Law Under a Democratic Constitution

Essays in Honour of Jeffrey Goldsworthy

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Goldsworthy on the Normative Justification for Originalism

LAWRENCE B SOLUM

I. Introduction

In *The Case for Originalism*, Jeffrey Goldsworthy made an elegant and sophisticated argument for originalism as a theory of constitutional practice.[1] This chapter will investigate one important component of Goldsworthy's argument, which I shall call 'the normative component' of the case for originalism. The best way to begin is by laying out the whole argument using Goldsworthy's own concise statement, with some omissions indicated by ellipses, and some minor changes in terminology indicated by square brackets:

1. A constitution, like any other law, necessarily has a meaning that pre-exists judicial interpretation of it.
2. The meaning of a law is part (perhaps all) of what it is; therefore, to change the meaning of a law is to change the law.
3. The original meaning of a constitution is … 'its utterance meaning' ….

…

4. When a constitution itself requires that it be changed only by some special democratic procedure, this binds judges as well as other officials.

…

5. Any judge who violated that requirement would flout the constitution itself, the rule of law, the principle of democracy, and (in many federal systems) the principle of federalism.
6. When interpreting such a constitution, the judges' primary duty is to reveal and clarify its pre-existing meaning. When that meaning is [underdeterminate], their secondary duty is to … supplement it. …[2]

Goldsworthy refers to each of these numbered statements as propositions, adding two additional steps that anticipate objections,[3] but the six propositions quoted above are the core of his affirmative justification for originalism.

In this chapter, I will undertake a sympathetic examination of the normative component of Goldsworthy's case for originalism – as expressed in Propositions 4, 5 and 6.[4]

[1] J Goldsworthy, 'The Case for Originalism' in G Huscroft and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge, Cambridge University Press, 2011) 42.

[2] ibid 42–43.

[3] ibid 43.

[4] When I refer to Goldsworthy's numbered propositions, I will capitalise the word Proposition for the sake of clarity of reference.

The examination is sympathetic, because I largely agree with Goldsworthy's argument. I will attempt to probe Goldsworthy's arguments for possible weaknesses and unstated assumptions, and to make some suggestions for how his argument might be repaired, strengthened or elaborated.

This chapter focuses on the normative component of the case for originalism, because I believe that the moral and legal components of the case for originalism raise the most controversial issues – the issues where critics of originalism will take their 'last stand,' so to speak. But this focus on the normative elements of Goldsworthy's case for originalism should not obscure the originality and importance of Goldsworthy's treatment of the linguistic issues. Propositions 1, 2 and 3 reflect Goldsworthy's pioneering work on these issues. That work anticipated developments in the United States and elsewhere. That work has been profoundly influential and remains the most sophisticated body of work on issues at the intersection of the philosophy of language and constitutional theory.

Here is the roadmap. Section II. situates Goldsworthy's argument in the landscape of contemporary constitutional theory – understood parochially from the viewpoint of constitutional theory in the United States. Section III. evaluates the case for originalism from the inside by offering an internal assessment of Goldsworthy's normative arguments. Section IV. looks at the argument from the outside, offering some concerns that originate from outside of Goldsworthy's theoretical framework. The conclusion in section V. makes some comments on the significance of Goldsworthy's argument.

II. Situating the Case for Originalism

Before digging into the substance of Goldsworthy's case for originalism, I will offer some terminological and conceptual observations and clarifications, beginning with the obvious question, 'What is originalism?'

A. What is Originalism?

Goldsworthy is making the case for 'originalism', but there is no consensus among constitutional theorists or practitioners about what 'originalism' is. The word 'originalism' is a neologism introduced by Professor Paul Brest in the following passage: 'By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters'.[5] Brest was a critic of the textualist and intentionalist positions for which he coined a label, but the name stuck and was adopted by theorists who came to call themselves 'originalists'. The subsequent history of originalism is too complex to summarise in a few sentences,[6] but it includes the defence

[5] P Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204.

[6] The story can be told from various perspectives, but a comprehensive history of the originalist constitutional theory – as opposed to the role of originalism in politics and judicial practice – is yet to be told. Among the historical accounts of originalism, are the following. See, eg, J O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore, MD, Johns Hopkins University Press, 2005); LE Sawyer, 'Principle and Politics in the New History of Originalism' (2017) 57 *American Journal of Legal History* 198; V Kesavan and MS Paulsen, 'The Interpretive Force of the Constitution's Secret Drafting History' (2003) 91 *Georgetown Law Journal* 1113.

of what has come to be called 'original intentions originalism' by Richard Kay,[7] the emergence of 'public meaning originalism' – prompted by Justice Antonin Scalia's suggestion that originalists 'change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning'[8] – and the subsequent emergence of what has sometimes been called 'the New Originalism' in the work of Randy Barnett[9] and Keith Whittington.[10]

Whittington and then Barnett introduced the interpretation–construction distinction, which marks the difference between the discovery of the linguistic meaning of the constitutional text ('interpretation') and the determination of the legal effect associated with the text ('construction').[11] Subsequent theorists have introduced additional forms of originalism, including 'original methods originalism' (associated with Michael Rappaport and John McGinnis)[12] and 'original law originalism' (developed by William Baude[13] and Stephen Sachs).[14] Much of the American development of originalist theory was anticipated by Jeffrey Goldsworthy in a series of articles developing originalist theory in the Australian context, but with a sophisticated awareness of developments in the United States.[15]

The theoretical diversity of contemporary originalist theory in the academy led Thomas Colby and Peter Smith to contend that 'originalism is not a single, coherent, unified theory of constitutional interpretation, but is rather a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label'.[16] While Colby and Smith are correct to observe that there are significant differences among originalists, they are wrong to deny that originalism has a unifying core. That core is specified by two theoretical ideas upon which almost all originalists agree. We can call these ideas the Fixation Thesis and the Constraint Principle.[17] In simplified form, these ideas can be articulated as follows:

> *The Fixation Thesis*: The original meaning of the constitutional text is fixed at the time each provision is framed and/or ratified.[18]

[7] RS Kay, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses' (1988) 82 *Northwestern University Law Review* 226.

[8] 'Address by Justice Antonin Scalia before the Attorney General's Conference on Economic Liberties in Washington, DC (June 14, 1986)' in *Original Meaning Jurisprudence: A Sourcebook* (Washington, DC, United States Department of Justice, 1987) 101, 106. Scalia's suggestion was taken up by Gary Lawson, Steven Calabresi, and Saikrishna Prakash. G Lawson, 'Proving the Law' (1992) 86 *Northwestern University Law Review* 859, 875; SG Calabresi and SB Prakash, 'The President's Power to Execute the Laws' (1994) 104 *Yale Law Journal* 541, 553.

[9] R Barnett, 'An Originalism for Nonoriginalists' (1999) 45 *Loyola Law Review* 611.

[10] KE Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, University Press of Kansas, 1999); KE Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Massachusetts, Harvard University Press, 1999).

[11] For an overview of the interpretation–construction distinction and the role that it plays in contemporary originalism, see LB Solum, 'Originalism and Constitutional Construction' (2013) 82 *Fordham Law Review* 453; see also LB Solum, 'The Interpretation–Construction Distinction' (2010) 27 *Constitutional Commentary* 95; RE Barnett, 'Interpretation and Construction' (2011) 34 *Harvard Journal of Law & Public Policy* 65.

[12] JO McGinnis and MB Rappaport, 'Original Methods Originalism: A New Theory of Interpretation and the Case against Construction' (2009) 103 *Northwestern University Law Review* 751, 769.

[13] See W Baude, 'Is Originalism Our Law?' (2015) 115 *Columbia Law Review* 2349.

