

# *More v Roper: a comment on Lawrence Solum's defence of originalism*

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Sirota, L. (2017) More v Roper: a comment on Lawrence Solum's defence of originalism. DPCE Online, 31 (3). ISSN 2037-6677 Available at <https://centaur.reading.ac.uk/104111/>

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Published version at: <http://www.dpceonline.it/index.php/dpceonline/article/view/436>

Publisher: DPCE

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## *More v Roper*: A Comment on Lawrence Solum's Defence of Originalism

di Léonid Sirota

**Abstract:** *More v Roper*: *a commento della difesa di Lawrence Solum dell'originalismo* – Constitutions can be seen either as defensive mechanisms for protecting liberty, as suggested by the metaphor of entrenchment, or as weapons to eliminate injustice, as suggested by the metaphor of striking down unconstitutional legislation. In his statement on originalism in support of then-Judge Gorsuch's appointment to the Supreme Court of the United States, Lawrence Solum eloquently defends the former, defensive view, and argues that originalist interpretation is more consonant with it than living constitutionalism. This comment supports Professor Solum's position by reference to some Canadian cases in which living constitutionalism could have been, has arguably been, or may well become a source of danger to the rights and liberties of citizens.

**Keywords:** Canada, Constitutional interpretation, Living constitutionalism, Originalism.

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### 1. Two Views of Constitutions

Lawrence Solum's statement on the nomination of then-Judge Gorsuch to the Supreme Court<sup>1</sup> concisely but cogently addresses a number of critical responses to and even myths about originalism, and makes a powerful case for the legitimacy of this approach to constitutional interpretation. Although it speaks directly to the legal and political controversies in the United States, many of its arguments are relevant to other jurisdictions where courts are charged with interpreting constitutional texts and enforcing their provisions against the wishes of democratic majorities.

All such jurisdictions face common questions. One such question, on which I will focus in this comment, is whether the constitutional text, and the judicial power of enforcing this text, are defensive mechanisms protecting citizens from government encroachments on their rights, or weapons with which to eliminate injustice. The metaphor of constitutional "entrenchment" seems to reflect the former view; that of "striking down" unconstitutional legislation, the latter. This choice is not merely semantic. One's vision of the constitutional text will influence one's vision of the judicial role in enforcing this text.

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<sup>1</sup> L.B. Solum, *Statement of Lawrence B. Solum: Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, March 22, 2017.

As Professor Solum shows, originalism takes the defensive approach. Originalist interpretation starts from the proposition that the (public) meaning of the constitutional text is fixed at the moment of its framing. The judiciary cannot depart from this meaning: it “does not and should not have the power to amend the text on a case-by-case basis”.<sup>2</sup> Although it is a “myth” that a fixed constitutional text cannot be applied to new factual circumstances,<sup>3</sup> the adaptations must not have the effect of changing the text. It is important that judges be bound by the text, because when they are not, the rights that the text protects are imperiled.

Of course, to the extent that “[o]riginalist judges do not believe that they have the power to impose their own values on the nation”,<sup>4</sup> such judges forego opportunities to make the nation more just. While originalist judges need not be restrained, in the sense of forbearing from declaring laws unconstitutional, they cannot remedy the failures of the constitutional text to acknowledge some rights that may well be worth protecting, or re-allocate authority among government institutions to bring its distribution into conformity with ideals of efficiency, subsidiarity, etc. But originalists think that these forgone opportunities are costs worth incurring to secure “the rule of constitutional law and not the rule of the men and women”<sup>5</sup> charged with declaring this law in court decisions.

Originalists are likely to share Professor Solum’s conviction “that giving judges the power to override the Constitution and impose their own vision of constitutional law is dangerous for everyone”.<sup>6</sup> The example of “the Reconstruction period when the living constitutionalists of that era undermined important provisions of the Fourteenth Amendment”<sup>7</sup> guaranteeing the rights American citizens, including the former slaves, vis-à-vis the States, is perhaps especially compelling to Americans, but it is a warning to the citizens of every polity that values freedom and equality. Originalists are like Robert Bolt’s Thomas More, worried that they could not “stand upright in the winds that would blow” if the laws were cut down in the pursuit of some great moral cause.<sup>8</sup>

If originalists are More, living constitutionalists are William Roper, the enthusiast who would “cut down every law in England” “to get after the Devil”.<sup>9</sup> They seek justice rather than safety, and make constitutional law into a weapon to achieve it. They believe that amendment procedures, to which originalists point as the means for changing insufficiently just, or simply outdated, constitutional text<sup>10</sup> are too cumbersome to be adequate to the task of achieving the law they wish to see enacted. The example of the “the Warren Court [which] sometimes issued opinions that decided constitutional questions without any reference to the

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<sup>2</sup> *Ibid*, at 2.

