

# CONSTITUTIONAL CULTURES, DEMOCRACY, AND UNWRITTEN PRINCIPLES

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*In Living Originalism, Jack Balkin offers an account of the U.S. Constitution's legitimacy and presents a theory for reconciling originalism and living constitutionalism. In describing the Constitution's legitimacy, he distinguishes between the functions of a constitution as a "basic law," a "higher law," and "the people's law." According to Balkin, the legitimacy of the U.S. Constitution stems from its serving as a higher law, as well as the people's law. Next, in reconciling originalism and living constitutionalism, he relies heavily on the distinction between interpretation and construction. The object of interpretation, the Constitution's original meaning, should not be changed except by formal amendment, while constructions can legitimately be changed by later ones, so as to better reflect contemporary values. This Article focuses on possible weaknesses in both of these arguments.*

*First, by drawing on the constitutional traditions of other countries, this Article notes that some constitutions do not serve as higher law or the people's law. For example, the Australian Constitution serves as a basic law but not a higher law or the people's law. Nevertheless, it enjoys legitimacy by providing a framework for lawmaking and providing a fair and democratic political process. Moreover, constitutions are adopted in very different historical, social, and political contexts, to serve different needs, and communities build on them and come to depend on them in different ways. Thus, Balkin's theory may apply only to the U.S. Constitution, and the different functions of constitutions elsewhere may help to dispel any false sense of necessity in terms of serving as a higher law or the people's law.*

*This Article also expresses several doubts about Balkin's theory of living originalism. It questions whether the theory is too good to be true: that is, whether judicial review has impeccable democratic credentials or instead allows an unelected elite to moderate the power of the majority. This Article next asks whether Balkin's theory proves too much. He argues that the process of construction is essentially*

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*democratic. If, however, constitutions are justified by an act of popular sovereignty, and later constructions are legitimate for the same reasons, it is not clear why constitutional interpretations that change original meanings cannot be similarly justified. This Article ends by discussing Balkin's distinction between interpretation and construction, especially as it relates to so-called "unwritten principles." If, as Balkin suggests, unwritten principles can evolve over time, constitutional construction could, in effect, add new provisions to the Constitution, not only when necessary to implement its original underlying principles, but to implement new principles that were themselves adopted by construction.*

## I. INTRODUCTION

I am grateful for having had the opportunity to read Jack Balkin's splendid new book and to learn more about the U.S. Constitution and its historical background. I agree with much of his theory of constitutional interpretation and construction.<sup>1</sup> I agree that the supposed dichotomy between originalism and living constitutionalism is a false one; that originalism is concerned with a constitution's original meaning rather than its founders' application intentions;<sup>2</sup> and that if a constitution requires judges to apply abstract moral principles, then they must do so according to their own best judgment of what those principles require—not according to the founders' possibly partial and imperfect understanding of them.<sup>3</sup> But to make a useful contribution, I must focus in what follows on points of disagreement and possible weaknesses in his argument.

## II. DIFFERENCES BETWEEN CONSTITUTIONAL CULTURES

It might help to explain my position if I say something about the cultural context in which it was formed. Reading Balkin's account brought home to me some major differences between the U.S. and Australian constitutional traditions.<sup>4</sup>

He distinguishes between the functions of a constitution as a "basic law" (a foundational or supreme law "that trumps other law to the contrary"),<sup>5</sup> a "higher law" ("a source of inspiration and aspiration, a repository of values and principles"),<sup>6</sup> and "the people's law" ("our achieve-

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1. Throughout this Article, I use the term "interpretation" in the narrow sense defined by Balkin, which denotes an inquiry into the preexisting meaning of a constitution and does not include the creative supplementation of that meaning when it is insufficiently determinate to resolve constitutional disputes. *See infra* Part V.1.

2. *See* JACK M. BALKIN, *LIVING ORIGINALISM* 6–7 (2011).

3. *See id.* Note that I use the term "founders" throughout to mean all those involved in the adoption of a constitution: drafters, ratifiers, enactors, etc.

4. Balkin adverts to such differences in an endnote, which was included in response to my earlier comments. *Id.* at 359 n.2.

5. *Id.* at 59.

6. *Id.* at 59–60.

ment and the product of our efforts as a people, which involves a collective identification with those who came before us and with those who will come after us”).<sup>7</sup>

It is notable that some constitutions do not have all or possibly any of these functions. Britain’s largely unwritten, customary constitution, and New Zealand’s written constitution, are not “basic laws” because they do not trump other laws: they can be changed by statutes enacted by their parliaments in the ordinary way.<sup>8</sup> Neither of them serves as a “higher law” either, although the British Constitution might be regarded by the British people as “their law.”

The Australian Constitution is a basic but not a higher law, and might not qualify as “the people’s law.” Compared with its U.S. counterpart, it is “a prosaic document expressed in lawyer’s language.”<sup>9</sup> Consisting almost entirely of structural and power-conferring provisions, it lacks the grand and inspirational declarations of national values or principles that are found in a “higher law.” It includes a handful of provisions designed to suppress regional favoritism and to curb the power of the federal Parliament, but no bill of rights. Its status as “the people’s law” is dubious because, in 1992, no less than one-third of Australians were found not to know that they even have a written constitution, let alone anything about its contents.<sup>10</sup> It establishes the basic legal framework for their democratic and federal governance, but remains largely in the background and only occasionally attracts a modicum of public attention due to some dispute (usually a federal one) about its meaning.

In Australia, public commitment to and debate over principles of political morality are largely left to the political realm. Historically, social movements have rarely appealed to values they suppose to be embodied in the Constitution, except for those inspired by the structural principle of “states’ rights.” For the most part, the Constitution merely provides a framework within which debates over political morality take place, and only lawyers appeal to constitutional principles. For example, although many people might regard “the rule of law” as fundamental to the Australian legal tradition, only lawyers would think to argue that it is a principle implicit in the Constitution. Free speech has also long been celebrated as fundamental to that tradition, but lawyers have been able to attribute this to the Constitution only since 1992, when the High Court

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7. Balkin uses the term “our law.” *Id.* at 60.

8. With one exception: under these constitutions, the nations’ Parliament has “sovereign” power to enact any law whatsoever, even one that is inconsistent with the preexisting constitution, except a law that limits its own sovereign power. On the pragmatic and malleable nature of the United Kingdom and New Zealand constitutions, see Dawn Oliver, *The United Kingdom, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 329 (Dawn Oliver & Carlo Fusaro eds., 2011) and Paul Rishworth, *New Zealand, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY, supra*, at 235.

9. Anthony Mason, *The Australian Constitution in Retrospect and Prospect, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION* 7, 8 (Robert French et al. eds., 2003).

10. Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 *FED. L. REV.* 133, 146 n.87 (1996) (referencing a poll conducted by Irving Saulwick).

first “discovered” in it an implied freedom of political communication.<sup>11</sup> Most Australians are still unaware of that discovery.

According to Balkin, the success and legitimacy of the U.S. Constitution stem from its serving as a higher law rather than merely as a basic law.<sup>12</sup> I am not sure why. The lack of grand, inspirational principles in their Constitution does not undermine Australians’ attachment to their political and legal system. Their Constitution apparently enjoys legitimacy because, as a basic law providing a “framework for politics and lawmaking,”<sup>13</sup> it gives them access to a fair and democratic political process through which they can pursue their political aspirations. It appears unnecessary for it also to function as a “higher law” that gives authoritative expression to those aspirations.<sup>14</sup>

Balkin also regards it as “central” to Americans’ attachment to their Constitution that its status as “their law” provides them with “a constitutive narrative through which [they] imagine themselves as a people, with shared memories, goals, aspirations, values, duties, and ambitions.”<sup>15</sup> Australians, on the other hand, seem perfectly able to identify themselves as a historically continuing people, characterized by some basic shared values and commitments, without their Constitution playing a large part in the narrative, except as the essential legal device by which federation was attained. The common values and commitments that define them as a people can be left unwritten—the Constitution can take them for granted, and vice versa—while serving the functions that Balkin emphasizes (providing a collective narrative, binding different generations together, and so on).<sup>16</sup>

Indeed, the British have for many centuries enjoyed a high regard for themselves as a historically continuous people, whose distinctive cultural virtues have enabled them to play a vital role in European and world history, although they lack any written constitution at all. Admittedly, appeal to a largely fictional “Ancient Constitution,” embodied in custom rather than written law, was for centuries a standard gambit in English political rhetoric, which played much the same role that Balkin sometimes attributes to the U.S. Constitution.<sup>17</sup>

Much in Balkin’s account of U.S. constitutional culture is alien to the Australian experience. I dispute his assertion that “[b]oth rights pro-

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11. See *infra* text accompanying notes 139–46.

