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REFLECTIVE EQUILIBRIUM AND CONSTITUTIONAL METHOD:
LESSONS FROM JOHN MCCAIN AND THE NATURAL BORN CITIZENSHIP CLAUSE

Mitchell N. Berman*

(Draft, June 3, 2009)

INTRODUCTION

Partisans to the debate over originalism press their respective positions on diverse grounds. Originalists variously argue, for example, that fidelity to the original meaning of the constitutional text (or to certain intentions of framers or ratifiers) is demanded by proper respect for the rule of law, or follows from the correct understanding of the nature and objective of interpretation generally, or best promotes values like stability, predictability, and democratic accountability. Their opponents challenge these claims and argue further that a commitment to originalism is unworkable, produces bad or unjust results, or furnishes insidious cover for the naked policy choices of its proponents.

Yet as varied as are these (and other) argumentative strategies, they do not exhaust the set of plausible ways to argue for or against a normative theory of constitutional interpretation. In particular, it might be possible to argue productively about candidate normative theories of constitutional interpretation (what I will henceforth call “constitutional theories,” for short) by assigning a more prominent role than is customary to purportedly shared convictions about the proper legal resolution of particular cases. In this essay, I aim to explore that possibility by adapting the Rawlsian method of reflective equilibrium to the constitutional domain and by focusing, as a case study, on the specific question of whether Senator John McCain is constitutionally eligible to serve as president of the United States, consistent with the natural

* Richard Dale Endowed Chair in Law, the University of Texas at Austin. For very helpful comments on an earlier draft, I am indebted to Mike Dorf, Mark Greenberg, Kevin Toh, and participants at a constitutional theory workshop at Vanderbilt Law School. I am also grateful to Guha Krishnamurthi and Casey Duncan for excellent research assistance.

born citizenship clause of the United States Constitution, which provides that “no person except a natural born citizen . . . shall be eligible to the Office of President.”¹

Very generally, the idea is this. The method of reflective equilibrium maintains that our beliefs in a range of domains will be better justified if we seek coherence among different sorts of considered judgments, or considered judgments about different sorts of claims or propositions. In ethics, for example, the method instructs that we should work back and forth among our considered judgments about the rightness or wrongness of particular actions in particular contexts, the general articulable principles that govern our conduct, and the yet more abstract theoretical considerations that shape or determine the principles. Crucially, none of these different types of judgments is uniquely epistemically privileged; in principle, all judgments are revisable in light of all others. If this model applies to the constitutional domain, then the direction of argument between constitutional theory and constitutional case holdings ought not to be wholly unidirectional. While the correct outcomes in constitutional cases will often simply follow from application of the correct constitutional theory, the constitutional theory we deploy should itself be answerable to whatever strong considered judgments we may have about the correct outcomes in particular cases—judgments about their *legal* correctness, mind you, not of their *moral* correctness (though the moral correctness of a particular proposition may, in some cases, significantly contribute to its legal correctness).

Now, the ambition to use strong intuitions or convictions about particular cases to drive (necessarily provisional and rebuttable) conclusions about interpretive constitutional theory might seem circular on the supposition that those case-specific convictions themselves will be informed or infected by our theories. Put more strongly, we might expect our legal judgments about cases to be the products, not the grounds, of our constitutional theories. The possibility I am raising is that that need not always be

¹ U.S. Const. Art. II, Sec. 1, cl. 5.

true. And it is not true, I will suggest, with respect to the question of McCain's eligibility for the presidency.²

Assuming (as was generally accepted prior to provocative recent work by Jack Chin)³ that McCain, who was born in the Panama Canal Zone, was a citizen at birth by virtue of his being born to citizen parents but not by virtue of being born in the United States, his eligibility for the presidency would seem to depend on the legal question of whether the constitutional term "natural born Citizen" is limited to that subclass of birthright citizens who were born in the territorial United States. I argue that an overwhelming majority of participants in legal practice have the strong conviction that McCain is eligible—which is to say that the clause is not so limited—that there are grounds for this conviction, and that those grounds are not contingent on beliefs about the historical facts of what the phrase "natural born Citizen" meant in 1787 or what the framers or ratifiers intended it to mean or to accomplish. The depth, breadth, and character of this case-specific conviction are thus inconsistent with a commitment to originalism as a constitutional theory. Admittedly, I do not expect my argument to carry much weight at all with committed originalists: whatever limited ability work in constitutional theory ever has to change minds, coherentist arguments of the sort presented here are of a character especially unlikely to sway the faithful. I am principally addressing myself, then, to the agnostic or uncommitted. Even as to them, however, I do not pretend that my argument will amount to a decisive refutation of originalism. (Such a contention would be incompatible with the very method of reflective equilibrium that I invoke.) Quite the contrary, I view it more as piling on. It bolsters additional reasons to conclude that, while the original public meaning of the constitutional text and the original semantic intentions of its authors are relevant, they do not constitute the sole touchstones of correct constitutional interpretation, as originalism claims.

² I am not the first to think that the McCain case can generate lessons about constitutional method well beyond its narrow context. A brief but insightful analysis of the way that the case reinforces the significance of extrajudicial constitutional interpretation is Peter J. Spiro, Commentary, *McCain's Citizenship and Constitutional Method*, 107 Mich. L. Rev. First Impressions 42 (2008), <http://michiganlawreview.org/firstimpressions/vol107/spiro.pdf>.

³ Gabriel J. Chin, Commentary, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 Mich. L. Rev. First Impressions 1 (2008), <http://michiganlawreview.org/firstimpressions/vol107/chin.pdf>.

* * *

The essay proceeds in five parts. Part I starts by defining originalism, for if we are to intelligently assess this theory we need to be clear on just what it maintains. Part II presents a brief critical overview of principal existing arguments for originalism. Part III introduces reflective equilibrium as a distinct method for reasoning about normative theories of constitutional interpretation. Part IV employs the method in the particular context of addressing the case-specific question of whether McCain is a natural born citizen within the meaning of the Constitution. As already explained, I will contend that analysis of this question causes trouble for originalism. Part V challenges the argument of Part IV by focusing attention on two other cases based on the natural born citizenship clause—the case of a naturalized foreign-born citizen like Arnold Schwarzenegger or Jennifer Granholm; and the case of a native-born citizen delivered by Caesarian section, like Warren Harding. The cases are presented to suggest that the non-originalist arguments that appear to be doing work in Part IV commit us to conclusions in one or both of these adjacent cases that fly in the face of our considered case-specific convictions. And if this is true, then we have reason to doubt either that reflective equilibrium can be transplanted to the constitutional realm in the manner that Part IV assumes or that the specific arguments advanced in that part are sound. I propose, however, that, rather than undermining the analysis of Part IV, the cases explored in Part V provide helpful further basis for believing what most of us already grasp: an attractive and defensible theory of constitutional interpretation is likely to be more complex than snappy slogans or pithy labels can capture.

I. WHAT ORIGINALISM IS

Let us start by getting clear on just what originalism is—what, in other words, is the proposition that originalists and their opponents debate. We can subdivide this single question into two components: what sort of thesis is originalism, and what is its content.⁴

I understand originalism to be, at its heart, a normative thesis about how some participants in American constitutional practice—judges, crucially, but possibly other persons as well—ought to behave as participants. Originalists commonly articulate their thesis using deontic language, most frequently asserting what judges should, ought, or must do, or what they are required or bound or obligated to do. And what judges are required or obligated to do, according to originalism, is to interpret the Constitution in accordance with some specified aspect or feature of its original character—usually its original “public meaning” or the meaning originally intended by its framers or ratifiers—at least unless a decision by the United States Supreme Court has advanced a contrary interpretation and there exist sufficient reasons to accord that judicial precedent *stare decisis* weight. In other words, and putting aside for the moment the special problem of continued adherence to non-originalist judicial precedent, judges should interpret the Constitution *solely* in accordance with some feature of the original character of the constitutional provision at issue.

Several things about this thesis should be emphasized.

