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R. v. Comeau[1] raises questions about the place of originalism in the interpretation of a federalism provision of the *Constitution Act, 1867*,[2] as well as related issues about the doctrine of *stare decisis*. Indeed, in anticipation of the Supreme Court's hearing of the case, Léonid Sirota and Benjamin Oliphant wrote in the postscript to their 2017 article entitled "Originalist Reasoning in Canadian Constitutional Jurisprudence": "[t]he Supreme Court's decision … may well provide welcome clarifications as to [the] value and importance of originalist reasoning in Canada".[3] They argued that the case posed a question that represented "'the biggest single challenge facing originalists' — whether and how to 'reconcil[e] originalism with precedent'"[4] that deviates from the original meaning of a constitutional provision. When understood in these terms, *Comeau* engaged a broad academic debate about the relationship between living tree constitutionalism and originalism that is ongoing in Canada, the United States and elsewhere.

In this article, I will argue that the general commitment of Canadian courts to living tree constitutionalism does not rule out a place for originalism in the interpretation of the division of powers. We shall see that the Supreme Court drew upon originalist methods in *Comeau* when

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1 [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342 (S.C.C.) [hereinafter "*Comeau*"].

2 *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

3 Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 UBC Law Review 505, at 576 (citations omitted) [hereinafter "Sirota & Oliphant, 'Originalist Reasoning'"].

4 *Id*.

reading and applying section 121 of the *Constitution Act, 1867*. The Court's treatment of precedent in *Comeau* did not, however, definitively resolve the question of what should happen in the case of a conflict between a court's understanding of the Constitution's original meaning and settled precedent, nor did the reasons in the case settle the question of what should be the appropriate relationship between originalism and living tree constitutionalism in Canadian constitutional interpretation. I will conclude that the Court in *Comeau* evidenced an eclectic approach, and I will suggest why that approach can be justified.

The article will proceed in three Parts. Part I will describe the Court's reasoning in *Comeau*. Part II will introduce some current positions in debates about the relationship between originalism and the living tree doctrine in Canadian constitutional interpretation, as well as some theoretical debates about originalism and living tree constitutionalism. Part III will argue that *Comeau* interprets section 121 in ways that are consistent with the "original public meaning" version of originalism, although the decision does not resolve the question of what would happen in the event of a direct conflict between a court's understanding of the original meaning of a constitutional provision and settled precedent with respect to that provision. The article will further note that some passages of the Court's decision express living tree constitutionalist values and that the relationship between these values and originalist ones is unresolved in the case. It will conclude by arguing that this lack of resolution is characteristic of an eclectic approach to constitutional interpretation and that eclecticism is justified because it does justice to the range of values that are at play in the practice of constitutional interpretation.

I. PART I : *COMEAU* AND CONSTITUTIONAL INTERPRETATION

Mr. Comeau, who was the respondent at the Supreme Court of Canada, argued that provisions of New Brunswick's *Liquor Control Act*[5] violated section 121 of the *Constitution Act, 1867*, which states: "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." According to the respondent, section 134(b) of the *Liquor Control Act* offended section 121 because that provision of the Constitution "prevents the Province of New Brunswick from legislating

[5] R.S.N.B. 1973, c. L-10.

that New Brunswick residents cannot stock alcohol from another province".[6] In finding in favour of Mr. Comeau, the trial judge departed from long-standing precedents and did so "on the basis of historical and opinion evidence tendered by an expert witness".[7]

At issue in the appeal to the Supreme Court of Canada were two questions: "First, did the trial judge err in departing from precedent, and second, what is the proper interpretation of s. 121?"[8]

The Court introduced the first issue by setting out the trial judge's reasoning. According to the Court, the trial judge accepted "(1) [an] expert's description of the drafter's motivations for including s. 121 in the *Constitution Act, 1867*, and (2) [that] expert's opinion that those motivations drive how s. 121 is to be interpreted".[9] Based on this evidence, the trial judge held that a line of precedents, beginning with *Gold Seal Ltd. v. Attorney General for the Province of Alberta*[10] had been incorrectly decided. That decision held that "s. 121 prohibits direct tariff barriers (*i.e.*, custom duties) on goods moving between provinces".[11] By contrast, the trial judge reasoned that the expert's evidence on the legislative history and on the political climate at the time indicated that "in the minds of the drafters [the phrase "admitted free" in s. 121] … meant barrier-free borders".[12] The trial judge concluded that this new evidence fell within an exception to vertical *stare decisis* set out in *Canada (Attorney General) v. Bedford*.[13]

The Supreme Court of Canada held that the trial judge erred. The Court reasoned that the evidence before the trial judge did not fall within the *Bedford* exception, which states that evidence must meet "the threshold of fundamentally shifting the parameters of the debate"[14] in order for a lower court to be able to revisit binding precedent. The Court held that

> [b]ecause the historical evidence accepted by the trial judge is not evidence of changing legislative and social facts or some other fundamental change, it cannot justify departing from vertical *stare*

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6 *Comeau*, at para. 4.

7 *Id.*, at para. 6. The New Brunswick Court of Appeal dismissed the Crown's application for leave to appeal. The Crown then appealed to the Supreme Court of Canada (paras. 21-22).

8 *Id.*, at para. 7.

9 *Id.*, at para. 36.

10 [1921] S.C.J. No. 43, 62 S.C.R. 424 (S.C.C.).

11 *Comeau*, at para. 14.

12 *Id.*, at para. 16.

13 [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101 (S.C.C.).

14 *Comeau*, at para. 43.

> *decisis*. While one's particular collection of historical facts or one's view of that historical evidence may push in favour of a statutory interpretation different from that in a prior decision, the mere existence of that evidence does not permit the judge to depart from binding precedent.[15]

The Court supported this conclusion with some observations about the Privy Council's reasoning about the living tree approach to constitutional interpretation set out in *Edwards v. Canada (Attorney General)*[16] and *stare decisis*. The Court noted that by being "limited entirely to the words and context of the provision in light of the historical evidence", the trial judge's interpretation of section 121 was at odds with the purposive approach set out in *Edwards* and followed by a long line of cases.[17] The Court further held that the trial judge's reliance on the expert's opinion about the correct interpretation of section 121 was an error because constitutional interpretation is within the core competence of judges and to rely on the expert's opinion on this kind of matter was "to cede the judge's primary task to an expert".[18] According to the Court, if courts were to rely on expert opinion in this way, they would undermine the very purposes of *stare decisis*, as such reliance would introduce an unmanageable degree of instability into the law.[19]

On the second issue raised by *Comeau*, namely the proper interpretation of section 121, the Court concluded:

> … s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders.[20]

The Court arrived at this conclusion by analyzing the historical and legislative context of section 121, the unwritten constitutional principle of federalism, and the case law interpreting that section. In its examination of the historical context, the Court looked at trends and events, including declining British preferences for Canadian exports by

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15 *Id.*, at para. 37.
16 [1930] A.C. 124, 1929 U.K.P.C. 86 [hereinafter "*Edwards*"].
17 *Comeau*, at para. 39.
18 *Id.*, at para. 40.
19 *Id.*, at para. 41.
20 *Id.*, at para. 53.

