct, what bearing (if any) should it have on the consultation of international law in constitutional interpretation? As Gray provides,

[i]n the absence of Platonic capacities that would allow us direct access to the true nature of the physical world, the best path to truth is through substantive and open exchange with others who have an interest in the answer.²⁹⁸

International law is a product of transnational dialogue. It occupies a prominent position in the legal and ethical literature concerning individual rights. International courts, tribunals and committees vigorously debate the meaning of fundamental human rights enshrined in international instruments and glean moral insights from these texts. As the ‘dominant [global] forum for human rights discourse,’²⁹⁹ international law arguably carries greater weight than rival interpretive aides.³⁰⁰

In addition, despite postmodernist³⁰¹ and other objections to the notion of universal norms,³⁰² international law continues to gauge the values of the

²⁹⁶ Walker (n 36) 100; Glensy (n 5) 1188–9. It is worth noting that the notion of an objective moral order is highly controversial: Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 29, quoted in Allan, ‘“Do the Right Thing” Judging’ (n 147) 19. Nonetheless, it has been suggested that international law is ‘more reliable as an indicator of “true” human rights ... than the decisions of an individual nation’: Larsen (n 133) 1319, quoting Strossen (n 238) 830. Similarly, ‘if the international community universally agrees on a particular principle, then the chances are it is morally justifiable as a matter of objective truth; and should at least be given some weight’: Michael (n 4) 209. These arguments both presuppose the existence of an objective moral truth and falsely equate global consensus with that moral truth: Jed Rubenfeld, ‘The Two World Orders’ (2003) 27(4) *Wilson Quarterly* 22, 29–30, cited in Weisburd (n 126) 370; Youngjae Lee, ‘International Consensus as Persuasive Authority in the Eighth Amendment’ (2007) 156 *University of Pennsylvania Law Review* 63, cited in Michael (n 4) 210.

²⁹⁷ Glensy (n 5) 1188.

²⁹⁸ Gray (n 26) 1274. See also Sitaraman (n 143) 676.

²⁹⁹ Thomas (n 10) 29.

³⁰⁰ Walker (n 36) 101.

³⁰¹ Cultural relativism undercuts the very idea of a universal norm, let alone arguments which accord it with special significance: Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3rd ed, 2013) 93–105.

international community. Therefore, the near-global consensus which international law embodies can shine light on the common law principles which shape constitutional interpretation (Pathway One) and on the content of the moral categories contained in national constitutions (Pathway Two). In addition, the universal values which international law embodies could also serve as a counterpoint to domestic community values and facilitate expository consultation (Pathway Three).

International law critics, however, argue that the universality of international law is undermined by its allegedly undemocratic character. It has been suggested that constitutional interpreters should not rush to cite ‘the decisions of a small group of unaccountable, international law decision-makers as a prism through which to interpret ... the [*Australian*] *Constitution*’.³⁰³ According to critics, international law is not universal but parochial and elitist. Organisations which interpret international law, such as the United Nations Human Rights Committee (‘UNHRC’), are not structured democratically³⁰⁴ and ‘typically conduct their activities insulated from meaningful scrutiny by a broader public,’³⁰⁵ dangerously ‘short-circuiting ... the democratic process.’³⁰⁶

Yet, this criticism ignores how international law operates in practice. Treaty law is *voluntarily* entered into by state executives and is often approved by legislatures who are themselves elected.³⁰⁷ Customary international law is based, in part, on *actual* state practice.³⁰⁸ Accordingly, the portrayal of international law as the exclusive (and undemocratic) domain of elite jurists is

³⁰² States can make reservations to international treaties which they enter. This undermines the universality of international treaty law: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 2(1)(d), 19–23. In addition, widely accepted values (contained in international law), such as freedom and human dignity, which might command consensus when described in a vacuum, usually lose that consensus when courts implement them in practice: Martin Krygier and Arthur Glass, ‘Shaky Premises: Values, Attitudes and the Law’ (1995) 17 *Sydney Law Review* 385, 390, cited in Michael (n 4) 211.

³⁰³ Allan, “‘Do the Right Thing’ Judging” (n 147) 2.

³⁰⁴ Glensy (n 5) 1225.