First, the thesis is very demanding. Originalism, as I understand it, is not the weaker thesis that, for example, judges ought to pay serious attention to the original meaning or that they ought ordinarily to follow the original meaning. This point cannot be emphasized strongly enough. Virtually nobody denies that the original meaning of a constitutional provision is always relevant to the interpretive task, and few theorists deny that it is frequently a weighty consideration. What makes originalism so controversial is precisely the position it takes on what I have called in other work the dimension of interpretive *strength*. Non-originalists do not deny that the original meaning constitutes a reason, possibly even a weighty

⁴ Much of the analysis in this Part is drawn from Mitchell N. Berman, *Originalism is Bunk*, 84 NYU L. Rev. 1, 1-37 (2009).

reason, in favor of a given contemporary constitutional interpretation; they only deny the originalist contention that original meaning is a conclusive or exclusive reason to adopt a particular interpretation.⁵

Second, I am assuming that what originalism is is an empirical question. I am not trying to smuggle in my own views about how originalism should be conceived to render it most plausible or attractive, but nor am I trying to make it more demanding than its champions espouse, thus to render it more vulnerable to attack. I maintain that this is how it is most often understood in the contemporary constitutional theory literature, by its proponents and opponents alike. As two prominent originalists have recently and succinctly put it, originalism “requires that judges interpret the document based only on its original meaning.”⁶ To be sure, I do not insist that all self-described originalists understand their thesis in precisely this way. Moreover, because change is a constant, I would expect originalism to morph into a more modest (and therefore more plausible) form over time. But this notably strong thesis presents the

⁵ It is true that several scholars have claimed over the years that “we are all originalists now.” I believe that most scholars who advance this claim are what I would call non-originalists—they believe that the original meaning does not always decisively determine the content of constitutional law, even absent controlling nonoriginalist judicial precedent—and they fail to appreciate the extent to which self-described originalists maintain the more demanding thesis. *See id.* at 29 n.72.

⁶ John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const. Comment. 371, 374 (2007). For just a tiny sample of similar characterizations by other originalists, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 4 (2004) (“[B]y committing ourselves to a written constitution, we commit ourselves to adhere to the original meaning of the text and any later amendments.”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541, 551-52 (1994) (“[T]he text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land. . . . The meaning of all . . . legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them. Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.”) (footnotes omitted); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1250 (1994) (“[O]riginalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 Geo. L.J. 1113, 1142 (2003) (“[O]riginal meaning textualism is the only method of interpreting the Constitution.”); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 Const. Comment. 529, 544 (1998) (“When we accept some text as law, we also commit to the law’s original meanings. . . . Indeed, to embrace the legitimacy of words as law without their original, ordinary meanings is to embrace nothing.”); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURT: LAW OR POLITICS?* 32 (“The constitutional text as originally understood should be deemed authoritative for purposes of constitutional adjudication.”). Originalist icons Raoul Berger and Robert Bork conveyed just the same claim. *See, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 3 (1977) (contending “that the ‘original intention’ of the Framers . . . is binding on the Court”); ROBERT BORK, *THE TEMPTING OF AMERICA* 5 (1990) (arguing that a judge “is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment”). *See also, e.g.*, OFFICE OF LEGAL POLICY, *ORIGINAL MEANING: A SOURCEBOOK* 2 (U.S. Dept. of Justice 1987) (“[C]ourts must construe the Constitution according to its original meaning.”).

most accurate snapshot of originalism *simpliciter* circa 2009.

In any event, I am quite explicit about the thesis that I will hold up for scrutiny. If you believe that I get it wrong, then you might well find that the arguments I claim to muster against it do not squarely hit their target. If you believe that I get it very wrong, then you are unlikely to find anything that follows of much interest at all, except perhaps as a curiosity.

Third, while I maintain that this is the thesis that self-described originalists most commonly advance and that their critics—the non-originalists—oppose, I fully recognize that there exists variation within the originalist camp. I intend my definition of originalism—that, putting aside for the moment the special problem of continued adherence to non-originalist judicial precedent, judges should interpret the Constitution *solely* in accordance with some feature of the original character of the constitutional provision at issue—to be agnostic with respect to those matters that most divide the originalists. Let me highlight four.

Originalist object. As is well known, the first issue that divides originalists concerns which aspect of the original character demands present-day fidelity: the meaning intended by the framers or ratifiers of a provision, or the “public meaning” that an ordinary, reasonable person at the time of ratification would have understood the provision to bear, or some similar such idea. I have used the phrase “original character” to encompass these distinct interpretive objects, and I will use the term “original meaning” going forward to accommodate either original public meaning or original intended meaning, or any other broadly similar notion.

Originalist subject. As already hinted, a second question about which contemporary originalists divide, though rarely explicitly, concerns whether the original character is binding only on judges or on other participants too, like legislators, executive officials, and ordinary citizens. All of these positions converge on the claim that judges must follow the original meaning; it’s just that some originalists believe that others of us are obligated to follow the original meaning too.

Originalism and stare decisis. I have already said that self-described originalists disagree over whether judges act properly in rejecting the original meaning in favor of intervening judicial precedent. While the formulation I advance might appear to take sides on this disputes, carefully read, it does not. Originalists who make no exception for stare decisis still agree that the original meaning is binding if there is no intervening contrary judicial precedent, they just deny that the existence of intervening judicial precedent alters the judicial obligation (that is, they accept *if*, but not *only if*).

Non-normative originalism. I have described originalism as a thesis regarding what some set of interpreters—courts, at the very least—should do: they ought to follow the Constitution’s original meaning. Most originalists advance a view of just this sort, expressly employing deontic operators like “should,” “ought” “obligated,” “required,” and “bound.” Yet some theorists whose originalist credentials are otherwise impeccable expressly deny that they mean to advance any normative claims.⁷ Does this view cause any significant difficulty for our working definition of originalism?

I think it does not. When contending that a judge should or must (endeavor to) interpret the Constitution in accordance with its original meaning, originalists are essentially telescoping two claims: first, that judges should say what the (constitutional) law is; and second, that what the constitutional law is is what its original meaning was. When originalists disclaim a position about what judges should do, they mean, I think, to recognize that they are not advancing any *argument* for this first claim. But because it is not in fact controversial in the contemporary debates over American constitutional interpretation that judges should enforce the law, the non-normative variant of originalism is not interestingly distinct, for our purposes, from its more common, avowedly normative, cousin. Put another way, we can think of the putatively non-normative variant as at least contingently normative: insofar as judges ought to follow the law, they should follow the Constitution’s original meaning.

There is, however, at least one other way to think about non-normative originalism. In his

⁷ Gary Lawson is a good example. See, e.g., Gary Lawson *On Reading Recipes . . . and Constitutions*, 85 Geo. L.J. 1823 (1997).

monumental work “Semantic Originalism,”⁸ Larry Solum carves the originalist salami one slice thinner than I have just done, distinguishing not only between what the law is and what judges should do, but also between what is the Constitution’s *semantic* content and what is its *legal* content. On his view, the original meaning determines the former but only “contributes” to the latter, without fully determining it. The most recent draft of this paper that I have seen does not make wholly clear whether contributions other than the Constitution’s semantic content (and other than judicial precedent) may in some cases produce legal content that is inconsistent with the semantic content or whether these other contributions can serve, at most, only to supplement underdeterminate semantic content, thereby producing constitutional law that is more determinate than the semantic content (paradigmatically, by being less vague), while always consistent with it. In yet more recent work, however, Solum seems to endorse the more robust version of the “contribution thesis,” such that the semantic content does not merely contribute to the legal content, but firmly constrains it.⁹ In my view, Solum’s account accurately captures the main branch of contemporary originalism if but only if the contribution thesis is understood in this way—i.e., as maintaining that the (necessarily originalist) semantic content of the constitutional text establishes the parameters of permissible constitutional law, while allowing non-originalist considerations to be employed in the *construction* of more determinate constitutional law for those circumstances in which we require determinacy greater than the semantic content permits. Non-originalism insists that correct general propositions of constitutional law could be inconsistent with, and not merely underspecified by, the original meaning (or original “semantic content”) of the constitutional text.

II. ARGUING ORIGINALISM

Originalism is a controversial thesis. Many and diverse arguments have been advanced for and against it. For example, some originalists rely heavily on the claim that only originalism is consistent

⁸ Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Papers Series, Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

⁹ Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, __ Nw. U. L. Rev. __ (forthcoming 2009).

with respect for democracy, or that it best advances the legal system's interests in stability and predictability of decisionmaking. Critics argue, among other things, that originalism relies upon a naïve faith in the possibility of historical reconstruction, or that it produces substantively bad results. This is not the place to comprehensively catalogue, let alone to critically assess, all of the extant arguments. Instead, let us move up one level of generality. Is it possible and useful to identify types of arguments for and against originalism? That is, can we profitably classify the different sorts of arguments at play in the originalism debate? Of course, there exist an almost limitless number of possible classificatory schemes. The question is which, if any, help us think more productively about problems of constitutional interpretation.

