Author's Response: Further Reflections on Law and Legitimacy in the Supreme Court

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ABSTRACT

This Article responds to comments on my book Law and Legitimacy in the Supreme Court *by Professors Gillian Metzger, Scott Soames, Lawrence Solum, and Keith Whittington. It defends the main theses that my book develops and engages further questions that Professors Metzger, Soames, Solum, and Whittington either raise or provoke.*

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* Story Professor of Law, Harvard Law School. This article is an expanded and revised version of the remarks that I delivered in response to commentators and earlier panel discussions in the Symposium on April 12, 2019. I am grateful to Emily Massey for enormously helpful comments on a prior draft.

The questions that should most concern people who care about the Constitution and constitutional law are diverse, though interrelated. Among them are these: Is the Constitution binding law in the United States and, if so, why? Is the Constitution morally legitimate? Was its meaning fixed at the time of its ratification? Can it have multiple meanings? How should Supreme Court Justices interpret the Constitution? And—perhaps before we get to that question—how should the Justices choose among or develop theories of constitutional interpretation? What is the relationship between law, morality, and tactical expediency in constitutional adjudication, and what should it be?

A number of these questions—which I take up in *Law and Legitimacy in the Supreme Court*[1]—arise at the intersection of law, political science, moral philosophy, and the philosophy of language. In the book's preface, I acknowledged the intellectual riskiness of adopting positions that span all of these disciplines. But I emphasized that the most important questions about law, language, and legitimacy in the Supreme Court transcend disciplinary bounds. Accordingly, my most fervent aspiration was to frame issues and provoke interdisciplinary conversation.

Given my hopes for interdisciplinary engagement, I could scarcely be more delighted by the responses that my book elicited from the distinguished scholars who participated in this Symposium.[2] Gillian Metzger is a legal scholar of the first rank whose work ranges across constitutional and administrative law. Scott Soames is a preeminent philosopher of language. Law professor Lawrence Solum possesses a stunning breadth of philosophical knowledge that he has deployed with great insight in defining and defending constitutional originalism. Keith Whittington is a highly distinguished political theorist who has already exerted a large influence on legal debates and who will undoubtedly continue to do so. Among my reasons for gratitude to these commentators is that each has engaged my arguments with discernment and charity before proffering challenges.

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1. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

2. Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353 (2020); Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241 (2020); Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287 (2020); Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. & PUB. POL'Y 227 (2020).

In this response, I could not possibly address all of the commentators' questions and criticisms, nor react to all of their provocative and insightful observations. In replying selectively, I begin in Part I with a summary of *Law and Legitimacy in the Supreme Court*'s main themes. My purpose in doing so is not to correct anyone's account, but to clarify how various parts of my argument fit together. Some of the interconnections are integral not only to the book, but also to my responses to the commentators in this Symposium.

Parts II and III, which respond mostly to comments and criticisms by Professors Soames and Solum, are organized topically, to reflect the twin aspects of the constitutional theory that *Law and Legitimacy in the Supreme Court* advances. The Reflective Equilibrium Theory that my book lays out and defends in Chapter Six is a meta-theory, designed to guide the development and choice of a first-order constitutional theory. Part II replies to criticisms of Reflective Equilibrium Theory by Professor Soames, who maintains that the choice of a first-order constitutional theory requires no normative judgment, and by Professor Solum, who challenges my account of the normative considerations on which theory choice ought to depend.

Part III defends the partially sketched first-order constitutional theory that emerges from parts of *Law and Legitimacy in the Supreme Court* in which I assert claims about the obligations and constraints to which good-faith participants in constitutional arguments are subject. In his paper for this Symposium, Professor Solum attempts a head-to-head comparison of my Reflective Equilibrium Theory with Public Meaning Originalism (PMO). That comparison is not precisely apt. As I said in *Law and Legitimacy in the Supreme Court*, Reflective Equilibrium "is a second-order theory," designed to guide the development of and choice among constitutional theories, and "does not preclude the possibility that some form of originalism might be the best first-order theory."[3]

Nonetheless, Professor Solum is correct that I spoke in the book of "applying Reflective Equilibrium Theory to concrete constitutional cases" as the means by which Justices and others sould work out, over time, the substantive and methodological elements of their first-order constitutional theories.[4] Professor Solum is further correct that, in discussing the obligations and constraints to which good faith participants in constitutional argument are subject, *Law and Legitimacy in the Supreme Court* embraces assumptions and endorses both substantive and methodological premises that PMO (by his account) rejects.

Accepting that the outlines of the first-order theory that emerge from *Law and Legitimacy in the Supreme Court* can be compared with PMO, Part III responds to some of the critical arguments that Professors Solum and Soames offer in analyzing my first-order theory and comparing it with versions of PMO. Before doing so, however, Part III begins with an important point of framing. In response to objections that my theory is insufficiently complete and leaves too many issues

3. FALLON, *supra* note 1, at 146.
4. *Id*. at 145.

for case-by-case judgment, Part III argues that extant versions of PMO are also dramatically incomplete and underdeterminate. It also speculates that resolving those indeterminacies would require normative judgments.