1850[21] and the United States' abrogation in 1866 of the *Reciprocity Treaty* which had "mimicked the provinces' earlier access to British demand".[22] In response to these events, the framers of the *Constitution Act, 1867* "agreed that individual provinces needed to relinquish their tariff powers".[23] The Court examined legislative debates, and in light of these, noted that the framers chose the broader, more ambiguous phrase "admitted free" rather than "a narrower phrase like 'free from tariffs'".[24] Based on its assessment of the historical materials, the Court concluded that section 121 "prohibits the imposition of charges on goods crossing provincial boundaries", that there was no evidence suggesting that provinces would "lose their power to legislate under s. 92 of the *Constitution Act, 1867* for the benefit of their constituents, even if that might have impacts on interprovincial trade", and that there was limited historical support for the view that the section guaranteed "trade free of *all* barriers".[25]

In examining the legislative context of section 121, the Court considered (1) sections 122 and 123, which address the shifting of customs and excise levies from the provinces to Parliament, (2) Part VIII, which includes sections, including section 121, that impose "direct burdens on the price of commodities",[26] and (3) the placement of section 121 in the *Constitution Act, 1867*, relative to sections 91 and 92. After assessing this legislative context, the Court concluded that section 121

> was part of a scheme that enabled the shifting of customs, excise, and similar levies from the former colonies to the Dominion; that it should be interpreted as applying to measures that increase the price of goods when they cross a provincial border; and that it should not be read so expansively that it would impinge on legislative powers under ss. 91 and 92 of the *Constitution Act, 1867*.[27]

The Court then read section 121 in light of the principle of federalism, citing *Reference re Securities Act*[28] for the proposition

> that both federal and provincial powers must be respected and one power must not be used in a manner that effectively eviscerates

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21 *Id.*, at para. 57.
22 *Id.*, at para. 58.
23 *Id.*, at para. 62.
24 *Id.*, at para. 64.
25 *Id.*, at para. 67.
26 *Id.*, at para. 71.
27 *Id.*, at para. 73.
28 [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837 (S.C.C.).

> another. Rather, federalism demands that a balance be struck, a balance that allows the federal Parliament and the provincial legislatures to act effectively in their respective spheres.[29]

In coming to its conclusion about how an interpretation of section 121 could arrive at an appropriate balance, the Court referred to the living tree doctrine, noting that the doctrine "is not an open invitation for litigants to ask a court to constitutionalize a specific policy outcome. It simply asks that courts be alert to evolutions in, for example, how we understand jurisdictional balances and the considerations that animate it".[30] The Court considered interpretations of section 121 that argued in favour of full economic integration[31] or of giving provincial governments "expansive scope to impose barriers on goods crossing their borders".[32] In rejecting both of these interpretations, the Court concluded that the appropriate federal balance would be struck by a rule that

> prohibits laws directed at curtailing the passage of goods over interprovincial borders, but allows legislatures to pass laws to achieve other goals within their powers, even though the laws may have the incidental effect of impeding the passage of goods over interprovincial borders.[33]

The Court supported this understanding of the text of section 121 with its reading of the relevant precedents and articulated a test for determining whether a law infringes the provision. According to that test, a court first asks "whether the essence or character of the law is to restrict or prohibit trade across a provincial border".[34] If the law does not do this, section 121 is not engaged.[35] However, "[i]f it does, the claimant must also establish that the primary purpose of the law is to restrict trade".[36] If the primary purpose of legislation is directed at a valid provincial goal and only incidentally restricts interprovincial trade, it will be found to be valid.[37]

The Court applied this test to the impugned provisions of the *Liquor Control Act* (including section 134(b)) and concluded that by making it

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29 *Comeau*, at para. 79.
30 *Id.*, at para. 83.
31 *Id.*, at para. 85.
32 *Id.*, at para. 87.
33 *Id.*, at para. 88.
34 *Id.*, at para. 108.
35 *Id.*, at para. 111.
36 *Id.*
37 *Id.*, at para. 112.

an offence to obtain liquor from a source other than the New Brunswick Liquor Corporation, the Act did impede interprovincial trade, but its primary purpose was the valid one of "restrict[ing] access to *any* non-Corporation liquor, not just liquor brought in from another province".[38]

Did the Court in *Comeau* clarify the place of originalism in Canadian constitutional interpretation and did it specify what should happen should a binding precedent conflict with a novel judicial interpretation of the original meaning of a constitutional provision? We have seen above that the Court addressed arguments about the intentions of the drafters of section 121, interpreted the provision in light of its historical and legislative context, as well as the principle of federalism, and constructed a two-part doctrinal rule. We saw further that in its consideration of the exception to vertical *stare decisis*, the Court referred to *Edwards*, the classic citation for the living tree doctrine in Canadian constitutional law.

In the next Part, I will provide context for the Court's analysis by examining some recent writing on originalism, both from Canada and elsewhere. That discussion will enable us to see that the doctrine of the living tree can be understood to be consistent with a particular version of originalism. Once we understand the nature of that consistency, we will see in Part III how *Comeau* was also an example of a specific form of originalist reasoning, although that case contains passages that suggest a commitment to living tree constitutionalist ideas. I will conclude Part III by arguing that the Court did not provide a definitive answer to the question of how a court should respond to a conflict between the Constitution's original meaning and a well-established precedent, and that in its acceptance of diverse interpretive sources, the Court evidenced an embrace of eclecticism.

II. PART II: ORIGINALISM IN CANADIAN LAW AND LEGAL THEORY

Léonid Sirota, Benjamin Oliphant, Bradley Miller and others have made valuable contributions to our understanding of originalism's place in Canadian constitutional law.[39] Miller, in an important chapter challenging the conventional understanding of the constitutional

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[38] *Id.*, at para. 122.

