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## Comparative Originalism

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# Texas Law Review

## *See Also*

Response

Comparative Originalism

David Fontana\*

### I. Introduction

American constitutional scholarship can sometimes seem enormously repetitive. Even if there are truly new ideas or truly new perspectives, they seem to be answering the same old questions. We have popular constitutionalism, which seems to be both an old idea and an answer to the old questions posed by our “obsession” with the role of unelected judges in a democratic society.<sup>1</sup> The paradigmatic scholarly event in the law in any given academic year is still probably the publication of the Supreme Court Foreword by the *Harvard Law Review*.<sup>2</sup> The more things change, the more they stay the same.

In this crowded scholarly world, Jamal Greene’s work in his short career so far stands out. He has been writing about another overanalyzed topic in constitutional law, originalism, but has been offering some fresh new perspectives. Professor Greene’s earlier work focused on the national politics surrounding originalism.<sup>3</sup> More recently, along with several collaborators, he has written about the individual politics and public opinion data surrounding originalism.<sup>4</sup> To these new perspectives on originalism we

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\* Associate Professor of Law, George Washington University Law School. My thanks go to Jamal Greene and the editors of the Texas Law Review for inviting me to write this Response, and to Brad Snyder and Peter Smith for their comments on this Response.

1. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

2. See Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 463 (1994–1995) (“Since 1951 the editors of the *Harvard Law Review* have selected a prominent scholar of constitutional law to write a ‘Foreword’ to the *Review*’s annual survey of the work of the Supreme Court.”).

3. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

4. See Jamal Greene et al., *Profiling Originalism*, (Columbia Pub. Law Research Paper No. 10-232), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1567702](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567702).

have the article I will respond to here, which begins the conversation about originalism from a comparative perspective.<sup>5</sup> Professor Greene argues that originalism is distinctively an American obsession, and offers some initial explanations as to why that is the case.

Richard Primus has helpfully responded to the article from a domestic constitutional theory perspective.<sup>6</sup> I will address the article from a comparative constitutional law perspective. From this perspective, I consider Professor Greene's work very promising, but also as posing some concerns addressed very briefly in this Response. First, the article needs to be clearer about whose attitudes towards originalism it is comparing: courts, commentators, or countries? Are we discussing just the United States Supreme Court versus other high courts? Are we discussing elite political and social actors in the United States compared to other countries? Are we comparing academics in the United States and other countries? As I will briefly mention, the differences in attitudes towards originalism might be more or less dramatic depending on whose attitudes we are comparing, and depending on whose attitudes we are comparing we might need different types of evidence than the types Professor Greene provides.

Second, Professor Greene might be comparing the wrong countries. Professor Greene compares originalism in the United States to originalism in Canada and Australia, because of what he considers to be the relevant and important similarities between the constitutional systems of these three countries.<sup>7</sup> In an ongoing project, though, I argue that the most relevant dimensions of a country that explains its orientation towards originalism is whether or not its constitution created the nation that lives under the constitution, or whether the constitution merely reorganized the institutions of the country but did not create the nation that lives under the constitution. In other words, was the constitution revolutionary, or reorganizational? The American Constitution was perhaps the first nation-creating, revolutionary constitution, and so has always featured an element of originalism. The other countries that Professor Greene examines—Canada and Australia—feature

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5. See Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1 (2009) (considering why originalism is a major topic of discussion in the United States and less so at least in some other countries).

6. See Richard Primus, *The Functions of Ethical Originalism*, 88 TEXAS L. REV. SEE ALSO 79 (2010) (examining some of the forms of ethical arguments that Professor Greene highlights in his Article).

7. See, e.g., Greene, *supra* note 5, at 1 (“This Article . . . focus[es] particular attention on the political and constitutional histories of Canada and Australia, nations that, like the United States, have well-established traditions of judicial enforcement of a written constitution, and that share with the United States a common law adjudicative norm.”); *id.* at 4–5 (“Like the United States, Canada and Australia are stable, liberal, federal democracies with independent judiciaries, well-established traditions of judicial review, and written constitutions of long standing relative to most of the world’s. Moreover, all three countries have common law legal regimes derived from British practice and so seem more likely than civil law countries to approach constitutional interpretation using the evolutionary and judge-empowering methods generally disfavored by originalists.”).