Part IV takes up issues framed by Professor Metzger's paper, involving the relevance of sociological legitimacy to moral and legal legitimacy. Part V engages Professor Whittington's provocative remarks about the extent to which current legitimacy deficits in politics and constitutional adjudication are unprecedented and about the likely course of future events in exacerbating or alleviating them.

I. THE AGENDA OF LAW AND LEGITIMACY IN THE SUPREME COURT

Law and Legitimacy in the Supreme Court endeavors to frame a number of interrelated issues arising at the intersection of constitutional law, jurisprudence, political theory, and the philosophy of language. Its parts and arguments are interconnected. Although not following the book's chapter-by-chapter organization, this Part highlights some of my central theses, especially those that buttress one another.

A. The Nature of Law

Among the most fundamental questions that *Law and Legitimacy in the Supreme Court* seeks to answer is whether the Supreme Court is bound by law and, if so, how and why. In addressing that question, the book relies on a practice-based theory of the kind most famously developed by Professor H.L.A. Hart.[5] According to Hartian theory, the foundations of law lie in acceptance. For example, the Constitution occupies the status of law in the United States not because the Framers commanded or directed that it should be law, but because various relevant constituencies—centrally including judges—accept it as such today. If judges and others stopped accepting the Constitution as law, it would cease to be law, just as the dictates of the British Parliament lost their status as law in the thirteen American colonies following the colonies' declaration of independence.

To explicate the phenomenon of acceptance that necessarily undergirds any functioning legal system, Hart introduced the concept of a "rule of recognition."[6] In Hart's formulation, the rule of recognition is "a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts."[7]

If we apply Hart's terminology to the United States, two points seem clear. First, the rule of recognition identifies the Constitution as law. But, second, the

5. *See* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

6. *Id*. at 79–99.

7. *Id*. at 256; *see also id*. at 116 ("[R]ules of recognition specifying the criteria of legal validity and [the legal system's] rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.").

rule of recognition—defined as a rule existing only insofar as it is accepted or practiced by judges—is vague or underdeterminate in relevant respects. Vagueness and underdeterminacy provide the only plausible explanations for familiar and sometimes notorious disagreements among the Justices of the Supreme Court about how to interpret the Constitution.[8]

Those disagreements have multiple dimensions. One involves whether and if so to what extent the Supreme Court is bound today by original meanings of constitutional language, especially if intervening judicial precedents have deviated from originally understood meanings. Other disagreements turn on the meaning of "meaning," even so far as original constitutional meanings are concerned. Using illustrative examples, *Law and Legitimacy in the Supreme Court* identifies multiple senses of meaning to which Justices of the Supreme Court sometimes appeal in defending conclusions about the Constitution's meaning, including its original meaning. These include "(1) contextual meaning, as framed by the shared presuppositions of speakers and listeners, (2) literal or semantic meaning, (3) moral conceptual meaning, (4) reasonable meaning, . . . (5) intended meaning,"[9] and interpreted or precedential meaning.[10]

B. Law, Legitimacy, and Constitutional Theory

The underdeterminacy of the rule (or rules) of recognition in the United States—including in picking out the sense of meaning that should control the outcome of constitutional disputes—gives rise to a number of related worries about the legitimacy of constitutional adjudication, especially in the Supreme Court. Fruitful analysis of those worries requires distinctions among three possible senses of the term "legitimacy": moral, sociological, and legal.

Moral legitimacy is a normative concept, gauging the capacity of legal systems, governmental institutions, and judicial judgments to alter citizens' moral rights and obligations. A morally legitimate judicial judgment deserves respect and typically obedience even by those who disagree with it or think it mistaken. In contrast with moral legitimacy, sociological legitimacy is an empirical rather than a normative concept. Regimes and judicial rulings have sociological legitimacy insofar as people believe that they deserve respect and possibly obedience, regardless of whether public appraisals are correct. For example, the Nazi regime may have possessed considerable sociological legitimacy in Germany during the 1930s, even though it possessed no moral legitimacy. The third variety of legitimacy, legal legitimacy, is complexly related both to moral and sociological legitimacy. But it depends mostly on legal criteria that enjoy partial autonomy from both moral right and wrong, on one hand, and from popular sociology, on the other.

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8. I shall say more about the rule of recognition below in response to Professor Soames's commentary in this Symposium. *See infra* Part I.A.

9. FALLON, *supra* note 1, at 51.

10. *See id*. at 78.