[39] See, *e.g.*, Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42 *Queen's Law Journal* 107 [hereinafter "Oliphant & Sirota, 'Originalism'"] and Bradley W Miller, "Beguiled by Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can. Journal of Law & Juris. 331 [hereinafter "Miller, 'Beguiled'"].

metaphor of the living tree, situates *Edwards*[40] in contemporary theories of originalism.[41] I focus on Miller's work because it provides an excellent entry point into debates about originalism and because it has influenced how recent scholarship has approached originalism in Canada.

Miller argues that the Privy Council rejected a specific form of originalism espoused by the Supreme Court of Canada's reasons in that case.[42] That form of originalism focuses on how a Constitution's drafters intended that a constitutional provision should be applied. Miller describes the Supreme Court of Canada's interpretation of the relevant provision in the following terms: "the object of the inquiry was not about the framers' intentions with respect to the *semantic* meaning of 'persons', but rather their intentions about *application* meaning; that is, how *would* they have answered the concrete question 'does section 24 of the *BNA Act* permit women to be appointed to the Senate?'"[43]

1. Original Public Meaning Originalism in *Edwards*

The notion of framers' intentions is central to a version of originalism that goes by the name "original intentions originalism".[44] Standing opposed to this version is another — original public meaning originalism — which focuses on the "plain meaning of the text".[45] According to Miller, the Privy Council adopted this latter version of originalism when it interpreted section 24 of the *British North America Act* ("*BNA Act*"). Miller notes that when interpreting the meaning of the word "person", the Privy Council looked to "(1) 'external evidence derived from extraneous circumstances such as previous legislation and decided cases', and (2) 'internal evidence derived from the *Act* itself'".[46] Miller argues that in so doing, the Privy Council aimed to ascertain not the

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[40] *Edwards, supra*, note 16.

[41] Bradley W. Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds. , *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 120 [hereinafter "Miller, 'Origin Myth'"].

[42] *Edwards v. Canada (Attorney General)*, [1928] S.C.R. 276 (S.C.C.).

[43] Miller, "Origin Myth", at 125 (citations omitted).

[44] *Id.*, at 128.

[45] *Id.*, at 134.

[46] *Id.*, at 131.

intentions of the framers, but rather the plain or original public meaning of the provision, and this "semantic meaning" was "fixed as of 1867".[47]

How can we reconcile this reading of *Edwards* with the case's status in Canadian constitutional law as the classic source of "living tree constitutionalism"? Miller argues that a careful reading of the case reveals that "the Privy Council did not state that the *BNA Act is* a living tree, but that the *BNA Act planted* a living tree".[48] The living tree then, is not the *BNA Act* itself, but rather the Canadian Constitution as a whole, which includes usages, conventions and constitutional doctrine. According to Miller, it is the Canadian Constitution in its entirety that is "a living tree capable of growth and expansion within its natural limits, and *not* the specific textual provisions of the *BNA Act*. The task of textual interpretation is always focused on recovering the fixed, semantic meaning of the text."[49]

At this point in his argument, Miller introduces a well-known, if controversial distinction in the writing on originalism between "interpretation" and "construction".[50] When the act of interpreting the original public meaning of constitutional text reveals that the text is indeterminate with respect to a particular legal question, a court will need to construct a rule that allows it to apply the text to the question at hand.[51] In the *Edwards* case, the Privy Council adopted a rule of construction that required that the ambiguity in the word "person" be resolved in favour of an inclusive, rather than exclusive, reading of the term.[52] According to Miller, it was this rule of construction that allowed the Privy Council to apply the text to the question of whether women fell within the scope of section 24 of the *BNA Act* and to conclude that they did.

Miller seems to argue that for the Privy Council, the corpus of constitutional law lying beyond the original public meaning of the constitutional text's provisions — a body of law that includes customs, usages, and doctrinal rules, including rules of construction — is

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47 *Id.*, at 134.

48 *Id.*, at 132.

49 *Id.*, at 132.

50 For a recent explanation of the distinction and debates surrounding it, see Randy E. Barnett and Evan D. Bernick, "The Letter and the Spirit: A Unified Theory of Originalism" (2018) 107:1 Geo. Law Journal 1, at 10-18 [hereinafter "Barnett and Bernick, 'Letter'"].

51 According to Barnett and Bernick, "when original meaning was insufficient to determine the outcome of a case or controversy, the judiciary needed to engage in constitutional construction to supplement original meaning", *id.*, at 13.

52 Miller, "Origin Myth", at 135.

susceptible to evolution. By contrast, the object of constitutional interpretation, namely the original public meaning of the text's provisions, is fixed at the moment when the Constitution is enacted. This understanding of original public meaning originalism allows for *applications* of the constitutional text that differ from what the Constitution's framers themselves would have intended. This is so, in part, because the original public meaning version of originalism does not concern itself with the framers' intentions, but it is also because some original public meaning originalists believe that courts can legitimately develop rules of construction that apply indeterminate constitutional text to novel circumstances.[53] The challenge for these originalists lies in determining how to limit judicial discretion when courts generate rules of construction, since if courts were unconstrained in this exercise, the rule of law values of settlement and certainty that are associated with originalism would be lost.[54] And since these rules of construction arise in cases that rest on interpretations of the relevant constitutional provision, there is the possibility that these cases, once they have become settled precedents, will conflict with an interpretation that discloses a novel understanding of the relevant provision's original public meaning. It is to a discussion of these values of settlement and certainty and the place of precedent in the literature on originalism that I now turn.

2. Originalism in Theory: Normativity, Living Tree Constitutionalism and Precedent

Thus far we have seen that the doctrine of living tree interpretation in *Edwards*, as it has been construed by Miller, is consistent with original public meaning originalism. I have also made passing reference to rule of law values associated with originalism, namely those of settlement and stability. In order to address living tree constitutionalism as an alternative theory to originalism (and not simply a doctrine articulated in a given case), I will aim to specify rule of law values that its proponents view as central to the theory and show how they engage the legality-related values that are central to originalism. Before I enter into the discussion of living tree constitutionalism, let me clarify my understanding of the

[53] Barnett and Bernick describe debates amongst originalists about the utility of the interpretation-construction distinction in Barnett and Bernick, "Letter", at 14-16.

[54] Barnett and Bernick, "Letter", at 17.

normative content associated with originalism and discuss a prominent originalist's incorporation of certain living tree insights into his theory.