³⁰⁵ Forcese and Freeman (n 70) 530, citing Eric Stein, ‘International Integration and Democracy: No Love at First Sight’ (2001) 95 *American Journal of International Law* 489.

³⁰⁶ *Ibid* 532.

³⁰⁷ However, in Australia, the operation of treaty law is subject to the limitations of municipal dualism outlined above.

³⁰⁸ *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment)* [1985] ICJ Rep 13, 20–1 [27]; Michael Wood, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 18 [36].

misleading.³⁰⁹ International law, more than any other interpretive guide, reflects global dialogue, consensus and action.

B *Objectivity and the Rule of Law*

International law can also help protect the rule of law. As discussed above, constitutional interpreters are required to make difficult constructional choices and, where constitutional language is ambiguous, enter the construction zone.³¹⁰ In making these constructional choices, judges may resort to subjective value judgments which are not anchored in law, causing the constitutional construction zone to be somewhat chaotic. Chaos, of course, is antithetical to the rule of law.³¹¹ International law is helpful because it can mitigate this chaos.

In theory, this chaos-mitigating role is not unique to international law. The consultation of *any* source external to a constitution could operate to decrease judicial subjectivity³¹² and tackle the 'subjective, individualistic notions of morality'³¹³ which affect constitutional interpretation and undermine the rule of law. International law, however, has distinct advantages. International law is 'external to the [domestic] judiciary itself',³¹⁴ unlike domestic precedent. International law can be easier to identify than Australian community standards.³¹⁵ Customary international law is based on actual state practice, rather than subjective moral judgment. International law also enjoys broader consensus and recognition than other interpretive aides, such as foreign

³⁰⁹ Conversely, if the criticism is correct and international law is undemocratic, international law may — according to anti-majoritarianism — be a useful interpretive resource to *combat* democratically-endorsed community standards where those standards conflict with fundamental human rights, such as prejudices regarding asylum seekers: see, eg, Alex Oliver, 'The Lowy Institute Poll 2014', *Lowy Institute for International Policy* (Web Page, 2 June 2014) <www.lowyinstitute.org/publications/lowy-institute-poll-2014>, archived at <<https://perma.cc/R7SQ-ML3G>>.

³¹⁰ See Part IV(B), discussing Pathway Two; Part II(B), quoting Originalist Principle 6.

³¹¹ Cf descriptions of clarity as 'the enemy': Eyal Benvenisti and Alon Harel, 'Embracing the Tension between National and International Human Rights Law: The Case for Parity' (GlobalTrust Working Paper Series No 04/2015, GlobalTrust Research Project, 2015) 32 <<http://globaltrust.tau.ac.il/wp-content/uploads/2015/04/Benvenisti-and-Harel-Discordant-Parity-WPS-04-15.pdf>>, archived at <<https://perma.cc/3RYU-L6R2>>.

³¹² See, eg, Strossen (n 238) 830; Larsen (n 133) 1303–4; Kirby, 'International Law: The Impact on National Constitutions' (n 27) 359–60.

³¹³ Strossen (n 238) 830.

³¹⁴ Larsen (n 133) 1303.

³¹⁵ Walker (n 36) 101.

domestic law. In light of these advantages, it has been suggested that ‘where the [Australian] *Constitution* is silent or ambiguous, it is preferable to rely on international law expressly rather than to implicitly rely on [interpreters’] personal preferences.’³¹⁶ Where an ‘interpretative norm has reached the level of an international rule of law, the use of the norm decreases the judge’s subjectivity in interpreting constitutional provisions.’³¹⁷ International law anchors constitutional interpretation in objective, definable and widely accepted norms.

There are, however, some noteworthy criticisms of this ‘objectivity’ theory. First, Larsen argues that ‘[t]he *indeterminacy* of customary international human rights law presents serious problems for the objectivity theory as a foil to subjective constitutional interpretation.’³¹⁸ Second, the insertion of yet another interpretive tool (international law) into the already crowded construction zone might add to the existing chaos, rather than alleviate it. Critics argue that the consultation of international law would plunge courts into an ‘extra-legal realm ... [of] fiction in which there are no boundaries’³¹⁹ and undermine, rather than protect, the rule of law.