[14] See SE Sachs, 'Originalism as a Theory of Legal Change' (2015) 38 *Harvard Journal of Law & Public Policy* 817, 875.

[15] J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 21; J Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review* 677, 683.

[16] TB Colby and PJ Smith, 'Living Originalism' (2009) 59 *Duke Law Journal* 239.

[17] 'Fixation Thesis' and 'Constraint Principle' are capitalised to indicate that these are proper names of theoretical constructs as articulated in the manner specified here.

[18] For a more precise explication of the Fixation Thesis, see LB Solum, 'The Fixation Thesis: The Role of Historical Fact in Original Meaning' (2015) 91 *Notre Dame Law Review* 1.

> *The Constraint Principle*: Constitutional practice, including the elaboration of constitutional doctrine and the decision of constitutional cases, should be constrained by the original meaning of the constitutional text. At a minimum, constraint requires that constitutional practice be consistent with original meaning (as specified below).[19]

For the purposes of this chapter, 'originalism' is a family of constitutional theories that almost all affirm fixation and constraint in some form. Nonoriginalist constitutional theories deny either fixation or constraint: for example, some living constitutionalists believe that judges should have the power to change constitutional doctrine so that it reflects contemporary circumstances and values, even if that requires the adoption of constructions that are inconsistent with the original meaning of the constitutional text.

Goldsworthy does not use the language of 'fixation' and 'constraint', but his case for originalism includes claims that are best understood as affirming both ideas. Thus, Propositions 1, 2 and 4 imply the Fixation Thesis or something very close to it. In his elaboration of Proposition 4, Goldsworthy explicitly affirms that conceptual content of fixation in slightly different words. For example, he writes:

> The conventional meaning of many words that appear in Shakespeare's plays have shifted over the last four centuries, but it does not follow that their meanings within his plays have shifted. The words as used in his plays continue to mean what they meant when he first used them.[20]

Goldsworthy does not use the term 'constraint', but it is clear that his Propositions 4, 5, 6 express approximately the same idea as the Constraint Principle.

Goldsworthy also puts forth a view about the nature of original meaning. He rejects intentionalism and instead affirms the view that the original meaning of the constitutional text is its 'utterance meaning'. It seems clear that Goldsworthy's notion of the utterance meaning of a constitutional text is closely related to 'public meaning'. Whether his view is distinguishable from the views of public meaning advanced by Gary Lawson or myself is an interesting and subtle question, but it will not be pursued in this chapter.[21]

B. The Interpretation–Construction Distinction

One of the most fundamental distinctions in legal theory marks the difference between 'legal content' and 'communicative content'.[22] Constitutional texts (and other legal texts such as statutes and contracts) have both communicative content (roughly linguistic meaning) and legal content (such as doctrines of constitutional law). Thus, the First Amendment to the *United States Constitution* includes the Free-Speech Clause with relatively sparse communicative content, but that clause has given rise to a complex body of free-speech doctrine that is far richer in content than the linguistic meaning of the words 'freedom', 'of'

[19] This version of the two ideas is from LB Solum, 'The Constraint Principle: Original Meaning and Constitutional Practice' (Unpublished, 13 April 2018) https://ssrn.com/abstract=2940215 (last accessed 7 November 2018) (on file with author).

[20] Goldsworthy, 'The Case for Originalism' (n 1) 52.

[21] Lawson's view is expressed in Lawson (n 8). A full statement of my view will be set forth in 'The Public Meaning Thesis' (unpublished manuscript on file with the author).

[22] LB Solum, 'Communicative Content and Legal Content' (2013) 89 *Notre Dame Law Review* 479.

and 'speech'. We can think of the communicative content of a constitutional provision as the set of propositions that are communicated by the text. The legal content associated with a provision consists of a set of propositions of law. In some cases, legal content may be a direct translation of communicated propositions into legal propositions, but this is not necessarily the case. Consider the Constitution of the Confederate States of America: this text has communicative content, but it no longer gives rise to any operative legal content.

The distinction between communicative content and legal content gives rise to the interpretation-construction distinction. The distinction was introduced into contemporary constitutional theory by Keith Whittington initially, and later by Randy Barnett. The distinction has a long history,[23] but for the purposes of this chapter, I will use the words 'interpretation' and 'construction' in stipulated technical senses, as follows:

> *Constitutional Interpretation*: The phrase 'constitutional interpretation' is stipulated to refer to the activity that discerns the communicative content (roughly, linguistic meaning) of the constitutional text.
>
> *Constitutional Construction*: The phrase 'constitutional construction' is stipulated to refer to the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text (including the decision of constitutional cases by the courts).[24]

Goldsworthy does not explicitly adopt the terminology of the interpretation-construction distinction, but his work employs the basic idea using different terminology. Thus, in a portion of Proposition 6 omitted above, Goldsworthy distinguishes between the meaning of a constitutional provision and supplementation of that meaning.[25] So far as I can discern, there is nothing in *The Case for Originalism* that is inconsistent with the interpretation-construction distinction.

C. Disentangling the Normative and Factual Elements of the Case for Originalism

In general, the justification for originalism includes both normative and factual claims.[26] The Fixation Thesis is not a normative claim; the idea that meaning is fixed follows from

[23] See generally G Klass, 'Interpretation and Construction 1: Francis Lieber' (*New Private Law: Project on the Foundations of Private Law*, 19 November 2015) http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/ (last accessed 7 November 2018); G Klass, 'Interpretation and Construction 2: Samuel Williston' (*New Private Law: Project on the Foundations of Private Law*, 23 November 2015) https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass/ (last accessed 7 November 2018); G Klass, 'Interpretation and Construction 3: Arthur Linton Corbin' (*New Private Law: Project on the Foundations of Private Law*, 25 November 2015) http://blogs.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass/ (last accessed 7 November 2018); see also R Poscher, 'The Hermeneutic Character of Legal Construction' in S Glanert and F Girard (eds), *Law's Hermeneutics: Other Investigations* (London, Routledge, 2017) 207.

[24] These definitions were presented in Solum, 'Originalism and Constitutional Construction' (n 11) 457.

[25] Goldsworthy, 'The Case for Originalism' (n 1) 42–43.

[26] I do not mean to take a strong stand on the fact–value distinction and, in particular, I am not assuming that there are no 'moral facts' and I certainly do not believe there are no legal facts. It might be more precise to distinguish between 'normative and non-normative claims', or 'normative facts versus facts that are not normative in nature'.

facts about the way that language works. The fact that the communicative content of the constitutional text is fixed at the time that each provision is framed, and ratified, does not entail the conclusion that the fixed communicative content should constrain constitutional practice. It is at the very least possible that judges and officials would accept the Fixation Thesis but deny the Constraint Principle. The Fixation Thesis is a factual claim about the communicative content of the constitutional text. The Constraint Principle is a normative claim about constitutional practice.

The Constraint Principle is normative because it is a claim about how legal practice ought to go; if the Constraint Principle is true or correct, then it follows that constitutional actors ought to do certain things and refrain from doing others. In the sense that I am using the word 'normative', this is simply what it means to be a normative claim.

In debates about constitutional theory, we can distinguish two types of normative claims: moral and legal. As I am using the term 'normative', a normative claim provides a reason for action or evaluation. Moral claims are obviously normative. If an action is morally right, this provides a reason for performing the action. Legal claims are normative as well. If an action is legally required, that provides a reason for performing the action. Of course, there are deep questions about the nature of legal normativity and its relationship to morality. For the purposes of this chapter, I will assume that all-things-considered moral claims override legal claims.