12. BALKIN, *supra* note 2, at 85.

13. *Id.* at 98.

14. Cf. *id.* at 59–60 (describing the U.S. Constitution’s function as a higher law, which “represents important values that should trump ordinary law, supervise quotidian acts of governmental power, and hold both law and power to account”).

15. *Id.* at 61.

16. *Id.* at 96–98.

17. See *id.* at 333; JANELLE GREENBERG, THE RADICAL FACE OF THE ANCIENT CONSTITUTION: ST. EDWARD’S “LAWS” IN EARLY MODERN POLITICAL THOUGHT 3–4 (2001); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 14–15 (1987).

tections and structural protections are necessary to construct a workable political sphere,” without which “a decent form of politics is not possible.”<sup>18</sup> The founders of Australia’s Constitution, who in this respect were influenced more by the British than the U.S. tradition, did not agree. In general, they deemed it both unnecessary and unwise to impose substantive fetters on their parliaments’ powers. One of their reasons was that judicial interpretations of abstract rights could have unpredictable and undesirable consequences.<sup>19</sup> Their faith in the common law and progressive legislative reform by democratically elected parliaments has largely been vindicated by the Australian record of rights protection, which is far from perfect, but at least as meritorious as that of the United States.<sup>20</sup>

I would especially dispute the asserted necessity of “rights protections” in the case of such abstract and open-ended guarantees as the privileges or immunities clause in the Fourteenth Amendment. This, according to Balkin, protects whatever unenumerated rights the bulk of the American people, at any particular time, regard as basic rights to which all citizens are entitled.<sup>21</sup> If, by definition, the bulk of the American people believe this of some right, it is unlikely to be threatened by either Congress or the vast majority of state legislatures. The only function of the clause is then to facilitate a mopping-up operation in a small minority of outlier states, to bring them into line with the prevailing national sentiment.<sup>22</sup> Rather than being essential to a decent form of politics, this would seem at best merely to accelerate political reform in the boon-docks.

The whole idea of the Constitution as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians, although an increasing number would like to amend the Constitution so that it could play a more “educative” role in spreading a “human rights culture.”<sup>23</sup> In Australia, what Balkin calls “redemption” of social injustice<sup>24</sup> is the responsibility of the political realm, not the constitutional one. I have no doubt that Australians aspire to make their community more just over time. But they aspire to do so through the political process, not through the “construction” of abstract constitutional principles.<sup>25</sup> Balkin

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18. BALKIN, *supra* note 2, at 24. To be fair, he also acknowledges the historical and social contingency of the U.S. tradition. *Id.* at 81–82, 90–91.

19. See Jeffrey Goldsworthy, *The Constitutional Protection of Rights in Australia*, in AUSTRALIAN FEDERATION: TOWARDS THE SECOND CENTURY 151, 151–57 (Gregory Craven ed., 1992).

20. See PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA (Tom Campbell et al. eds., 2006).

21. BALKIN, *supra* note 2, at 209–10.

22. *Id.* at 211–12.

23. See, e.g., George Williams, *Constructing a Community-Based Bill of Rights*, in PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 247 (Tom Campbell et al. eds., 2003).

24. *Id.* at ch. 5.

25. This point is subject to some uncertainty on my part as to the scope of “constitutional construction” in Balkin’s theory. See *infra* note 104. If any political decision involves constitutional con-

observes that “[i]n every generation people have seen injustice in their society and made claims in the name of the Constitution to remedy those injustices.”<sup>26</sup> I see no good reason why, even in the United States, their objective could not have been achieved through ordinary political struggle, particularly if he is right to repeatedly claim that constitutional construction must sooner or later bend to the popular will. He acknowledges that issues must become prominent in political debate before they can be brought to the courts,<sup>27</sup> and even “discrete and insular minorities” cannot be helped by litigation until they have become politically potent enough to command recognition.<sup>28</sup>

Why should claims about justice have to be made “in the name of the Constitution”?<sup>29</sup> Why not in the name of justice? Is justice valued only or mainly because the Constitution has committed the nation to it? If there is popular support for more justice, why not allow it to be achieved sooner, through ordinary politics, rather than later, through convoluted constitutional processes that Balkin attempts to justify as a brake designed to slow down political change?<sup>30</sup> It is true that political change can be hasty and improvident. But it may equally, and perhaps more often, be long overdue. Why should Americans have had to put up with *Lochner*-era constructions for so long? Moreover, many of the constitutional provisions that structure politics in the United States were designed to make political reform arduous. Why add to them a process of judicial review of abstract rights that, according to Balkin, is also inherently conservative?<sup>31</sup>

I concede that formally declaring the nation’s commitment to abstract moral principles might serve to educate and inspire, as Abraham Lincoln suggested.<sup>32</sup> But Australians seem to get by without constitutional prompting. For them, basic values and commitments are up for grabs along with everything else in politics. Of course, some are much more deeply entrenched in popular sentiment than others and would be widely regarded as almost definitive of the nation’s character. So again, enumeration in a constitution is not needed for that purpose.

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struction, then the distinction I draw in the text evaporates. But then, so too does much of the utility of the very notion of constitutional construction.

26. BALKIN, *supra* note 2, at 75.

27. *Id.* at 321–24.

28. *Id.* at 322.

29. *Id.* at 75.

30. *See id.* at ch. 14.

31. I am therefore attracted to the “middleman” objection that Balkin attempts to rebut. *See id.* at 325–28. I acknowledge that, as he cautions, his book necessarily assumes rather than argues for judicial review. *Id.* at 68.

32. *See id.* at 76.

Balkin suggests that constitutional principles as abstract and vague as those in the Fourteenth Amendment can “set the terms of political discourse”<sup>33</sup> and “channel and discipline future political judgment.”<sup>34</sup> But as he also observes, the challenge of constitutional design is to structure and channel political decision making without being overly prescriptive.<sup>35</sup> Much later, he welcomes the fact that these principles are so vague that they can be appropriated by both sides of the culture wars, liberal and conservative.<sup>36</sup> The “channels” are so broad, and the “discipline” so slack, that I wonder how much they really change the course of political discourse, other than by enabling judges to intervene and to influence or override political judgment.

On this point, Balkin likens the accepted method of constitutional interpretation to “a common language that allows people with very different views to reason together”: it “must be a language of legitimation and a language of dissent.”<sup>37</sup> The Constitution would lose democratic legitimacy if political antagonists could not find their opposing political views vindicated by the Constitution.<sup>38</sup> I doubt that it is as capacious as Balkin suggests. It is a product of late eighteenth-century liberalism and republicanism that is now, arguably, somewhat antiquated. It does not protect the social and economic rights that are found in modern constitutions such as that of South Africa.<sup>39</sup> To take one example of the possible consequences, consider the plight of social democrats in the United States who believe that universal health care, as provided in all other western democracies, is essential to treating the community’s neediest members with decency. Social democrats can use the political process to advocate this. But are they disadvantaged by the absence of such rights in the Constitution, which embodies the ideals of eighteenth-century liberalism rather than those of twentieth-century social democracy, given that it is revered as the repository of the nation’s most cherished values? Do political ideals that were undreamt of when the Constitution was adopted face an uphill battle for social acceptance if they cannot be shoehorned into it? And, on the other hand, might this tend to delegitimize the Constitution in the eyes of their advocates? Consider also the protection in the Second Amendment of the right to bear arms, which (with respect) most people in other western democracies find bizarre. Does this outdated clause, simply by virtue of appearing in the Constitution, give an unfair rhetorical and political advantage (as well as a legal one) to opponents of gun control?

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33. *Id.* at 25.

34. *Id.* at 29.

35. *Id.* at 29–31.

36. *Id.* at 280–82.

37. *Id.* at 135–36.

38. *See id.* at 136.