In previous work I suggested that the arguments for originalism fall into two types, what I called “hard” and “soft.” Soft arguments for originalism, I claimed, contend (in effect, if not explicitly) that judicial fidelity to the Constitution's original meaning is contingently optimal, that it produces a better overall state of affairs, given current (and, perhaps, foreseeable) conditions, than any alternative. Hard arguments endeavor to ground originalism more deeply and securely. As a first pass, they maintain either that originalism can be derived from one or another conceptual truth or that it follows logically from a set of premises that, while not themselves conceptually or necessarily true, are in fact noncontroversial. Soft and hard originalism provide different answers to the question of whether, or to what extent, the originalist claim is subject to empirical investigation and to reasonable disagreement about the shape and strength of competing values. If the claim is understood as hostage to empirics and evaluative disagreement (as per soft originalism), then, given the most plausible accounts of our present state of knowledge about the relevant facts and of the prospects for consensus about matters of value, it might seem to follow that soft originalist theses will be far more provisional and tentative than hard originalist theses.¹⁰

¹⁰ Larry Solum has taken me to task for this distinction, suggesting that it depends upon a naïve pre-Quinean embrace of conceptual a priority. Solum, *Semantic Originalism*, *supra* note ___, at ___.

The most familiar and clearest example of a hard argument for originalism is intentionalist. Very simply, intentionalists argue or assume that the practice of constitutional interpretation is what it seems on the surface to be: the interpretation of the constitutional text. And interpretation, they argue further, just is—in all contexts—the effort to discern or ascertain the meaning that the text’s author intended to communicate. Therefore, constitutional interpretation just is the effort to discern the meaning that the Constitution’s authors (conceived either as framers or ratifiers) intended their text to communicate. A second hard view (much simplified) holds that originalism follows from the fact that a written constitution is designed to be authoritative or normatively binding. Law can have this authoritative character, the argument goes, only by dint of the authority of its authors. Therefore, our Constitution can in fact be authoritative, and our decision to treat it as authoritative can be intelligible, only if we strive to interpret it in accordance with the meaning that its authors intended to convey.

Notice that the structure of the argument is similar in the two cases: to accept the initial premise (that judges do or ought to interpret the Constitution, or that the Constitution is or ought to be authoritative) is said to entail that judges should follow the original meaning insofar as they can discover it. The truth of the conclusion does not depend upon any plausibly contestable assumptions of empirical fact or value. Criticisms of these arguments thus target the seemingly conceptual premises about the nature of interpretation or the nature of legal authority. In particular, critics deny that it is necessarily or conceptually true: first, that to interpret any text at all is to seek to discover its authorially intended meaning; and second, that law’s authority (in whatever sense of authority the originalist invokes) can derive only from the authority of its authors.

Most of the remaining arguments for originalism are soft: they invoke one or more values that any legal system, or our legal system in particular, ought to advance or instantiate—rule of law values

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. I don’t believe that is so, for the point of the distinction is only to mark differences in the texture and structure of argumentative strategies and assumptions, not to endorse any particular contested position in logic or metaphysics. For essentially this same reason (indeed, it is not clear to me that views about, e.g., the nature of interpretation are entirely a priori), I am disposed to resist Kevin Toh’s suggestion, in personal communication, that my proposed distinction between “hard” and “soft” arguments would be more intuitively rendered as a distinction between “a priori” and “a posteriori” arguments.

like predictability, stability, and transparency; democratic values like popular sovereignty and majoritarian preference-satisfaction; liberty, justice and welfare—and maintain that strict fidelity to the original meaning promotes or realizes the relevant set of values better than any alternative interpretive approach. The arguments are soft in my terminology because, despite occasional claims by originalists to the contrary, it should be reasonably clear that the claims cannot be successfully maintained without making empirical or predictive assumptions. Indeed, that originalist interpretation is neither part of the concepts of democracy or the rule of law or the like, nor logically entailed by a commitment to such ideals, seems adequately proven by the facts that, though the United States has never had a strictly originalist judiciary, we do have democracy and the rule of law.

Accordingly, arguments for originalism that invoke diverse values like democracy, stability, justice, welfare and so on are best understood to maintain that strict adherence to original meaning (again, contrary judicial precedents possibly excepted) promotes the relevant values better than does any alternative. But, critics object, once we recognize that one alternative to originalism would be an interpretive approach that pays substantial but not conclusive respect to the Constitution's original meaning—allowing interpreters to depart from that meaning for good and weighty reason—then the extremism and thus the implausibility of originalism becomes patent. Surely it is not true that *in every single case* the relevant values would be optimized by judicial enforcement of the original meaning: when a generally obscure original meaning runs counter to longstanding practice and popular expectations, stability and predictability might favor the non-originalist interpretation; when circumstances have changed in ways not foreseen by the framing generation, interests in justice, welfare, and democratic accountability might all militate in favor of a non-originalist interpretation that better meets contemporary needs and widespread preferences and judgments; and so on. To be sure, originalists try to meet these objections by emphasizing the value or virtue of the judiciary following more easily articulated and sharper edged rules. But in the absence of an effective mechanism to enforce judicial obedience to the supposed obligation of strict fidelity to the original meaning, the originalists run up against the familiar

and powerful challenges to rule consequentialism. For all these reasons, then, it seems unlikely that soft considerations can effectively support a thesis as strict and demanding as is contemporary originalism.

* * *

The summary to this point is far from comprehensive. But it has limited ambitions. My goal has not been to capture the full flavor of a lengthy, raucous, and dynamic scholarly debate, but to convey two principal types of arguments for originalism, along with some of the objections and challenges they confront. However partial and incomplete this overview has been, it may help pave the way for more abstract thinking about the disparate resources and strategies we have for reasoning about theories of constitutional interpretation.

III. HOW TO CHOOSE A CONSTITUTIONAL THEORY: THE METHOD OF REFLECTIVE EQUILIBRIUM

Let us briefly step away from arguments for originalism and think instead about how to argue more generally for a constitutional theory. I will identify three broad ways—coherentist, foundationalist, and instrumentalist. Without contending that these three ways are exhaustive, I will argue merely that coherentism might warrant more attention and respect than it usually receives.

Coherentism is an approach to epistemic justification across domains of inquiry. It maintains that a belief is justified by its inclusion in a system of beliefs that are mutually consistent and supportive. Its rival, foundationalism, provides that one or another set of these judgments provides the grounds for arguing for others, but not vice versa. Foundationalism, but not coherentism, treats some judgments as “bedrock,” not revisable in light of others. The most familiar way to discover or develop a maximally coherent set of beliefs is the Rawlsian method of reflective equilibrium, which comes in both “narrow”

and “wide” forms.¹¹ Narrow reflective equilibrium directs that we work between our case-specific judgments or intuitions and our judgments about general reasons or principles. In wide reflective equilibrium, we expand our field of inquiry to encompass yet more general or comprehensive theoretical frameworks. In ethics, where the method is arguably most plausible (although this was not Rawls’s own view), wide reflective equilibrium directs us to seek coherence among our case-specific intuitions or judgments of what is right, wrong, or permissible (like whether it is permissible to switch the trolley under carefully specified circumstances), general reasons or principles (like that it is impermissible to intentionally kill an innocent person), and comprehensive moral theories (like Kantianism or classical utilitarianism).

This image of clearly distinct levels of inquiry is no doubt overly stylized. Still, it is a useful guide when trying to transplant the method to other domains, for it compels us to attend self-consciously to the range of different types of judgment we might reasonably hope to bring into coherence. Obviously, decisions regarding how to demarcate a domain of inquiry and how to identify and classify the types of judgments that constitute the domain will be contestable. That said, I propose that, applied to the realm of American constitutional theory, reflective equilibrium would require coherence among, at a minimum, judgments: about particular cases, about the correct normative theory of constitutional interpretation, and about a theory of law. To introduce this last and most general level of judgment is not to assume that the correct theory of law will uniquely determine the correct approach to constitutional interpretation (as Dworkin, for example, seems to conclude).¹² Perhaps that is true. But the much more modest (two-part) assumption is only that any normative theory of constitutional interpretation upon which we settle must

¹¹ Rawls’s best known discussion of reflective equilibrium appears at 48-51 in *A THEORY OF JUSTICE* (1971). He introduced the distinction between “narrow” and “wide” reflective equilibrium in *The Independence of Moral Theory*, 47 *Proceedings and Addresses of the American Philosophical Association* 5 (1974). For a good overview of the process, see Norman Daniels, “Reflective Equilibrium,” *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, Aug. 28, 2003, <http://plato.stanford.edu/entries/reflective-equilibrium/>.

¹² Dworkin’s coherentism is a subject too large for this essay. Too briefly: I share Michael Dorf’s judgment that to embrace coherentism as a way to justify theories of constitutional interpretation does not entail that the theory that emerges as most justified or warranted must itself direct judges to engage in Dworkin-style coherentist analysis as the way of determining what the law is. See Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 *Yale L.J.* 1237, 1257-58 (2005).

be at least consistent with our conceptual theory of law, and that not all initially plausible theories of the two types (of law and of constitutional interpretation) can be made to adequately cohere.