<sup>3</sup> *Ibid*, at 3.

<sup>4</sup> *Ibid*, at 2.

<sup>5</sup> *Ibid*, at 7.

<sup>6</sup> *Ibid*, at 5.

<sup>7</sup> *Ibid*.

<sup>8</sup> Robert Bolt, *A Man for All Seasons* (Bloomsbury, London, 1995) at 42.

<sup>9</sup> *Ibid* at 41.

<sup>10</sup> See Solum, *supra* note 1, at 10.

constitutional text” is a positive one for them, as these decisions brought the law closer to their ideals.<sup>11</sup>

I do not mean to be disparaging. Wanting to get at the devil is a commendable sentiment.<sup>12</sup> *Today's* living constitutionalists are no defenders of Jim Crow laws. I may strongly disagree with some of the substantive views about justice that many of them hold, but that should be of no relevance to our debate about constitutional interpretation. As Professor Solum rightly notes, “[o]riginalism can and should be endorsed by both ... progressives and conservatives”,<sup>13</sup> as well as by those who subscribe to neither of these positions. Questions of justice are by their nature imbued with a certain urgency, and it is understandable that those with strong views on such questions are willing to entertain resolute measures to give them effect.

Nevertheless, it is not only fair, but necessary to ask whether such measures—for example, allowing the courts to amend the meaning of constitutional texts—are justified, even by the high-minded objectives that their promoters pursue. Or are originalists right to worry that resorting to them will expose us to dangers of such magnitude that any potential gains will not be worth it, that the winds that will blow across the land once the binding nature of the constitution's original meaning is cut down will be too strong for us to stand? In my view, they are.

## 2. The Price of Living Constitutionalism

I will make the argument for the proposition that the defensive, Morian view of constitutional texts as ramparts for rights, is preferable, and therefore for originalism, by referring to some Canadian examples of the perils of living constitutionalism. I assume that similar arguments could be made in the context of other legal systems; Professor Solum suggests what it would look like in the United States, asking the left-leaning members of his audience to consider whether they would “prefer a conservative Justice who does not believe that she or he is bound by the constitutional text” to one who believes that she or he is so bound.<sup>14</sup> But the Canadian case may be worth considering not only because it has the great virtue (to me!) of being the one with which I am most familiar, but also because of the firm conviction of (virtually all) Canadian judges and (most) commentators that living constitutionalism is the path to justice, and originalism to perdition.<sup>15</sup>

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<sup>11</sup> *Ibid*, at 5.

<sup>12</sup> The late Justice Scalia, for one, seems to have shared it, even if he would not let it influence his judging: see J. Senior, *In Conversation: Antonin Scalia*, New York Magazine, October 6, 2013, online: <<http://nymag.com/news/features/antonin-scalia-2013-10>> (explaining his belief in the Devil).

<sup>13</sup> Solum, *supra* note 1, at 5.

<sup>14</sup> *Ibid*, at 5.

<sup>15</sup> See B.J. Oliphant, L. Sirota, *Has the Supreme Court of Canada Rejected 'Originalism'?*, 42 Queen's Law Journal, 2016, 107, 111-21 (reviewing judicial, extra-judicial, and academic rejections of originalism in Canada); see also S. Beaulac, *Post-World War I/Quiet Revolution (1920-1970) – Through the Lenses of Legal Interpretation and International Law*, in E. Mendes (ed), *Canada's Constitutional Democracy: The 150th Anniversary Celebration*, 21 (describing those willing