(a) Originalism's Normativity

We have seen above that originalism is a big tent that includes proponents of the original intentions and original public meaning versions. Originalism's tent includes other versions, including "original methods originalism", the consideration of which is beyond the scope of this article.[55] This diversity has led some commentators to conclude that originalism is "not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label".[56] Solum challenges this view and claims that two central ideas unite all originalists. According to Solum:

> All or almost all originalists agree that the original meaning of the Constitution was fixed at the time each provision was framed and ratified. Almost all originalists agree that original meaning must make an important contribution to the content of constitutional doctrine: most originalists agree that courts should view themselves as constrained by original meaning and that very good reasons are required for legitimate departures from that constraint.[57]

These aspects of originalism stress the importance of settlement and stability of law. The original meaning of the Constitution settles certain questions of interpretation and anchors the interpretive activity of courts. It is important to note that these rule of law values are articulated in a context where the originalist's interlocutors will reasonably ask that the arguments advanced be responsive to contemporary concerns and understandings of what a Constitution is for.[58] Jack Balkin argues further that the task of identifying the original public meaning of a given constitutional provision requires a normative choice, and does not

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[55] For an overview of the many strands of originalism, see Lawrence B. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" (May 2, 2011) online: Georgetown University Law Centre, online: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub> [hereinafter "Solum, 'What is Originalism'"].

[56] Thomas B. Colby and Peter J. Smith, "Living Originalism" (2009) 59:2 *Duke Law Journal* 239, at 244.

[57] Solum, "What is Originalism", at 33.

[58] For a recent argument along these lines, see Jack M. Balkin, "The Construction of Original Public Meaning" (2016) 31 Constitutional Commentary 71 at 88, 96.

involve "simply reporting objectively and dispassionately on the facts of the past".[59] This is so, argues Balkin, because "disputes about original public meaning are usually more than simple disputes about facts; they are also usually disputes about theories and normative assumptions".[60] Originalism, then, is value-laden. As a *theory*, it is called upon to justify itself in normative terms to those who may not share its commitments, and as a *method*, it involves making and defending interpretive choices when, for instance, a judge identifies the original public meaning of a constitutional provision.

In *Living Originalism*,[61] Balkin argues that this normative aspect of originalism further manifests itself in two related distinctions, between principles and rules and between constitutional delegations and constraints. He claims that when constitutional designers decide between language that expresses one or the other of each of the terms in these distinctions, they make a choice that has normative implications. He writes:

> we should pay careful attention to the reasons why constitutional designers choose particular kinds of language. Adopters use fixed rules because they want to limit discretion; they use standards or principles because they want to channel politics through certain key concepts but delegate the details to future generations.[62]

To illustrate these distinctions, Balkin contrasts open-ended terms in the American Constitution, such as "due process" and "equal protection of the laws"[63] with more determinate language, such as the requirement that "the president must be thirty-five years old".[64] According to Balkin, it makes sense to interpret the former kinds of terms as expressing an intention to articulate "a collection of key values and commitments that set the terms of political discourse and that future generations must attempt to keep faith with".[65] Because those responsible for designing a Constitution "cannot prepare for every eventuality",[66] they use this kind of open-ended language as a means of delegating to future generations

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[59] *Id.*, at 81.

[60] *Id*.

[61] Jack M. Balkin, *Living Originalism* (Cambridge, Mass: Harvard University Press, 2011) [hereinafter "Balkin, 'Living Originalism'"].

[62] *Id.*, at 6-7.

[63] *Id.*, at 25.

[64] *Id.*, at 44.

[65] *Id.*, at 25.

[66] *Id*.

the responsibility for developing "institutions and practices to make politics and governance possible and successful in changing circumstances".[67] By contrast, the more determinate language in a Constitution can resolve specific issues that were unsettled at the moment of a Constitution's coming into force[68] or establish institutional features of a constitutional polity that, in Balkin's words, are "hardwired", are not susceptible to meaningful debate, and thus constrain future generations' interpretations of them.[69]

Balkin argues that originalist interpretations of a Constitution must account for this difference. To make interpretive choices that render principles more rule-like and to imagine that the primary goal when applying these principles is to constrain constitutional judges, is to misconstrue the plain meaning of the text, as well as the design of the Constitution.[70] It is here that the distinctions we have seen above between intended application and original public meaning, and between interpretation and construction have significant purchase. According to Balkin's theory, if one interprets open-ended constitutional provisions exclusively in light of evidence about how the founding generation thought that they would be applied in specific circumstances, one does violence to those provisions' original meaning. That meaning is broader than any given intended application of them, and their status as principles and not rules forms an essential part of their original meaning. Moreover, restricting the interpretation of open-ended provisions to their intended application removes from future generations the power delegated to them by the Constitution to construct such provisions in ways that are responsive to changing circumstances. In Miller's terms, such a restrictive interpretation stunts the growth of constitutional usages, conventions and doctrine, which as we have seen above, he understands as comprising the Constitution's living tree.

It is perhaps not surprising, then, that Balkin, like Miller, understands his version of originalism to be consistent in some respects with living tree constitutionalism and inconsistent with forms of originalism that interpret constitutional provisions exclusively in light of how the framers thought that they should be applied. In order to understand in what

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67 *Id*.
68 *Id.*, at 26.
69 *Id.*, at 42.
70 *Id.*, at 29.

respects Balkin's originalism diverges from living tree constitutionalism, let us turn to the work of a prominent proponent of that theory.

(b) Living Tree Constitutionalism

Aileen Kavanagh argues against original intention originalism, in terms that would be recognizable to Balkin, when she states: "a judge claiming to interpret the Constitution must justify and explain looking to original intention as a legitimate source of constitutional meaning.… So, an interpretation can never be thoroughly descriptive in the way in which originalist argument assumes."[71] As we have seen from our discussion of Balkin's work, this claim applies equally to original public meaning originalism and she sets out the relevant living constitutionalist arguments.

The living tree constitutionalist claims that any instance of constitutional interpretation must be supported by "justifying reasons" which, Kavanagh argues, "must be advanced as part of an evaluative framework that shows why they are relevant".[72] This justificatory project has been framed by Ronald Dworkin as essential to the rule of law. According to Dworkin, under conditions of disagreement about what the Constitution requires, "[i]t must … be part of the rule of law, not merely that all sides should obey the rules, but that they should accept some institutional settlement of what the rules are".[73] This acceptance arises, Dworkin argues, in response to a court's application of "principles that define the court's responsibilities to hold what the legislature has done to independent standards of policy or justice".[74] Controversial constitutional decisions must be taken, imposed and justified, Dworkin argues, in a spirit of humility that concedes that those who disagree with a decision may be right, that takes seriously the opposing side's concerns as moral convictions and does not view them to be mere preferences, and that offers reasons in a spirit of solicitude and not with a "winner-takes all" mentality, which seeks to reduce those who oppose a decision to a condition of "subservience".[75] The living tree constitutionalist thus emphasizes a certain quality of respect for the moral agency of those

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[71] Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can. Journal of Law & Juris. 55, at 64 [hereinafter "Kavanagh, 'Idea'"].