These critics, however, fail to appreciate that the realm of constitutional interpretation is *already* very disorderly. Kirby J, in his rejoinder to McHugh J in *Al-Kateb*, alluded to the *existing* chaos in the construction zone. He argued that ‘constitutional lawyers ... [already] have “loose-leaf” copies of the *Constitution* in which the text is elaborated by the decisions of ... courts, and which refer to contextual, historical and other materials.’³²⁰ Goldsworthy also accepts that no single document (not even the *Constitution*) contains an exhaustive statement of what makes up constitutional law. The construction zone is already a busy space. Therefore, the introduction of international law will not meaningfully increase the hubbub.³²¹ If anything, international law could moderate the ruckus and preserve the rule of law. For the reasons outlined above, it is no surprise that constitutional interpreters seeking to

³¹⁶ Simpson and Williams (n 15) 218; Michael (n 4) 213.

³¹⁷ Tamela R Hughlett, ‘International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution’ (1992) 45 *Oklahoma Law Review* 169, 182.

³¹⁸ Larsen (n 133) 1307 (emphasis added). See Part V(C).

³¹⁹ George Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 *Federal Law Review* 1, 7; French, ‘Oil and Water’ (n 28) 10 [17]–[18].

³²⁰ *Al-Kateb* (n 2) 626 [183].

³²¹ Certainly the volume of international law is not a relevant consideration: Willheim (n 9) 35.

dampen the impact of personal idiosyncrasies may well prefer consulting international law over other legal and non-legal resources.³²²

C *Practical Orientation*

One of the main shortcomings of various interpretive resources is that they are so abstract and theoretical as to have limited practical utility. Not so with international law. International law is practice-oriented and seeks to guide behaviour. It has been persuasively argued that the 'value in referring to the international source of legal reasoning when applying the same logic in a domestic decision ... exceed[s] the value to be derived from citing more abstract texts such as philosophical literature'.³²³ In addition to reflecting actual state practice or norms which states voluntarily agree to abide by, international law is 'a logical paradigm far more closely analogous to domestic legal reasoning than more general texts, such as academic writings'.³²⁴ Unlike philosophers, who are detached from the real-world effects of the normative guidance which they provide, interpreters of international law are said to usually bear some responsibility for their normative judgments.³²⁵ Compared with purely philosophical discourse, international law is geared towards application.

Yet, some commentators question the practical value of consulting certain international instruments, in particular international human rights treaties. They maintain that the provisions of these treaties can be just as ambiguous as the corresponding domestic constitutional provisions which they might illuminate.³²⁶

With its high level of abstraction and minimal case law, international law jurisprudence is not well suited to the task of close factual analysis and the ascer-

³²² Wuerth (n 143) 64–5.

³²³ Michael (n 4) 204.

³²⁴ *Ibid.*

³²⁵ Tushnet, 'When Is Knowing Less Better than Knowing More' (n 215) 1285–6. See also Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109, 118. Consider, for example, a state's pronouncement of *opinio juris*.

³²⁶ Simpson and Williams (n 15) 219; Michael (n 4) 213. But see *ICCPR* (n 77) art 14(3)(f), which is very specific in providing that, for criminal trials, the defendant is to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

taining of fine distinctions in a particular domestic context that is frequently the work of a constitutional court.³²⁷

However, these commentators conveniently ignore the decisions and comments of bodies which interpret international treaties and provide concrete guidance on their application. For example, art 19(3) of the *ICCPR* outlines in very general terms two categories in which the freedom of expression may be restricted, namely:

- (a) For respect of the rights or reputations of others; [and]
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The wording of the treaty does not contain additional detail. However, the UNHRC, tasked with providing guidance on the meaning and application of the *ICCPR*, provided the following more detailed explanation in *General Comment No 34*:

It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.³²⁸

The UNHRC's guidance clarifies the scope of art 19(3) of the *ICCPR* and outlines real-world examples of where it may not be invoked to restrict the freedom of expression. However, this *General Comment* remains just that — a *general comment*.³²⁹ Despite being relatively prescriptive, it would not undermine the constructional freedom of interpreters of the treaty. The *General Comment* leaves open questions like: how is 'legitimate public interest' defined, and what precisely does 'national security' encompass? Yet,

³²⁷ Hovell and Williams (n 15) 118. See also *Roach* (n 110) 224–5 [181] (Heydon J), addressing the language of international instruments; Walker (n 36) 101.