“constitutions” (the foundational documents in both of these countries are usually called something other than simply “the Constitution” in the first place) that simply reorganized existing communities rather than created those communities. For the purposes of comparing modalities of constitutional interpretation, then, Professor Greene is not really comparing “the most similar” countries, but instead the most polar opposite countries.<sup>8</sup>

## II. What Are We Comparing?

In order to assess the accuracy of the comparisons highlighted in his article, it must first be clear what Professor Greene intends to compare. Professor Greene seems to compare the discussions regarding constitutional interpretation in entire countries<sup>9</sup>—that is, he wants to compare the decisions of courts, the writing of leading academics, and the discussions by leading social and political commentators. But to compare systematic and comprehensive institutions, we need systematic and comprehensive evidence, and the article is largely lacking on that front (particularly outside of the United States). I admire Professor Greene for the enormity of the comparison in constitutional interpretation that he purports to undertake. Comparative constitutional law, because of the importance of context and detail, might be a field like legal history in that scholarly projects are better suited as scholarly books rather than as law review articles. But if these overall country comparisons are going to be done as law review articles, as Professor Greene tries to do, then the evidence presented must be systematic.

Consider, for instance, a comparison of originalism in the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia. I would argue that the interpretive differences between these courts in terms of how these courts actually use originalism to decide cases are overall much smaller than Professor Greene suggests. Professor Greene states that our Supreme Court is more originalist than other courts.<sup>10</sup> But is this really true? There are certainly examples of major American Supreme Court opinions that talk about originalism, most recently and notably *District of Columbia v. Heller*.<sup>11</sup> There are also examples of major Supreme Court opinions that do not make any substantial references to originalist evidence, like the University of Michigan affirmative action cases in 2003,<sup>12</sup> cases about the Fourteenth Amendment that never seriously engage with the Civil

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8. *Id.* at 4 n.11 (stating that the Article tries to compare the “most similar cases”).

9. *See, e.g., id.* at 1 (“[O]riginalism is remarkably unpopular outside the United States.”).

10. *See id.* at 4. (observing that “few peoples more earnestly or enthusiastically engage originalist constitutional premises than we do”).

11. 128 S. Ct. 2783, 2796 (2008) (discussing, inter alia, the original draft of the Second Amendment). *See* Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 256–57 (2008) (noting that the majority and dissenting opinions rely much on originalist evidence).

12. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (neither making thorough originalist arguments in the majority opinions).

War or the leading creators of the Civil War Amendment like John Bingham. In Canada, originalism factors into constitutional decisions at least in part and at least some of the time,<sup>13</sup> and Professor Greene himself notes that originalism has had at least some supporters on the High Court of Australia.<sup>14</sup>

The record, then, is more mixed than the article suggests. Some of the time the American Supreme Court relies on originalism, sometimes it does not. Some of the time the Canadian Supreme Court and Australian High Court discuss originalist evidence, sometimes they do not. Since this is not a comparison of courts that always use originalism with courts that never do, we need more systematic evidence, because Professor Greene does want to show that *in general* our Supreme Court is more originalist than other courts. Various forms of systematic evidence might suffice. Perhaps evidence that in major constitutional cases the courts really differ; perhaps evidence about in what percent of cases the United States Supreme Court cites *The Federalist Papers* compared to similar references in the Canadian Supreme Court and the Australian High Court. Regardless of what type of systematic evidence is used, some of it must be systematic. To make general arguments we need general evidence. Professor Greene's conclusions are surely right and quite interesting, but the evidence used must match these claims.

Professor Greene's claims are probably more clearly true when it comes to the prominence of originalism in the scholarly, political, and social commentary of these countries. While it is easy to find originalism in the scholarship of both politically conservative<sup>15</sup> and politically liberal<sup>16</sup> American academics, it is hard to find any examples of academics elsewhere in the world discussing originalism as much as they do in the United States. While it is easy to find originalism discussed by political actors<sup>17</sup> or social movements<sup>18</sup> in the United States, it is hard to find originalism discussed by

13. See *Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, 507–09 (Can.) (considering the minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons as extrinsic aids to the interpretation of constitutional provisions).