The claim about the riskiness of the living constitutionalist view can be made in parallel with that about its limited usefulness. In the American context, Professor Solum notes that originalism does not require overturning *Brown v Board of Education*.<sup>16</sup> Similarly, weaponizing constitutional interpretation is unnecessary in Canada. To be sure, *some* decisions of the Supreme Court of Canada cannot be justified on any originalist view, such as the one where a majority of the Court proposed to “give ... constitutional benediction” to the right to strike.<sup>17</sup> But most important Canadian decisions that are usually said to have rejected originalism explicitly or implicitly, including the so-called *Persons Case*,<sup>18</sup> which is arguably the Canadian equivalent of *Brown* as the litmus test of the legitimacy of interpretive theories, are consistent with originalism.<sup>19</sup>

However, Benjamin Oliphant and I having developed this argument at considerable length elsewhere,<sup>20</sup> I not dwell on it. Rather, I want to focus on some instances in which living constitutionalism in Canada could have been, has arguably been, or may well become a source of danger to the rights and liberties of citizens. The conceit of living constitutionalists is that the present and the future will bring about greater justice, and greater respect for rights, than existed in the past, so that we are always better off if judges are at liberty to discard the constitutional meanings of yesteryear in favour of those of the present, which presumably can eventually be discarded as they too come to be retrograde in their turn. Yet there is, sadly, no guarantee that this must be so.

Let me begin with a case that is typically thought of as enforcing an “implied bill of rights” found by the Supreme Court of Canada between the lines of the *Constitution Act, 1867*,<sup>21</sup> but which did in fact involve the drawing of boundaries between its provisions: *Switzman v Elbling*,<sup>22</sup> which invalidated Québec’s so-called “Padlock Act”. The statute sought to outlaw “communistic propaganda”, and authorized the provincial Attorney-General to close down any building used to advocate for communism or bolshevism. The decision was a landmark victory for civil liberties, and is probably best remembered for Justice Rand’s heartfelt defence of the freedom of thought and expression, which he declared “little less vital to man’s mind and spirit than breathing is to his physical existence”.<sup>23</sup> However, the

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to entertain the legitimate presence of originalist reasoning in Canada, including fellow contributor to this symposium Benjamin Oliphant and me, as “revisionists”).

<sup>16</sup> 347 US 483 (1954).

<sup>17</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 at para 3.

<sup>18</sup> *Edwards v. Canada (AG)*, [1930] AC 124 (PC(UK)).

<sup>19</sup> See especially B.W. Miller, *Origin Myth: The Persons Case, the Living Tree, and the New Originalism* in G. Huscroft, B.W. Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation*, 2011, 120; it is also worth recalling that, not long after giving the opinion of the Judicial Committee of the Privy Council in the *Persons Case*, Lord Sankey also delivered that in the *Aeronautics Reference*, [1932] AC 54, where he stated, at 70, that “[t]he process of [constitutional] interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the *original contract* upon which the federation was founded” (emphasis mine).

<sup>20</sup> Oliphant, Sirota, *supra* note 15.

<sup>21</sup> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

<sup>22</sup> [1957] SCR 285 [Switzman].

<sup>23</sup> *Ibid*, at 306.

legal issue, 25 years prior to the entrenchment of the *Canadian Charter of Rights and Freedoms*,<sup>24</sup> was one of division of powers. Did the province have the constitutional authority to enact the Padlock Act as a law relative to “property and civil rights”,<sup>25</sup> or was it legislation in relation to criminal law, which could only be enacted by (the federal) Parliament?<sup>26</sup>

In holding that proscription of communist propaganda was indeed criminal law in substance, the majority took an approach that was at least consistent with originalism. It looked at the interaction between the relevant “heads” of federal and provincial powers, taking the need for them to be read together into account;<sup>27</sup> at the hybrid criminal-and-civil nature of public nuisance at common law, which allowed provinces to legislate to prevent nuisances but not other crimes;<sup>28</sup> and at the long-standing meaning of the phrases “civil rights”, which referred to rights individuals held against other individuals,<sup>29</sup> and “criminal law”, which for its part covered public evils, including in the realm of ideas.<sup>30</sup>