39. S. AFR. CONST., 1996 ch. 2 (Bill of Rights).

On the other hand, insofar as Balkin is right that the Constitution or the methodology for construing it are so flexible that both upholders and critics of the status quo can find their opposing political visions to be vindicated, what is the point? The Constitution is then like an ink blot, onto which any vision can be projected. And its democratic legitimacy seems based on the kind of myth that Balkin describes as “a false story that obfuscates the truth about social life.”<sup>40</sup> Why not have political antagonists press their demands in the language of ordinary politics, rather than encouraging them to do so in a constrained and somewhat artificial terminology, appealing to an ancient and indeterminate text? After all, their most fundamental concern is surely injustice or good governance, not compliance with a clause in a legal instrument. And if so, then to repeat a point made earlier, perhaps the real practical function of the constitutional text is not to contribute to political debate, but to enable unelected judges to intrude into it.

The notion that constitutional interpretation and construction by citizens is the “standard case”<sup>41</sup> is also alien to Australia. It is true that the political branches of government need to form opinions about the scope of their own constitutional powers in order to exercise them.<sup>42</sup> But in Australia, the Constitution has always been regarded as first and foremost a legal instrument that the High Court has supreme authority to interpret and enforce.<sup>43</sup> This difference in constitutional tradition may have important consequences for the defense of originalism. My defense of it rests much more heavily than Balkin’s on the undemocratic nature of constitutional change wrought by judicial nonoriginalism.<sup>44</sup> Conversely, he presumably needs to rely more heavily on other objections to nonoriginalism. I will return to this point shortly.

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40. BALKIN, *supra* note 2, at 97.

41. *Id.* at 17.

42. On the role of the national Parliament in the development of Australia’s constitutional system, see generally PARLIAMENT: THE VISION IN HINDSIGHT (G. Lindell & R. Bennett eds., 2001). See also *infra* note 104.

43. See CHERYL SAUNDERS, THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS 76 (2011).

44. See Jeffrey Goldsworthy, *The Case for Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 51–57 (Grant Huscroft & Bradley W. Miller eds., 2011); Jeffrey Goldsworthy, *Constitutional Interpretation: Originalism*, 4 PHIL. COMPASS, 682, 687–88 (2009); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, MELB. U. L. REV. 677, 686–87 (2000); Jeffrey Goldsworthy, *Original Meanings and Contemporary Understandings in Constitutional Interpretation*, in CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT: ESSAYS IN HONOUR OF GEORGE WINTERTON 245, 248 (HP Lee & Peter Gerangelos eds., 2009); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 38–39 (1997).



### III. IS BALKIN'S THEORY TOO GOOD TO BE TRUE?

Balkin claims that his theory reconciles, or strikes a judicious compromise, between various contending positions: originalism and living constitutionalism, judicial review and popular sovereignty,<sup>45</sup> supermajoritarian constitutionalism and majoritarian democracy.<sup>46</sup> In addition, he claims that it is politically neutral: living constitutionalism can be appropriated by either side of the culture wars, liberal or conservative.<sup>47</sup>

Is all this too good to be true? While I accept the reconciliation of originalism and living constitutionalism, I question Balkin's attempt to show that judicial review as practiced in the United States has impeccable democratic credentials.

According to Balkin, the Constitution must serve not only as "basic law" and "higher law," but also as "our law": a product of "the constitution-making power of the public."<sup>48</sup> The legitimacy of the "living constitution" — "the Constitution-in-practice" — which is constructed by the political and judicial branches, "comes from their joint responsiveness to public opinion over long stretches of time."<sup>49</sup> Only then is it ultimately grounded "in democracy and in the ideals of popular sovereignty."<sup>50</sup> He warns against placing "development of the Constitution in the hands of elite jurists, obscuring its connection to . . . the people's constitution-making power."<sup>51</sup> Judicial decisions must be open to the influence of popular values in order to be "accepted and thus legitimated by the public."<sup>52</sup>

It is therefore fortunate that the constitutional constructions of the New Deal and the post-War civil rights periods are not only consistent with the Constitution's original meaning, but also democratically legitimate. They were mainly the work of the political branches of government, responding to social reform movements,<sup>53</sup> fortified by judicial contributions that unconsciously responded to the opinions of "national majorities."<sup>54</sup>

Balkin does not claim that in exercising judicial review the judges should be self-consciously guided by public opinion. To the contrary, they should behave like lawyers and employ orthodox professional reasoning, without attempting to respond to changing times or placate popular sentiment.<sup>55</sup> But judicial decision making responds to public opinion

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45. BALKIN, *supra* note 2, at 287–88.

46. *Id.* at 327.

47. *Id.* at 112, 280–82.

48. *Id.* at 118; *see supra* notes 5–7 and accompanying text.

49. BALKIN, *supra* note 2, at 22.

50. *Id.* at 278.

51. *Id.* at 123.

52. *Id.* at 115.

53. *Id.* at 283.

54. *Id.* at 289.

55. *Id.* at 328, 332–34.

unconsciously and indirectly. The judges' legal methodology leaves room for the inevitable influence of social and political movements.<sup>56</sup> This is mainly because: (1) they are inevitably influenced by changes in community values brought about by social and political struggle;<sup>57</sup> (2) they are members of a national elite that also controls the nation's political branches, and they tend to share its values;<sup>58</sup> (3) they are appointed by the political branches partly because of their social and political opinions;<sup>59</sup> (4) they are constrained by prior constitutional constructions of the political branches, which shape the constitutional landscape in which they operate;<sup>60</sup> and (5) issues must become prominent in political debate before they are even brought to the courts.<sup>61</sup> The upshot is that even the courts' constitutional constructions are "the residue or the sediment of previous acts of constitutional politics" that are "accepted and thus legitimated by the public."<sup>62</sup> Those members of the public who do not regard them as legitimate are free to agitate for change.

While these factors obviously help shape judicial doctrine, Balkin acknowledges that it does not simply mirror current public opinion.<sup>63</sup> It is influenced by, but also itself influences, public opinion.<sup>64</sup> Judges tend to share the values of those who appointed them, rather than current values.<sup>65</sup> They tend to be biased towards the status quo,<sup>66</sup> and they slow down change by checking and balancing other political forces.<sup>67</sup> They act as a brake, to retard excessively hasty and improvident political change, without ever having the last word.<sup>68</sup> In summary:

The purpose of judicial review in this model is to represent and protect, in as legally principled a way as possible, the constitutional values of temporally extended majorities, and to prevent drastic changes in those constitutional values unless there has been extended and sustained support for change that is reflected in long-term changes in constitutional culture.<sup>69</sup>

Judicial constructions are therefore democratic in the long run if not in the short term.<sup>70</sup> They are countermajoritarian only with respect to regional outliers.<sup>71</sup>

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56. *Id.* at 283–84.

57. *Id.* at 331.

58. *Id.* at 289.

59. *Id.*

60. *Id.* at 283–84, 297–305.

61. *Id.* at 322.

62. *Id.* at 114–15; *see also id.* at 69–73.

63. *Id.* at 287.

64. *Id.* at 289–90, 324–25.

65. *Id.* at 289, 303.

66. *Id.* at 326.

67. *Id.* at 307.

68. *Id.* at 289–90.

69. *Id.* at 328.

70. *Id.* at 326–27.

71. *Id.* at 302.

I am not convinced by this. The idea that democratic legitimacy comes from judicial review being indirectly co-opted by social movements can be turned on its head: social movements go to the courts because they cannot persuade enough of their fellow citizens to endorse their views. It may be true that “constructions gain democratic legitimacy by popular acceptance garnered over longer periods of time.”<sup>72</sup> But the fact that the public eventually comes to accept changes originally made by elites—perhaps because it does not have a real opportunity to do otherwise—does not make the introduction of those changes democratic. Even dictators, if they wish to retain power, must accommodate enduring public sentiment, while attempting to shift it in their favor.