As *Law and Legitimacy in the Supreme Court* explains, the Supreme Court currently faces legitimacy challenges in all three of these categories.[11] But I emphasize questions of moral legitimacy, involving the moral justifiability and respect-worthiness of Supreme Court decision-making in an era when the Justices recurrently divide along ideological lines. If the rule of recognition marks the Constitution as law, but evidently leaves room for the Justices' political values to influence their interpretive decisions, via one mechanism or another, then why should those with different values view the Justices' decisions as morally respect-worthy?

Within the context of American constitutional law, constitutional theories propose answers to this question. Constitutional theories enter constitutional discourse as, among other things, instruments for attaining enhanced moral legitimacy in adjudication. Proponents characteristically claim that theories such as originalism and various versions of non-originalism would promote the legitimacy or respect-worthiness of constitutional decision-making in two ways. First, the best, correct, or optimal constitutional theory, if scrupulously practiced, might guarantee accurate results. For example, some originalists claim that whatever result is most consistent with the original meaning of constitutional language is correct and therefore uniquely respect-worthy in light of the Constitution's status as law. Second, even those who believe a particular theory to be less than ideal might owe their respect to Justices who applied their theories with integrity, even when the Justices disliked the results. For example, those of us who are not originalists might say, in response to the ruling of originalist Justices, "I disagree with both the methodology and the result, but nevertheless I respect the result because I respect the consistency and integrity of the originalist Justices' reasoning in applying their methodology."

Consistency in applying a theory could not guarantee moral respect-worthiness if the theory were not itself a reasonable one. We should not respect the decision-making of a Justice who consistently read the Constitution through the lens of a Nazi or authoritarian ideology. Nevertheless, it is important to see why we care about whether political regimes are "legitimate" as distinguished from perfectly just and why we assess whether judicial decisions are legitimate as distinct from correct. No constitutional order has ever been perfectly just. In all likelihood, none ever will be. Similarly, in the domain of constitutional adjudication, all of us will predictably disagree with some judicial decisions. We cannot reasonably expect every ruling to be correct, either by our lights or by an objective standard. Under these conditions, legitimacy—understood roughly as respect-worthiness or entitlement to respect—matters as a realistically attainable ideal that plays a vital role in defining political obligation and justifiability. As citizens, we owe our respect to legitimate regimes and judicial decisions, even when they deploy

11. *See id.* at 156–74.

the coercive force of the law in ways that we substantively deplore. I shall say more about the appropriate criteria for gauging respect-worthiness shortly.

C. How to Choose or Develop a Constitutional Theory: Reflective Equilibrium Theory

The potential role of constitutional theories in securing the moral legitimacy of both our general constitutional order and of Supreme Court decision-making gives urgency to the question: how should Supreme Court Justices (along with the rest of us) choose or develop a constitutional theory?[12] Constitutional theorists—both originalist and non-originalist—have often argued as if judges and others have access to a set of fully developed and reasonably determinate constitutional theories among which they need only to choose. But unspoken assumptions that there is an available menu of determinate constitutional theories reflect a mirage. Nearly all constitutional theories—including most species of originalism—are dramatically incomplete or underdeterminate.[13] Constitutional practice routinely generates questions posing methodological complexities that almost no one has thought of before. Accordingly, even if we provisionally choose a theory, we cannot escape the challenge of adapting or revising it to deal with the new, previously unforeseen cases that experience inevitably presents.

Linking the challenges of theory-choice and theory-development in this way, *Law and Legitimacy in the Supreme Court* advances a meta-theory—or a theory of how to develop a constitutional theory or choose among rival candidates—that I call Reflective Equilibrium Theory. That theory embodies three major claims.

First, insofar as permitted by the vague or indeterminate rules of recognition that ground our constitutional order, Supreme Court Justices, like the rest of us, should adopt constitutional theories that, if widely practiced, would promote the moral legitimacy of constitutional law and adjudication. This prescription requires the identification of legitimacy criteria. In response to that challenge, my book argues that moral legitimacy can have multiple, diverse sources or foundations.[14] One important foundation lies in political democracy. Decisions by democratically chosen and accountable bodies have a claim to respect based on the process from which they resulted. A second, classically recognized source of moral or political legitimacy is substantive justice. Just arrangements and decisions deserve respect precisely because they are just. A third source of legitimacy is procedural fairness in law application and dispute resolution.

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12. Constitutional theories in the relevant sense have two offices. First, they identify the legal norms that bind judges as a matter of law. As all participants in or followers of constitutional debates should recognize, there is disagreement and uncertainty about what some of the relevant, binding norms are. Second, a fully developed constitutional theory would specify how Justices of the Supreme Court should decide cases in which no binding rule controls. Among the Justices' functions legal is to reach determinate conclusions even when the authorities that bear on a dispute are relevantly vague or underdeterminate. *See* FALLON, *supra* note 1, at 132–33.

13. *See* FALLON, *supra* note 1, at 137–42.

14. *See id*. at 29.