But even if all-things-considered moral obligations trump legal duties, it may nonetheless be the case that legal duties can alter our moral obligations. We may have *pro tanto* moral reasons to act or refrain from acting, and these *pro tanto* moral reasons might be overridden, once legal obligations and permissions are taken into account. For example, one might have a *pro tanto* moral reason to take food from its owner and provide it to a hungry person, but once the legal rights of the owner are considered, the moral reason might be overridden and one would then have an all-things-considered moral reason not to perform the action. In the constitutional sphere, the executive might have a *pro tanto* reason of political morality to adopt a policy that would alleviate some social evil, but that *pro tanto* reason might be overridden if the action would constitute an exercise of lawmaking power that is reserved to the legislature.

There are many further complications. It is not clear whether there is a general obligation to obey the law; and if there is such an obligation, questions arise as to whether it is defeasible and, if so, under what conditions. Philosophical anarchists take the position that there is no general obligation to obey the law, but arguments for such an obligation have been made. Moreover, whether or not there is a general obligation to obey the law, there may be such an obligation with respect to a particular legal system that is reasonably just – even if particular laws are themselves not morally optimal. These issues are further complicated by the divide in general moral philosophy between consequentialist, deontological and aretaic theories. These questions are deep and, on this occasion, we shall have to finesse them by making certain reasonable (but contestable) assumptions.

For the purposes of this chapter, I will assume that the full case for originalism must provide a moral justification. Let me call this the 'Requirement of Moral Justification' (or RMJ). Even if there is an obligation to obey the law, and even if the Constraint Principle (or something like it) is part of the law, a critic of originalism can argue that the law should be changed on the ground that the Constraint Principle lacks normative justification, and that there are all-things-considered reasons to change that law so as to

legally authorise departure from constraint. This is not to say that RMJ renders the legal case for the Constraint Principle (or something like it) irrelevant. If constraint is legally required, then many constitutional actors may view themselves as obligated to act in accord with original meaning – unless and until the constitution is changed. Of course, a fully-developed argument for RMJ would require a much fuller discussion than that provided in this short paragraph. Here, RMJ is simply an assumption, accompanied by an explanation of the assumption's plausibility.

In *The Case for Originalism*, Goldsworthy's argument includes both normative and factual elements. Propositions 1, 2 and 3 make factual claims about communicative content (linguistic meaning). Propositions 4, 5 and 6 make normative arguments. Some of these arguments are moral, some are legal, and some are either ambiguous or make both moral and legal claims.

Recall Proposition 4: '[w]hen a constitution itself requires that it be changed only by some special democratic procedure, this binds judges as well as other officials'. This claim is best understood as legal in nature: the claim that judges and officials are 'bound' by constitutional provisions that limit amendments to those that are approved by a specific procedure is a claim about what is legally required of judges and officials.

Proposition 5 makes both moral and legal claims. Recall that Proposition 5 claims that any judge who violated the requirement that some constitution be changed only by a special democratic procedure would 'flout' (act contrary to): (1) 'the constitution itself', (2) 'the rule of law', (3) 'the principle of democracy' and (4) 'the principle of federalism' (if the constitution establishes a federal system).

The first of these claims ('the constitution itself') might appear, on its surface, to be purely legal in nature. Acting contrary to the constitution is acting contrary to law. However, in his explication of the constitution-itself argument, Goldsworthy does explicitly make moral claims. Here is the relevant passage:

> A working constitution that is generally accepted as morally authoritative is indeed morally authoritative because it is essential to decent, civilized life – provided that it does not include moral flaws so egregious that they outweigh that benefit. This is because it provides the community with incalculable benefits of an established and accepted set of procedures for making collective decisions binding on all its members; in other words, because the only realistic alternative is usually some form of grievous civil strife, such as anarchy or civil war.[27]

This aspect of the constitution-itself argument is clearly moral in nature. In the discussion that follows in section III., I will consider both the legal and moral dimensions of Goldsworthy's constitution-itself argument.

The second claim is ambiguous: the 'rule of law' could be understood as either a legal or moral claim. It might be that Goldsworthy's rule of law argument is that violations of the Constraint Principle are violations of the law: this interpretation is suggested by this statement: 'Originalism is motivated by respect for the requirements of the constitution itself, and therefore of the rule of law'.[28] Again, the argument has two dimensions – each considered separately below.

[27] Goldsworthy, 'The Case for Originalism' (n 1) 59.
[28] Goldsworthy, 'The Case for Originalism' (n 1) 57.

The third claim refers to the principle of democracy. Goldsworthy's explication of the fourth argument makes it clear that he rejects the argument that originalism is justified by a principle of popular sovereignty.[29] Although his explanation does not directly refer to the idea of democratic legitimacy, he does invoke the idea of 'democratic control over constitutional change'.[30] That claim sounds in political morality, and I will classify it as a purely moral claim.

The fourth and final claim ('the principle of federalism') is not amplified in any explicit way in Goldsworthy's explication of Proposition 5. My understanding of the claim is that it is legal in nature. Goldsworthy does not attempt to make an argument of political morality for the principle of federalism, but it seems obvious that circumventing the federalism component of a constitutional amendment procedure would run afoul of the legal principle of federalism that is contained in many constitutions. Although we cannot be sure, I believe that the best understanding of Goldsworthy's claim is that his federalism argument sounds in law and not morality.

III. Internal Assessment of Goldsworthy's Normative Arguments

I will begin with the legal components of Goldsworthy's case for originalism and then move to the moral elements. Before proceeding further, I want to emphasise my admiration for Goldsworthy's statement of the normative case for originalism. No effort prior to Goldsworthy's is as sophisticated, rich and well-argued. My own work on these issues, the current version of which is developed in an unpublished manuscript entitled *The Constraint Principle*, stands (I hope squarely) on Goldsworthy's shoulders. Moreover, although I am sceptical about the legal component of Goldsworthy's case for originalism, I am largely in agreement with the underlying thrust of the moral component. If I probe for weaknesses and unstated assumptions, it is because I believe that Goldsworthy's arguments are important and, for that reason, should be developed in their best possible form.

A. The Legal Component of the Case for Originalism

The legal component of Goldsworthy's case for originalism includes four distinct elements: (1) the amendment procedures argument, (2) the constitution-itself argument, (3) the rule of law argument, and (4) the principle of federalism argument. The first of these elements is from Proposition 4 and the remaining three elements are drawn from Proposition 5. These arguments contain both moral and legal dimensions, but the discussion that follows is focused solely on the legal dimension of these four arguments; the moral arguments are discussed in the section that immediately follows.

It goes without saying that the argument that originalism is already the law can only be made in the context of a particular legal system. Thus, originalism might be the law

[29] Goldsworthy, 'The Case for Originalism' (n 1) 58.
[30] Goldsworthy, 'The Case for Originalism' (n 1) 59.

in Australia but not in the United States. In this chapter, I am not assessing the claim that originalism is the law in Australia; my focus will be on the United States. Nonetheless, there are parallels between the two cases, and some of the argumentative moves that I make in the American case may also be relevant to the Australian case.

The question at hand is whether compliance with the Constraint Principle (or something like it) is legally required in the United States. Some theorists have thought the answer to this question is obviously 'yes', because the legal content produced by a legal text must, as a matter of logic, be the 'meaning' of the text. The idea is that originalism provides the correct theory of constitutional 'interpretation' and that it is obvious that judges and officials are obligated to follow the Constitution (as made explicit by the Constraint Principle). But this seemingly simple argument is based on a conflation between interpretation (understood as the activity that discerns the meaning of the constitutional text) and construction (understood as the activity that determines the legal effects of the text, including the content of constitutional doctrine). From the fact that a constitutional text has communicative content (CC), it does not follow that officials and judges must give the constitution corresponding legal content (LC). The assumption that it does has been dubbed 'the standard picture' by Mark Greenberg, and whatever the merits of the standard picture, it is not a necessary truth that the legal content associated with a constitutional text is simply a translation of the communicative content into legal rules.[31] It is at least possible that the propositions of law associated with a constitution would be inconsistent with the communicative content.