Justice Taschereau’s dissenting opinion, by contrast, sought to extend previously recognized provincial powers to prevent nuisances or to impose civil consequences on persons convicted of (federally created) criminal offences to a further power to sanction “those who preach and write doctrines of a nature to support treason, violation of official secrets, sedition, etc.”.<sup>31</sup> In Justice Taschereau’s view, it was essential that provinces have the ability to do so in light of “experience [that] teaches us ... that Canadians, less than 10 years ago, despite the oaths of allegiance that they had sworn, did not hesitate in the name of communism to infringe official secrets and to imperil the safety of the state.”<sup>32</sup> A living constitutionalist approach, focused on what he perceived as the pressing current needs of the state and the community, thus led Justice Taschereau to adopt a position that was much less protective of civil liberties than that of his more originalist colleagues.

But there is more to be said about Justice Taschereau’s appeal to the needs of the present and the experience of recent past. This “experience” to which he refers was acquired through the work of the Royal Commission that investigated the infiltration of the Canadian government by suspected Soviet agents in the wake of the defection of Igor Gouzenko, a cypher clerk in the Soviet embassy in Ottawa. This Commission, of which Justices Taschereau and Kellock were co-presidents, and in which the then-future Justices Fauteux and Cartwright were involved as counsel, was subsequently described by a future Chief Justice of Canada as a

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<sup>24</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*].

<sup>25</sup> *Constitution Act, 1867*, s 92(13).

<sup>26</sup> *Ibid*, s 91(27).

<sup>27</sup> See *Switzman*, *supra* note 22, at 302-03 (Rand J)

<sup>28</sup> *Ibid*, at 304 (Rand J)

<sup>29</sup> *Ibid*, at 305 (Rand J), 308 (Kellock J), 328 (Abbott J).

<sup>30</sup> *Ibid*, at 307 (Rand J), 311 (Nolan J), 316-17 (Cartwright J), 320 (Fauteux J), 326-27 (Abbott J).

<sup>31</sup> *Ibid*, at 299 (translation mine).

<sup>32</sup> *Ibid*.



“shameful” episode in Canadian legal history,<sup>33</sup> due to its high-handed inquisitorial methods and violations of the suspects’ due process rights.<sup>34</sup> It is, in other words, an example of laws being cut down to get after a suspected Devil, and of fell winds sweeping the land as a result. Justice Taschereau’s living constitutionalist judgment would have cut down such higher law as there was to let these winds blow unobstructed.

This is a reminder that while we may fervently hope that the values and desires of society will become more rights-conscious and justice-focused over time, these hopes will not always be fulfilled. Indeed, even if we assume that the post-1945 Red Scare was an especially inglorious episode in the history of public rights-consciousness, it was hardly the only occasion on which the present needs have been deemed to outweigh historic rights. Let me give just a few additional examples.

The first two concern equality rights. The *Canadian Charter’s* general equality guarantee provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on” an open-ended list of specified grounds.<sup>35</sup> Beginning in *Andrews v Law Society of British Columbia*,<sup>36</sup> the Supreme Court has consistently interpreted this as a prohibition on discrimination only—in effect reading out of the constitutional text the guarantee of equality before the law insofar as it might call into question the justifiability of distinctions not based on “enumerated” or “analogous grounds”. The then-Justice Binnie, a leading proponent of living constitutionalism in Canada (and Justice Scalia’s sometime sparring partner on this issue), candidly described as *Andrews* as having “decided that section 15 should go back to being a prohibition against discrimination”<sup>37</sup>—even though, when the Canadian Charter was being drafted, “[i]t was the legislators—not the judges—who decided to add the introductory language giving ‘everyone’ the right to equal benefit and protection of the law”.<sup>38</sup> The legislators, according to Justice Binnie, had been imprudent in framing section 15, but the judges, in their wisdom, made sure that the scope of its protection be narrower than that which an originalist court would have enforced.

In addition to the general equality protection, the *Canadian Charter* includes a specific provision to the effect that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.<sup>39</sup> Kerri Froc has argued that courts have unduly restricted if not

<sup>33</sup> B. Laskin, *Canada’s Bill of Rights: A Dilemma for the Courts?*, 111(2) *International and Comparative Law Quarterly*, 1962, 519, 523.