Those who wield hard arguments for originalism (“hard originalists,” for short) tend to be foundationalist: they appear to believe that originalism follows as a matter of course from some other belief that they take, even implicitly, as foundationally true. This characterization is probably most clearly apt of the intentionalist-originalists. They operate from an implicit belief that law is something like the semantic meaning of an authoritative pronouncement,¹³ and the semantic meaning just is the meaning intended by the author. Either or both views seem often to be accepted as foundationally true.

Soft originalists, in contrast, appear to assume little or nothing about the concept of law. By arguing for originalism on the bare grounds that such an interpretive approach is the best way to realize particular values (stability, predictability, democratic accountability, or what-have-you) they appear frequently to assume that law’s nature or character imposes no meaningful constraints on how we should choose a theory of, or approach to, constitutional interpretation. By and large, that is, they seem not to contemplate or to entertain that other sorts of judgments—like more abstract judgments about the concept of law—bear on the correctness of a particular normative theory of interpretation. But because it is not clear that they need, or do, take the values they champion as foundationally true, I think they are not most felicitously classed as foundationalists. On the other hand, however, their arguments have a freestanding character that betrays little commitment to reconciling a normative theory of constitutional interpretation within a broader system of mutually supportive judgments. Perhaps, then, it is not illuminating to characterize soft originalism as either foundationalist or coherentist. This is not to say that soft originalists embrace some third distinct epistemology, but only that the modesty of their theoretical ambitions leaves them epistemologically uncommitted. Accordingly, let us characterize soft originalism as instrumentalist (“pragmatist” is another label that springs to mind), understanding that it is a rule-

¹³ This is what Mark Greenberg has dubbed the “standard view” of law. See Mark Greenberg, *The Standard Picture and Its Discontents* 5 (UCLA Sch. of Law Research Paper No. 08-07, 2008), available at <http://ssrn.com/abstract=1103569>.

instrumentalism rather than the case-by-case instrumentalism of, say, Judge Richard Posner or Cass Sunstein.

Against the instrumentalists, coherentists about constitutional method suppose that there is some relationship of importance between theories of constitutional interpretation and theories of law. Our theory of interpretation is answerable to theories of law, not dependent only on how well the theory is likely to advance a varied basket of values and ends. Against the foundationalists, coherentism supposes that the correct theory of constitutional interpretation does not simply flow from a theory of law but rather that the two sorts of theories answer to each other, as well as to other judgments, like those about specific cases. The classification of originalist arguments presented in Part II suggests, if roughly accurate, that few if any of the principal ways of arguing for originalism presently in vogue are coherentist. The broad jurisprudential or methodological suggestion of this essay is that we might come to better warranted views about normative theories of constitutional interpretation by self-consciously employing the method of wide reflective equilibrium, and therefore by paying more systematic attention to how particular theories of constitutional interpretation fit together with theories of law and with case-specific judgments of constitutionality.

Of course, engaging in a project of wide reflective equilibrium is no mean undertaking. I cannot advance the project very far in the remainder of this essay. Instead, I hope to take two steps down that path. I start in the next Part by identifying what Rawls called a provisional “fixed point”—a judgment that, albeit revisable, strikes us on reflection as very hard to shake. This is our judgment that John McCain is constitutionally eligible to be president. (In starting with a case-specific judgment, I follow Michael Dorf’s wise observation from a decade ago that, while many theorists appear to assume “that the choice of a constitutional theory precedes the formulation of answers in particular cases . . . in practice, matters typically proceed in the opposite direction.”¹⁴) This case-specific judgment will not itself tell us

¹⁴ Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 Cal. L. Rev. 593, 594 (1999). See also S.L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 Ox. J.L.S. 221 (1990).

much about the proper constitutional theory, but it will substantially undermine originalism. To some readers, however, it might suggest a fairly simple justice-seeking theory¹⁵ in which the criterion of success for any proffered interpretation is that it maximizes justice or, more modestly, in which it is a necessary condition that the successful interpretation avoid substantial injustice. Consideration of other neighboring cases in Part V complicates this simple picture and points toward the framework of a more satisfactory theory of constitutional interpretation, as well, perhaps, as the rudiments of a theory of law.

IV. TAKING CASE-SPECIFIC JUDGMENTS SERIOUSLY: JOHN MCCAIN

A. *Take One*

John McCain III was born to two U.S. citizens in 1936 in the Panama Canal Zone where his father, an admiral in the U.S. navy, was stationed. Because he was not born in the territorial United States, McCain's candidacy for president has been seen by many to raise anew the question of what the natural born citizen clause means.¹⁶ The issue had arisen before—the 1964 Republican presidential nominee Barry Goldwater had been born in the territory of Arizona three years prior to its formal grant of statehood, and George Romney, a candidate for the Republican party's nomination in 1968 had been born to American missionaries in Mexico—but had never been authoritatively resolved by the courts. And the scholarship to date has reached no consensus on the clause's original meaning. All commentators agree that persons born in the United States (except for children of foreign ministers or enemy combatants) are “natural born citizens.” Beyond that, however, scholars have concluded variously (1) that the founding-era technical legal meaning of “natural born” was the same as “native born,” and extended only to persons

¹⁵ I take the concept and nomenclature of “justice-seeking theory” from Larry Sager, although his own account is far from simple. See generally LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* ch. 5 (2004).

¹⁶ Although the issue had been discussed in the blogosphere for some time, it did not attract significant mainstream media attention until a February 2008 article in *The New York Times*. Carl Hulse, *McCain's Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. Times, Feb. 28, 2008, at A21. The online companion to the Michigan Law Review then ran a symposium on the subject two months before the general election. See *An Online Symposium on John McCain and Natural Born Citizenship*, 107 Mich. L. Rev. First Impressions Sept. 2008.

who enjoyed citizenship under the principle of *jus soli* (right of the soil), and not by *jus sanguinis* (right of the blood);¹⁷ (2) that “natural born” had a broader meaning than “native born” and encompassed both *jus soli* and *jus sanguinis*;¹⁸ (3) that the framers intended the phrase to cover whoever was deemed a citizen at birth by operation of subsequently adopted naturalization statutes, possibly with the sole proviso that Congress could not grant “natural born” citizenship retroactively;¹⁹ (4) that the framers intended to delegate to Congress the power, not to reconfigure the content of “natural born citizenship” whenever it chooses, but to “clarify” or “declare” the meaning of the term so as to “fix” it once and for all;²⁰ and (5) that the original meaning may have been ambiguous or is opaque to us.²¹ As one scholar who has researched the question fairly summarized, while “there are powerful arguments that Senator McCain or anyone else in this position is constitutionally qualified, . . . it is not a slam dunk situation.”²²

In short, then, the question of McCain’s eligibility has arisen in a context that we rarely see today: a constitutional text that bears no clear contemporary meaning, controverted historical meaning and intentions; and very sparse judicial precedent.²³ Given the prominence of text, original understanding, and judicial precedent as modalities of constitutional argument, we might expect opinions on the subject

¹⁷ 113 Cong. Rec. 15,875, 15,880 (1967) (Brief of the Hon. Pinckney G. McElwee introduced by Mr. Dowdy); Randall Kennedy, *A Natural Aristocracy?*, 12 Const. Commentary 175, 175 (1995).

¹⁸ Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1, 1 (1968); Christina S. Lohman, *Presidential Eligibility: the Meaning of the Natural-Born Citizen Clause*, 36 Gonz. L. Rev. 349, 359 (2001); Alexander Porter Morse, *Natural-Born Citizen of the United States: Eligibility for the Office of President*, 66 Alb. L.J. 99, 99 (1904).

¹⁹ Jill Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881, 893–96 (1988).

²⁰ Although this is not Pryor’s own view, it is at least suggested by some of the older authorities she cites. *See id.* at 884 nn.13 & 14. For a general discussion of the founder’s views on “fixing” meaning, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519 (2003).

²¹ *See* Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 Mich. L. Rev. First Impressions 22 (2008) (concluding that, for a “new originalist,” the meaning of the term, and in particular its application to the question of John McCain’s eligibility, might depend upon constitutional “construction,” not “interpretation”).

²² Hulse, *supra* note __ at A21 (quoting Sarah Duggin).