Some theorists believe that the answer to the question whether the Constraint Principle is legally required is clearly 'no'. This belief is usually grounded on the observation that the legal content of constitutional doctrine frequently contradicts the communicative content of the text of the United States' Constitution. These contradictions are not limited to a few isolated cases; instead, the tension between original meaning and constitutional doctrine exists across a wide variety of constitutional contexts, ranging from separation of powers and federalism to the freedom of speech and the unenumerated constitutional right to privacy. For example, the First Amendment of the *United States Constitution* begins with the phrase, 'Congress shall make no law', but the Supreme Court has applied the First Amendment to the judiciary and the executive in many cases; for example, *New York Times v Sullivan*.[32] These Supreme Court cases are clearly part of American constitutional law, and therefore, some theorists believe that it is obviously true that originalism is not the law – in other words, the Constraint Principle is not itself a rule of constitutional law.[33]

[31] M Greenberg, 'The Standard Picture and Its Discontents' in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford, Oxford University Press, 2011) Vol 1, 39; M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288, 1296–99; M Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in A Marmor and S Soames (eds), *Philosophical Foundations of Language in The Law* (Oxford, Oxford University Press, 2011) 217, 223–24; M Greenberg, 'What Makes A Method of Legal Interpretation Correct? Legal Standards vs Fundamental Determinants' (2017) 130 *Harvard Law Review Forum* 105, 107.

[32] *New York Times v Sullivan*, 376 US 254 (1964).

[33] A more nuanced version of this position appears in RH Fallon, 'How to Choose a Constitutional Theory' (1999) 87 *California Law Review* 535, 547:

> If the Constitution's status as ultimate law depends on practices of acceptance, then the claim that the written Constitution is the only valid source of constitutional norms loses all pretense of self-evident validity. As originalists candidly admit, originalist principles cannot explain or justify much of contemporary

But once again, things are not simple. Some court decisions are mistaken as a matter of law: from the fact that a decision has been made by the Supreme Court and is therefore binding on the lower courts and officials, it does not follow that the decision is correct. One way to make this clear is to distinguish between the deep structure and the surface structure of constitutional law.[34] It is at least possible that the deep structure of constitutional law in a particular jurisdiction is originalist and that some features of the surface structure are mistakes.[35] William Baude has pursued a similar line in his magisterial: 'Is Originalism Our Law?'[36]

Goldsworthy distributes his version of the positivist argument among several closely related claims, including the amendment-argument in Proposition 4 and the constitution-itself, rule-of-law and federalism arguments in Proposition 5. On my understanding of Goldsworthy, all of these arguments express the same basic idea: the law requires originalism – at least in some jurisdictions. This can be seen from the fact that the constitution specifies the procedure for change by formal amendment, from the nature of the constitution, from the notion of the rule of law and from the principle of federalism (in some constitutions). For this reason, I will treat all of these arguments as one argument: the positive law requires originalism (or more specifically, the Constraint Principle) in legal system L (where L could be Australia, the United States, or some other national or subnational legal system with a written constitution).

Goldsworthy acknowledges the existence of judicial decisions in the United States that are inconsistent with originalism, quoting Justice Scalia's statement that 'it would be foolish to pretend that … [originalism] has become … the dominant mode of interpretation in the courts.'[37] I believe that the crucial argument made by Goldsworthy is contained in the following passage:

> Even when judges purport to enforce unenumerated, supposedly implied principles, they invariably claim to have discovered those principles in the constitution, not added them to it. This surely indicates that they know that they lack lawful authority deliberately to change the constitution. If there is a discrepancy between what they say they do and what on occasions they actually do, the former is better evidence of the scope of their lawful authority than the latter. Any claim about the lawful scope of judicial authority must be able to pass the test of public candor: If that claim is not and cannot be candidly asserted in public by the judges themselves, it is almost certainly false.[38]

constitutional law. Important lines of precedent diverge from original understandings. Judges frequently take other considerations into account. Moreover, the public generally accepts the courts' nonoriginalist pronouncements as legitimate – not merely as final, but as properly rendered.

[34] The terminology is borrowed from Noam Chomsky. See N Chomsky, *Aspects of the Theory of Syntax* (Cambridge, Massachusetts, MIT Press, 1965). For application to constitutional law, see BF Havel, 'The Constitution in an Era of Supranational Adjudication' (2000) 78 *North Carolina Law Review* 257, 280.

[35] For my own statement of the positivist argument in tentative form in a working paper, see LB Solum, 'Semantic Originalism' (Unpublished, 22 November 2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (last accessed 7 November 2018) (on file with author).

[36] See Baude (n 13).

[37] See A Scalia, 'Foreword' (2008) 31 *Harvard Journal of Law & Public Policy* 871, 871, quoted in Goldsworthy, 'The Case for Originalism' (n 1) 56.

[38] Goldsworthy, 'The Case for Originalism' (n 1) 56–57. Goldsworthy makes an additional claim that I believe is not sufficient to rebut the positivist argument that originalism is not the law. His additional argument focuses on the cases in which judges act 'creatively' by 'supplementing' the constitutional text when it is underdeterminate (at 56), but my judgement is that there are at least some important Supreme Court cases in the United States that cannot be explained in this way. A full evaluation of this claim would require us to examine many Supreme Court cases and determine whether the Court is supplementing or amending the Constitution: such an evaluation is beyond the scope of this chapter.

Goldsworthy's argument runs together ideas that can be teased apart. One portion of the argument is a normative argument that seems to be about the values of publicity and transparency; I believe that Goldsworthy is referring to these values when he introduces 'the test of public candor'. Transparency and publicity are important values of political morality, but I do not believe that it is plausible to argue that the test of public candor is a legal principle that renders living constitutionalist opinions invalid if they fail to pass the test. Hence, this portion of the argument is best understood as sounding in political morality and not law.

The other aspect of Goldsworthy's argument does make a legal claim – that judicial practice is best understood as committing to originalism as a matter of principle and hence that the deep structure of constitutional law is originalist. The difficulty with this argument is that when nonoriginalist judges justify their decisions, they are not employing originalism as the standard of constitutional fidelity. Instead, they invoke the function, purpose, ideals, principles, or spirit of the constitution. But as we all know, adherence to the purpose of a legal text can be invoked as a justification for acting contrary to the communicative content (or linguistic meaning) of the text. References to constitutional function (and similar ideas) might superficially resemble a commitment to the constitutional text (and hence originalism) but, in fact, the opposite may be true. Reference to the function of the constitutional text may well signal commitment to the idea that the constitutional text is not legally binding on judges. Of course, the failure to be explicit about the invocation of a power to override the communicative content of the constitutional text may be contrary to the values of transparency and publicity, but those are best understood as moral values and not as legal rules.

Moreover, it seems likely that, in many cases, judges do not attempt to justify their decisions by reference to the constitutional text at all. An unusually candid example is found in Justice Richard Posner's concurring opinion in *Hively*,[39] which contains the following remarkable statement:

> [I]nterpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text) – a meaning that infuses the statement with vitality and significance today. An example of this last form of interpretation – the form that in my mind is most clearly applicable to the present case – is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation – the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting 'original meaning'.[40]

Justice Stephen Breyer of the United States Supreme Court is not quite as clear as Judge Posner, but his monograph *Active Liberty* is transparently anti-originalist.[41] This is not the occasion to rehearse the evidence but, in my opinion, many opinions of the United States Supreme Court cannot be construed as affirming originalism in principle but departing from originalism in practice.

[39] *Hively v Ivy Tech Community College of Indiana*, 853 F.3d 339, 352 (7th Cir 2017).