The role of substantive justice in legitimacy calculations is of crucial importance. If a theory would prescribe severely unjust results or otherwise result in practically or morally intolerable consequences, it should not be adopted, at least without revision. By contrast, if a theory would tend to promote just outcomes in the preponderance of cases, the results would strongly support its adoption.

Second, Reflective Equilibrium Theory includes, and takes its name from, a specific methodology for appraising, developing, and choosing among first-order constitutional theories. This methodology, which draws its inspiration from Rawls's reliance on reflective equilibrium as a device for reasoning about issues of political morality,[15] calls for Justices and others to consider the attractiveness of interpretive principles and the desirability or acceptability of the outcomes that those principles would yield in light of one another:

> When the Justices' case-by-case intuitions about constitutional justice are at odds with their prior interpretive methodological assumptions or commitments, Reflective Equilibrium Theory prescribes that they—like the rest of us who care about constitutional law and engage in constitutional argument—should consider and reconsider our case-specific convictions and our views about sound interpretive methodology at the same time, in search of an equilibrium solution. Most often, case-specific judgments should yield to demands for the consistent application of sound interpretive principles. This is the hallmark of principled decisionmaking. Occasionally, however, unshakeable convictions about the constitutional correctness of particular outcomes should provoke a reformulation or revision of prior methodological commitments (as may have occurred for some of the Justices in the iconic school desegregation case of *Brown v. Board of Education*).[16]

Third, by emphasizing both the underdeterminacy of most, if not all, extant constitutional theories and the appropriate role of consequences in guiding theory choice, Reflective Equilibrium Theory suggests that a well-chosen first-order theory ought to be revisable, not rigidly fixed. My book's elaboration of the preference for revisability echoes Rawls in moving from a narrow to a "wide" theory of reflective equilibrium in which "[e]fforts by the Justices of the Supreme Court to reach the kind of moral judgment necessary to the legitimate exercise of their office might also include reference to and possible reformulations of ideals" of "reasonableness" in the exercise of judicial power, as well as of "substantive justice, procedural fairness in the allocation of lawmaking power, and the rule of law."[17]

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15. *See* JOHN RAWLS, A THEORY OF JUSTICE 20–22, 48–53 (1971).
16. FALLON, *supra* note 1, at 18–19.
17. *Id.* at 151.

D. Applying Reflective Equilibrium Theory to Identify or Develop a First-Order Constitutional Theory

Although my book is partly concerned with meta-theory, it also aims to make progress in addressing the question: what interpretive theory or methodology should judges and others adopt or develop? But it aims for progress in a limited, incremental way. The relative modesty of my ambition on this score responds to the limits of human foresight in anticipating all of the possible circumstances and considerations in light of which an interpretive theory would ideally be shaped. Accordingly, *Law and Legitimacy in the Supreme Court* defends an admittedly incomplete theory that includes both provisional interpretive premises and a framework for developing and revising further premises through case-by-case decision-making. My theory's prescriptions for interpreting and implementing the Constitution include the following:[18]

- the Justices must acknowledge the paramount authority of the Constitution in all cases;
- constitutional provisions sometimes have multiple meanings, including not only contextual meaning as framed by shared presuppositions of speakers and listeners, but also literal, intended, reasonable, and real-conceptual (or moral) meaning;
- precedent is a legitimate source of authority in constitutional interpretation;
- the Justices should maintain reasonable stability in constitutional doctrine, even when the doctrine—as judged by criteria unrelated to interests in stability—is less than optimal by their lights;
- the capacity of judicial precedents and longstanding executive and congressional practice to control outcomes depends on forward- as well as backward-looking considerations;
- the Justices should resolve doubts about proper interpretation and priorities of authority in light of both backward- and forward-looking legitimacy concerns.

These premises are obviously very vague. But they are only starting points. Throughout, *Law and Legitimacy in the Supreme Court* emphasizes a paramount obligation of those who engage in constitutional argument to argue and reason in good faith.[19] Given this obligation of argument in good faith, I maintain that the Justices—like the rest of us—inescapably embrace further, thicker methodological commitments through their case-by-case processes of argumentation and decision. In other words, when the Justices appeal to methodological premises in

18. *See id.* at 98–102.
19. *See, e.g.*, FALLON, *supra* note 1, at 130–32.

arguing for a conclusion in one case, they implicitly promise to treat those same premises as controlling in future cases. Over time, the Justices should thus work out an increasingly determinate first-order constitutional theory—provided, of course, that they accept the obligation to reason consistently and in good faith from one case to the next.

What holds for the Justices also applies to the rest of us. Through engagement in constitutional arguments in diverse cases over time, we, too, will (or at least should) develop progressively more detailed and determinate first-order theories of our own. The prescriptions that I listed above constitute relative fixed points in my constitutional theory. Other, more specific commitments emerge in my discussion of specific cases and issues in *Law and Legitimacy in the Supreme Court*.