[72] *Id*.

[73] Ronald Dworkin, "What is the Rule of Law" (1970) 30:2 *Antioch Review* 151, at 152 [hereinafter "Dworkin, 'Rule of Law'"].

[74] *Id*.

[75] *Id.*, at 152-55.

subject to judicial decisions. Kristen Rundle in her writing on Fuller has labelled this kind of respect "reciprocity"[76] and Jeremy Waldron has in a similar vein argued that the rule of law values of "orientation to the public good" and "systematicity" respect "the dignity of reasoning and even argumentativeness … of … individuals whose lives law governs".[77]

Yet for all the emphasis that the living tree constitutionalist places on the justificatory aspects of the rule of law, she is at pains to stress that the interpretive powers of courts are limited. Kavanagh insists that a court engaged in constitutional adjudication is subject to a variety of constraints, including the fact that its interpretive activity is directed at the Constitution and does not involve pure moral reasoning,[78] and she argues that judges are bound to make their decisions in light of "a pre-existing legal framework and standards",[79] precedent,[80] and the norms of the legal culture[81] and of an adjudicative setting.[82] These normative constraints are important because compliance with them evinces respect for "the values of authority and continuity in law, of legal certainty and predictability".[83] Ultimately, the living tree constitutionalist recognizes that the boundaries of a constitutional provision's meaning are fixed by "the standards set out in the Constitution".[84] The living tree constitutionalist recognizes, then, that courts are constrained by the rule of law values primarily associated with her originalist opponent and by the text itself. We have also seen above that Balkin recognizes that originalist courts are obliged to justify their interpretive choices in ways that resemble a court labouring under the justificatory requirements of living tree constitutionalism. The difference between Kavanagh's and Balkin's approaches seems to be largely one of emphasis. In order to illustrate more concretely how the interpretive activities of the originalist differ from those of her living tree constitutionalist counterpart, I turn to examine how they might approach precedent and the original meaning of constitutional text.

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[76] Kristen Rundle, "Fuller's Internal Morality of Law" (2016) 11:9 *Philosophy Compass* 499, at 500.

[77] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga. Law Review 1, at 36.

[78] Kavanagh, "Idea", at 70.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id.*, at 72.

[84] *Id.*, at 62.

(c) Originalism, Living Tree Constitutionalism, Precedent and Constitutional Text

Precedent represents a serious challenge for originalists, Solum notes, because if the original meaning of the Constitution (however defined) determines its interpretation, then judicial citations to precedent when interpreting the Constitution are either superfluous or mistaken.[85] The most difficult originalist case arises when precedent conflicts with a court's interpretation of the original meaning of the Constitution. Solum has delineated a variety of pragmatic ways of dealing with such a conflict. For instance, if adopting a correct originalist interpretation over an incorrect precedent would result in serious institutional or political disturbances, an originalist court may respect the precedent for a transitional period in order to permit any political adjustments to be made before the originalist interpretation could safely be adopted.[86] Similarly, in contexts where judges are divided over approaches to constitutional interpretation, an originalist judge may accept the validity of precedent in a case where it clearly conflicted with the original meaning, as a means of gaining the support of judges on the same bench who reject originalism.[87] In each instance, the pragmatic reasons act as limits on the interpretive activities of the originalist judge, who would otherwise, as a matter of principle, reject the precedent in question.

For the living tree constitutionalist, precedent presents a different set of concerns. Judges in this account are obliged to arrive at an interpretation of the Constitution that can be justified to the parties before them, in terms that fit within an evaluative framework and in a manner that respects their moral agency and, where necessary to do so, an interpretation may change the law. In some circumstances, such change occurs in order for courts to respond to changing legal and social conditions.[88] Therefore, if an earlier court's interpretation of the meaning of a constitutional provision is shown to be clearly mistaken in light of the applicable evaluative framework and the evolving context, the living tree constitutionalist judge is free to interpret the provision differently.[89] According to Kavanagh, the living tree constitutionalist judge must give

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[85] Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach" (2018) 33:3 Const. Commentary 451, at 457 [hereinafter "Solum, 'Originalist Theory'"].

[86] *Id.*, at 462.

[87] *Id.*, at 464-65.

[88] Kavanagh, "Idea", at 68.

[89] *Id.*, at 67.

due consideration to precedents, and in overruling them, she must appeal to strong, supporting reasons that would overcome the rule of law reasons for conserving them.[90] But precedent does not pose the challenges to the living tree constitutionalist that it does for the originalist. The living tree constitutionalist judge is limited only by the quality of the justificatory reasons that she can offer for preserving or overruling precedent. By contrast, the originalist when faced with precedent makes pragmatic judgments about whether to respect it or to uphold the original meaning of the constitution, which otherwise has supervening value.

This contrast between the respective roles that precedent plays in originalism and living tree constitutionalism applies even to versions of originalism that are in some respects consistent with the living tree approach to constitutional interpretation. A comparison of the work of Balkin, who as we have seen, espouses this version of originalism, with the scholarship of David Strauss, who places the issue of precedent at the centre of his living tree theory, further reveals a difference in how they understand the concept of constitutional legitimacy. For Balkin, the touchstone of constitutional interpretation is the text's original public meaning. The fact that the Constitution is susceptible to evolution in respect of those provisions that are framed in open-ended terms is consistent with the original public meaning of those terms, and in particular, their status as principles, rather than rules. Where the language and original understanding of a constitutional provision is determinate and was understood to be so at the time of the founding, respect for the original meaning entails rejecting the possibility that such a provision can be changed over time via constitutional interpretation or construction.[91]

Balkin's respect for the original meaning of the Constitution is grounded in the importance that his theory of constitutional interpretation accords popular sovereignty. For Balkin, the constitutional text results from an exercise of sovereignty and is legitimate and owed fidelity because of that fact. That fidelity is expressed when interpreters respect the Constitution's determinate language by not altering it.[92] And fidelity

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[90] *Id.*, at 70.

[91] Balkin, "Living Originalism", at 55.