The process of constitutional construction that Balkin describes involves, as he would no doubt acknowledge, a complex interaction of majoritarian and elite forces. Judicial construction falls within the elite category, even if it is strongly influenced by the values of extended national majorities. The process overall is imperfectly democratic, and it strikes me as an exaggeration to describe it in terms of “the people’s constitution-making power.”<sup>73</sup> I prefer John Hart Ely’s description of it as exemplifying the ancient theory of “mixed government,” which recommends that an unelected elite be empowered to moderate the excesses of government by the people.<sup>74</sup> After quoting from Tribe’s and Dworkin’s accounts of judicial review, he remarks that “the message is clear: government by the people may be an ennobling myth, but sometimes the people get it wrong, and as the reflective elite element in our law-making system, the justices must keep them within the bounds of what is acceptable to the reasoning class.”<sup>75</sup>

Ely adds that this “turn[s] my stomach . . . I simply cannot understand by what right the educated elite can lay claim to any sort of veto on the collective judgment of its (okay, our) fellow citizens.”<sup>76</sup>

#### IV. DOES BALKIN’S THEORY PROVE TOO MUCH?

I also wonder whether, from an originalist perspective, Balkin’s theory proves too much. He argues that the processes through which the Constitution-in-practice is often changed through “construction” are essentially democratic. But if so, a case could surely be made that even the Constitution’s original meaning should be open to change in the same, essentially democratic, fashion. At the very least, his argument undermines originalist criticisms that nonoriginalist interpretation is undemocratic.

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72. *Id.* at 121.

73. *Id.* at 123.

74. John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 291–92 (1999).

75. *Id.* at 290.

76. *Id.* at 291.

In defending originalism in the Australian context, I rely heavily on judicial departures from original meanings being (1) contrary to the mandated amendment procedure, which requires a referendum;<sup>77</sup> and therefore (2) contrary to the rule of law; and also (3) profoundly undemocratic.<sup>78</sup> Balkin's theory, on the other hand, can place scant reliance on the democratic objection, given its central thesis that the courts are constrained by the opinions of long-term majorities. It is possible that Balkin might also be reluctant to rely on the objection from democracy because the supermajoritarian requirements of Article V are so onerous as to be arguably undemocratic, by making it much too easy for minorities to veto constitutional amendments.<sup>79</sup> The upshot is that Balkin's defense of originalism against nonoriginalism must rely mainly on rule of law arguments.

Balkin observes that judges appear to lack legitimacy in changing the meaning of hard-wired constitutional rules.<sup>80</sup> As for why, he appeals to the principle of popular sovereignty.<sup>81</sup> Since the Constitution was adopted by "the people," it should not subsequently be changed by anyone else. But founding the legitimacy of a very old constitution on original popular ratification is dubious. Balkin says that on one alternative view (that of common law constitutionalist David Strauss), the Constitution "could be any text produced by anyone, as long as Americans find it useful to settle matters,"<sup>82</sup> apparently regarding this as a kind of *reductio ad absurdum*. Yet the Canadian Constitution almost fits this description: the British North America Act is a British statute enacted in 1867 that Canadians continue to find useful in settling constitutional matters.<sup>83</sup> Although it was not originally adopted by "the people," it now enjoys as much legitimacy in Canada as the U.S. Constitution has in the United States. That a constitution originated in an act of popular sovereignty is unnecessary to its current legitimacy as law. But Balkin's reliance on popular sovereignty is dubious for a second reason. Even when a constitution originated in an act of popular sovereignty, if later constitutional constructions are legitimate for the same reason,<sup>84</sup> it is not clear why constitutional interpretations that change original meanings cannot be similarly justified.

Balkin often says that the Constitution retains legitimacy because citizens can work to change constructions with which they vehemently

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77. AUSTRALIAN CONSTITUTION S 128.

78. See *supra* note 44 and accompanying text.

79. The Australian equivalent, s 128, also includes a supermajoritarian requirement, but it is far less onerous and has played a minor role in the defeat of proposed amendments. AUSTRALIAN CONSTITUTION S 128.

80. BALKIN, *supra* note 2, at 53–54.

81. *Id.* at 54.

82. *Id.*

83. See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 55 (Jeffrey Goldsworthy ed., 2006).

84. BALKIN, *supra* note 2, at 54–55.

disagree.<sup>85</sup> He insists that the legitimacy of the Constitution-in-practice depends on it reflecting contemporary values: it must be “our law.”<sup>86</sup> Why is the same not true of the meaning of the written Constitution? Balkin claims that once living constitutionalists realize that the original meanings of constitutional rights are not determined by original expectations about the applications of those rights, they have little reason to oppose his theory of “framework originalism.”<sup>87</sup> But what if elements of the original meaning have themselves come to feel like an imposition from an alien past, which the public does not believe it has a “fair chance” to change<sup>88</sup> because of the supermajoritarian straitjacket of Article V? My point is that the defense of originalism could be jeopardized if too much weight is placed on the principle of popular sovereignty: such a strategy might lead to a collapse into something like Bruce Ackerman’s position.<sup>89</sup>

Balkin’s defense of original meaning often seems to rest on an assumption: Americans happen to have committed themselves to accepting the Constitution as the plan for their self-government,<sup>90</sup> and this entails respect for the plan’s original meaning.<sup>91</sup> Otherwise, the plan would be subject to change as a result of semantic happenstance: fortuitous changes in the popular meanings of the words used to communicate the plan.<sup>92</sup> But Balkin needs an argument for *why* Americans should *continue* to accept their commitment to the plan, including the severe obstacles to changing it that Article V imposes on them. He suggests that only if Americans have fidelity to the original plan can it provide a source of redemptive principles they can claim as their own.<sup>93</sup> But I see little reason to think that fidelity to an evolving plan would not serve this purpose just as well as fidelity to evolving understandings of abstract principles within an otherwise fixed plan. Moreover, changes to the plan could be made intelligently in light of the evolution of cultural norms, rather than unthinkingly by semantic happenstance.

For these reasons, Balkin’s defense of originalism may need to rely more heavily on fidelity to original meaning being entailed by rule of law values, independently of such considerations as popular sovereignty or

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85. See, e.g., *id.* at 334–36.

86. *Id.* at 60.

87. *Id.* at 41–43.

88. *Id.* at 72.

89. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–69 (1991) (contrasting the “modern” system of higher lawmaking, which Ackerman describes as a “successful movement in constitutional politics,” from the “classical” system, which “operates along the lines sketched by the Founding Federalists in Article Five of the original Constitution”). Balkin distinguishes his position from Ackerman’s in BALKIN, *supra* note 2, at 309–12.

90. BALKIN, *supra* note 2, at 36, 38, 45.

91. *Id.* at 35–36.

92. *Id.* at 36–37. His examples include “domestic Violence” and “Republican Form of Government.” *Id.* at 37.

93. *Id.* at 98–99.

democratic legitimacy.<sup>94</sup> He could argue that constitutional construction can be pursued democratically only because of the stable framework provided by hard-wired rules interpreted by originalist methodology, and that democracy itself would be jeopardized if the framework itself were up for grabs in the political melee. But he might find this difficult. He maintains that democratic legitimacy is enhanced by constitutional construction being a game that both sides of politics can play, and win, at different times. He might be hard pressed to deny the same virtue to nonoriginalist interpretation.

One basic reason why judges cannot legitimately change hard-wired rules is that they have no legal authority to do so. Indeed, Article V implicitly withholds any such authority from them. In my opinion, considerations of democracy reinforce this point but do not make it redundant. If judges were to change the original meaning of the Constitution, they would lack what Balkin calls procedural legitimacy, which is distinct from moral legitimacy and democratic legitimacy (which tends to be his focus).<sup>95</sup> Balkin does mention the rule of law, but indicates that for his purposes it is secondary to the principle of popular sovereignty.<sup>96</sup> He also underemphasizes the exclusivity of the Article V amendment process.

## V. DISTINGUISHING INTERPRETATION FROM CONSTRUCTION: GENUINE AND SPURIOUS IMPLICATIONS

### A. *Distinguishing Interpretation from Construction*

The distinction between interpretation and construction is at the heart of Balkin's theory. The object of interpretation, the Constitution's original meaning, should not be changed except by formal amendment.<sup>97</sup> It follows that correct interpretations should not be changed. On the other hand, earlier constructions can legitimately be changed or repudiated by later ones, so as better to reflect contemporary values.<sup>98</sup> That is how Balkin reconciles originalism, which concerns interpretation, with living constitutionalism, which concerns construction.<sup>99</sup> It is therefore crucial that we correctly categorize any instance of judicial elucidation or elaboration (to use neutral terms) of the Constitution: is it interpretation, or construction?

Interpretation aims at revealing or clarifying the Constitution's original meaning. Construction begins when interpretation is exhausted: when the original meaning of the Constitution is not sufficiently specific,

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94. *Id.* at 95, 329.