Unlike some other theories, my first-order theory—consistent with the second-order prescription of Reflective Equilibrium Theory—has quasi-procedural as well as substantive components. Most centrally, it calls for application of reflective equilibrium methodology to develop, test, and sometimes revise prior, tentative methodological as well as substantive commitments in the course of case-by-case argument and decision. Given the limits of current knowledge and human foresight, I prefer a theory that requires case-by-case judgments in some instances to one that purports to resolve everything in advance. The bite of my demand for good faith reasoning is that revisions of methodological premises imply promises of future adherence.[20] Accordingly, neither Reflective Equilibrium Theory nor my first-order constitutional theory affords any license for methodologically unprincipled case-by-case opportunism.

II. CHALLENGES TO REFLECTIVE EQUILIBRIUM THEORY AND MY ACCOUNT OF NORMATIVE CONSIDERATIONS BEARING ON THE CHOICE OF FIRST-ORDER CONSTITUTIONAL THEORIES

Professor Soames and Professor Solum both probe and criticize my defense of Reflective Equilibrium Theory as a framework for developing or choosing among first-order constitutional theories. Soames's criticism is fundamental: he maintains that Reflective Equilibrium Theory introduces normative argument and judgment into a domain where they have no proper place. Although Professor Solum agrees with me about the need to choose a constitutional theory on normative grounds, he rejects my characterization of substantive justice as a directly pertinent consideration. In addition, his views about normative legitimacy imply disagreement with an important detail of Reflective Equilibrium Theory. I shall respond to these criticisms in turn.

A. Normative and "Positivistic" Grounds for Theory Choice

Professor Soames rejects my proposed Reflective Equilibrium approach to the choice and development of a first-order constitutional theory on the ground that it

20. *See id.* at 11–13, 130–32.

is a method of moral reasoning,[21] wrongly imported into a domain in which "positivistic" rather than normative considerations ought to control. According to Soames, "the rule of recognition" in our legal system uniquely picks out his preferred version of originalism, which he calls "deferentialism,"[22] as the only lawful approach for judges to follow.[23] His argument appears to proceed in two steps. First, he believes that the public regards the Constitution and its various provisions as assertions, prescriptions, or stipulations by the Constitution's authors to the contemporary public.[24] Second, if the Constitution is a sequence of utterances by speakers to readers or listeners, it follows that the uniquely correct method for interpreting the Constitution is the method that reveals as a matter of linguistic fact what the Constitution asserted, prescribed, or stipulated at the time of its promulgation.[25] Accordingly, Soames maintains, originalism—if not his deferentialist version of it—should be adopted on "positivistic" grounds that exclude any necessity of moral argumentation.[26] As a matter of sociological fact, the rule of recognition picks out originalism as the only lawful option within our legal system.

As a first step in assessing Soames's argument, it is important to recognize that although he deliberately follows Professor Hart in grounding legal obligation in a "rule of recognition," his usage of that term differs sharply from Hart's. According to Hart, judicial practice determines the content of the rule of recognition.[27] In contrast, Professor Soames acknowledges that many and possibly most judges are not originalists.[28] Rejecting Hart's identification of the content of the rule of recognition with the practices of a "legal elite,"[29] Soames instead posits that the rule of recognition draws its content from what he believes to be sociologically widespread views among the public about the Constitution as a set of

21. Soames, *supra* note 2, at 274–75.

22. *Id*. at 246.

23. Soames asserts that his theory "conforms to our Hartian, sociological rule of recognition," *id*. at 253; that "the balance of the evidence favors an originalist conception of our positivistic rule of recognition concerning the judiciary," *id*. at 254; and that "originalism is the best articulation of the understanding of, and reverence for, the Constitution that is implicit in our fundamental Hartian rule of recognition," *id*. at 285.

24. *Id*. at 271 ("Everyone wants to know what the Constitution says or asserts (and thereby promises, guarantees, or requires."); *see also id*. at 285 ("My argument here is that originalism is the best articulation of the understanding of, and reverence for, the Constitution that is implicit in our fundamental Hartian rule of recognition.").

25. *See id*. at 246 ("To discover what the law asserts/stipulates is to discover what the lawmakers asserted/ stipulated in adopting a text.").

26. *Id*. at 253 (referring to his theory as "[p]ositivistic [o]riginalism"*)*; *id*. at 285 (eschewing reliance on arguments that Justices should practice originalism "*because* following originalist principles will, in general, produce better moral and political results" in favor of "the *descriptive* claim that our existing legal norms are largely originalist" and "that originalism is the best articulation of the understanding of, and reverence for, the Constitution that is implicit in our fundamental Hartian rule of recognition").

27. *See supra* note 7 and accompanying text.