[40] ibid 352–53.

[41] S Breyer, *Active Liberty: Interpreting a Democratic Constitution*, revised edn (New York, Oxford University Press, 2008); I Somin, '"Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?' (2006) 100 *Northwestern University Law Review* 1827, 1850 (describing Breyer's critique of originalism in *Active Liberty*).

I have not formed any ultimate judgement about the thesis that originalism or the Constraint Principle is part of the deep structure of constitutional law in the United States. I am not fully convinced by Goldsworthy's version of the argument; nor am I convinced by the more extensive version of the argument advanced by William Baude. But even if the argument were successful, it would not make a complete case for originalism. Many originalists conceive of originalism as a project of law reform: originalism is not yet the law, but it should be. Living constitutionalists can advance their project in the same way. If Goldsworthy and Baude are correct, then living constitutionalists can – and some surely will – argue that living constitutionalism should be adopted as a programme of law reform.

B. The Moral Component of the Case for Originalism

As I understand the moral components of Goldsworthy's case for originalism, it has two primary components: one based on the ideal of the rule of law, and the other based on the idea of democratic legitimacy. The rule-of-law argument is found in the moral understanding of Goldsworthy's amendment argument in Proposition 4, and the constitution-itself and rule-of law arguments in Proposition 5. The democratic legitimacy argument is found in the principle-of-democracy argument in Proposition 5.

i. The Rule of Law Argument

The moral version of the rule-of-law argument is based on the idea that the rule of law is an ideal of political morality. The idea is that originalism complies with the rule-of-law principle, but that living constitutionalism (nonoriginalism) does not.

I have already quoted one of the key passages above. Goldsworthy argues that adherence to a constitution is required for the rule of law. He might be understood as arguing that an originalist constitutional practice 'provides the community with incalculable benefits of an established and accepted set of procedures for making collective decisions binding on all its members', and that 'the only realistic alternative is usually some form of grievous civil strife, such as anarchy or civil war'.[42] But this understanding of Goldsworthy's position is unsatisfactory. His own statement of the argument does not claim that originalism is the only alternative to civil strife, but instead identifies a 'working constitution' as the institution that confers the benefits of the rule of law.

The real work is done by a subsequent argument, which I shall dub the 'restrictions argument'. Goldsworthy states the argument as follows:

> The constitution protects and empowers, as well as restricts, subsequent generations, and these benefits are inseparable from the restrictions: They are two sides of the same coin. If some attempt to evade the restrictions by acting unconstitutionally, others may be tempted to follow suit, putting the constitution itself at risk along with the protection and empowerment it provides. The procedures that a constitution prescribes for its own amendment exemplify this coincidence of empowerment and restriction. … If judges, for example, were openly to change the constitution

[42] Goldsworthy, 'The Case for Originalism' (n 1) 59.

> contrary to the prescribed amendment procedure, other legal officials might be tempted to follow suit (which is why, when judges occasionally do so, they pretend not to).[43]

Notice that Goldsworthy is making an empirical claim about a causal mechanism. The argument is that nonoriginalist constitutional practice by judges would encourage other officials to violate the constitution, eventually undermining the rule of law, leading to civil strife.

If this causal claim is true, one might ask why the rule of law has not given way in the United States? The United States Supreme Court has engaged in substantial nonoriginalist constitutional practice for many decades – arguably since the New Deal Court in the late thirties and early forties, and certainly since the Warren Court of the fifties and sixties. If the causal claim were true, then sufficient time has passed for the causal processes to play out. If the rule of law still holds in the United States, then it might be argued that this fact disproves the efficacy of the causal mechanism that Goldsworthy postulates.

One line of rejoinder to the American counterexample to the causal claim is suggested by Goldsworthy's qualification of his claim: he has suggested that the damage to the rule of law occurs in cases in which judges 'openly … change the constitution' without amendment. Goldsworthy's claim that the United States Supreme Court has not openly claimed that it has the power to amend the Constitution is correct, but it is not so clear that the Court has not been open about adopting a nonoriginalist approach to constitutional interpretation. The relevant political actors – eg, members of Congress and their staff – are sophisticated actors with an institutional capacity to understand the difference between abstract professions of fidelity to the Constitution that are self-understood as consistent with living constitutionalism, and the more rigorous demands of originalism and the Constraint Principle. It seems very unlikely that Congress fails to understand that the current Supreme Court is not an originalist court, and that many of the important decisions of the past several decades are inconsistent with the communicative content of the constitutional text.

Nonetheless, it might be argued that the United States is at risk of serious damage to the rule of law – eventually, if not in the very near future. It might be argued that constitutional practice in the United States is subject to what might be called a downward spiral of politicisation. As political actors come to recognise that nonoriginalist judging can allow the ideological and political preferences of the Justices to determine the outcome of politically salient issues, there may be strong incentives to politicise the judicial selection process. Presidents will have incentives to select their ideological allies as Supreme Court Justices and the Senate will have incentives to use the confirmation process to affect the ideological composition of the Court. For example, one might interpret the Senate's failure to act on Merrick Garland's nomination to replace Antonin Scalia on the Supreme Court as motivated by the hope that a Republican President would be elected who would then appoint a more conservative Justice. This action by Republicans might provoke Democrats to retaliate; for example, if control of the Senate returns to Democrats in 2018, the Senate might refuse to act on any Supreme Court nominations by a Republican President. Heightened awareness of the politicisation of the process might lead to the delegitimation of the Supreme Court's authority to decide constitutional cases which bind the lower courts, legislatures and executive officials – at both the national and state levels. Thus, Goldsworthy's claim about damage

[43] Goldsworthy, 'The Case for Originalism' (n 1) 59.

to the rule of law could be correct in the long run, even if the process of politicisation has not yet reached the stage where the rule of law is in imminent danger.

ii. The Democratic Legitimacy Argument

Goldsworthy's principle-of-democracy argument is not developed in depth. Goldsworthy seems to assume that his readers accept the claim that the democratic legitimacy of the institution of judicial review is seriously damaged by violations of the Constraint Principle. I agree with the gist of Goldsworthy's argument, but there are many complications that must be taken into account.

The principle-of-democracy argument (like the legal argument) is context dependent. It might hold in Australia, but fail in the United States. As Goldsworthy himself recognises, the democratic pedigree of many constitutions is dubious. The unamended *United States Constitution*, as well as the first 12 amendments, were adopted by an electorate that excluded the vast majority of the population: women, slaves, Native Americans and non-property qualified white males were all excluded from direct participation in the ratification process. The *Canadian Constitution* was even less democratic, tracing its origins to action by the Parliament of the United Kingdom. The Constitution of the United States does have a process for amendment in Article V, but that process requires two-thirds of both houses of Congress to propose an amendment (or call a convention) and ratification by three-fourths of the state legislatures.

Moreover, it is not clear that the United States Supreme Court actually acts undemocratically when it violates the Constraint Principle; Corinna Lain, for example, has argued that many of the Supreme Court's most controversial decisions moved the law in a direction favoured by democratic majorities.[44] Thus, many opponents of originalism believe that the democratic legitimacy argument cuts against originalism and not for it. For these reasons, a fully developed version of the democratic legitimacy argument requires more depth than provided in Goldsworthy's brief statement.