95. *Id.* at 65.

96. *Id.* at 329.

97. *Id.* at 10.

98. Balkin asserts that construction is today the dominant method of constitutional reform, being more flexible etc. than formal amendment. *Id.* at 319.

99. *Id.* at 23, 327.

or cannot be identified with sufficient specificity, to settle the issue at hand. In order to decide that issue, constructors have no alternative but to exercise either a law-making or law-applying discretion.<sup>100</sup> For example, if after all available evidence of its original meaning has been exhausted, a constitutional provision remains ambiguous, constructors must choose between its possible alternative meanings. If its original meaning is inherently vague, they must choose how to resolve the vagueness: where to draw the line that is required in the borderline zone of indeterminacy. These choices are not governed by the Constitution itself, because either its meaning or all accessible evidence of that meaning, has been exhausted. Constructors are free to base their choice on the contemporary values of extended national majorities. It follows that, as these values change, constructions can change, without the Constitution itself being illegitimately altered.

If this is right, the distinction between interpretation and construction is an instance of the broader distinction drawn by legal positivists between identifying determinate law and exercising law-making discretion to cure underdeterminate law.<sup>101</sup> Ambiguity as well as vagueness or gaps are familiar kinds of underdeterminacy. This is consistent with much of what Balkin says about construction, such as that it is employed when original meaning is uncertain or ambiguous,<sup>102</sup> when vagueness or gaps in the Constitution must be resolved to enable it to be applied,<sup>103</sup> and when the Constitution must be “filled out” or “fleshed out” in order to be implemented.<sup>104</sup>

I will later suggest that occasionally, construction can legitimately go beyond the curing of indeterminacies.<sup>105</sup> Judges sometimes correct omissions in a constitution, by adding to it what they call “implications” to enable it to achieve what they regard as its essential purposes.<sup>106</sup> That must surely be classified as construction, rather than interpretation.

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100. *See id.* at 23.

101. There is an enormous literature on this, starting with H.L.A. HART, *THE CONCEPT OF LAW* ch. 7 (1961), and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 4 (1977).

102. BALKIN, *supra* note 2, at 341–42 n.2.

103. *Id.* at 282.

104. *Id.* at 3–4. Balkin also talks about construction being required to “build out the American state” by establishing laws or institutions (such as government departments) to serve constitutional purposes. *Id.* at 5. No doubt when most statutes are passed, the legislature assumes that it has constitutional authority to pass them. But does it follow that in every case the legislature has engaged in constitutional construction? Surely not in unproblematic cases, when the Constitution plainly permits a variety of possible laws or institutions to be established. *Id.* at 297–300. That is just ordinary democratic policy making at work. Surely constitutional construction takes place only when there is some genuine uncertainty or dispute about the meaning or application of the Constitution and a conscious effort to resolve it. Balkin refers to the “overlap” between construction and “ordinary processes of policy and lawmaking,” *id.* at 297, suggesting that construction only takes place when it “help[s] forge new understandings” of constitutional powers, *id.* at 299, but advises us not to worry too much about the distinction. *Id.* at 300.

105. *See infra* Part V.C.

106. *See infra* Part V.C.

B. *The Inexplicit Component of Constitutional Meaning: Ellipses, Implicit Assumptions, and Implications*

The distinction between interpretation and construction makes it crucial to determine exactly what “original meaning” is. The more substantial and determinate it is, the more unchangeable content the Constitution has—and the less need there is for the construction, on that fixed foundation, of a changeable superstructure of doctrine. For example, if the original meaning of the Constitution were confined to the original literal meaning of its terms, its content would be much thinner—much less substantial and determinate—than if original meaning includes non-literal meanings, implications, and presuppositions. There is a tendency in recent accounts of the “new originalism,” including Balkin’s, to equate original meaning with original semantic meaning.<sup>107</sup> But, depending on what is meant by “semantic,” this may be too narrow.

Balkin acknowledges that the semantic meaning of a constitutional provision can be nonstandard or nonliteral: legal terms can be terms of art, synecdoches, or metonyms.<sup>108</sup> I would add that constitutional provisions can also include ellipses: they can omit intended qualifications that are obvious from the context. For example, just as “everyone has gone to Paris” means “everyone in some contextually defined group has gone to Paris,” the Australian Parliament’s express power to make laws “with respect to . . . taxation” is a power to make laws “with respect to its own taxation” and not “with respect to all taxation including state taxation.”<sup>109</sup>

The meaning of a legal text, like that of any communication, can also include presuppositions (tacit assumptions) and other implications. As I use the term, presuppositions differ from what the philosopher H.P. Grice famously called “implicatures.”<sup>110</sup> The latter are meanings that a speaker deliberately attempts to communicate by implication, by providing the audience with clues that they need to “read between the lines.” Deliberate implications are rare in legal texts, because lawyers usually attempt to be as explicit as possible to avoid any chance of misunderstanding. Presuppositions, or tacit assumptions, are not deliberately communicated by implication. Instead, they are taken for granted: they

107. BALKIN, *supra* note 2, at 12–13, 43–44, 104. But prominent originalists do acknowledge implications. See, e.g., Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U.L. REV. 615, 622–26 (2009); Lawrence B. Solum, *Semantic Originalism* 58, 74–75 (Univ. of Ill. Coll. of Law, Ill. Pub. Law and Legal Theory Research Papers Series No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

108. “Congress” as well as “speech” and “press” in the First Amendment are synecdoches or metonyms—because otherwise the amendment would be ineffectual. BALKIN, *supra* note 2, at 204; see also *id.* at 13.

109. AUSTRALIAN CONSTITUTION S 51(ii). Section 92 of this Constitution is also notoriously elliptical: it provides that interstate trade, commerce and intercourse shall be “absolutely free [period],” which is now understood to mean something like “absolutely free from discriminatory protectionism.” AUSTRALIAN CONSTITUTION S 92; see also *Cole v. Whitfield* (1988) 165 CLR 360 (Austl.).

110. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 24–40, 138–43, 269–82 (1989).



are so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account.<sup>111</sup>

As Justice Felix Frankfurter once said of statutory interpretation (and constitutional interpretation is the same), the most fundamental question is “[w]hat is below the surface of the words and yet fairly a part of them?”<sup>112</sup> This is a vital but undertheorized issue for theories of constitutional interpretation. In Australia, complaints about judicial activism have involved allegations of the spurious “discovery” of nonexistent implications at least as often as accusations of unintended meanings being given to words in the text.<sup>113</sup>

Many philosophers of language now regard literal meanings “as typically quite fragmentary and incomplete, and as falling far short of determining a complete proposition even after disambiguation.”<sup>114</sup> Our words often provide the bare bones of what we mean, which can only be properly understood if many background assumptions are grasped. If not, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. If I order a hamburger in a restaurant and carefully list all the ingredients I want, I do not think it necessary to specify that they should be fresh and edible, the meat not too cold, and so on. If I thought about this at all, I would expect it to be taken for granted. Even if I did specify those requirements, I would not think to add that the hamburger should not be encased in a cube of solid lucite plastic that can only be opened by a jackhammer.<sup>115</sup> My order implicitly requires a hamburger that can be immediately eaten without much difficulty.

The inevitable dependence of meaning on tacit assumptions that are taken for granted is true of legal texts, including statutes and constitutions. Despite attempts by lawyers who draft such documents to be very explicit, some dependence on presuppositions is inescapable. They include simple common sense, which is why the old “golden rule” requires that provisions sometimes be understood nonliterally to avoid patent ab-

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111. See Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, in *FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR LESLIE ZINES* 150, 164–68 (Geoffrey Lindell ed., 1994). Randy Barnett accepts the existence of implicatures but does not agree that tacit assumptions form part of the meaning of constitutions. Barnett, *supra* note 107, at 621–29. I think he is wrong in that respect and that most of his examples of implicatures in contracts and constitutions are really tacit assumptions.

112. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 533 (1947).

113. See, for example, the discussion of the implied freedom of political communication at *infra* notes 139–46 and accompanying text.