28. Soames, *supra* note 2, at 254 ("True, non-originalists outnumber originalists among federal judges.").

29. *Id*. at 254–55.

linguistic assertions, prescriptions, or stipulations and from entailed views about the legal interpretive methods that judges should therefore practice.[30]

In my view, Soames's argument rests on untenable jurisprudential foundations. Even if a substantial majority of the public regarded the Constitution as a set of directives, stipulations, or commands by the Constitution's authors and believed on those grounds that deferentialism was the only respect-worthy judicial methodology, it is unclear what the jurisprudential significance of that sociological fact would be. Hart sought to explain what "law" is in terms of the practice of judges and other officials in identifying the systemic rules that they accept as authoritative. By contrast, Professor Soames's competing sketch of a jurisprudential theory appears to contemplate that "the law" in a jurisdiction could float free of—and even be contrary to—the practices of judges and other officials in identifying the ultimate sources of legal obligation. If Professor Soames has a jurisprudential theory that would have this implication, he would need to say a very great deal more by way of elaboration and support, including about its implications for what "the law" is in regimes not founded on principles of popular sovereignty.

There is a further problem as well. Even if Professor Soames could ground a theory of constitutional interpretation in the public's beliefs about the nature of the Constitution, his contribution to this Symposium cites no sociological evidence to support his fundamentally sociological claims. In Part III, I shall express skepticism about whether it would even be possible to interpret the Constitution in the same way as utterances in ordinary conversation. But if we focus now just on how the public views the Constitution and understands its significance, the empirical data of which I am aware point to no clear conclusion. As I emphasized in *Law and Legitimacy in the Supreme Court*, sociological legitimacy is both group-relative and a matter of degree.[31] If asked in opinion polls whether they believe that the Supreme Court should rigidly adhere to the Constitution's original meaning, Americans are split or uncertain.[32] As Professor Whittington emphasizes, some studies suggest that the public cares much more about the

30. *Id*. at 255 ("The source of the sociological legitimacy of our legal system is the Constitution, which has been our beacon since the founding, emerging improved and amended after the crucible of a great civil war. Because it is the bedrock of legitimacy of our governing institutions, all federal judges, all justices of the Supreme Court, the President, all members of Congress, and many other federal officials take an oath of fidelity to it. It is the ultimate ground of our Hartian rule of recognition because recognizing the proper constitutional provenance of a legal provision is, for most Americans, a reason for valuing and respecting it as something far greater than a command backed by force, while recognizing that a legal provision lacks such provenance provides grounds for dissatisfaction.")

31. FALLON, *supra* note 1, at 23.

32. *See* Samantha Smith, *Americans Remain Divided on How the Supreme Court Should Interpret the Constitution*, PEW RESEARCH CENTER (Apr. 6, 2017), https://www.pewresearch.org/fact-tank/2017/04/06/americans-remain-divided-on-how-the-supreme-court-should-interpret-the-constitution/ [https://perma.cc/FV2S-LRR7]. ("About half of the public (46%) says the U.S. Supreme Court should make its rulings based on its understanding of what the Constitution 'meant as it was originally written,' while an identical share says the court should base its rulings on what the Constitution 'means in current times,' according to a survey conducted in October.").

outcome of cases than the methods by which the courts reason.[33] Professor Metzger cites some evidence that points the other way, at least when the public perceives the Court as strategic rather than sincere.[34] But even public expectations of judicial sincerity (which I strongly endorse) do not imply public expectations of originalist decision-making in all cases. Accordingly, absent evidence that Soames fails to provide, it strikes me as doubtful, at best, that actual sociological evidence would support his claim that the public views his very specific proposed tenets of deferentialist constitutional interpretation as the uniquely respect-worthy form of judging.

With that expression of doubt, I return to Professor Hart, whose basic jurisprudential framework *Law and Legitimacy in the Supreme Court* embraces. Unpersuaded by Professor Soames's alternative account of the rule of recognition, I see no good reason to abandon the Hartian approach. And within the Hartian framework, judicial practice establishes that the rule of recognition in our legal system is too vague to certify robust versions of originalism (such as Professor Soames's) as uniquely legally correct. There is no other plausible explanation for why there is as much disagreement in constitutional matters, including matters of constitutional theory, as there is—even though the disagreement is matched, of course, by virtual consensus about a number of other fundamental matters. If so, what judges ought to do in cases in which the rule of recognition is vague or underdeterminate inescapably emerges as a matter for normative judgment.[35]

B. Theory Choice Within a Reflective Equilibrium Framework

Professor Solum agrees with me that the choice of a first-order constitutional theory requires normative judgment,[36] and he does not reject out of hand the use

33. Whittington, *supra* note 2, at 236–37 ("[T]he average citizen seems to assess political actions, including judicial actions, primarily in substantive rather than in process terms.").

34. Metzger, *supra* note 2, at 366 (citing James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMP. LEG. STUD. 592, 594–95, 598 (2017), as supporting the proposition that "perceptions that the Court is politicized, that the Justices are 'little more than politicians in robes' who engage in 'strategic, rather than sincere, decision making,' do have a legitimacy-undermining effect").