<sup>34</sup> See M.H. Fyfe, *Some Legal Aspects of the Report of the Royal Commission on Espionage*, 24 *Canadian Bar Review*, 1946, 777-779.

<sup>35</sup> *Canadian Charter*, s 15.

<sup>36</sup> [1989] 1 SCR 143, 56 DLR (4<sup>th</sup>) 1 [*Andrews*].

<sup>37</sup> I. Binnie, *Judging The Judges: ‘May They Boldly Go Where Ivan Rand Went Before’*, 26 *Canadian Journal of Law and Jurisprudence*, 2013, 5-14 (emphasis mine). This passage is part of a section subtitled “The ‘Reading Down’ of the Charter”; however, without developing this claim here, I would suggest that it is very doubtful that Justice Binnie’s other examples actually involve judicial “reading down” of constitutional text, carefully interpreted.

<sup>38</sup> *Ibid*, at 13.

<sup>39</sup> *Canadian Charter*, s 28.

altogether abandoned this guarantee, failing to attach any real importance to the message of gender-consciousness that its framers sought to imprint on the Canadian Charter.<sup>40</sup> If Professor Froc is right about this,<sup>41</sup> then the fate of this provision too illustrates how living constitutionalism, or at least a lack of fidelity to the constitutional text's original meaning, can result in the under-protection of rights relative to what would have been available under originalism.

My final example of possible retrogression in the scope the *Canadian Charter's* rights due to living constitutionalism concerns the protections afforded to “[a]ny person charged with an offence”: the right to be tried within a reasonable time; the protection against self-incrimination; the presumption of innocence; the prohibition on retroactive criminal laws; and others.<sup>42</sup> But what does it mean to be “charged with an offence”? In other words, who exactly benefits from these guarantees? The Supreme Court of Canada has held that a person facing disciplinary or administrative sanctions is not “charged with an offence”, and thus does not benefit from Charter protections, unless he or she is exposed to “true penal consequences” if found guilty.<sup>43</sup> (According to this line of cases, neither the loss of a license needed to practice one’s profession nor even a six-figure fine is a “true penal consequence”.)

An important reason for this, as Steven Penney has recently argued, “is the Court’s admitted fear that doing so would frustrate governments’ ability to regulate economic activity in the public interest”.<sup>44</sup> To the extent that this has indeed been the Court’s motivation, it is a living constitutionalist one, the scope of constitutional protections being determined by the putative needs of today’s society. Yet its consequences are dire, as Professor Penney explains: “[l]egislatures have increasingly relied on administrative and civil enforcement regimes to address forms of wrongdoing previously left to the criminal law. In many instances, the sanctions accompanying these regimes are harsh, the targets are ordinary people, and the rules protecting adjudicative fairness are weak.”<sup>45</sup> The distinction between offences that carry “true penal consequences” and attract the protections of the *Canadian Charter* for those accused of having committed them, and those that do not “is ill-suited to manage this phenomenon.”<sup>46</sup> Living constitutionalism has served to give effect, not to expanding understandings of rights or a clearer vision

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<sup>40</sup> K.A. Froc, *Is Originalism Bad for Women? The Curious Case of Canada's Equal Rights Amendment*, 19 *Review of Constitutional Studies*, 2015, 237.

<sup>41</sup> One might query whether Professor Froc’s interpretive approach does not unduly privilege the intentions of section 28’s promoters in ascertaining its public meaning; however, this is not the place for that debate.

<sup>42</sup> *Canadian Charter*, s 11.

<sup>43</sup> *R v. Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235; *Martineau v. MNR*, 2004 SCC 81, [2004] 3 SCR 737; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 SCR 3; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 SCR 250.

<sup>44</sup> S. Penney, ‘Chartering’ in the Shadow of *Lochner*: *Guindon*, *Goodwin* and the Criminal-Administrative Distinction at the Supreme Court of Canada, 76 *South Carolina Law Review*, 2016, 307-08; I have critiqued Professor Penney’s article, notably its embrace of consequentialist living constitutionalism in L. Sirota, *A Pile of Problems* (February 6, 2017) *Double Aspect* (blog), online: < <https://doubleaspect.blog/2017/02/06/a-pile-of-problems/> >.