²³ The most relevant judicial precedents—none of them close to directly on point—include *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that members of Indian tribes are not birthright citizens under the Fourteenth Amendment because not “subject to the jurisdiction” of the United States); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that, by force of the Fourteenth Amendment, a child of Chinese subjects born in the United States is a U.S. citizen); *Weedin v. Chin Bow*, 274 U.S. 657 (1927) (holding that, under the governing statute, a child born abroad is not a U.S. citizen if his father, albeit a citizen under principles of *jus sanguinis*, had not resided in the country prior to the child’s birth); and *Montana v. Kennedy*, 366 U.S. 308 (1961) (interpreting governing statute to confer birthright citizenship on principles of *jus sanguinis* only through paternal citizenship).

to be diverse and equivocal. However, neither expectation is borne out. To the contrary, there appears to be an extraordinary degree of consensus across diverse sectors of society—among lay people, law professors, and elected officials—that McCain is eligible, along with a robust conviction in the correctness of this answer.

In April 2008, for example, the U.S. Senate unanimously passed a bipartisan resolution “recognizing that John Sidney McCain, III, is a natural born citizen.” The stated grounds for this conclusion included that “there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to American citizens serving in the military nor to prevent those children from serving as their country’s President”; that “such limitations would be inconsistent with the purpose and intent of the ‘natural born Citizen’ clause . . . , as evidenced by the First Congress’s own statute defining the term ‘natural born Citizen’”; that “the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders”; and that “previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President.” As Patrick Leahy, the resolution’s principal sponsor explained, the conclusion reflected the “common sense” of all senators. “Because he was born to American citizens,” Leahy added, “there is no doubt in my mind that Senator McCain is a natural born citizen.”²⁴

Theodore Olson and Laurence Tribe had reached the same verdict a month earlier in a jointly authored white paper.²⁵ Supporting their conclusion in a bare two pages of analysis, Olson and Tribe reasoned that Congress had “recognized in successive federal statutes since the Nation’s Founding that children born abroad to U.S. citizens are themselves U.S. citizens,” and particularly observed that the naturalization statute passed by the First Congress expressly referred to foreign-born children of U.S. citizens as “natural born citizens.” This, they added, was consistent with the British statutes in effect at

²⁴ Statement of Sen. Patrick Leahy on the introduction of the Senate Resolution (April 10, 2008).

²⁵ Opinion of Laurence Tribe & Theodore B. Olson (Mar. 19, 2008) (included as an appendix in Chin, *supra* note 2).

the time. They also identified “a second and independent basis” for their conclusion, namely the “substantial legal support for the proposition that the Panama Canal Zone was indeed sovereign U.S. territory when Senator McCain was born there in 1936,” thereby granting him citizenship on principles of *jus soli*. “Historical practice [Goldwater’s receipt of the Republican Party’s nomination for President in 1964, and the fact that Charles Curtis served as Vice President to Herbert Hoover despite being born in Kansas one year before it achieved statehood] confirms that birth on soil that is under the sovereignty of the United States, but not within a State, satisfies the Natural Born Citizen Clause.” Noting that Barack Obama was born in Hawaii only two years after its admission to statehood, Olson and Tribe deemed it “inconceivable that Senator Obama would have been ineligible for the Presidency had he been born two years earlier.” For these and other reasons, they concluded, “based on the original meaning of the Constitution, the Framers’ intentions, and subsequent legal and historical precedent, Senator McCain’s birth to parents who were U.S. citizens, serving on a U.S. military base in the Panama Canal Zone in 1936, makes him a ‘natural born Citizen’ within the meaning of the Constitution.”

As best I can tell, legal academic opinion largely accords with this conclusion. On the most frequented blawgs, for example, Michael Dorf, James Lindgren, and Larry Solum have all weighed in in McCain’s favor, while Jonathan Turley appears to be the lone dissenter.²⁶ Even Jack Chin (who, as we will see, contends that McCain was not in fact a U.S. citizen at birth—let alone a “natural born” U.S. citizen) seems to agree that, if the relevant statutes had conferred citizenship on McCain at birth, then he would have been a “natural born citizen” for constitutional purposes.²⁷

On this matter, finally, lay opinion and elite opinion appear to coincide. It is hard to find any expression of dissent in the blogosphere, while fervent affirmations of McCain’s eligibility abound. The

²⁶ Dorf on Law, http://michaeldorf.org/2008_02_01_archive.html (Feb. 29, 2008 13:21 EST); Posting of Jim Lindgren to The Volokh Conspiracy, <http://volokh.com/posts/1204265246.shtml> (Feb. 29, 2008 00:07 PST); Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/07/gabriel-j-chin.html> (July 14, 2008 15:57 EST); Jonathan Turley, <http://jonathanturley.org/2008/02/28/does-john-mccain-have-an-alexander-hamilton-problem-a-constitutional-challenge-may-loom-over-mccains-eligibility-for-president/> (Feb. 28, 2008).

²⁷ Chin, *supra* note 2, at 2.

following postings are representative of both the strength of conviction on the subject and the reasoning embraced:

Anyone who has served in the US military knows that any children they have are ‘natural born’ citizens no matter where they are actually born. Just think if that wasn’t so. The military would consist of nothing but single men and women. Since much of our military are married we’d lose all of them.²⁸

I can’t even believe there is any debate on whether or not someone who risked his life in Vietnam, was held in Hanoi’s infamous POW camp and was awarded a Silver Star, a Bronze Star, a Legion of Merit, a Purple Heart, and the Distinguished Flying Cross while serving his country is eligible as president because he was born on foreign soil while his parents were serving his country. Seriously, he may not be my candidate, but it sure as shit isn’t because of any doubt of him being an “eligible” American.²⁹

In short, armchair empiricism suggests that the conviction that McCain is a natural born citizen within the meaning of the law is broadly shared and robustly held. Moreover, it rests, or is said to rest, on a wide variety of arguments.

Importantly, though, and for several different reasons, many of the common argumentative maneuvers don’t withstand scrutiny.

Some are just fallacious. For example, Olson and Tribe’s argument that McCain probably enjoyed citizenship just by virtue of having been born in the “sovereign U.S. territory” of the canal zone overlooks, as Chin has pointed out, that persons whose sole claim to citizenship is birth in the canal zone are not treated as citizens under existing law; they are routinely deported.³⁰ In reaching the contrary conclusion (albeit with some equivocation), not only do Tribe and Olson overlook this fact, they also ignore the well-settled distinction between incorporated territories—those destined for statehood—and

²⁸ Comment responding to posting of Matt Margolis to Blogs for Victory, <http://blogsforvictory.com/2008/02/28/the-inevitable-natural-born-citizen-debate/> (Feb. 28, 2008 13:29 EST).

²⁹ Comment responding to posting of McCullough to Dvorak Uncensored, <http://www.dvorak.org/blog/2008/02/28/is-john-mccain-a-%E2%80%9Cnatural-born-citizen%E2%80%9D/> (Feb. 28, 2008 9:29 EST).

³⁰ Posting of Jack Chin to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/07/page/2/> (July 12, 2008 13:28 EST).

unincorporated territories.³¹ Even putting aside this distinction, that Olson and Tribe would find it “inconceivable” that a two years difference in birth might spell the difference between eligibility and ineligibility for presidency is itself, if “conceivable,” more than a little surprising. That’s just the way rules (as opposed to standards) work: they impose substantially different consequences for conduct or phenomena that reside on different sides of a line whose precise location is sometimes arbitrary. Hawaii was annexed by the United States in 1898 and made a territory in 1900. Surely there was *some* point in time at which it is true that a person born as a U.S. citizen in Hawaii would not have been a U.S. citizen had she been born there a year earlier.

Other arguments, while perhaps strictly true, are substantially misleading. Consider, for example, the Senate Resolution’s observation that “previous presidential candidates were born outside the United States of America and were understood to be eligible to be President.” Well, some were understood to be eligible—Goldwater, for instance. But the eligibility of many others was deeply questioned. George Romney’s eligibility was challenged in a legal opinion published in the Congressional Record, and Franklin Delano Roosevelt, Jr., who served in Congress and was once considered a possible presidential candidate was once deemed ineligible because of his birth in Canada.³²

Most significantly, though, many of the most often expressed reasons for finding McCain eligible are not self-evidently good arguments of constitutional law. Consider the kindred but distinct arguments that a contrary result (1) would be unjust to McCain himself (especially given his distinguished service to this country); (2) would be unjust to Senator McCain’s father, Admiral McCain; (3) would be unjust to all foreign-born children of service members; (4) would be unjust to all service member parents of foreign-born children; and (5) would imprudently discourage military service. My claim is not that arguments of justice and prudence are not legitimate modalities of constitutional argument, but only that the arguments

³¹ Sarah Helene Duggin & Mary Beth Collins, “*Natural Born*” in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. Rev. 53, 89–96 (2005).