35. To forestall possible misunderstanding, I want to be clear that I have not meant to argue that sociological evidence, including evidence of methodological disagreement among judges, rules out the possibility that some form of originalism might be compatible with our legal system's rule of recognition (in the sense in which Professor Hart used that term). As Professor William Baude has argued, rarely, if ever, do judges and Justices claim a legal authorization to reject the Constitution's original meaning (unless in cases falling under the authority of precedent). *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). Nevertheless, even if we were to agree with Baude that the practice of most or all judges is consistent with some very flexible form of originalism, it would take a further argument to establish that norms of practice are uniquely correctly interpreted to require Professor Soames's deferentialism.

36. Solum, *supra* note 2, at 342 (introducing and pursuing the question "whether Public Meaning Originalism or Reflective Equilibrium Theory offers the more likely path to constitutional legitimacy").

of a reflective equilibrium framework to structure normative choice.[37] But he disagrees with me about a number of issues bearing on theory choice, including about the nature of the reflective equilibrium at which conscientious practitioners of Reflective Equilibrium Theory ought to aim.

If I understand Professor Solum's position correctly, the root of our disagreement lies in divergent views about the nature of moral legitimacy. We seem to concur that the best first-order constitutional theory would promote the overall moral legitimacy of our constitutional order and result in Supreme Court decision-making that even those who disagree with particular outcomes ought to respect. But we come apart over the factors that contribute to the moral legitimacy of constitutional regimes and that Justices should take into account in choosing a constitutional theory. With regard to these matters, Solum says that I am "mistaken to include substantive justice as a component of legitimacy"[38] and to treat substantive justice as an important criterion in the development and choice of a first-order constitutional theory within a Reflective Equilibrium framework. In his view, legitimacy is "a process value, whereas substantive justice is characteristic of outcomes."[39] Substantive justice, Solum emphasizes, is deeply controversial.[40] Insofar as Reflective Equilibrium Theory is concerned, he sees a problem of mistaken inputs yielding unreliable if not flatly mistaken outputs.

With regard to the unacceptability of substantive justice as a component of legitimacy, however, Solum no sooner stakes his claim than he begins to yield ground. The backtracking starts with efforts to elaborate a procedural conception of moral legitimacy as an appropriate criterion of theory choice. Insofar as the legitimacy of constitutional regimes is concerned, Solum says that "we are not obliged to cooperate with a constitutional system that is evil or wicked."[41] He also appears to accept Professor Randy Barnett's view that "constitutional legitimacy can be seen as a product of procedural assurances that legal commands are not unjust."[42] In response, I would say only that this acknowledgment allows in through the back door what Solum purports to exclude at the front: in order to assess whether a constitutional regime includes adequate procedural assurances against substantively unjust outcomes to count as "legitimate," we have to take a stand on what substantive justice requires or at least rules out. If Solum disagrees, it is only half-heartedly. "[P]erhaps the difference between substantive justice of

37. *Id*. at 350 ("In this Essay, I do not attempt to reach a bottom-line conclusion and pronounce a final judgment on the relative merits of Public Meaning Originalism and Reflective Equilibrium Theory.").

38. *Id*., at 338.

39. *Id*.

40. *See id*. at 348 ("viewing moral legitimacy as justice fails to provide a basis for convergence" on results that all can "endorse, despite their disagreements about what outcomes are just.").

41. *Id*. at 338.

42. *Id*. at 338 (discussing Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 113 (2003)).

outcomes and reliability of outcomes" and process values "is of secondary importance,"[43] he writes.[44]

Solum makes a similar concession a few pages later, this time with specific reference to the criteria that appropriately bear on the selection of a constitutional theory. In a passage comparing the relative desirability of Public Meaning Originalism and my first-order theory, he insists that the choice should depend on process values, but then acknowledges immediately that considerations of substantive justice appropriately play a crucial role in identifying which processes are fair and which are not:

> Is the process provided by Public Meaning Originalism a sufficiently reliable guarantee of reasonable justice so as to be legitimate? Answering that question requires that we develop a theory of reasonable justice, discover the original meaning of the constitutional text, and consider the implications of an originalist Supreme Court for the likelihood of constitutional amendments.[45]

In light of this acknowledgment, I am unsure how large the gap is between Solum and me or how much is at stake when he says that I am "mistaken to include substantive justice as a component of legitimacy" that properly bears on the choice of a constitutional theory.[46] I would guess that there is a significant difference in practice, definable in the following terms: I think it would be reckless to endorse any first-order constitutional theory, including a version of Public Meaning Originalism (PMO), without knowing what the implications would be for rights that are important to substantive justice under a number of constitutional provisions.