<sup>45</sup> Penney, *ibid*, at 309.

<sup>46</sup> *Ibid*.



of justice, but to the encroachment of an administrative state impatient of traditional notions of due process.

Now, admittedly it is not clear whether originalism would have provided better protection for due process than living constitutionalism has in this instance. The Supreme Court has invoked textual as well as policy arguments for a narrow interpretation of the phrase “charged with an offence”.<sup>47</sup> I am not aware of studies of this phrase’s original meaning, and cannot undertake one here. It is worth noting, however, that in the well-known case of *R v Sault Ste. Marie*,<sup>48</sup> Justice Dickson, as he then was, while acknowledging that regulatory or “public welfare” infractions “might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application”,<sup>49</sup> repeatedly described them as “offences” and spoke of persons being “charged” with them. *Sault Ste. Marie* was decided only a few years before the entrenchment of the *Canadian Charter*, whose framers would doubtless have been aware of it. But be that as it may, what can be said with confidence is that an originalist approach to the *Canadian Charter* would yield no less protection to due process rights than a living constitutionalist one.

I close this survey of the perils of living constitutionalism by considering an issue which is due to be addressed by the Supreme Court of Canada in the coming months: interprovincial free trade. New Brunswick’s Provincial Court struck down a prohibition on the importation of beer into the province in *R v Comeau*,<sup>50</sup> on the basis that it was contrary to section 121 of the *Constitution Act, 1867*, which provides that “[a]ll Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall ... be admitted free into each of the other Provinces”. This decision that calls into question the constitutionality of other non-tariff barriers to interprovincial trade erected by provincial legislatures, which the Supreme Court’s decision in *Gold Seal Ltd v Alberta*<sup>51</sup> upheld almost a century ago. Among such barriers are “those aiming at price control through supply management”, notably in agriculture, which “will be more difficult or impossible to implement without discriminating against trade from outside the province”,<sup>52</sup> as the *Comeau* court recognized.<sup>53</sup>

Malcolm Lavoie describes *Comeau* as a “markedly originalist” decision;<sup>54</sup> Mr Oliphant as one that is “thoroughly” so.<sup>55</sup> As Professor Lavoie notes, it is arguable that the current values of Canadian society are much more tolerant of economic regulation, including interprovincial trade barriers, than those that were prevalent

<sup>47</sup> Wigglesworth, *supra* note 43, at 554–56.

<sup>48</sup> [1978] 2 SCR 1299.

<sup>49</sup> *Ibid.*, at 1303.

<sup>50</sup> 2016 NBPC 3, 398 DLR (4<sup>th</sup>) 123, leave to appeal to SCC granted 37398 (4 May 2017).

<sup>51</sup> (1921) 62 SCR 424, 62 DLR 62.

<sup>52</sup> M. Lavoie, “*R. v. Comeau* and Section 121 of the *Constitution Act, 1867*: Freeing the Beer and Fortifying the Economic Union”, 40(1) *Dalhousie Law Journal*, 2017, 189–204.

<sup>53</sup> *Comeau*, *supra* note 50, at para 152.

<sup>54</sup> Lavoie, *supra* note 52, at 192.

<sup>55</sup> B. Oliphant, *Originalism, Beer, and Interprovincial Trade Barriers* (6 May 2016) Policy Options, online: <<http://policyoptions.irpp.org/2016/05/06/originalism-beer-interprovincial-trade-barriers/>>.

when the *Constitution Act, 1867* was enacted,<sup>56</sup> a period which the judge in *Comeau* characterised as “the high-water mark in the belief in free enterprise”.<sup>57</sup> (Mr Oliphant, by contrast, suggests that “the interpretation of obscure sections bearing on trade barriers is not an area liable to considerable moral evolution over the years. One presumes Canadians have liked booze, and have not liked being charged for travelling across borders with it, rather consistently over the years.”<sup>58</sup> For what it is worth, I suspect that both he and Professor Lavoie are right at their respective levels of generality—exposing the inherent indeterminacy of living constitutionalist analysis.) As Mr Oliphant and I have said elsewhere, when it decides the appeal from the Provincial Court’s decision in *Comeau*, “[t]he Supreme Court could be faced with a stark interpretive choice between a very strong originalist case ... and arguments based (perhaps paradoxically) both on *stare decisis* and what may be perceived as the needs, or at least the expectations, of current society”.<sup>59</sup> Indeed, the Crown is explicitly appealing to “progressive interpretation” and dismissing the value of “textual certainty” in its submissions to the Supreme Court.<sup>60</sup>