³² *Id.* at 57.

are much too underdeveloped to suggest a worked out constitutional theory: it is not clear that all those who advance these arguments in defense of McCain’s eligibility would acknowledge that arguments of the same type have any force at all across all contexts. The point is well illustrated by the remarks of Senator Lindsay Graham, who appears to consider himself a “strict constructionist.”³³ McCain’s father was posted to the Canal Zone “on orders from the United States government,” Graham observed. If he is deemed ineligible for president, “we need to tell every military family that your kid can’t be president if they take an overseas assignment.”³⁴ Precisely how Graham himself understands this observation to function as an argument for McCain’s eligibility is not wholly clear. I accept that this would be a bad result. But surely Graham is not assuming, as a general premise or theory of interpretation, that the goodness or badness of a particular outcome constitutes the touchstone for the correctness (or incorrectness) of a proposition of constitutional law. As a “strict constructionist,” presumably he is not advocating that the Constitution should presumptively be interpreted to avoid bad results. In just the same way, we might reasonably doubt that all those who appear to derive the conclusion that McCain is eligible from the fact that a contrary judgment would be unjust to him or his father proceed from the general premise that the Constitution must always be interpreted to avoid injustice, or even that the avoidance of injustice is always a valid *pro tanto* reason in support of a candidate interpretation.³⁵

³³ See, e.g., *Bush Confident of Securing Senate Confirmation*, Boston Globe, Oct. 8, 2005; Confirmation Hearing on the Nomination of Samuel A. Alito etc, S Hrg 109-227 (2006), at 429.

³⁴ Hulse, *supra* note __ (quoting Lindsay Graham).

³⁵ Many commentators also place seemingly excessive weight on the absence of evidence that the framers intended to exclude foreign-born children of U.S. service members. See, e.g., S. Res. 511, 110th Cong. 2008 (enacted) (“Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to American citizens serving in the military nor to prevent those children from serving as their country’s President, . . . John Sidney McCain, III, is a “natural born Citizen” under Article II, Section 1, of the Constitution of the United States.”); Opinion of Tribe & Olson, *supra* note __ (“It goes without saying that the Framers did not intend to exclude a person from the office of the President simply because he or she was born to U.S. citizens serving in the U.S. military outside of the continental United States . . .”). Generally, that’s not how originalist arguments run. For expectation or application originalists, an intent that X obtain might be constitutionally dispositive. And meaning originalists (whether focused on intended meaning or public meaning) would likely take an intent that X as weighty evidence that the text has a meaning that permits X. But the absence of an intent that X ordinarily has substantially less probative weight; it may be that the framers lacked an intent concerning X because they never thought about the situation.

I hope you do not suppose that, in criticizing some of the arguments given for the near-universal judgment that McCain is legally eligible to be president, I aim to cast doubt on that conclusion. Not at all. I share the conviction. Furthermore, I am disposed to accept that at least some of the reasons given for that conclusion are good reasons of constitutional interpretation. My point is to suggest that people's conviction that McCain is eligible (assuming that he was a birthright citizen) is very likely prior to any particular theory they may have about the proper way(s) to interpret the Constitution: most commentators are more certain of their case-specific conclusion than they are of the general soundness of the particular considerations upon which they purport to rely.³⁶ The method of reflective equilibrium advises us to take this conviction seriously—seriously, but not intransigently. Any theory of constitutional interpretation that would not yield this case-specific conclusion is to that extent undermined or thrown into doubt. Our theories of interpretation are answerable to this judgment.³⁷

Originalism is such a theory—but not because I assume that the original meaning or intent of the natural born citizen clause was strictly limited to *jus soli*. The McCain case undermines originalism because our conviction is not contingent on the historical facts that originalism would make dispositive. For shorthand, let us say that our conviction about this case is that McCain is “non-contingently eligible” for President, by which I mean, of course, not that his eligibility is contingent on nothing, but only that it's not contingent on any particular facts about the original character of the natural born citizen clause. Put very simply, originalism makes the correct judgment about McCain's eligibility contingent on some

³⁶ Because the epistemic significance, on coherentist thinking, of the fact that a particular judgment is shared by others may not be entirely clear or noncontroversial, perhaps I should say that you should take the conviction seriously if you in fact hold it, and that you may allow the fact that others share it (to the extent that they do) to strengthen your own conviction on this point. (I am grateful to Kevin Toh for provoking this clarification.)

³⁷ This might not be true if our case-specific judgments, though not purporting, or initially appearing, to rely on any particular interpretive theory, are in fact traceable to a prior embrace of a particular interpretive theory by ourselves or by others. Suppose, for example, that the judiciary, or the broader society, accepted some constitutional interpretation, *p*, on originalist grounds. You might be influenced by this general acceptance or endorsement of *p* in coming to believe that *p* is in fact the correct legal meaning of the relevant constitutional text, *T*. Later, historians might persuade you that the original meaning of *T* was not *p*. If *p* generates some case-specific judgment *c* not itself consistent with the original understanding of *T*, your conviction that *c* might be unreliable against originalism to the extent that others' commitment to an originalist interpretation was causally responsible for your case-specific judgment of *c*, notwithstanding your unawareness of that fact. Be this as it may be, it strikes me as not remotely likely that qualifications of this sort contaminate whatever convictions we might have about whether McCain is a natural born citizen within the meaning of Article II.

facts about the late eighteenth century—even, I would think, if we are mistaken about those facts. If the original meaning of “natural born Citizen” was limited to birthright citizens born in U.S. territory then McCain is not legally eligible, says originalism, no matter what any of us—or all of us—might believe. Indeed, if sufficient historical evidence that the original meaning was limited to the native-born were to be unearthed, then we would seem compelled to conclude that McCain is ineligible to be president even if the evidence were to be discovered after his election, or deep in his first term.³⁸ Furthermore, if this hypothetically compelling historical evidence were to arise some years after a McCain presidency, and if another candidate were to present the same issue, and if a court were to deem a legal challenge to that candidate justiciable, then it would seem that the McCain precedent would be, for an originalist, entirely without legal relevance: while self-described originalists differ mightily over whether to recognize an exception for judicial precedents, I am aware of none who would also recognize an exception for non-judicial precedents—which is not surprising given the difficulty of then insisting that no other social and political developments could bear on constitutional meaning.³⁹ All of these originalist conclusions conflict with our non-contingent conviction about McCain. So much the worse for our case-specific conviction, says the foundationalist-originalist.⁴⁰ So much the worse for originalism, says the coherentist.⁴¹

³⁸ Admittedly, exactly what we should do about his ineligibility would be a separate question. See the discussion of non-normative originalism in Part I.

³⁹ For a discussion of the difficulty originalists confront when they accept an exception for stare decisis, see Berman, *Originalism is Bunk*, *supra* note __, at 33-36.

⁴⁰ To his credit, this, I believe, would be Solum’s response. See Solum, *Originalism and the Natural Born Citizen Clause*, *supra* note __. But as noted in the Introduction, I expect most committed originalists to respond this way (this is a comment on how coherentist arguments operate, not a questioning of my opponents’ good faith), which is why I hope mostly to reach the presently unaffiliated.

⁴¹ We could run essentially the same argument by relying on *Brown v. Board of Education*. On this view, *Brown* undermines originalism so long as we are strongly committed to the proposition that *Brown* was correct in holding that de jure racial segregation in public education is unconstitutional, and even without establishing that the original meaning of the Equal Protection Clause cannot accommodate that result. Rather, *Brown* undermines originalism just because, or insofar as, we believe it was non-contingently correct.

Although I believe this argument has substantial force, I think that the McCain case makes the point even more effectively for at least two reasons. First, it might be harder than we appreciate for those of us not alive in 1954 (or alive but too young to have attended to constitutional debates) to separate our convictions regarding whether *Brown* was rightly decided in 1954 from our intuitions regarding what the correct statement of the law is now. That is, from the standpoint of 2009, contemplating *Brown* introduces the variable of intervening judicial precedent that the contemplation of McCain’s eligibility does not. Second, because racial segregation offends

B. *Take Two*

In claiming that many of us are durably convinced, on reflection, that McCain is a natural born citizen within the meaning of Article II, thus constitutionally eligible to be president, I mean to be saying more than that many of us believe that a challenge to his eligibility should be nonjusticiable. The claim is that he and his supporters could correctly contend that a McCain presidency would have been wholly constitutional (assuming satisfaction of any other legal requirements), that members of the legislative and executive branches of the national government and of the states could support a McCain presidency consistent with their constitutional obligations. I'd like now to briefly consider whether that judgment might be less secure than first appears because we, or many of us, are mistaking for a conviction of non-contingent eligibility the distinct but neighboring convictions that, although McCain would *not* be constitutionally eligible were the constitutional history to come out the wrong way, either (a) the judiciary should nonetheless not intervene or (b) nobody (judges and others) should feel any moral compunction about disregarding the fact of McCain's legal ineligibility. The difference between (a) and (b) is that the former view leaves open the possibility that relevant actors in the legal drama other than judges—like McCain himself and his electors—should feel duty-bound to act in accordance with the conclusion that he is ineligible. The latter position, in contrast, maintains that, while McCain would not be legally eligible to be president were the original meaning of “natural born citizen” limited to birthright citizenship by *jus soli*, such a legal conclusion would confer no moral obligation upon anyone.