³²⁸ Human Rights Committee, *General Comment No 34: Article 19 — Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [30] (citations omitted).

³²⁹ Compare this to the UNHRC's detailed, application-specific decision in *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2324/2013*, UN Doc CCPR/C/116/D/2324/2013 (17 November 2016), which held that a ban on abortion in Ireland violated the *ICCPR*.

this degree of constructional freedom is not unique to international law. Domestic statute also leaves open important questions which interpreters are required to tackle (as do domestic common law and constitutional principles).³³⁰ International law, like statute, is characterised by both generality and specificity. International law, in this sense, bears the hallmarks of *law*. Compared with more theoretical literature, international law is highly practice-oriented. Its consultation engages roughly the same skillset as does the consultation of domestic statute and common law, and it is likely to yield more relevant and reliable outcomes.

After establishing that originalists can consult international law (as the Originalist Pathways reveal), and that international law has distinct advantages over other interpretive aides, let us briefly examine *how* international law should be treated by constitutional interpreters. Firstly, can judges be *selective* in consulting international law? Secondly, what *weight* does international law carry in constitutional interpretation?

D Selectivity

The consultation of international law by constitutional interpreters, particularly in the context of controversial social and moral issues, is frequently dubbed ‘nose-counting’³³¹ or ‘cherry-picking’.³³² Critics argue that the selection of international law materials (and positions) is akin to ‘looking out over a crowd and picking your friends.’³³³ The selection between rival international instruments is allegedly conducted on an ad hoc basis.³³⁴ Deference is to numbers, not reason.³³⁵ Independent assessment of the quality and relevance of international law decision-making is said to be replaced by a

³³⁰ Willheim (n 9) 35.

³³¹ Ernest A Young, ‘Foreign Law and the Denominator Problem’ (2005) 119 *Harvard Law Review* 148, 150–1; Mark Tushnet, ‘How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses’ (2005) 49 *Saint Louis University Law Journal* 671, 673; Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 58.

³³² Hovell and Williams (n 15) 119–20.

³³³ In respect of foreign domestic law, see: Tushnet, ‘When Is Knowing Less Better than Knowing More’ (n 215) 1275–6, 1280, citing ‘Confirmation Hearing on the Nomination of John G Roberts Jr to be Chief Justice of the United States Before the Senate Committee on the Judiciary’, 109th Congress 200 (2005), 201 (statement of Judge John Roberts); Austen L Parrish, ‘Storm in a Teacup: The US Supreme Court’s Use of Foreign Law’ [2007] *University of Illinois Law Review* 637, 650–1; Michael (n 4) 213.

³³⁴ Hovell and Williams (n 15) 119–20.

³³⁵ Young (n 331) 155; Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 58.

statistical aggregation of instruments and tribunals adhering to a particular position.³³⁶ Consequently, according to critics, references to international law are reduced to decoration or ‘ornamentation.’³³⁷ ‘They do no analytic work,’ reflecting ‘a sort of intellectual laziness, a refusal to accept responsibility for making one’s own decision.’³³⁸ Judges are guilty of both ‘judicial fig-leaving’ and triggering an ‘arms race’ of international citations that purports to ‘create a sense of inevitability about positions that they in fact are adopting on grounds other than deference to precedent.’³³⁹ This, according to critics, is problematic because it expands judicial discretion and emboldens judicial subjectivity.³⁴⁰

However, this criticism does not specifically target the consultation of international law,³⁴¹ and nor does it accord with moderate originalism. The risk of defective legal reasoning and footnote-loading exists in the context of any legal work. More importantly, selectivity is an integral part of the judicial function, whether or not international law is involved: ‘Judges are always parsing, filtering, and, indeed, *selecting* the authority they believe to be the most binding and persuasive to reach their decision.’³⁴² Selectivity is a, if not *the*, cornerstone of judicial decision-making.³⁴³ The suggestion that domestic legal principles might be more settled than international legal principles, and

³³⁶ See Sitaraman (n 143) 681.

³³⁷ Levinson (n 129) 363; Richard A Posner, ‘Foreword: A Political Court’ (2005) 119 *Harvard Law Review* 32, 88; Tushnet, ‘When Is Knowing Less Better than Knowing More’ (n 215) 1287. ‘Reference to official judgments, whether local or foreign, helps rescue judges from a feeling of intellectual nakedness’: Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129, 138.