14. See Greene, *supra* note 5, at 40–62 (describing “faint-hearted” support for originalist arguments in Australian jurisprudence).

15. See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 676–77 (2006) (citing the Supreme Court's originalist reasoning with approval).

16. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–303 (2007) (explaining the relevance and importance of constitutional interpretation based on originalist and original expected application arguments); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 549–50 (2009) (proposing and praising the compatibility of originalism and living constitutionalism); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442–54 (2007) (emphasizing value of both originalist interpretation and interpretation based on original expected application).

17. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006) (“Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.”).

18. See, e.g., Rush Limbaugh, *Limbaugh Fundamentals: What is Originalism?*, THE LIMBAUGH LETTER, Dec. 2005, at 12, available at <http://www.rushlimbaugh.com/home/menu/>

either group outside of the United States. But again, systematic evidence would suffice. Are there really any articles in the leading law reviews of Canada and Australia about originalism? Are there speeches on the floor of their respective legislatures? Do their religious leaders not discuss originalism, as our religious leaders sometimes do? Again, all important questions that must be considered if systematic arguments are to be made, and none of these questions are really addressed in the article.

### III. Selecting the Right Case Studies

My more substantial concern with Professor Greene's rather important article has to do with what countries he compares and why he compares these particular countries, rather than what segments of each country he decides to compare. Professor Greene focuses on three countries, but uses these particular case studies to make some fairly general conclusions.<sup>19</sup> To reach the conclusions he wants to reach, though, Professor Greene selects precisely the wrong countries to compare to the United States, rather than the right countries.

Large-N studies—or studies of a range of countries rather than a particularly important few—have become the trend in a wide range of academic disciplines focused on comparison, as noted by the leading tracts on comparative social science methodology.<sup>20</sup> It is hard to do large-N studies in comparative constitutional law, though, because there simply are not that many countries that have stable, politically relevant constitutions and constitutional courts.<sup>21</sup> Moreover, because of linguistic and other

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limfunoriginalism.guest.html (“Originalism means not molding the Constitution to fit your political and social beliefs. It means not citing foreign law to support your preferences. It means not imposing your personal policy whims on society via judicial fiat. And where the Constitution is silent, it means not inventing a penumbra to support your own opinion.”).

19. See Greene, *supra* note 5, at 3 (“The notion that the meaning of a political constitution is, in any practical sense, fixed at some point in the past and authoritative in present cases is pooh-pooed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe.”); *id.* (considering “[t]he global rejection of American-style originalism”); *id.* at 5–6 (“In short, although some version of originalist judicial practice is not peculiar to the United States, the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts, not the least the two most like our own.”); *id.* at 18 (“Outside the United States, American originalism is as well-known as it is marginalized.”); *id.* at 62 (“Yet hardly any sober or respectable foreign nation, our closest cousins included, boasts a similar mass of opinion in favor of American-style originalism. Even in other democratic nations with long traditions of constitutional judicial review, with deep common law roots, and with difficult processes of constitutional amendment, resistance to judicial activism does not commingle with historical fetishism.”).

20. See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 67 (1994); *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* xvii (Henry E. Brady & David Collier eds., 2004).

21. Tom Ginsburg and Zachary Elkins have produced a helpful database that provides more general comparative constitutional law information, and have produced some large-N comparative constitutional studies using this database. See *generally* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

considerations, we do not have all of the relevant information about those countries in the first place.

That means that comparative constitutional law has tended to focus on the same smaller number of countries: Canada, New Zealand, Australia, the United Kingdom, South Africa, France, Germany, and India. There are exceptions,<sup>22</sup> but the leading law review articles on comparative constitutional law to this point focus primarily on these countries.<sup>23</sup>

Professor Greene is using a small-N approach, and looks to two of these commonly examined countries, in his case Canada and Australia. Professor Greene states very clearly that he is using a “most similar cases” approach to comparative constitutional scholarship. By this, he means that he is comparing the following:

[C]ases that have similar characteristics, or cases that are matched on all variables or potential explanations that are not central to the study, but vary in the values on the key independent and dependent variables. By controlling for variables or potential explanations that are not central to the study, the most similar cases principle helps “isolate” the great significance of the variance on the key independent variable in determining the variance on the dependent variable, thereby allowing for partial substitute for statistical or experimental control. What is more, because the most similar cases principle suggests that comparable cases should be selected so as to hold constant non-key variables while isolating the explanatory power of the key independent variable, this approach is the most adequate for a diachronic, cross-time comparison within the same polity (e.g. a study of the impact of a certain change through a pre change/post change comparison).<sup>24</sup>

The countries that Professor Greene considers to be “the most similar cases” are the United States, Canada and Australia.<sup>25</sup> He selects Canada and Australia to compare to the United States because they are “two foreign legal regimes that are in many key respects comparable to our own.”<sup>26</sup>

But comparable in what ways? Before comparing similar cases, we need a convincing argument as to why these countries “are matched on all variables or potential explanations that are not central to the study, but vary

22. *E.g.*, GRETCHEN L. HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS AND PRESIDENTS IN ARGENTINA* (2005); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT* (2005); JEFFREY K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010); MARY L. VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT* (2000).

23. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1041, 1055–56, 1061–62 (2004) (discussing primarily Canada and South Africa); Mark Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 *HARV. C.R.-C.L. L. REV.* 1 (2006) (relying primarily on Canada and the United Kingdom).

24. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *AM. J. COMP. L.* 125, 135 (2005).

25. Greene, *supra* note 5, at 4 n.11.

26. *Id.* at 4.

in the values on the key independent and dependent variables.”<sup>27</sup> In Professor Greene’s article, though, we have a footnote saying that he is using the “most similar cases” approach.<sup>28</sup> In other places, as far as I can tell, there are two other explicit statements about how these three countries are the “most similar cases”: first, a statement that “This Article . . . focus[es] particular attention on the political and constitutional histories of Canada and Australia, nations that, like the United States, have well-established traditions of judicial enforcement of a written constitution, and that share with the United States a common law adjudicative norm”<sup>29</sup> and then a statement that

Like the United States, Canada and Australia are stable, liberal, federal democracies with independent judiciaries, well-established traditions of judicial review, and written constitutions of long standing relative to most of the world’s. Moreover, all three countries have common law legal regimes derived from British practice and so seem more likely than civil law countries to approach constitutional interpretation using the evolutionary and judge-empowering methods generally disfavored by originalists.<sup>30</sup>

It is not clear whether these factors mean that Canada and Australia are the most similar cases, and whether these factors are relevant here. First, Canada and Australia do not have the most similar histories of “judicial enforcement of a written constitution”<sup>31</sup> as Professor Greene suggests. Canada has only clearly judicially enforced a written constitution since the Charter of Rights and Freedoms in 1982,<sup>32</sup> meaning in fact it has one of the least similar and shortest histories of judicial enforcement of a written constitution. Australia still does not have a written constitution similar to the American Constitution. It does have a constitution dating back some time, and so Australian judicial review does operate like American judicial review because Australian courts do have “*general* authority to determine what the Constitution means”<sup>33</sup> and their “constitutional interpretations are authoritative and binding.”<sup>34</sup> Even putting aside that this broad power of judicial review power in Australia is more recent and more controversial there than here, Australia does not include an explicit bill of rights,<sup>35</sup> which

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27. Hirschl, *supra* note 23, at 134.

28. Greene, *supra* note 5, at 4 n.11.

29. *Id.* at 1.

30. *Id.* at 4–5.

31. *Id.* at 1.

32. *See* *Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, 507 (Can.) (describing the history of the 1982 Charter of Rights and Freedoms).

33. *See* Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOB. STUD. L. REV. 281, 281 (2007) (quoting Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784 (2003)).

34. *Id.*

35. *Id.* at 285.



makes the Australian system an “outlier in modern constitutional systems,”<sup>36</sup> particularly when compared to the American system.