Here's a roundabout way to test the suggestion that I have mischaracterized the case-specific considered judgment that I observe in myself and in others. I have assumed thus far that McCain was a citizen at birth, albeit by virtue only of the principle of *jus sanguinis*, not by *jus soli*. But Jack Chin's recent scholarship reveals that this is not so obviously true as to be accepted without argument. As Chin

principles of justice to a far greater degree than would the possible constitutional ineligibility of John McCain and similarly situated others, we might worry that our convictions related to *Brown* are as much about what the Court should have done as about what the constitutional law was. That is, we might risk confusing a moral conviction that the Court should have done justice regardless of what the constitutional law (correctly understood) might have been, for a conviction about what the constitutional law (correctly understood) actually was.

explains, the statutory framework in effect at the time of McCain’s birth in 1936 conferred citizenship on persons born “out of the limits and jurisdiction of the United States” if one or both parents was a U.S. citizen.⁴² The problem for McCain, Chin argues, is that limits and jurisdiction were understood at the time to refer to different concepts. The limits of the United States is a straightforward territorial concept: by being born in the Canal Zone, McCain was born out of the limits of the U.S. within the meaning of § 1993. Jurisdiction, however, refers to the legitimate exercise of sovereign power: because the Panama Canal Zone was within U.S. jurisdiction, McCain was *not* born outside of the jurisdiction of the U.S. Therefore, he was not granted citizenship by § 1993. Because no other constitutional or statutory provision granted him citizenship, and because the United States had abolished common law principles of citizenship, McCain was not a citizen at birth. Instead, he was granted citizenship *after birth* by virtue of a 1937 revision to the immigration laws that expressly conferred citizenship on “any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother . . . was or is a citizen of the United States.”⁴³ Thus, while McCain is a citizen by virtue of his birth, he was not a citizen at birth, Chin concludes, and surely cannot be a “natural born Citizen.”

Now, Chin’s argument is not impregnable. McCain’s status as a “natural born citizen” could possibly be restored in a variety of ways: if “limits and jurisdiction” is best interpreted as a mere doublet—a redundancy, like “cease and desist” or “metes and bounds”—rather than as marking distinct concepts;⁴⁴ or if, contrary to Chin’s contention, common law principles of citizenship have remained effective; or if “natural born citizenship” is interpreted to mean “citizenship *by birth*” and not “citizenship *at birth*,”⁴⁵ let alone some subset thereof. But none of these paths for rebutting Chin’s argument is a clear

⁴² 8 U.S.C. § 1993. The statute added two qualifications: first, the citizen parents must have resided in the United States at some point; and second, if only one parent was a U.S. citizen, the child must reside continuously in the U.S. for 5 years prior to her eighteenth birthday and take an oath of allegiance.

⁴³ 8 U.S.C. § 1403.

⁴⁴ See Stephen E. Sachs, Commentary, *Why John McCain Was a Citizen at Birth*, 107 Mich. L. Rev. First Impressions 49, 51–53 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/sachs.pdf>.

⁴⁵ See Solum, *Originalism and the Natural Born Citizen Clause*, *supra* note ___, at 28.

winner.⁴⁶ So let us assume *arguendo* that Chin’s analysis is correct: John McCain was not an American citizen at birth. The instant question is whether this supposition affects our initial conviction that McCain would have been non-contingently eligible to be president had he been born a year later, or if the relevant statutes had been amended a year earlier.

Chin presented his scholarship after McCain effectively sewed up the Republican nomination. Yet I’d bet that few readers of his paper, or of reports of his paper in the mainstream media,⁴⁷ thought: “Wow! This could change everything!” Few readers, in other words, predicted or would have urged that McCain be excluded from the ballot or that, were he to prevail in the general election against the Democratic candidate, Barack Obama, he should step aside in favor of his own vice presidential nominee. I’d also doubt, however, that this is because many readers would accept that the correct legal interpretation of “natural-born citizen” extends to cover persons not citizens at birth. If all this is correct, then the predictably apathetic response to Chin’s fascinating paper might best be explained by readers’ judgments that, while McCain would *not* be constitutionally eligible to be president if Chin’s analysis were correct, his ineligibility should not be enforced by the courts, or would be due to a legal technicality that all of us may comfortably disregard. And if this is so, we might suspect that a similar judgment is at work even if Chin is wrong. That is, if we believe, *contra* Chin, that McCain was a U.S. citizen at birth, we might *not* believe, as I contended in Section IV.A., that that makes him non-contingently eligible to be president. Instead, we might believe that one of two things is true—either that he is *legally* eligible to be president or that, if he isn’t, the *moral* grounds for disregarding his technical legal ineligibility are overwhelming—and that which of the two is the case depends entirely upon facts about the late eighteenth century.

Although this is possible, my own guess is that reflection on the Chin wrinkle does more to bolster the argument from the preceding section than to undermine it. Unfortunately, this is hard or

⁴⁶ One scholar of immigration law adjudged Chin’s analysis “compelling as a matter of positive law.” Spiro, *supra* note __, at 44.

⁴⁷ See, e.g., Adam Liptak, *A Hint of New Life to a McCain Birth Issue*, N.Y. Times, July 11, 2008, at __.

impossible to demonstrate. About all I can do is avow that my own reactions to the two variants of the McCain case differ, to report that other readers of a previous draft of this paper have had similar reactions, and to invite the reader's own introspection. The Chin thesis discomforted me when I first encountered it prior to the November election because, while I surely did not feel that his research, if sound, would justify judicial action or even that it should compel McCain to stand aside out of respect for the Constitution, I could not fully shake the sense that it would cast a legal stain or taint on a McCain presidency: all would not be quite right, legally speaking. Reflection on doubts about the original meaning of the Natural Born Citizen Clause, in contrast, caused me no similar disquiet. Had McCain been born a citizen and had he defeated Obama in November, I believed he could have assumed the presidency without apology or asterisk no matter what the framers intended to capture by the phrase and no matter how the hypothetical reasonable citizen might have understood it at the time of ratification. The Chin variant on the McCain case teaches that we need not be slaves to the law; the pre-Chin variant teaches that the Constitution is not enslaved to the deep past.

V. OBJECTIONS AND FURTHER ANALYSIS

Originalists can respond to the foregoing argument in several ways. Of course, they could abandon originalism or soften it into a more moderate form. (As I have argued elsewhere,⁴⁸ “moderate originalism”—a collection of views that consider the original meaning highly relevant, though not necessarily constraining, even putting judicial precedent aside—describes a plausible swath of originalist logical space, but does not fairly lay claim to the label originalism *simpliciter*: “originalism” is a highly controversial theory of constitutional interpretation; “moderate originalism” is not.) Alternatively, they can continue to insist that McCain's constitutional eligibility does depend upon historical facts about the late eighteenth century. If they do bite this bullet, they could either reject reflective equilibrium as a

⁴⁸ See Berman, *Originalism is Bunk*, *supra* note __, at 16-27.

viable method for reasoning about constitutional theory, or they could accept the method but disclaim the case-specific conviction that McCain is non-contingently eligible. Here I pursue a line of argument that might be taken to challenge the analysis of Part IV.

Quite generally, the strategy shall be to marshal other strong case-specific intuitions that are consistent with originalism and that cannot be brought into coherence with any plausible theory of interpretation that would be supported or suggested by our case-specific conviction that McCain is non-contingently eligible. One way to carry out this strategy involves two other cases involving the natural born citizenship clause: one involving the eligibility of a naturalized American citizen (call this the Arnold Schwarzenegger case), and a second involving the eligibility of a birthright citizen born in the United States by caesarian section (call this the Warren Harding case). The claims will be that we have strong convictions that Schwarzenegger is not eligible for President and that Harding is. The argument that builds upon these claims holds that we cannot bring into reflective equilibrium these two case-specific convictions and the case-specific conviction that McCain is non-contingently eligible, along with any plausible non-originalist theory of interpretation. Put another way, any non-originalist theory of interpretation that would seem to yield the intuitively correct result in the case of John McCain commits us to the intuitively incorrect results in one or both of the cases of Schwarzenegger and Harding. Originalists would advise that we abandon either the coherentist method of justification or the conviction of McCain's non-contingent eligibility, either of which moves would leave originalism remaining unscathed.