It would be unfortunate if the Court were to agree. This is not only because “textual certainty” is more valuable than the Crown cares to acknowledge, though it is; nor only because Canadians do indeed like their booze, though they do, albeit in lesser quantities than they did when the *Constitution Act, 1867* was framed.<sup>61</sup> Sanctioning the ability of the provinces to impose barriers to internal trade is also exceedingly costly, not only in terms of the liberty of individuals and businesses to work throughout the country or to trade with partners of their choosing, but also in purely financial terms. A report by the Canadian Senate’s Standing Committee on Banking, Trade and Commerce concluded that “internal trade barriers reduce Canada’s gross domestic product by between \$50 billion and \$130 billion”.<sup>62</sup> At least some of this cost, moreover, is perversely distributed. Agricultural supply management, according to a recent study, “is regressive: the poorest households incur a burden relative to income that is approximately five times larger than that

<sup>56</sup> Lavoie, *supra* note 52, at 204–05.

<sup>57</sup> *Comeau*, *supra* note 50, at para 89.

<sup>58</sup> Oliphant, *supra* note 55.

<sup>59</sup> L. Sirota, B. Oliphant, *Originalist Reasoning in Canadian Constitutional Jurisprudence*, 50:2 UBC Law Review, 2017, 505, 575–76.

<sup>60</sup> Supreme Court of Canada file no 37398, “Appellant’s Factum”, online: <[http://scc-csc.ca/WebDocuments-DocumentsWeb/37398/FM010\\_Appellant\\_Her-Majesty-the-Queen.pdf](http://scc-csc.ca/WebDocuments-DocumentsWeb/37398/FM010_Appellant_Her-Majesty-the-Queen.pdf)> at paras 25–27.

<sup>61</sup> See M.J. Fish, *The Effect of Alcohol on the Canadian Constitution ... Seriously*, 57(1) McGill Law Journal, 2011, 189, 194–97 (describing the role of alcohol in “19<sup>th</sup>-century Canada”, where “there was a lot drinking going on ...—and not much else”: *ibid*, at 194).

<sup>62</sup> Standing Senate Committee on Banking, Trade and Commerce, “Tear Down These Walls: Dismantling Canada’s Internal Trade Barriers”, June 2016, online:

<[https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-06-13\\_BANC\\_FifthReport\\_SS-2\\_tradebarriers\(FINAL\)\\_E.pdf](https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-06-13_BANC_FifthReport_SS-2_tradebarriers(FINAL)_E.pdf)>; see also R.K. Bemrose, W. Mark Brown, J. Tweedle, *Going the Distance: Estimating the Effect of Provincial Borders on Trade when Geography Matters*, Statistics Canada Analytical Studies Branch Research Paper Series, September 2017, online: [www.statcan.gc.ca/pub/11f0019m/11f0019m2017394-eng.pdf](http://www.statcan.gc.ca/pub/11f0019m/11f0019m2017394-eng.pdf) (estimating provincial “border effects” on trade within Canada to be equivalent to a tariff of 6.9%, in contrast to the situation in the United States, where, measured using the same methodology, the effect of State lines is nil).

of the richest households. Further ... low-income households (in the bottom two quintiles) with children pay between \$466 and \$592 per year for dairy and poultry products as a result of [supply management].”<sup>63</sup> Although not all of these costs would be removed merely by enforcing section 121 of the *Constitution Act, 1867* in accordance with its original meaning set out in *Comeau*, these figures remind us that living constitutionalism can come at a price, not only to abstract ideals such as the Rule of Law, but also to individuals and families, including, and even especially, to the most vulnerable.