[92] It is worth noting that Balkin does argue that the plain meaning of the Constitution's determinate language should not be altered, absent evidence that the original understanding was that this language expressed a principle, rather than a rule (*id.*, at 48). Thus, even the distinction between

is further expressed when interpreters exercise the authority delegated to them by the Constitution's open-ended provisions and offer constructions that are responsive to changing times and circumstances.[93]

By contrast, a living-tree constitutionalist who prioritizes the justificatory values associated with constitutional interpretation may, in certain circumstances, interpret constitutional language in ways that diverge from its plain meaning and the original understanding of that meaning. And the underlying justification for living tree constitutionalist interpretations lies not in respect for the sovereign authority of the Constitution's framers, but rather in the extent to which a given interpretation can be justified to those who are subject to the Constitution's authority.

An illustration of these aspects of living tree constitutionalism can be found in Strauss's work on constitutional interpretation. Strauss argues that much of contemporary American constitutional law doctrine is simply not consistent with the original understanding of the relevant constitutional provisions.[94] The rationale for this fact and for what Strauss calls "common law constitutional interpretation"[95] is two-fold. The first, "rational traditionalist" justification states that "one should be very careful about rejecting judgments made by people who were acting reflectively, and in good faith, especially when those judgments have been reaffirmed or at least accepted over time".[96] This rationale explains why we should accept the considered judgments of courts who have interpreted the Constitution over time: precedents that are the result of processes of evolution are valued because they have been subject to constant reconsideration and repeatedly tested against concrete experience.[97] According to Strauss, this rational traditionalist justification for common law constitutional interpretation both explains and justifies current American constitutional practice. Strauss argues that "[i]n practice, constitutional law is, mostly, common law. What matters to

rules and principles is subject to the general originalist requirement that the constitutional text be understood in light of its original meaning.

93 *Id.*, at 55.

94 David A Strauss, "Do We Have a Living Constitution?" (2011) 59:4 *Drake Law Review* 973, at 976.

95 David A Strauss, "Common Law Constitutional Interpretation" (1996) 63:3 U. Chi. Law Review 877.

96 *Id.*, at 891.

97 *Id.*, at 891-92.

most constitutional debates, in and out of courts, is the doctrine the courts have created, not the text".[98]

According to Strauss, the second, "conventionalist" rationale for common law constitutional interpretation explains why the constitutional text is given varying weight, depending on the nature of the dispute in question. This rationale "suggests that, other things equal, the text should be interpreted in the way best calculated to provide a focal point of agreement and to avoid the cost of reopening every question".[99] The conventionalist basis for Strauss's common law constitutionalism explains why the meaning of uncontroversial and determinate provisions of the constitutional text is typically accepted at face value. He notes, for instance, that there is no serious debate over whether the American constitutional stipulation that the limit of a President's term is four years should be measured with the Gregorian, as opposed to another calendar.[100] All reasonable interpreters of the Constitution accept the resolution of the question of how long a President's term should be that is offered by the plain meaning of the text. The plain meaning is accepted because it provides this resolution, rather than out of obedience to the framers' authoritative exercise of sovereignty.

By contrast, in areas of significant political and moral debate, Strauss argues, the plain meaning of constitutional text and the original understandings of the framers have less significance. Debates are nonetheless framed as exercises of constitutional interpretation for the conventionalist reason that there is a general consensus in the United States that "the words of the Constitution should count for something".[101] For instance, judicial interpretations of the Fourteenth Amendment that extended protections offered by the Bill of Rights to the states addressed contested questions of political morality. The "incorporation doctrine", as it has been developed through a line of Supreme Court cases, is not obviously supported by the constitutional text or the framers' understanding of that text.[102] Nonetheless, what would otherwise have been a debate over matters of pure political morality was tied by the courts to the Constitution, and in Strauss's words: "[t]he link to the text

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98 *Id.*, at 904.
99 *Id.*, at 912.
100 *Id.*, at 912.
101 *Id.*, at 923.
102 *Id.*, at 922.

legitimated incorporation by connecting it to something everyone believed in".[103]

For present purposes, the contrast between living tree constitutionalism and originalism turns on how each weighs the values of settlement, certainty, stability, and sovereignty, on the one hand, and what I label justification, on the other. I have claimed that even for an originalist such as Balkin who accommodates much of the living tree constitutionalist framework in his theory, this difference in weighing yields a divergence between how he treats precedent and the original meaning of constitutional text and how Strauss, a proponent of living tree constitutionalism who privileges common law constitutional methods, treats those constitutional sources.

III. Part III: Precedent v Originalism: An Unresolved Debate And Comeau's Eclecticism

With this theoretical background in view, we are now in a position to answer the question of what place the Supreme Court of Canada in *Comeau* gave to originalism and precedent in its interpretation of section 121 of the *Constitution Act, 1867*. Given that the Court seemed to dismiss the expert's evidence about the framer's intentions, which was decisive in the trial judge's reasons for overturning precedent, we might be tempted to say that the Court rejected originalism. This would be a mistake. Although the Court rejected an originalist interpretation that focused tightly on the framer's intentions, it undertook an analysis that employed the interpretive strategies of original public meaning originalism. As we have seen, the Court examined the historical and legislative context of section 121 in order to determine its correct interpretation and rejected what it saw as purely policy-based arguments for alternative readings. In effect, the Court's examination of the historical and legislative context revealed what the provision would have meant in 1867.

Moreover, the decision could be read as adopting the interpretation-construction distinction that has emerged as a key component of some theories of originalism. After undertaking its interpretation of section 121, the Court synthesized the relevant precedents and constructed a doctrinal test that allowed the Court to apply that provision

[103] *Id.*, at 923.

to the facts before it. The Court's interpretation did not seek to determine how the framers would have applied the section. In its use of interpretive methods associated with original public meaning originalism and in its implicit adoption of the interpretation-construction distinction, *Comeau* resembles Miller's rendering of the Privy Council's reasons in the *Edwards* case and manifests significant aspects of Balkin's version of public meaning originalism.