Second, it is certainly true that Canada and Australia have a “common law adjudicative norm”<sup>37</sup> similar to the United States. But the “common law” adjective more usually describes how torts or contracts works in a country than it does how that country’s constitutional adjudication system operates. The common law countries inspired by the British common law tradition have, in fact, been the real outliers when it comes to constitutional law, as they have been the last few to adopt written constitutions enforceable by courts. Even then, they have only adopted something like what Stephen Gardbaum has called the “Commonwealth model” of judicial review rather than the “American model.”<sup>38</sup> At the same time, civil law countries like Germany have aggressive constitutional courts with broad interpretive mandates,<sup>39</sup> similar to the U.S. Supreme Court in the common law United States.

In my preliminary studies of comparative originalism, as part of a larger ongoing project, I have instead found that the “most similar cases” to the United States when it comes to constitutional interpretation are those countries where the constitution emerges from a revolution that creates the nation, rather than a constitutional process that simply reorganized the country and did not create the nation. I call this distinction, or really this continuum, the difference between “revolutionary” constitutions and “reorganizational” constitutions. Where a constitution is revolutionary, the countries tend to be more focused on the founding moment and so tend to focus more on what might be called an interpretive originalism. This is because the founding moment and the role of the constitution in that moment creates a series of national and cultural ideas and individuals that will be relevant in the years to come.

For instance, the founders of the Constitution in a revolutionary constitution are not just the founders of the Constitution, but also the founders of the cultural nation. James Madison and George Washington were instrumental in the creation of the American Constitution. But Madison and Washington were also instrumental in the creation of the American nation. So, we refer to those constitutional founders, and their constitutional ideas have resonance in the years to come, because they were also the

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36. *Id.*

37. Greene, *supra* note 5, at 1.

38. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 707–08 (2001) (noting that the Commonwealth model of judicial review differs from the American model because it does not grant fundamental rights higher legal status than legislation, is not entrenched against ordinary repeal, and is not always enforced by courts setting aside legislation).

39. See, e.g., Donald Kommers, *The Federal Constitutional Court in the German Political System*, 26 COMP. POL. STUD. 470, 470 (describing the Federal Constitutional Court in Germany as the “most active and powerful constitutional court in Europe”).

founders for the entire nation. Their presence becomes a powerful legitimating tool because they were “present at the creation”<sup>40</sup> of the nation as well as of the Constitution. The Constitution is simultaneous with the creation moment, and the drafters of the Constitution tend to be taken from the group of individuals who are also the creators of the nation. This means the constitutional founders take on a certain status beyond just the words they wrote into the Constitution. They become quasi-religious figures, bringing a nation from isolation into a separate, juridical, autonomous existence. Revolutionary constitutions, then, promote originalism because of the particular reverence associated with the individual figures associated with the creation of the Constitution—because they are also the individual figures associated with the creation of the nation.

Likewise, the founders and the founding generation become consequential because they are the first individuals and the first generation with a series of ideas about constitutions and government and everything else that are seen as legitimate. They are the first intellectuals, the first creators, of the new cultural nation. Ideas from before the founding generation are seen as either illegitimate, or less legitimate, because they were the ideas that the nation broke from in order to create the constitution and the nation that was in part created by the constitution. Not just Madison as an individual but Madison’s generation has a certain resonance because that generation is the first generation of Americans and so is the first generation with legitimated ideas about the world.

If the nation predated the constitution, then several key cultural and political understandings (what Paul Kahn has called the “interpretive community” that defines a particular constitutional tradition)<sup>41</sup> would predate the constitution and significantly affect how the constitution was interpreted. But if the constitution is created as the nation is created (and as part of the creation of that nation), then the first series of legitimate ideas about the social and political order are the ideas (and the individuals) that were also behind the creation of the Constitution. In other words, just as the individuals creating a constitution in revolutionary constitutions take on a certain role, so do the ideas behind the constitution of that generation. They are individuals and ideas that were the first to found the nation, not just the constitution.

Given these realities, it should not be surprising that countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions or are acting in revolutionary constitutional moments; the post-colonial constitutions of African and Latin

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40. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969).

41. See Paul W. Kahn, *Commentary, Interpretation and Authority in State Constitutionalism*, 106 *HARV. L. REV.* 1147, 1147 (1993) (discussing the “unique, historically identifiable qualities of the . . . community” behind a constitution).