These difficulties with the democratic legitimacy argument might be overcome in various ways. Democratic legitimacy is best understood as a scalar and not a binary: that is, the democratic legitimacy of a given institution is not an all or nothing affair, but is instead a matter of degrees. The democratic legitimacy of a constitutional system that adheres to the Constraint Principle must be compared to the alternative – and a strong case can be made that an imperfectly legitimate originalist constitutional practice is, nonetheless, more legitimate than a constitutional practice that allows a simple majority of the highest court the power to adopt amending constitutional constructions – even if their decisions are endorsed by the public in the opinion polls. In the case of the United States, five members of the Supreme Court can effectively change the Constitution. Supreme Court Justices are not elected, and they serve for life terms. The only mechanism for removing the Justices, impeachment, is difficult and conviction requires a supermajority (two-thirds) vote by the Senate. Much more would need to be said, but the brief summary in this paragraph is sufficient to demonstrate that the full case for originalism on democratic legitimacy grounds would require a lengthy and complex argument.

[44] C Barrett Lain, 'Upside-Down Judicial Review' (2012) 101 *Georgetown Law Journal* 113.

IV. Some External Reflections on Goldsworthy's Case for Originalism

Goldsworthy's *The Case for Originalism* is compact, spanning some 28 pages. It would be unreasonable to expect an in-depth examination of the foundational issues in constitutional theory in a short, programmatic statement of the arguments for originalism. Nonetheless, future work on this topic by Goldsworthy and others could be improved by reflection on questions about the structure of the debate over originalism, and the appropriate methods for justifying normative constitutional theories. In this section, I will raise two such issues. The first raises the question whether originalism can be justified without consideration of the alternatives. The second issue involves the question as to what methods of justification are appropriate when normative constitutional theories are assessed from the moral point of view.

A. The Need for Pairwise Comparison

Goldsworthy's *The Case for Originalism* does not have much to say about the alternatives to originalism, but surely the normative case for originalism must take the alternatives into account.[45] This complicates the task of justifying originalism, because there is no single alternative. Instead, there are many different forms of nonoriginalism, including the following:

Constitutional Pluralism: This is the view that law is a complex argumentative practice with plural forms of constitutional argument.[46]

Constructive Interpretation: This is Ronald Dworkin's theory, also called 'law as integrity' or the 'moral readings' theory.[47]

Common Law Constitutionalism: This is the view that the content of constitutional law should be determined by a common-law process.[48]

Popular Constitutionalism: This is the view that 'We the People' (the polity) can legitimately change the constitution through processes such as transformative appointments that do not formally amend the text.[49]

Multiple Meanings: This is the view that the constitutional text has multiple linguistic meanings and that constitutional practice should choose between these meanings on a case by case basis.[50]

[45] The legal case is different. If originalism is legally required, then the existence of alternatives is irrelevant from the legal point of view.

[46] See P Bobbitt, *Constitutional Interpretation* (Oxford, Blackwell Publishers, 1991) 12–13.

[47] See RM Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts, Harvard University Press, 1996) 2–3. The moral readings view is now strongly associated with James Fleming. See, eg, JE Fleming, 'Fidelity, Change, and the Good Constitution' (2014) 62 *American Journal of Comparative Law* 515, 515.

[48] DA Strauss, *The Living Constitution* (Oxford, Oxford University Press, 2010).

[49] For a description of popular constitutionalism, see L Alexander and LB Solum, 'Popular? Constitutionalism?' (2005) 118 *Harvard Law Review* 1594.

[50] See CR Sunstein, 'Formalism in Constitutional Theory' (2017) 32 *Constitutional Commentary* 27; RH Fallon, 'The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation' (2015) 82 *University of Chicago Law Review* 1235.

Superlegislature: This is the view that the Supreme Court (or Constitutional Court) should act as an ongoing committee of constitutional revision, with the power to adopt amending constructions of the constitutional text on the basis of the same kinds of reasons that would be admissible in a constitutional convention.[51]

Thayerianism: This is a family of views that require courts to defer to the legislature, with three variants:

Constrained Thayerianism is the view that courts should defer to the legislature, but that Congress itself should be constrained by the original meaning of the constitutional text.

Unconstrained Thayerianism is the view that courts should defer to the legislature and that the legislature should have the constitutional power to revise the constitutional text, either by adopting amending legislation, or by creating implicit amendments through ordinary statutes.[52]

Representation Reinforcement Thayerianism is the view that courts should defer to the legislature except when judicial review is necessary to preserve democracy, including protection of discreet and insular minorities and protection of democratic processes.[53]

Constitutional Antitheory: There are four views that are 'antitheoretical' in the sense that they deny that constitutional practice should be guided by any normative theory, whether that theory be originalist or nonoriginalist:

Particularism is the view that constitutional practice should be guided by salient situation-specific normative considerations in particular constitutional situations.[54]

Pragmatism is the similar view, associated with Judge Richard Posner that constitutional decisions should be made pragmatically on the basis of various normative considerations.[55]

Eclecticism is the view that different judges should embrace different approaches to constitutional interpretation and construction, and that even a single judge should adopt different approaches on different occasions.[56]

Opportunism is the view that theoretical stances should be deployed strategically to achieve ideological or partisan goals.[57]

[51] B Leiter, 'Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature' (2015) 66 *Hastings Law Journal* 1601.

[52] Both constrained and unconstrained Thayerianism are inspired by the work of James Thayer. See JB Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129.

[53] This view is strongly associated with John Hart Ely. JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).

[54] Constitutional particularism would draw on moral particularism. J Dancy, 'Moral Particularism' (*Stanford Encyclopedia of Philosophy*, revised 22 September 2017) http://plato.stanford.edu/entries/moral-particularism/ (last accessed 7 November 2018).

[55] RA Posner, 'Legal Pragmatism Defended' (2004) 71 *University of Chicago Law Review* 683 ('The ultimate criterion of pragmatic adjudication is reasonableness'.).

[56] Although eclecticism seems implicit in the discourse of constitutional theory, no theorist of whom I am aware has explicitly articulated this position.

[57] For obvious reasons, adherents of constitutional opportunism will not publicly announce their position.

Constitutional Rejectionism: These views reject the constitution as an authoritative source of law.

> Anticonstitutionalism is the view that the communicative content of constitutions, in general, should play no role in constitutional practice.[58]
>
> Constitutional Replacement theories would allow the text of a normatively attractive replacement constitution to play a role in constitutional practice, but reject any constraining role for the current constitution of a particular jurisdiction; eg, the Constitution of the United States.[59]

Ideally, the case for originalism would be made by a process of pairwise comparison, with each of the major rivals considered. But once we begin to go down this road, it becomes apparent that the issues are more complex than acknowledged by Goldsworthy. For example, the democratic legitimacy argument is implicitly based on a comparison of originalism with a rival view that grants the highest court the power to invalidate legislation or executive action on the basis of the policy preferences of the members of the court. But many of the rivals to originalism do not have this feature. For example, the Thayerian family of nonoriginalist theories severely constrains the power of the highest court to invalidate legislation; the representation-reinforcement variant of Thayerianism limits judicial invalidation of legislation to cases where judicial action actually increases the democratic legitimacy of the system. But other rivals seem to suffer from severe problems of democratic legitimacy – the 'superlegislature' view is a prime example.

B. Procedures of Justification

Goldsworthy recognises that originalism may lead to 'grave injustice' in a particular case and, by extension, could produce systematic injustice.[60] Much of the resistance to originalism in the United States is focused on this objection, but the problem of injustice for originalism is most serious when there is a lack of social consensus on the question regarding whether a given law, executive action, or judicial decision is truly unjust. In cases where there is social consensus, the ordinary democratic politics will usually be able to correct the injustice. In the much rarer cases, where injustice is required (as opposed to merely permitted) by the constitutional text, constitutional amendments will be possible – given a supermajoritarian consensus in favour of the amendment. The difficulties arise in cases where there is substantial disagreement about whether a given practice is unjust. In the United States, the paradigm case of such disagreement is abortion and the Supreme Court's decision in *Roe v Wade*. Many citizens believe that a right to reproductive autonomy is essential to the equal citizenship and personhood of women – and that a society that does not provide such a right is fundamentally unjust to a degree that undermines legitimacy.