### 3. How to Argue about Originalism

I have argued that, although it is often thought to be useful or indeed essential to upholding rights and achieving justice, living constitutionalism can also produce the opposite effect. A living constitutionalist court would quite possibly have trampled over the federal division of powers and the freedom of expression in *Switzman*. Living constitutionalism may be to blame for the courts’ failure to protect people facing often very serious—but not “truly penal”—consequences in administrative or disciplinary proceedings. Living constitutionalism could cost tens if not hundreds of billions of dollars to Canada, and hundreds every year to its poorest families, if the Supreme Court reverses the Provincial Court’s decision in *Comeau*.

Relying on the constitutional text’s original meaning as a hedge against the winds of unwelcome change rather than cutting it down in an attempt to the social evils *du jour* is thus the prudent thing to do. But my argument will, I expect, strike some—perhaps originalists first and foremost<sup>64</sup>—as wrongheaded. The proper way to interpret constitutional texts should not be determined by whether we like the outcomes the possible methodologies yield, they will argue. If it is, then we will not settle on any particular methodology as the one to follow consistently, and courts will be free to pick and choose the one that suits them in any particular case. As Mr Oliphant’s contribution to this symposium shows, this is arguably what is happening in Canada.

I do not disagree with this. Like Professor Solum,<sup>65</sup> I too think that the best argument in favour of originalism is that it is the interpretative approach that is most consistent with the Rule of Law. As James Madison recognized, “if [the sense in which the Constitution was accepted and ratified by the nation] be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers”<sup>66</sup>—and consistency and stability in the application of the law are of course staples of the Rule of Law literature. I also agree with Professor Solum that there is a democratic argument, as well as one based on the

<sup>63</sup> R. Caldwell, C. Lawley, Di Xiang, *Milked and Feathered: The Regressive Welfare Effects of Canada’s Supply Management Regime*, 41(1) Canadian public policy, 2015, 1-2.

<sup>64</sup> But not all originalists: see e.g. Froc, *supra* note 40 (defending the choice of originalism to interpret at least some provisions of the *Canadian Charter* in part on explicitly results-oriented grounds).

<sup>65</sup> Solum, *supra* note 1, at 6-8.

<sup>66</sup> J. Madison, *Letter to H Lee*, 25 June 1824, in *Letters and Other Writings of James Madison Fourth President of the United States*, vol. 3, 1884, 441-42.

Rule of Law, to be made in favour of originalism.<sup>67</sup> As Lord Sankey pointed out in the *Aeronautics Reference*, it is not “legitimate that any judicial construction [of the constitutional text] should impose a new and different contract upon” the parties to the Canadian federation.<sup>68</sup>

By contrast, whether originalism yields outcomes that suit my (or anyone else's) policy preferences more often than alternative methodologies should not matter for deciding whether it is the proper way of interpreting constitutional texts. If it is the case that both the Rule of Law and democracy require constitutional interpreters to be originalists, then they ought to be originalists. If originalist interpretation yields constitutional rules that are less than just or desirable, then the solution is not for judges to arrogate to themselves the function of the *pouvoir constituant*,<sup>69</sup> but for the true *pouvoir constituant* to amend the constitution.

Nevertheless, the argument that living constitutionalism will lead to greater justice, while originalism will prevent the moral improvement of society from being reflected in its law is frequently enough made that it deserves a response on its own terms. The response that Professor Solum suggests, and which I have endeavoured to develop (in the Canadian context), is that there are a non-negligible number of cases in which living constitutionalism will lead courts to less rights-protecting or just results than would originalism. By itself, this claim does not amount to a convincing argument for originalism, but it does, in my view, neutralize what is perhaps the most compelling argument in favour of living constitutionalism. As Bolt's Thomas More knew, we ought to “give the Devil benefit of law, for [our] own safety's sake”<sup>70</sup> – even if this makes getting at him that much more difficult.

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<sup>67</sup> Solum, *supra* note 1, at 8-9.

<sup>68</sup> *Aeronautics Reference*, *supra* note 19, at 70.

<sup>69</sup> See J. Waldron, *Judicial Review and Judicial Supremacy*, New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper no. 14-57, online: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510550](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510550) at 40-41 (decrying living constitutionalism as fostering “judicial supremacy” in ways in which the application of stable rules enacted by the framers of the constitution does not).

<sup>70</sup> Bolt, *supra* note 8, at 42.