America, for instance, foster many originalist arguments.<sup>42</sup> Countries whose courts and commentators do not make originalist arguments tend to have constitutions that postdated the creation of the nation. This is not to say that countries with revolutionary constitutions always focus on originalist evidence and countries with reorganizational constitutions never do. Rather, it is simply to say that the more revolutionary the constitutional tradition or the moment, *ceteris paribus*, the greater the tendency there is to have discussions of originalism.

Given these general arguments about the distinction between the revolutionary versus reorganizational creation of constitutions, and how it matters for later constitutional interpretation, Professor Greene's case studies appear to be completely opposite case studies rather than "the most similar cases." The American Constitution was revolutionary, not just because of the speed with which it was created, as Professor Greene briefly acknowledges,<sup>43</sup> but because before the American Constitution there was no United States of America. Books about the founding fathers sell well among the general public not because Madison was simply the creator of the Constitution, but because Madison and his generation were the creators of the nation and the constitution. Their individual roles and fame, and the prominence of their ideas, are because they were the first Americans. By contrast, Pierre Trudeau, who was instrumental in the creation of constitutional judicial review in Canada via the 1982 Charter of Rights and Freedoms, was not the creator of the Canadian nation. Canada—and Australia—"had functional constitutions by the start of the twentieth century . . . and both countries were to varying degrees formally bound by the British Crown well into the 1980s."<sup>44</sup> The constitution postdated some basic cultural and political understandings in Canada and Australia, and so did the creators of the Canadian Charter and the Australian Constitution. This is not just true

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42. One interesting recent example of the invocation of originalist arguments from a court interpreting a post-colonial constitution comes from a recent landmark decision by the Delhi High Court in India striking down a law criminalizing adult consensual sodomy. See *Naz Foundation v. Government of the NCT, W.P. (C) No.7455/2001 of 2009* (Delhi HC); (2009) 160 DLT 277. The Constitution of India, adopted in 1950 after India's independence, functioned as the "cornerstone of a nation." GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1999). In general, though, particularly compared to other post-colonial systems, "originalism [is] rarely invoked by Indian courts." Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 N.U.J.S. L. REV. 297, 298 (2009). In deciding *Naz*—a particularly nation-defining case—the Delhi High Court referred back to the ideas behind the creation of the Constitution of India, discussing "where the notion of equality in the Indian Constitution flows from," *Naz Foundation, supra*, ¶ 129, as coming from the creation moment of the Constitution (and the creation moment of the nation, since the court cites to Pandit Jawaharlal Nehru). See *Naz Foundation, supra*, ¶ 129. See also Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1464-67 (2000) (discussing the "Indian originalism" that the decision embodied).

43. See Greene, *supra* note 5, at 6 ("[O]ur Constitution is perceived as revolutionary rather than evolutionary. The United States announced its sovereignty quickly, painfully, and without sympathy to its former colonizers . . . . The sovereign 'moments' of Canada and Australia were glacial by comparison.").

44. *Id.*

of Canada and Australia, but also of many of the other commonly studied constitutions examined in current comparative constitutional law scholarship (places like France and the United Kingdom, for instance). Perhaps this is why much of the salience of originalism around the world has been missed to this point.

#### IV. Conclusion

How many law review articles in the United States each year ask a genuine new question, and provide genuinely new answers? Surely just a handful, and Professor Greene's article ranks among that handful. One could search many American law reviews over hundreds of years, and many foreign publications, and not find anyone asking the question "why is the United States so interested in originalism"? Simply posing this question and providing a theory as to its answer represents an enormous step forward in our discussion about American constitutional interpretation.

My concern is, then, not with the fascinating question that Professor Greene poses, nor with the interesting answer he provides but more with the way he provides that answer. Being the first scholar to pose a question—let alone the first to provide a substantial answer—is a dangerous task, because going first means you are bound to slightly neglect some arguments that might only be raised if many people were posing and answering the question. Without the benefit of the scholarly echo chambers, things are much more difficult. The gaps in Professor Greene's article do not make me question many of his analyses or explanations, but they mean that as discussion of this topic proceeds further, there is still much to be written. And for that, we owe Professor Greene a huge debt.