A. Arnold Schwarzenegger and the Constraining Force of Text

Arnold Schwarzenegger was born in Austria, to Austrian parents, in 1947. He became a U.S. citizen in 1983. Because his American citizenship is by naturalization, not by birth, we share a strong conviction that he is not eligible to be president. To be sure, we recognize strong arguments that barring qualified and potentially very popular candidates like Schwarzenegger (and like Michigan Governor

Jennifer Granholm and former Secretary of State Madeleine Albright) might be both unjust and unwise. But, we say, that's what the Constitution requires. Schwarzenegger's ineligibility is not contingent on an assessment of the weight of the arguments of principle and policy that seem to weigh so heavily in our evaluation of the McCain case. Schwarzenegger's non-contingent ineligibility thus might appear, at first blush, to be in tension with whatever non-originalist theory of interpretation our conviction of McCain's non-contingent eligibility might seem to support. Surely, by the method of reflective equilibrium, Schwarzenegger's non-contingent ineligibility causes trouble for a rigorously justice-seeking theory of constitutional interpretation.

Of course, defenders of the analysis pursued in Part IV are not likely to find this argument troubling. In this case, they might reason, the plain language of the text is sufficient to resolve the issue against Schwarzenegger. A naturalized citizen is not "natural born." We can accommodate the conviction of Schwarzenegger's non-contingent ineligibility just by granting that the plain language of the text must play a prominent role in the best method of constitutional interpretation.⁴⁹ We do not need to be originalists to reach this conclusion, they might say.

B. Warren Harding and the Puzzle of Fortuitous Changes in Meaning

That is true. But enter now the case of Warren G. Harding, who is said to have been born by caesarian section. (Let us assume that this is both true and adequately proven.) Imagine that, in 1920, the phrase "natural born" had come widely to mean "born by vaginal delivery."⁵⁰ The argument is thus pressed that Harding is not a "natural born Citizen," hence ineligible to be president. Surely the argument is risible. We all have the strong conviction that Harding is eligible (he was born in Ohio), and that his eligibility is non-contingent on whether the meaning of words and phrases used in the Constitution have

⁴⁹ Some might also deny the case-specific conviction of Schwarzenegger's non-contingent ineligibility; they find it plausible that equality principles (constitutionalized by the later-enacted Fourteenth Amendment, and then reverse-incorporated against the federal government) can be relied upon to defeat Article II's discrimination between birthright and naturalized citizens. But I will put this counterargument aside at present and focus only on those who share the conviction that Schwarzenegger is non-contingently ineligible.

⁵⁰ See Lohman, *supra* note __, at 350 (noting that some have "poked fun at the clause with tongue-in-cheek assertions that individuals born by cesarean section are not viable presidential candidates").

or have not changed in any accidental ways. Like McCain, Harding is non-contingently eligible (although their eligibility is non-contingent on different circumstances). The Harding case, then, demonstrates that the non-originalist response to the Schwarzenegger case is not secure. Because we do not think that the correct case-specific resolution of constitutional questions is hostage to the fortuity of changed meanings, the text can provide the firm constraint that the Schwarzenegger case assumes it does only if the meaning of the text is fixed—either by its original public meaning or by the meaning intended by its authors.

This argument neither compels originalism nor undermines application of the method of reflective equilibrium to the constitutional domain. What it teaches is that a good theory of constitutional interpretation is likely to be complex. This does not mean that we are destined to say nothing more helpful and determinate than that many different modalities of argument are legitimate, and that wielding them appropriately in a given case requires good judgment. It could well be that existing and normatively attractive practices of constitutional interpretation involve reasoning that can be described not only by reference to the relative weights of the reasons we deploy, but to their structured interaction as well. Furthermore, as I have recently proposed elsewhere, such an account might cohere well with our best understanding of law itself as an argumentative practice.⁵¹

To offer just one possible piece of a larger picture (which piece I hold out at arm's length, for purposes of illustration) perhaps arguments of text are sound arguments (of not-conclusive weight, of course) even when not couched in terms of original meaning, but that when we believe to a sufficiently high confidence level that the putatively plain meaning attributed to the text was *not* originally intended or understood, then the argument from text alone is not just overridden, but canceled, and the original meaning carries the day unless overridden by arguments of a different sort—for example, arguments of policy, principle, or shared contemporary social understandings. Recast in the language of reasons, the

⁵¹ I take a first stab toward developing an account of law as a complex argumentative practice in Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in MATTHEW D. ADLER & KENNETH E. HIMMA EDS., *THE UNITED STATES AND THE RULE OF RECOGNITION* __ (2009).

suggestion is something like this: the fact that a plain or ordinary present meaning of a constitutional provision, T, is p constitutes a sound reason (of some weight) to interpret the law to be p in the absence of confident belief regarding whether the original meaning of T was p; but a confident belief that the original meaning of T was not p is a “protected reason”⁵² that constitutes both a sound first-order reason (of some weight) to interpret the law to be –p, and a second-order exclusionary reason not to entertain the otherwise available textualist reason in favor of p. In other words, when we believe that some candidate interpretation of a portion of the text was not originally intended or understood, then the mere fortuity that that interpretation fits a present meaning of the text is itself no reason to support that legal interpretation, although other considerations could constitute sound reasons for such an interpretation. (An illustration: if we believe to some requisite confidence level that the original meaning of “domestic violence” in Article IV⁵³ was roughly synonymous with “insurrection”—referring to a revolt against civil or political authority—then the happenstance that, in American English circa 2009, the term commonly means “private violence between intimates” would not *itself* be a reason to interpret the Constitution to compel the national government, on application from a state, to protect the state against an epidemic of spousal assaults, though it is conceivable that *other* reasons would support such an interpretation—reasons that, most likely, would not support a different result were the state to appeal for protection against ordinary street crime.)⁵⁴ I do not know how plausible this particular suggestion may turn out to be, on fuller reflection. My point is only to disabuse us of the naïve assumption that any pluralist or eclectic approach to interpretation must amount to nothing more structured and rigorous than a catalogue of legitimate

⁵² On “protected reasons” and “exclusionary reasons,” see JOSEPH RAZ, PRACTICAL REASON AND NORMS 35-48, 190-94 (1999).

⁵³ “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. Const. Art. IV, § 4.

⁵⁴ For a recent discussion of the Domestic Violence Clause that seeks to problematize the assumption that its original meaning was limited to insurrections and the like, but which is not inconsistent with anything I say here, see Mark S. Stein, *The Domestic Violence Clause in “New Originalist” Theory*, __ *Hast. Con. L.Q.* __ (forthcoming 2009).

argumentative modalities. Our existing argumentative legal practice might have (in Llewellyn’s words) a “bony structure”⁵⁵ that careful attention could help excavate.

CONCLUSION

Most arguments for normative theories of constitutional interpretation assume that their persuasiveness depends upon the cogency and force of the general considerations and theoretical desiderata appealed to. And whatever those considerations may be, they are rarely thought to include our convictions about the proper legal outcome of particular cases. Our normative theories of interpretation (or of “implementation”) are the grounds, not the product, of any case-specific judgments we may have. The method of reflective equilibrium advises that this is a mistake: our convictions about the principles that properly guide how we ought to interpret the Constitution, about the concept or nature of law, and about how particular cases should come out (and perhaps much else besides) inform, and are answerable to, each other.

Of course, even if this is true, it might also be true that there are few case-specific judgments to which we hold firm, prior to an embrace (even if revisable) of correct principles of constitutional interpretation. Given the prevalence of basically positivist jurisprudential outlooks, we simply may not have many strong convictions about particular case-specific legal questions, as we do about particular case-specific moral questions. But that doesn’t mean we have none. I have argued that most of us have a firm conviction that John McCain satisfies the Constitution’s eligibility requirements for the presidency—in particular, the requirement that the president be a “natural born Citizen”—notwithstanding the obscurity of the phrase and our acceptance, as a nontrivial possibility, that the phrase was understood at the time of the Constitution’s drafting and ratification to refer to persons who were born in the United States, as McCain himself was not. Reflection on this case thus undermines contemporary originalism—

⁵⁵ KARL N. LLEWELLYN, MY PHILOSOPHY OF LAW 181, 187 (1941) (describing “practice” as “the bony structure of a legal system”), *quoted in* Dennis M. Patterson, *Book Review—Law’s Practice*, 90 COLUM. L. REV. 575, 593 (1990).

the theory that (judicial precedent to one side) judges are legally obligated to interpret and implement the Constitution consistent with its original meaning. The case does not, however, dictate that we adopt any particular theory of constitutional interpretation. Our best theory of constitutional interpretation remains to be articulated. As we continue to work it out, coherentism counsels that we pay more attention than we often do both to more abstract theorizing about the concept of law and to more concrete judgments about individual cases.