114. Dan Sperber & Deirdre Wilson, *Pragmatics*, in *THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY* 468, 477 (Frank Jackson & Michael Smith eds., 2005); see also Andrei Marmor, *The Immorality of Textualism*, 38 *LOY. L.A. L. REV.* 2063, 2065–66 (2005) (“Judges typically need to interpret statutes . . . precisely because the meaning of the relevant statutory provision is not clear enough to yield a particular outcome . . . . In other words, from the perspective of a theory of interpretation, just telling judges that a statutory provision means what it literally states is mostly quite unhelpful.”).

115. JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 126–28 (1979).

surditities.<sup>116</sup> They may also include preexisting legal principles such as *mens rea*, which is usually held to be implicit in statutes creating new criminal offenses even without any express reference to it.<sup>117</sup> All the presumptions used in statutory interpretation can arguably be justified on this ground, in principle if not always in practice: the context provided by the general law implicitly limits language that, read literally, would be overinclusive.<sup>118</sup> These include the presumption that statutes are not intended to extend beyond territorial limits, to be retrospective, to override fundamental common law freedoms, and so on.

Constitutions may rely on background assumptions more than other legal instruments, because they are more often expressed in general terms intended to apply over very long periods to unpredictable future developments. Balkin acknowledges that constitutional drafters sometimes “leave things silent . . . because certain matters go without saying [or] because they are implicit in the structure of the constitutional system.”<sup>119</sup> One example may be the power of judicial review of itself. In Australia, at least, this power was undoubtedly presupposed by the founders although it is not explicitly granted by the Constitution.<sup>120</sup> Balkin mentions another example of a tacit assumption: the role of *stare decisis* in constitutional interpretation. As he suggests, “a common law style system of precedents was entirely foreseeable and indeed is implicit in the constitutional framework of a country with a common law tradition.”<sup>121</sup> Other suggested presuppositions, or perhaps implications, that have been inferred from the Australian Constitution include implied legislative powers, the separation of judicial power, and implications protecting the states from certain kinds of federal laws, which one judge described as “tacit” or “underlying assumptions.”<sup>122</sup>

There are many examples of presuppositions and implications that have been inferred from the terms of the U.S. Constitution. The “dormant” or “negative” commerce clause that restricts state legislative power with respect to interstate commerce is one: it was inferred, whether rightly or wrongly, from the commerce power expressly conferred on Congress.<sup>123</sup> Other examples that have been suggested include a presupposition in the Ninth Amendment that the people have unenumerated rights.<sup>124</sup> A possible implication that the U.S. Framers famously took pains to avoid, by adding the Ninth and Tenth Amendments, was that the

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116. F.A.R. BENNION, *STATUTORY INTERPRETATION: A CODE* 602–03 (2d ed. 1992).

117. See *R v. Tolson*, [1889] 23 Q.B.D. 168, 187 (Eng.); see also Lord Diplock’s opinion in *Sweet v. Parsley*, [1970] A.C. 132 (H.L.) 162–63 (appeal taken from Eng.).

118. For many examples, see BENNION, *supra* note 116, at pts. XVI–XVII, XXIII–XXIV.

119. BALKIN, *supra* note 2, at 24.

120. See SAUNDERS, *supra* note 43, at 75–77.

121. BALKIN, *supra* note 2, at 121.

122. *Victoria v Commonwealth* (1971) 122 CLR 353, 393, 403 (Austl.) (Windeyer, J.).

123. Wrongly, according to Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571.

124. Barnett, *supra* note 107, at 623.

federal government had power over the subject matter of any rights not expressly enumerated in the preceding clauses of the Bill of Rights.<sup>125</sup> They feared that silence about unenumerated rights would be taken to imply federal power over them, through an inference expressed by the interpretive maxim *expressio unius est exclusio alterius*. Another example is the argument about “penumbras” and “emanations” in *Griswold v. Connecticut*,<sup>126</sup> which seems to be a (very implausible) argument for inferring an implied general right to privacy from the enumeration of more specific rights that are all related to privacy.<sup>127</sup> And of course, supposedly implied intergovernmental immunities have been a perennial subject of controversy.<sup>128</sup>

Like almost all other theories of constitutional interpretation, Balkin’s theory does not provide an adequate treatment of what is implicit in or implicated by a constitution, and the proper methodology for identifying it. I propose to raise two issues. First, does the identification of this inexplicit content involve interpretation, aimed at discovering components of the original meaning of the text; or does it involve construction, aimed at “filling out” the text in order to implement it? A lot hangs on this question. If it involves interpretation, then implications are part of the original meaning of the Constitution and are unchangeable, whereas if it involves construction, they are neither of these things. Second, given the role necessarily played in this process by underlying purposes or principles, must they be “original” purposes and principles that informed the original meaning of the text?

### C. *Genuine and Spurious Implications*

I have already argued that genuine implications can be part of the meaning of a communication and are ascertained by a process of inference from its terms given its context and apparent purpose. But there are also spurious implications, which are not really part of the preexisting meaning of a communication, but are added to it by interpreters in order to improve it in some respect.

As I have said elsewhere, spurious implications “are a fertile device for judicial tampering with legal texts, whether contracts, statutes or constitutions.”<sup>129</sup> Moreover,

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125. *Id.* at 624–25.

126. 381 U.S. 479, 484 (1965).

127. For why it is implausible, see Walter Sinnott-Armstrong, *Two Ways to Derive Implied Constitutional Rights*, in *LEGAL INTERPRETATION IN DEMOCRATIC STATES* 231, 234–36 (Jeffrey Goldsworthy & Tom Campbell eds., 2002).

128. See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004–05 (2009) (describing the U.S. Supreme Court’s “new federalism” approach to immunity).

129. Jeffrey Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coxford Lecture*, 24 CAN. J.L. & JURIS. 305, 312 (2011).

[I]t is remarkable how often lawyers use idiosyncratic legal terminology that describes terms being “implied into” or “read into” legal texts, or of judges “making implications”. Or at least, this is common in Australia. Terms that are genuinely *implied by* a text are *inferred from* it: to speak of terms being *implied into* or *read into* it is to use oxymoronic expressions that, in trying to have it both ways, defy ordinary English. They presumably function as euphemisms, by blurring the distinction between the discovery of genuine implications, and the insertion of spurious ones.<sup>130</sup>

Balkin uses somewhat similar language, when he says that to resolve a failure of the express terms of the establishment clause to fully implement its underlying purpose, either they can be given a nonliteral meaning, or “we can imply a structural principle to supplement the text.”<sup>131</sup> Is this just convenient shorthand for “we can find a structural principle genuinely implied by the text,” or does it mean “we can add a structural principle to the text while calling it an implication”? The former would be an exercise of interpretation and the latter an exercise of construction.

It should be acknowledged not only that courts do sometimes add spurious implications, which are not really there to be discovered, to legal instruments, but also that this is not necessarily improper, although calling them implications might be criticized as an attempt at subterfuge.

The justification most commonly offered for the recognition of an implication is that it is “necessary.” Two different kinds of “necessity” can be found in British and Australian case law on implications, both statutory and contractual.<sup>132</sup> One is a kind of psychological necessity: it concerns whether or not interpreters are, as it were, compelled to acknowledge an alleged implication because it is so obvious as not to be reasonably deniable. This has been called the “obviousness test.”<sup>133</sup> The second kind is practical necessity (or in contract law, “business efficacy”): it concerns whether or not an alleged implication is practically necessary to enable some or all of the provisions of a legal instrument to achieve their intended purposes.<sup>134</sup> This might be called the “practical efficacy test.”

Obviousness should be preferred to practical efficacy as the test for genuine implications. It is particularly apposite where implicit assump-

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130. *Id.*

131. BALKIN, *supra* note 2, at 204; *see also id.* at 205 (“We cannot know whether a proposed reading contradicts the text until we decide whether the text uses a term nonliterally; this requires us to understand the principle or principles the text attempts to vindicate. In the same way, we need to know these principles in order to decide whether a proposed structural argument supplements or contradicts the text.”).

132. *See* Goldsworthy, *supra* note 111, at 168–70; *see also* ELISABETH PEDEN, GOOD FAITH IN THE PERFORMANCE OF CONTRACTS 60–71 (2003).