³³⁸ Tushnet, ‘When Is Knowing Less Better than Knowing More’ (n 215) 1287–8.

³³⁹ Richard Posner, *How Judges Think* (n 280) 350–1. According to Scalia J, to ‘invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry’: *Roper* (n 117) 627.

³⁴⁰ Alford, ‘Misusing International Sources to Interpret the *Constitution*’ (n 5) 67–9; Scalia, ‘Keynote Address’ (n 121) 309; Michael (n 4) 213. This complements pragmatic arguments about judicial reasoning: see, eg, *Lawrence* (n 132) 598 (Scalia J); James Allan and Grant Huscroft, ‘Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts’ (2006) 43 *San Diego Law Review* 1, 10–12; Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 61.

³⁴¹ Tushnet, ‘When Is Knowing Less Better than Knowing More’ (n 215) 1285, 1288.

³⁴² Glensy (n 5) 1239 (emphasis in original).

³⁴³ Tushnet, ‘When Is Knowing Less Better than Knowing More’ (n 215) 1280–1; Glensy (n 5) 1239.

that they therefore constrain the scope of judicial selectivity,³⁴⁴ clearly misses the point. Selectivity is a virtue, not a shortcoming.

Originalism, of course, recognises the limits of *interpretive* selectivity where a constitutional provision has an existing determinate meaning (Originalist Principles 4 and 5). However, originalism does not prohibit *consultative* selectivity; even if the meaning of a constitutional provision is fixed, interpreters remain free to *consult* international law, if only to confirm their understanding of that fixed meaning (Pathway Three). In doing so, constitutional interpreters can select from a range of international law materials.

E *Persuasive Guidance*

If constitutional interpreters consult a selection of international law materials, how much weight should they place on these resources? In other words, are international law resources to be treated, in constitutional interpretation, as binding or persuasive, or perhaps as something less?³⁴⁵

In the Australian context, ch III of the *Constitution* prevents interpreters from treating international law as binding.³⁴⁶ Arguably, Australia's commitment to dualism ought to prevent international law from being regarded as anything more than mere 'context.'³⁴⁷ In addition, notwithstanding the utility of international law, its consultation could cause confusion as to the normative hierarchy in constitutional interpretation. Although it is widely understood that a philosophical treatise is not legally binding, *ICCPR* provisions or ICJ judgments have the potential to mislead.³⁴⁸

³⁴⁴ Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 67, cited in Michael (n 4) 213. But see Part V(B), where it is argued that international law mitigates subjectivity.

³⁴⁵ These questions are of course more relevant to Pathways One and Two than to Pathway Three, according to which international law serves only as a useful point of contrast or illustrates likely outcomes of a particular constitutional interpretation.

³⁴⁶ See, eg, *Newcrest* (n 100) 657–8 (Kirby J); *Ward* (n 96) 391–2 [963] (Callinan J). In respect of the US, see: Larsen (n 133) 1291, 1293; Sitaraman (n 143) 677. In respect of South Africa, see Hovell and Williams (n 15) 120. In respect of other *democratic* concerns, see John O McGinnis, 'Contemporary Foreign and International Law in Constitutional Construction' (2006) 69 *Albany Law Review* 801, 807. In respect of *sovereignty* concerns, see Alford, 'Misusing International Sources to Interpret the Constitution' (n 5) 58; Allan, "Do the Right Thing" *Judging*' (n 147) 24–5; Michael (n 4) 214.

³⁴⁷ Michael (n 4) 208.

³⁴⁸ Under international law, the *ICCPR* is binding on parties to it, which include a majority of states; an ICJ judgment is only binding on parties (states) in a given case and only in respect

In light of these issues, can constitutional interpreters treat international law as persuasive? Michael argues that international law, like any evidence from which logical argumentation is derived, cannot *bind*. It is merely probative.³⁴⁹ If international law is consulted for its content, the question of where it belongs on the continuum of ‘bindingness’ is a non-issue.³⁵⁰ The constitutional ‘weight to be given to international law will depend upon its logical appeal’ because ‘[r]easons and insights are qualitative, relative and amorphous, and cannot be expressed as fixed norms which must be applied to a given case.’³⁵¹ Michael’s emphasis on cogency is instructive.