[58] LM Seidman, *On Constitutional Disobedience* (New York, Oxford University Press, 2013).

[59] S Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford, Oxford University Press, 2006).

[60] Goldsworthy's Proposition 8 deals with this objection. Goldsworthy, 'The Case for Originalism' (n 1) 43.

Other citizens believe that the right to life of the unborn is morally equivalent to the right to life of human persons, and hence that a constitutional right to abortion is fundamentally unjust – again, to a degree, that undermines legitimacy. Given the fact of pluralism which characterises modern democratic societies, fundamental disagreements of this sort are likely to exist – although the specific issues may change over time. Citizens affirm a wide variety of views about morality and religion, and given freedom of conscience, expression and religion, this pluralism is not likely to go away.

What general method is appropriate for the justification of a normative constitutional theory? Should a constitutional theorist aim to develop a constitutional theory that fits the theorist's own normative beliefs? Or does the context of constitutional theory require that theorists consider normative disagreement and aim, instead, at a theory that could receive broad support from reasonable citizens with a wide range of moral, political, and ideological beliefs?

One possible strategy for the justification of normative constitutional theories would take the form of deductive arguments that begin with value premises upon which all or almost all reasonable citizens can agree. This strategy might work in a society with a strong consensus on a single moral or religious doctrine – or an overlapping consensus among various doctrines that converge to support a normative constitutional theory.

We can begin our investigation of these questions with the idea of reflective equilibrium. The notion of 'reflective equilibrium', familiar from the work of John Rawls,[61] has been invoked as providing an appropriate method for resolving theoretical debates in normative constitutional theory.[62] How would this method apply to the question concerning whether to affirm the Constraint Principle in particular and originalism in general? We can begin to answer this question by explicating the idea of reflective equilibrium.

Given the nature of the problems of constitutional theory, we should not expect that the claims made about constitutional meaning will usually be justified by deductive proof. Of course, deductive proof is likely to play a role at the level of supporting detail. Some positions in constitutional theory may involve contradictions, and these positions are demonstrably false. But in other cases, our starting points will be our pre-reflective beliefs about various matters, ranging from the very particular and concrete to the general and abstract. Such starting points will include relatively particular beliefs like '*Brown v Board* was rightly decided', and relatively abstract beliefs like 'The rule of law values of predictability, certainty, consistency, and publicity are an important component of political morality'. In this picture, the method of constitutional theory starts with an examination of our pre-reflective beliefs and their relationships. Some beliefs may be inconsistent. In that case, one or more of the beliefs may need to be reexamined and revised. Gradually, our pre-reflective beliefs will become more refined and coherent. At some stage, the theorist will begin to regard some of these beliefs as considered judgements. A wholly successful constitutional theory will bring

[61] J Rawls, *A Theory of Justice* (Cambridge, Massachusetts, Harvard University Press, 1971).

[62] See RH Fallon, 'Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium' (2017) 84 *University of Chicago Law Review* 123; MN Berman, 'Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause' in G Huscroft and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York, Cambridge University Press, 2011) 246.

all of our considered judgements into reflective equilibrium – a relationship of consistency and mutual support.

So far, the description of the method of reflective equilibrium has treated constitutional theory as operating within the discourse of constitutional practice. But it is not the case that our beliefs about constitutional theory fall or stand independently of our beliefs about other matters. Consider an analogy to tort law. Normative tort theory may require recourse to general normative legal theory which, in turn, must be reconciled with moral philosophy and political theory. Given a consequentialist approach to tort theory, the normative evaluation of particular tort rules may best be accomplished by utilisation of the tools of economics, which themselves may involve formal techniques. Likewise, originalist constitutional theory uses tools drawn from the philosophy of language and theoretical linguistics as the basis for claims about meaning (eg, the Fixation Thesis and the Public Meaning Thesis). The Constraint Principle is a thesis in normative constitutional theory, but its validity may depend in part on our beliefs about nonconstitutional matters within law, and a variety of other matters outside of law.

The method of reflective equilibrium may begin with our pre-reflective beliefs about various matters. Let us call these initial beliefs 'intuitions' and, in the case of constitutional matters, 'constitutional intuitions'.[63] We have beliefs about various matters (eg, about facts, physics, and aesthetics), but let us stipulate for present purposes that our constitutional intuitions are normative beliefs which are constitutionally salient. Thus, our constitutional intuitions include beliefs about the rightness or wrongness of particular cases (both real and hypothetical), about the moral soundness of constitutional doctrines and principles and about more general normative matters, such as the normative attractiveness of democratic self-government, the importance of the rule of law and so forth.

The method of reflective equilibrium assumes that there is a contrast between our intuitions (before reflection) and our 'considered judgements'. Let us use this latter phrase to designate beliefs that have been subject to reflection and evaluation. The method of reflective equilibrium assumes that our intuitions are subject to revision for various reasons. Thus, one might have an intuitive belief that *Griswold v Connecticut*[64] was correctly decided (as a matter of normative constitutional theory), but after reflection one might conclude that this intuition was incorrect and that *Griswold* was an error. The initial belief might be based on a first-order normative judgement that the decision of married couples to use contraception should not be regulated by the state, and the revision might be motivated by the second-order consideration that the courts should not have the power to create constitutional rights absent authorisation to do so by the constitutional text. Given the complexity of constitutional law and theory, it would be quite surprising if all of our pre-reflective beliefs were already in a state of perfect consistency and mutual support. Some of our beliefs will have to give way to others; other sets of beliefs may need to be modified systematically to bring them into reflective equilibrium.

[63] By using the term 'intuition', I do not mean to imply anything deep about the nature or epistemic basis of these beliefs. For example, I do not mean to imply that our moral beliefs are produced by a faculty of moral intuition, much less that there is a special faculty of constitutional intuition.

[64] *Griswold v Connecticut*, 381 US 479 (1965).

Our normative beliefs about constitutional matters exist at a variety of levels of generality, ranging from beliefs about particular cases (actual and hypothetical), to midlevel principles and constitutional doctrines, and highly abstract beliefs about political morality. Thus, we may have a belief that *Brown v Board*[65] was decided correctly, that the Equal Protection Clause forbids discrimination on the basis of race and that a principle of equal citizenship should govern the basic structure of society. To reach reflective equilibrium, we seek to make our beliefs at all of these levels of generality consistent and mutually supportive. Reflective equilibrium does not assume that beliefs at one point on the continuum, between specific considered judgements about particular matters and general considered judgements about abstract matters, have priority.[66] We might begin with a high level of confidence in our intuitions about a particular case and a lower level of confidence in our intuition about an abstract principle, or vice versa.

Rawls distinguished between wide and narrow reflective equilibrium, and this distinction is particularly important with respect to constitutional matters in a pluralist society. Because the exegesis of Rawls's theory is not important for the purpose of the matters at hand, I will introduce a third idea, 'broad reflective equilibrium', which is the specific notion that is deployed in the argument that follows.

The distinction between narrow, wide and broad reflective equilibrium can be articulated in various ways, but for present purposes, let us stipulate to the following definitions that are tailored to the constitutional context:

Narrow Reflective Equilibrium: The considered judgements of an *individual* on constitutional theory are in narrow reflective equilibrium when they are consistent and mutually supportive with each other.

Wide Reflective Equilibrium: The considered judgements of an *individual* on constitutional theory are in wide reflective equilibrium if they consider the 'conditions under which it would be fair for reasonable people to choose among competing principles [of constitutional theory], as well as evidence that the resulting principles constitute a feasible or stable conception of justice, that is, that people could sustain their commitment to such principles'.[67]

Broad Reflective Equilibrium: The considered judgements of a *political community* are in broad reflective equilibrium when a broad group of citizens are each in wide reflective equilibrium, such that there is an overlapping consensus on constitutional principles that are sufficiently similar to provide adequate guidance for constitutional practice.