133. Goldsworthy, *supra* note 111, at 168; *see also* PEDEN, *supra* note 132, at 61–64.

134. *See Slipper Island Resort Ltd. v Minister of Works & Dev.* [1981] 1 NZLR 136 (CA) 139 (practical necessity in statutes); J.G. STARKE ET AL., CHESHIRE & FIFOOT’S LAW OF CONTRACT 212–13 (6th Australian ed. 1992) (“business efficacy” in contract law).

tions are concerned, because as previously explained, they are by definition “so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account.”<sup>135</sup> Since it is possible for a provision that is essential to the practical efficacy of a legal instrument to have been omitted due to any number of possible mistakes by its founders, its practical efficacy cannot by itself prove that it was included by implication. For example, if the founders erroneously believed that it was not practically necessary to achieve any of their purposes, it hardly seems plausible to regard the provision as an implicit assumption or any other kind of implication. When what we have said or written turns out to be deficient, genuine implications do not magically spring up to protect us from our mistakes.<sup>136</sup>

But it does not follow that judges should allow a constitution to fail in some vital respect. The difficulty of amending constitutions may be a reason for judges to be more creative when interpreting them, compared with other laws. The constitution’s founders may have failed to expressly provide for some problem because they did not anticipate it, because it was very unlikely to arise, or because they were too busy or could not agree on how to do so. When interpreting statutes, judges are often unwilling to rectify failures of that kind, preferring to leave it to the legislature to do so. But when dealing with a constitution, it is arguable that they should be more willing to provide a solution. If, because of the founders’ omission, a constitution might fail to achieve one of its main purposes, the potential consequences are grave. They include the danger of constitutional powers being abused, of the democratic process or the federal system being subverted, of human rights being egregiously violated, and so on. If the constitution is extremely difficult to amend formally, or if amendment can only be initiated by the very politicians who pose the threat that needs to be checked, there may be good moral reasons for the judges to act. True fidelity to the constitution may justify this.

Of course, there must be limits. If the founders’ purposes were pitched at a very high level of abstraction, almost any spurious implication could be added to a constitution (“the founders intended to establish democracy—or justice, liberty or equality—and this provision is necessary to achieve that purpose”). Judges are not “statesmen,” appointed to fill the shoes of the founders and continue the task of constitution making as an ongoing enterprise. They are generally bound not only by the founders’ ends but by the means that were chosen to achieve those ends.<sup>137</sup> Otherwise a constitution is just a set of abstract objectives, which the judges can choose to implement however they think best.

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135. See *supra* text accompanying note 111.

136. See Goldsworthy, *supra* note 111, at 168–70.

137. It follows that constitutional “silen[ce]” does not in itself justify judges “fill[ing] in the details.” *Contra* BALKIN, *supra* note 2, at 23. Silence may reflect an intention to leave the matter constitutionally unregulated and subject to the political process. *Id.* at 24–28. Only if the silence is not re-

Whether or not the judges should rectify a constitution so that it can achieve its essential purposes, by in effect inserting some provision into it, is a different question from whether or not the provision can plausibly be regarded as already implicit in it. If judges decide to rectify a constitution, they “should frankly acknowledge what they are doing, and not hide behind make-believe implications”—unless they are morally justified by extraordinary circumstances in lying about what they are doing.<sup>138</sup>

At one point, Balkin gives an example of an underlying principle that arguably gives rise to a substantive implication. He refers to Charles Black’s argument (also made by Alexander Meiklejohn) that a constitution providing for representative government impliedly protects, if it does not do so expressly, free speech on political or governmental matters.<sup>139</sup> This example is very close to my heart, because in 1992 the High Court of Australia accepted precisely that argument, and held that our Constitution impliedly protects freedom of political communication.<sup>140</sup> The leading case is our equivalent of *Citizens United v. Federal Election Commission*:<sup>141</sup> the Court overturned a legislative attempt to control escalating expenditures on political advertising.<sup>142</sup> I have argued that, in the Australian context, this implication is spurious rather than genuine.<sup>143</sup> Its recognition made a substantial change to Australia’s system of government, which to many, was more like a constitutional amendment than the discovery of a genuine implication. In 1975, Chief Justice Barwick observed that:

It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees. . . . [U]nlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.

The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers.<sup>144</sup>

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solved by some default rule, so that it must be filled in for the judges to decide some dispute, are they justified in doing so.

138. See Goldsworthy, *supra* note 111, at 169.

139. BALKIN, *supra* note 2, at 261 (citing CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39–45 (1969)). On Meiklejohn, see generally William G. Buss, *Alexander Meiklejohn, American Constitutional Law, and Australia’s Implied Freedom of Political Communication*, 34 FED. L. REV. 421 (2006).

140. *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106 (Austl.); *Nationwide News Pty. Ltd. v Wills* (1992) 177 CLR 1 (Austl.).

141. 130 S. Ct. 876 (2010).

142. See Gerald N. Rosenberg & John M. Williams, *Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439.

143. Jeffrey Goldsworthy, *Constitutional Implications Revisited*, 30 U. QUEENSLAND L.J. 9 (2011).

144. *Attorney-Gen. (Cth) ex rel. McKinlay v Commonwealth* (1975) 135 CLR 1 (Austl.).

By deciding against a bill of rights, Australia's founders entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights and between rights and other community interests, balances that require political rather than legal judgment. The implied freedom had escaped the notice of Australian lawyers and judges for the previous ninety years, despite cases such as *Australian Communist Party v. Commonwealth* (1951) in which it might have proved decisive.<sup>145</sup> Moreover, this suggests that the implied freedom is not necessary, either for the existence of representative government, or for the people to make genuine electoral choices. The fact is that Australia had such a government, and the people were able to make such choices, throughout those ninety years. It would undoubtedly be legitimate for the Court, in enforcing express provisions requiring that the people directly choose their representatives, to invalidate legislation restricting political communication so severely that it prevents them from doing so. But the Court has gone one step further and derived from those express provisions an implied freedom that it then applies largely independently of them, invalidating laws deemed to infringe the freedom, whether or not they prevent genuine electoral choices.<sup>146</sup> The implied freedom is a freestanding principle, independent of the constitutional provisions from which it was supposedly inferred, and which give it only partial effect.

One lesson from this is that a genuine implication is difficult to explain except in terms of original intent. Gricean implicatures depend on evidence of the speaker's intention to communicate something by implication.<sup>147</sup> Even when we say that something is implicit in or presupposed by an utterance, in the sense that it is taken for granted, we are saying that the speaker took it for granted. Texts cannot meaningfully be said to take anything for granted, at least not when their meaning is confined to literal meaning, severed from their authors' intentions. Indeed, all genuine implications other than those of logical entailment depend on some ingredient of meaning, in addition to the words of the text, which surely consists of evidence of the speaker's or author's intentions. Even when a court is adding a spurious implication, on the ground that it is necessary for a legal text to fulfill one of its essential purposes, these must surely be the purposes of the people who framed or enacted the text. Strictly speaking, words and texts do not have intentions or purpos-

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145. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Austl.). The statement in the text is subject to one exception: in the 1980s, the very activist Justice Lionel Murphy suggested that the Constitution included an implied right to free speech (not confined to political matters). His brethren at the time treated the suggestion with disdain. See *Miller v TCN Channel Nine Pty. Ltd.* (1986) 161 CLR 556 (Austl.).

146. For example, neither the political advertising legislation invalidated in *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106 (Austl.), nor the common law of defamation overridden in *Theophanous v Herald & Weekly Times Ltd.* (1994) 182 CLR 104 (Austl.), could seriously be argued to have made it impossible for the people to make genuine electoral choices, whether or not they infringed free speech to some extent (which is debatable).

147. See *supra* note 110 and accompanying text.

es. Only the people who use them do, and in the case of a legal text, it is natural to think that the pertinent people are those who brought it into being. A major challenge for nonoriginalists is to provide a plausible alternative account of inexplicit content. I am not aware of any serious attempt to do so.

*D. The Nature of Underlying Purposes or Principles*

The existence of genuine implications depends on evidence of unexpressed or partially expressed purposes, which may amount to principles, underlying the Constitution.<sup>148</sup> The same evidence is often crucial to establishing the meaning of express terms which, as Balkin notes, may be nonstandard (as in the case of terms of art) or nonliteral.<sup>149</sup> When underlying purposes or principles are used to help determine the original meaning of the constitutional text, as in the case of disambiguation, then surely they must be the founders' original purposes or principles—those that, as Balkin says, “animated the text.”<sup>150</sup> I have argued that this is also the case when they are used as evidence of inexplicit content.