The Court's reasons in *Comeau* tell us little, however, about how it might view the relationship between the original public meaning of the Constitution and precedents that interpret the Constitution. This is so because first, the Court found no conflict between what might be considered to be the original public meaning of section 121 and precedents that interpreted that provision. Second, although the question of precedent's relationship to original meaning is the subject of vigorous debate in the academic literature in the context of horizontal precedent, *Comeau* was a case of vertical precedent. Originalists recognize that if lower courts were permitted to "impose their own view of the original meaning of the constitutional text, the rule of law values of predictability, certainty, stability, publicity, and uniformity would be undermined."[104] We have seen above that the Court, in its assessment of the trial judge's reliance on the expert evidence, expressed similar concerns. In the end, the fact that the Court in *Comeau* concluded that the trial judge did not meet the stringent standard for overturning vertical precedent tells us little about how the Court would view the relationship between horizontal precedent and original public meaning, particularly in cases of conflict between the two.[105]

Does *Comeau* shed any light on the Court's view of the general relationship between originalism and living tree constitutionalism, and in particular on the relative weight that the Court gives to the values that are associated with each of these schools of constitutional interpretation? There are hints in the reasons. First, as we have seen above, the Court criticized the trial judge for focusing exclusively on the words and historical context of section 121 and failing to adopt a purposive approach to the section.[106] Second, the Court invoked the unwritten constitutional principle of federalism as a guide to interpreting

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[104] Solum, "Originalist Theory", at 460.

[105] For the Court's approach to horizontal precedent, see *Canada v. Craig*, [2012] S.C.J. No. 43, [2012] 2 S.C.R. 489 (S.C.C.). In the context of statutory interpretation, and in the context of constitutional interpretation, see *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.).

[106] *Comeau*, at para. 39.

section 121.[107] Third, the Court invoked the living tree doctrine and described it as "ask[ing] that courts be alert to evolutions in, for example, how we understand jurisdictional balances and the considerations that animate it".[108] Finally, the Court in *obiter* described the consequences of adopting the interpretation of section 121 for which the respondent advocated:

> Agricultural supply management schemes, public health-driven prohibitions, environmental controls, and innumerable comparable regulatory measures that incidentally impede the passage of goods crossing provincial borders may be invalid.[109]

Each of the first three hints suggests that the Court was willing to invoke materials beyond those relevant to determining the original public meaning in order to interpret the constitutional text, and each resonates with the justificatory focus of living tree constitutionalism, rather than originalism's values of settlement and stability. Consider first the invocation of purposive interpretation. Miller has contrasted a "purposive" approach to constitutional interpretation that seeks the "advancement of purposes or principles or policy objectives"[110] with the originalist interpretive methodology that he draws from the Privy Council's reasoning in *Edwards*. He has also argued that the canonical statement of the purposive approach to constitutional interpretation in *R. v. Big M. Drug Mart Ltd.*[111] is nuanced, begins with "the semantic meaning of the text"[112] and is in this respect consistent with originalism. Nonetheless, argues Miller, the purposive approach "seems to be a broad invitation to normative evaluation … undertaken with a view towards serving the good of those who are intended to benefit from the *Charter* — that is, all members of the political community".[113] Taken in the context of Miller's overall argument, this justificatory focus would seem to render purposive interpretation vulnerable to the originalist's charge that

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[107] *Id.*, at para. 79.

[108] *Id.*, at para. 83.

[109] *Id.*, at para. 3.

[110] Miller, "Origin Myth", at 129.

[111] *R. v. Big M. Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

[112] Miller, "Beguiled", at 341. For an argument that *Big M*'s rendering of purposive interpretation can be understood to be consistent with originalism, see Oliphant & Sirota, "Originalism", at 156-57.

[113] Miller, "Beguiled", at 341. For a similar contrast between the relative scope of purposes and legislative intentions that treats purposive approaches to interpretation more charitably, see Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996) at 187.

living tree constitutionalism "allows for ad hoc and unprincipled constitutional interpretation, that it lacks the resources to discipline or constrain its interpretations".[114] And when seen in this originalist light, the *Comeau* Court's criticism of the trial judge's failure to adopt a purposive interpretation can be understood as an implicit endorsement of a living tree and non-originalist approach to constitutional interpretation.

Second, let us consider the Court's invocation of the unwritten constitutional principle of federalism in *Comeau*. There is a significant body of writing on the unwritten constitutional principles in Canada, and I do not intend to add to it here. I only want to suggest that the Court's invocation of the unwritten principle of federalism in *Comeau* can be understood to be inconsistent with at least some forms of originalism. In an analysis of unwritten constitutional principles, Jeffrey Goldsworthy has distinguished what he calls genuine from spurious implications.[115] He writes: "[t]he existence of genuine implications depends on evidence of unexpressed or partially expressed purposes, which may amount to principles, underlying the Constitution".[116] These purposes, Goldsworthy argues, "must be the founders' original purposes or principles".[117] Spurious implications, which may include spurious unwritten constitutional principles, are those which "are not really part of the pre-existing meaning of a communication, but are added to it by interpreters in order to improve it in some respect.[118] For present purposes, I do not take a stance on whether the Supreme Court of Canada's unwritten constitutional principles are spurious or genuine, in Goldsworthy's sense. I only note that some commentators, including Jean LeClair, have argued that the sources of those principles are not limited to the constitutional text,[119] and therefore, could not be limited to principles that the founders' themselves held. I believe that for the originalist, LeClair's point holds even for unwritten principles, such as federalism, that can be inferred from constitutional provisions. The Court in the *Secession Reference* reasoned that the unwritten principles formed part of the "architecture of the Constitution" and that "the observance and respect for these

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[114] Miller, "Beguiled", at 349.

[115] Jeffrey Goldsworthy, "Constitutional Cultures, Democracy and Unwritten Principles" (2012) 2012:3 U. Ill. Law Review 683.

[116] *Id.*, at 706.

[117] *Id.*

[118] *Id.*, at 701.

[119] Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 *Queen's Law Journal* 389, at 402-405.

principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree".[120] The very concept of constitutional architecture would seem to represent an abstraction from the constitutional text that it would be difficult to characterize as "part of the pre-existing meaning of a communication". But even if it could be so characterized, the living tree purpose to which the Court claims that the principles are to be put would seem to represent the kind of attempt to "improve" upon that "communication" that Goldsworthy finds objectionable. When viewed through the lens of this debate, the Court in *Comeau*, by appealing to unwritten constitutional principles, drew on non-originalist sources of constitutional interpretation.

Third, we have seen above that the living tree doctrine is not necessarily inconsistent with some forms of originalism, and so the Court's invocation of that doctrine should not necessarily be seen as a rejection of originalism. Yet much turns on how we are to understand the significance of the Court's claim that the living tree doctrine asks that "courts be alert to evolutions in, for example, how we understand jurisdictional balance and the considerations that animate it".[121] If by this, the Court simply means that constitutional doctrine can evolve over time, then the claim would be entirely consistent with how Miller and Balkin present the contents of constitutional constructions. However, since the reference to the living tree doctrine precedes the reasons' interpretation of section 121, I suggest that the Court's reference to its "alertness" to evolutions in constitutional understandings is relevant to how the *meaning* of that section is to be interpreted, and therefore that it is tacitly endorsing a non-originalist reading of the Constitution.