While this article does not purport to define the precise weight which international law carries in constitutional interpretation, the following guidelines are a good starting point. On the one hand, international law is more than an extra-legal ethical code.³⁵² On the other hand, international law does not bind constitutional courts.³⁵³ Consultation of international law is about learning from transnational experience and debate, not submitting to foreign authority.

Returning to *Al-Kateb*, it is interesting to note that McHugh J reserved his harshest rhetoric to criticise the suggestion that the *Australian Constitution* should be read in conformity with international law, calling it ‘heretical.’³⁵⁴ Given that cosmopolitan originalism firmly rejects the proposition that the *Constitution* should *conform* to international law or that international law should *dictate* the interpretation of the *Constitution*, it avoids McHugh J’s censure. According to cosmopolitan originalism, international law should ‘be viewed as a tool, not as a master.’³⁵⁵ As Part V has demonstrated, international law is just that — a valuable tool which can both illuminate and inspire constitutional meaning.

of the issues decided in that case: *Statute of the International Court of Justice* art 59. Nevertheless, international law’s internal hierarchy defining the authoritativeness of its various instruments and institutions is less rigid than corresponding domestic legal hierarchies, making it less amenable to a doctrine of binding precedent: French, ‘Oil and Water’ (n 28) 12 [22].

³⁴⁹ Michael (n 4) 214.

³⁵⁰ *Ibid* 202.

³⁵¹ *Ibid*.

³⁵² Andrew Clapham, *Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations* (Oxford University Press, 7th ed, 2012) 78, cited in Hall (n 69) 22.

³⁵³ See, eg, in the US, Gray (n 26) 1275.

³⁵⁴ *Al-Kateb* (n 2) 589 [63]. In respect of the US, see *Thompson* (n 133) 869 n 4 (Scalia J); Larsen (n 133) 1322.

³⁵⁵ *R v Rahey* [1987] 1 SCR 588, 639 (La Forest J).

VI CONCLUSION

This article, exploring the theory of cosmopolitan originalism, has aimed to revisit and challenge certain preconceptions about the role of international law in constitutional interpretation. It has attempted to dismantle the marriage between originalism and localism that has dominated Australian and American constitutional jurisprudence. After exploring several pathways to using international law in constitutional interpretation — all of which rigorously adhere to the tenets of originalism — moderate originalists might wish to reconsider their attitude towards the role of international law in constitutional interpretation.

Although this article has not provided an exhaustive list of Australian constitutional provisions whose interpretation invites recourse to international law, the absence of an Australian bill of rights ensures that the pathways to consulting international law will not be invoked too frequently.³⁵⁶ Yet, moderate originalists must nonetheless not lose sight of the following originalist principle: *a constitution is a roadmap, not a GPS*. Constitutional interpretation requires navigation and choice. This article posits that international law can be a helpful signpost.

Moderate originalism, however, does impose some constraints on the use of international law. The call to galvanise constitutional interpreters into action should be tempered by common sense. Incomplete or inaccurate understandings of international law will certainly outweigh any benefits to be reaped from consulting it.³⁵⁷ It also goes without saying that the consultation of international law, even if implemented sensibly, will be resource-intensive. While this opportunity is exciting for scholars, it is daunting for courts.³⁵⁸ Yet, however formidable this challenge, judges should not be deterred from considering a new approach.

After all, moderate originalists acknowledge that judges do, at times, *create* constitutional law.³⁵⁹ Australian originalists recognise that ‘we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.’³⁶⁰ The

³⁵⁶ Willheim (n 9) 37–8.

³⁵⁷ Larsen (n 133) 1301.

³⁵⁸ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ (n 33) 68.

³⁵⁹ Justice JD Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) *Australian Bar Review* 110, 113, 116–17; Williams, Brennan and Lynch (n 12) 175–6, discussing John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, ed Robert Campbell (John Murray, 5th ed, 1885) vol 2, 645–7.

³⁶⁰ *Jumbunna* (n 87) 367–8 (O’Connor J).

framers were not omniscient. They consciously preferred to leave behind 'constitutional silences and open spaces'.³⁶¹ This article concludes that international law can, at times, fill a part of that void.

³⁶¹ Balkin, 'Framework Originalism and the Living Constitution' (n 58) 555.