But this brings me to a puzzle about Balkin's conception of “underlying principles.” He begins his book by asserting that his recommended “method of text and principle” requires fidelity to the original meaning of the Constitution, including the principles stated by the text, fidelity “to the principles that underlie the text,” and fidelity to “its underlying purposes.”<sup>151</sup> Construction should then attempt to “apply the constitutional text and its associated principles in current circumstances.”<sup>152</sup> This might be taken to suggest that underlying principles are original underlying principles which, like the original meaning of the text, should not be changed except as a consequence of formal amendment.<sup>153</sup>

Later, Balkin maintains that “[a]rticulating underlying principles is one of the tasks of constitutional construction.”<sup>154</sup> This is a little confusing, because constructions are not determined by the Constitution and therefore can legitimately be changed without it having to be formally amended. But Balkin could be saying here that, although underlying principles must be original ones, they are usually quite abstract, and therefore construction is needed to “articulate” them in the sense of resolving their inherent vagueness and/or determining how they should be applied in practice. Later he indicates that subsequent doctrinal con-

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148. See BALKIN, *supra* note 2, at 222, where he describes four conceptions of the “principles underlying the equal protection clause” as also amounting to “a reasonable construction of the purposes of the clause.”

149. See *id.* at 13; see also *id.* at 204 (“[W]e should try to interpret constitutional language to fulfill the purpose of the text as best we can determine it.”).

150. *Id.* at 12; see also *id.* at 143, 384 n.60.

151. *Id.* at 3.

152. *Id.*; see also *id.* at 327.

153. See *id.* at 10.

154. *Id.* at 14.



structions are always vulnerable to criticism for inconsistency with the Constitution's text and underlying principles. "The method of text and principle gives us a perspective outside of doctrine that we can use to evaluate it . . . [U]nderlying principles give us additional leverage to critique doctrine."<sup>155</sup> At one point he also distinguishes "ancient and outmoded constructions" from "the actual requirements of the constitutional framework," which seem to include "key structural principles underlying" specific provisions.<sup>156</sup> All this seems to imply that not only the text, but also its underlying principles, provide a secure, unchanging foundation for evaluating the flux of constructed doctrines. If so, they must be original underlying principles that endure through time.

But elsewhere, Balkin takes a different view. "Underlying principles," he says (and note: the principles themselves, not just their articulations) "are constitutional constructions. . . . [W]e ascribe these principles to the Constitution."<sup>157</sup> He distinguishes between two kinds of underlying principles, which have different functions.<sup>158</sup> Some are "structural" principles that are inferred "from the constitutional structure as a whole . . . from how the various institutions and structures outlined in the constitutional text relate to each other . . . from text, structure, and history."<sup>159</sup> For example, "the principle of democracy" is inferred "from various textual features that presume democracy."<sup>160</sup> "[W]e assume that these principles are part of the plan of government and underlie many different aspects of the text."<sup>161</sup> Sometimes they can be applied "to new situations in which the text is silent."<sup>162</sup> Although some of them may have been intended by the Founders, Balkin denies that they should be confused with original intentions: they may not have been intended by anyone, and they are based on how the Constitution actually works rather than how the Founders intended it to work.<sup>163</sup> The Founders' original assumptions about how the Constitution would work can be made obsolete not only by subsequent amendments but also by changes in constructions or in social circumstances. When that happens, new structural principles may have to be developed through construction.<sup>164</sup> Some of them might be principles the founding generation would have rejected, such as the modern principle of democracy.<sup>165</sup> Balkin also provides other examples of constitutional amendments and other developments altering

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155. *Id.* at 232–33.

156. *Id.* at 143.

157. *Id.* at 259.

158. *Id.*

159. *Id.* at 14.

160. *Id.* at 15.

161. *Id.* at 259.

162. *Id.*

163. *Id.* at 142.

164. *Id.*; see also *id.* at 260, 309.

165. *Id.* at 261–62.

structural assumptions and underlying principles.<sup>166</sup> On this view, not only the practical implementation of structural principles, but their very identity and nature, can be changed through construction.

To bring out the difference between relying on original purposes and principles as opposed to later “contemporary” ones, consider again the decisions that purported to discover in the Australian Constitution an implied freedom of political communication.<sup>167</sup> I have suggested that this was a spurious implication because it is not warranted by what we know of the founders’ purposes and principles. It certainly does not pass the “obviousness test” for implicit assumptions. Indeed, even as a spurious implication, it cannot be justified as practically necessary to fulfill their purposes and principles. On the other hand, if the purposes and principles that underlie the Constitution can evolve over time and spawn new implications, then those cases could be justified accordingly. Constitutional construction could then, in effect, add new provisions to the Constitution, not only when necessary to implement its original underlying principles, but to implement new principles that were themselves adopted by construction. I do not claim that Balkin would agree with this reasoning. But it might be thought to follow from his theory.

#### *E. Conclusion to Part V*

I wonder whether Balkin would agree with the following propositions:

1. When we are trying to ascertain the semantic meanings of constitutional provisions, the principle of fidelity to original meaning requires that we consult the original purposes and principles underlying them.
2. The same is true when we are trying to infer genuine implications from those provisions.
3. Spurious implications may be added to the Constitution by construction, but only when necessary to fulfill its underlying purposes or principles. These must be its original purposes or principles, because otherwise, anything at all could be added to the Constitution, by attributing to it some new purpose that can only be fulfilled if some new provision is added to it.
4. In addition to 3, we engage in constitutional construction when it is necessary either to implement the Constitution or to resolve disputes about its meaning, in situations where constitutional interpretation has shown its meaning to be relevantly underdeterminate. In those situations, we are no longer guided by the Constitution (although we must not contradict it), because interpretation has exhausted its content.

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166. *Id.* at 237–38, 249–51, 261–63.

167. *See supra* text accompanying notes 139–46.

5. It follows from proposition 4 that these constructions need not (although they could) be guided by the Constitution's original underlying purposes and principles. We are free to seek guidance from other purposes and principles, such as those more recently endorsed by extended national majorities. The current Constitution-in-practice, which includes the products of our constructions, is based partly on purposes and principles other than those that originally animated the constitutional text.
6. It follows that there are two different kinds of underlying constitutional principles: the original ones that are crucial to propositions 1, 2, and 3, and later ones that, according to propositions 4 and 5, can legitimately guide constructions.

The question is this: Is Balkin's "method of text and principle" a method of (1) "text understood according to its original meaning and original underlying principles, implemented when necessary by construction," or (2) "text understood according to its original meaning but substantially augmented to implement evolving underlying principles?" I am not sure. But while the former is a pure breed of originalism that happens to be consistent with living constitutionalism, the latter is a mongrel cross of originalism and nonoriginalism.

## VI. CONCLUSION

Some constitutions do not serve as "basic laws," "higher laws," or "the people's laws" in Balkin's sense.<sup>168</sup> So his theory may apply only to the U.S. Constitution.<sup>169</sup> That is not in itself a problem for his theory. Constitutions are adopted in very different historical, social, and political contexts to serve different needs, and communities build on them and come to depend on them in different ways. But the different functions of constitutions elsewhere may help to dispel any false sense of necessity. They may also raise questions about the desirability of: (1) applying constitutional brakes to slow down political changes, which may be long overdue as often as they are hasty and improvident; (2) entrenching constitutional principles that are so abstract and vague they can be invoked by both sides of political and cultural conflicts; and (3) venerating an aging constitution, that is extremely difficult to amend, as the authoritative repository of a community's values and ideals.

I have also expressed the following doubts about Balkin's theory: (1) it may be too good to be true, in its attempt to portray even judicial constructions of the Constitution as expressions of "the people's constitution-making power;"<sup>170</sup> (2) it may prove too much, from an originalist

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168. See *supra* Part II.

169. BALKIN, *supra* note 2, at 359 n.2.

170. *Id.* at 123.

perspective, because if constitutional construction is as democratic as he maintains, then nonoriginalist interpretation might claim the same virtue; (3) by waiving the democratic objection to nonoriginalist interpretation, he needs to rely more heavily on rule of law objections, which need further development; (4) his treatment of constitutional implications is inadequate; and (5) his account of the Constitution's underlying principles and purposes is ambiguous, and on one reading, inconsistent with genuine originalism.