Finally, the Court's reference to the effect of a specific interpretation of section 121 on "agricultural supply management schemes, public health-driven prohibitions, environmental controls, and innumerable comparable regulatory measures" introduces a prudential reason for declining to enforce the original meaning of the Constitution, if that meaning were at variance with established precedents. This reason, namely avoiding the disruption of well-established regulatory regimes, would be accepted by a living tree constitutionalist as it is unlikely that such a disruption could be reasonably justified to those who would be

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[120] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 51-52 (S.C.C.).

[121] *Comeau*, at para. 83.

affected by it. And as we have seen above, some originalists are willing to accommodate pragmatically these kinds of prudential considerations when interpreting the original meaning of the Constitution and upholding precedent at variance with it.[122]

From our assessment of these passages from *Comeau*, we may conclude that although the Court's reasons can be read to align with original public meaning originalism, there are indications that the Court is willing to engage in justificatory interpretive exercises that are distant from standard practices of originalist constitutional interpretation. One way of rendering these exercises consistent with the original public meaning approach would be to suggest that they may be pertinent to those parts of the Constitution — including conventions and doctrinal rules — that do not bear directly on the interpretation of the Constitution. I have already noted that this is an implausible way of understanding the Court's reference to the living tree doctrine, as that passage addresses the interpretation of section 121, and not merely its construction. The other passages I have discussed also addressed that question and so are best understood as evidencing a non-originalist approach to constitutional interpretation.

I believe that the better reading sees in these passages evidence of the Court's interpretive eclecticism. I have argued elsewhere that constitutional interpretation is a practice whose rules, including rules about the relative priority of different approaches to constitutional interpretation, "cannot be definitively set out in advance".[123] The discussion above of the normative grounds of the debate between originalism and living tree constitutionalism suggests why this is the case. Courts face contending rule of law values and differing conceptions of constitutional legitimacy when deciding whether to adopt one or the other of the approaches to constitutional interpretation that we have considered in this article. Because concepts such as the rule of law and

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[122] Solum, "Originalist Theory", at 462. See also, Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57:3 U. Cin. Law Review 849.

[123] Hoi Kong, "The Spending Power, Constitutional Interpretation and Legal Pragmatism" (2008) 34:1 *Queen's Law Journal* 305, at 315. For examples and defences of eclectic constitutional interpretation, see Philip Bobbitt, *Constitutional Interpretation* (Cambridge: Basil Blackwell, 1991) at c. 5 and Michael C. Dorf, "Create Your Own Constitutional Theory" (1999) 87:3 Cal. L. Rev. 593. For a qualified defence that proposes a priority ranking for those modes, see Richard H. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100:6 Harv. L. Rev. 1189.

constitutional legitimacy are complex and essentially contested,[124] it is unlikely that a constitutional interpreter will in all instances deploy a single approach to interpretation that understands these concepts through the lens of that approach, to the exclusion of all other understandings. Given the complexity of the situations in which courts and others are called upon to interpret the Constitution, it seems more likely that they will in some instances draw upon originalism and its privileged values of settlement and stability, and as a consequence give pride of place to popular sovereignty as a source of constitutional legitimacy. At other times, they will call upon living tree constitutionalism's justificatory focus, as they seek to vindicate that aspect of the rule of law and constitutional legitimacy. I believe that it is this openness to eclecticism that the Court expressed in the passages that we have just considered.

The question remains whether an eclectic approach can be justified. In their comprehensive survey of the Supreme Court of Canada's jurisprudence, which covers the full range of areas of constitutional law, Sirota and Oliphant note that the Court deploys an array of approaches to constitutional interpretation, including most notably for their purposes, originalism.[125] Although the authors intend their survey to demonstrate that originalism is a force to be reckoned with in Canadian constitutional law, the survey also suggests that eclecticism accurately describes the state of constitutional interpretation in Canada, across all of its domains. That description is the basis for a justification of a particular kind.

As we have seen above, constitutional interpretation engages questions of great normative complexity, in which contending values are persistently at play. By incorporating the normative commitments of a variety of approaches to constitutional interpretation, eclecticism contains within it the range of considerations that the public could reasonably expect a judge to weigh when making decisions under the Constitution.[126] By contrast, a judge who systematically decided cases

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[124] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21:2 Law & Phil. 137, 150. The literature on constitutional legitimacy is vast, and Balkin highlights various aspects of this concept in Balkin, "Living Originalism", at c. 4.

[125] See Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 UBC Law Review 505, and Oliphant & Sirota, "Originalism", *supra*, note 39.

[126] Philip Bobbitt has argued, in the American constitutional context, that the different modes of argument respond to specific features of the Constitution and aspects of the facts at issue in a given case. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982), at 231. Any analogous argument about the Canadian Constitution is beyond the scope of this article, but the idea that the Canadian jurisprudence is varied because of features of

following an approach that gave short shrift to any set of relevant considerations would deny the public this kind of full justification. Those subject to this kind of partial decision-making and who disagreed with it may feel as if their deeply felt commitments were ignored or treated as mere preferences, unworthy of serious consideration. They may, as a consequence, feel as if they were reduced to a position of subservience and that their moral agency was denied.[127] It is perhaps in its solicitude towards and respect for the range of normative commitments in the constitutional polity that eclecticism finds its ultimate justification.

IV. CONCLUSIONS

In this article, I have sought to situate *Comeau* in the context of debates about originalism. I have shown that the Court's reasoning can be understood to be consistent with the original public meaning version of originalism, which Miller has argued *Edwards* also evinced. I have further developed, in the Canadian context, Balkin's suggestion that originalism is a normative and not simply descriptive approach to constitutional interpretation, and I have argued that deciding between originalist and living tree approaches to constitutional interpretation involves weighing contending normative values. I concluded the previous Part by identifying and discussing passages that suggest that although *Comeau* can be understood to be consistent with original public meaning originalism, the Court in that case suggested a willingness to entertain living tree constitutionalist arguments. In my view, this willingness evidences the Court's eclectic approach to constitutional interpretation, its acknowledgment of the range of normative considerations that are at play in constitutional cases, and its respect for the diverse moral commitments that are held by members of the Canadian polity.

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the Constitution and the given facts of a case may explain what might otherwise appear to be a random distribution of interpretive approaches in the Canadian case law.

[127] See Dworkin, "Rule of Law" at 152 and the discussion in the accompanying main text.