There can be narrow reflective equilibrium at the individual level, but widespread disagreement about constitutional theory. And it is possible, and perhaps likely, that there

[65] *Brown v Board of Education of Topeka*, 347 US 483 (1954).

[66] Thus, the version of reflective equilibrium that I am articulating here does not assume the priority of the particular. One can imagine a particularist form of reflective equilibrium that did assume particular beliefs have priority over more general beliefs.

[67] N Daniels, 'Reflective Equilibrium' (*Stanford Encyclopedia of Philosophy*, revised 14 October 2016) http://plato.stanford.edu/entries/reflective-equilibrium/ (last accessed 7 November 2018). Daniels' definition is not specific to constitutional theory.

can be wide reflective equilibrium at the individual level, but that different individuals reach different conclusions about which constitutional principles can be the focus of a stable agreement. The emergence of broad reflective equilibrium requires that such disagreements be addressed with the aim of reaching an overlapping consensus on a set of constitutional principles that enable a stable and consistent constitutional practice. There can be broad reflective equilibrium, even though there is disagreement on a variety of issues in constitutional theory. For example, if there were overlapping consensus on several different originalist theories that affirmed the Fixation Thesis and the Constraint Principle, the remaining disagreements (eg, between public meaning theories and original methods theories) would not be so serious as to prevent the emergence of a reasonably consistent and stable constitutional jurisprudence. Broad reflective equilibrium does not require full constitutional consensus (where almost all constitutional actors affirm the same constitutional theory).[68]

Should constitutional theory aim at narrow, wide or broad reflective equilibrium? And what difference does this distinction make to the justification of the Constraint Principle? These questions are important and deep. The aim of the discussion that follows is to provide reasons for believing that constitutional theory ought to employ the method of broad reflective equilibrium (or wide reflective equilibrium in the alternative), but that the method of narrow reflective equilibrium is not appropriate.

Let us begin by examining the contrary position – that narrow reflective equilibrium provides the correct method of justification for normative constitutional theory. From the point of view of an individual (a judge or a constitutional theorist), narrow reflective equilibrium will result in a constitutional theory that is coherent. The individual theorist's views will be consistent and mutually supporting. Narrow reflective equilibrium will ensure that the individual's constitutional views are consistent with that individual's general views about political morality. Narrow reflective equilibrium begins with individual intuitions and ends with reflective equilibrium among considered judgements – from the point of view of the individual.

But it is clear that narrow reflective equilibrium does not provide the kind of justification that is appropriate to a constitutional theory for a pluralist society in which there is disagreement about deep matters – what Rawls called comprehensive religious and philosophical conceptions of the good. Our discussion of deep and shallow justifications shows why this is the case. If each individual seeks *internal consistency*, then different individuals will reach reflective equilibrium on different constitutional theories. But the primary role of a normative constitutional theory is not to provide *internal consistency*, but instead to provide a shared basis for agreement on a framework for the decision of constitutional cases. Narrow reflective equilibrium for each individual will produce a plurality of inconsistent views corresponding to the plurality of views about deep matters.

[68] The degree of consensus that is required is best understood as a function of principled constitutional stability. Disagreement that is consistent with a stable constitutional order, affirmed on the basis of principle (and not a result of the exercise of raw power), is consistent with broad reflective equilibrium.

This point can be illustrated (albeit simplistically) by considering five hypothetical justices, each of whom seeks narrow reflective equilibrium for their own constitutional theory:

Justice Immanuel holds a comprehensive deontological theory of the good and the right. His constitutional theory requires that the plain meaning of the Constitution be observed strictly and without exception by all officials and citizens.

Justice Jeremy holds a comprehensive welfarist theory of the good and the right. His constitutional theory requires that each constitutional case be decided in the way that produces the greatest sum of preference-satisfaction.

Justice Rosalind holds a comprehensive virtue-centred theory of the good and the right. Her constitutional theory requires that each constitutional case be decided in accord with the virtue of practical wisdom, so as to promote human flourishing.

Justice Francis holds a comprehensive religious conception of the good and the right. His constitutional theory emphasises the promotion of the true faith as the central aim of constitutional decisionmaking and, in particular, requires that the Constitution be interpreted to acknowledge the privileged role of the true faith in matters such as state support for religion.

Justice Gerald holds a theory of political morality in which equality of income and resources is the highest political value. His constitutional theory emphasises the promotion of economic equality as the central aim of constitutional decisionmaking.

The justices are each in narrow reflective equilibrium with respect to their own deep views, but none of the justices can affirm the method of any of the others. Moreover, members of the public who affirm a different comprehensive conception than any of the justices would have good reason to view those justices' constitutional theories as both wrong and illegitimate: internal consistency is not a sufficient basis for a shared agreement among citizens given the fact of reasonable pluralism.

Now consider the contrasting case of broad reflective equilibrium. Broad reflective equilibrium aims for consistency and mutual support among considered judgements that can be stated as public reasons. Each Justice would consider the fact of pluralism and seek agreement on constitutional principles that can be affirmed on the basis of considered judgements that can be shared by an overlapping consensus of reasonable citizens. Narrow reflective equilibrium is structured so as to produce constitutional dissensus – with different individuals and groups affirming different constitutional theories. Broad reflective equilibrium aims at constitutional consensus; more precisely, broad reflective equilibrium should aim at the greatest convergence among constitutional views that is practicable. Practicability could be theorised in various ways; for example, we might define the practicable by reference to Rawls's notion of the burdens of judgement.[69]

To reach broad reflective equilibrium, each of the hypothetical justices will need to avoid direct reliance on their own comprehensive views and instead seek public reasons or midlevel agreements. Given the fact of pluralism, constitutional theory requires principled

[69] J Rawls, *Political Liberalism* (New York, Columbia University Press, 2005) 36–37, 55–57.

compromise (broad reflective equilibrium) and not internal consistency (narrow reflective equilibrium). Because broad reflective equilibrium aims at an overlapping consensus among reasonable citizens, its achievement requires engagement among constitutional theorists, and between constitutional theorists and the wider political culture.

V. Conclusion

Goldsworthy's *The Case for Originalism* is, in my opinion, the single best version of what its title promises – a comprehensive justification for originalism, both as a theory of constitutional interpretation (and hence as a theory of the meaning of a constitutional text) and as an account of constitutional construction (and hence as a theory of constitutional practice). Although Goldsworthy's chapter is both relatively recent and admirably compact, it does more to illuminate debates about constitutional theory from an originalist perspective than anything (of which I am aware) that preceded it. The aim of this chapter has been to raise some questions about Goldsworthy's argument, to suggest ways in which it might be improved, and to make some suggestions regarding methods of argument about constitutional theory. None of what I have sought to accomplish in this chapter would have been possible without Goldsworthy's pioneering efforts.

More broadly, Goldsworthy has laid the foundations for a compelling case for originalism. Goldsworthy is surely correct that the communicative content of the constitutional text, fixed at the time of framing and ratification, is the actual 'meaning' of the text – if meaning is understood in its linguistic sense. And Goldsworthy has given us the foundational ideas for building the case that adherence to the original meaning will advance the rule of law and transparency – when originalism is compared to most of the forms of nonoriginalist living constitutionalism advocated by contemporary constitutional theorists. The opponents of originalism have yet to answer Goldsworthy's case, much less build the normative case for particular forms of nonoriginalist living constitutionalism. Despite the fact that originalism has occupied the centre stage in constitutional theory for much of the past four decades, it seems clear that much work needs to be done – both by the advocates of originalism and its opponents.