Some prominent opponents charge that PMO would introduce a wrecking ball into long-recognized rights and doctrines that lie at the core of modern constitutional law. For example, Professor David Strauss maintains flatly that if the Supreme Court consistently practiced PMO, it would need to reverse *Brown v. Board of Education*[47] and permit school segregation; the government could freely discriminate on the basis of sex or gender; the Bill of Rights would not apply to

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43. *Id.*

44. At another point in his criticism of Reflective Equilibrium Theory, Solum maintains that I do "not clearly distinguish moral legitimacy from justice" as a criterion for choosing a first-order theory. *Id.* at 347. On this matter he misunderstands me. Throughout *Law and Legitimacy in the Supreme Court*, I emphasize that there have never been any perfectly just regimes and that, in light of the pervasive phenomenon of reasonable moral disagreement, none of us can reasonably expect our conceptions of justice ever to be fully realized. *See, e.g.*, FALLON, *supra* note 1, at 24–35. It is because of the inevitable gap between legitimacy and justice that legitimacy—understood as respect-worthiness—matters as much as it does. I affirm that our obligations to the constitutional order depend on its moral legitimacy. *See, e.g.*, *id.* at 24. I also say clearly and repeatedly that moral legitimacy is compounded of multiple sources, of which substantive justice is only one. *See, e.g.*, *id.* at 34. In short, substantive justice and legitimacy are not the same, even though the latter is partly compounded of the former.

45. Solum, *supra* note 2, at 347.

46. *Id.* at 338.

47. 347 U.S. 483 (1954).

the states; states could abandon one-person, one-vote principles; and "[m]any federal labor, environmental, and consumer protection laws would be threatened."[48] Professor Henry Monaghan adds that Social Security, paper money, and much of the modern welfare state would be invalidated.[49]

I do not know whether Strauss and Monaghan are correct. Among other reasons, as I shall discuss below, I believe that extant versions of PMO are far less determinate than is often believed. My point here is more basic: notwithstanding Professor Solum's arguments to the contrary, we cannot responsibly commit to a first-order constitutional theory without some assurances that it would neither nullify rights that are vital to justice nor wreak havoc on governmental structures and policies on which millions depend for their economic security.

Ultimately, however, I am not sure that Professor Solum disagrees with me even on this point. At the end of his essay he writes that "resolution of the empirical questions [about the practical consequences of adopting either PMO or my first-order theory] is far outside the scope of this Essay"[50] and that he does "not attempt to reach a bottom-line conclusion"[51] about the relative merits of my theory and PMO.

Professor Solum more clearly disagrees with me about another point, also rooted in divergent views about the ideal of moral legitimacy and its implications for the development and choice of first-order constitutional theories. Once again, the nub of the issue is whether and, if so, how considerations of substantive justice should influence judicial practices, this time in specifying the nature of the reflective equilibrium at which Justices who care about the moral legitimacy of their decision-making ought to aim. Characteristically, Solum's analysis relies on a number of distinctions. My book, loosely following Rawls, speaks of and distinguishes narrow and wide reflective equilibrium.[52] Narrow reflective equilibrium exists when a person's case-by-case judgments and views about proper interpretive methodology are aligned harmoniously.[53] The achievement of wide reflective equilibrium requires a judge or theorist to take further account of and reach mutually consistent views about an additional variety of matters, including the views of others and the reasonableness of judgments and interpretive premises from their perspective. As I argued in *Law and Legitimacy in the Supreme Court*, the imperative to accommodate others' reasonable views in the quest for wide reflective equilibrium follows from what Rawls characterized as "the liberal principle of political legitimacy," which "demands justification for the exercise of judicial power that all reasonable people could be expected to respect 'in the light of

48. DAVID STRAUSS, THE LIVING CONSTITUTION 12–17 (2010).

49. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727–39 (1988).

50. Solum, *supra* note 2, at 347.

51. *Id*. at 350.

52. FALLON, *supra* note 1, at 150–51.

53. *See id*. at 142–50.

principles and ideals acceptable to their common human reason.'"[54] Nevertheless, I characterized the reflective equilibrium at which a judge or theorist should aim as a property of the views of the individual chooser.[55]

Unsatisfied with this formulation, Solum maintains that theory choice within a reflective equilibrium model should aspire to reflective equilibrium that is "broad" as well as "wide." He defines broad reflective equilibrium as follows: "[t]he considered judgments of a political community are in broad reflective equilibrium when a broad group of citizens are each in wide reflective equilibrium such that there is an overlapping consensus on constitutional principles that are sufficiently similar to provide adequate guidance for constitutional practice."[56] With this definition in place, Solum perceives "a difficulty with a first-person singular approach to reflective equilibrium" such as mine.[57]

Although I share many of Solum's underlying concerns, his usage of terminology seems to me to muddy rather than clarify matters regarding the appropriate practice of reflective equilibrium methodology. To begin with an ontological point, I do not believe, nor do I think Solum believes, that "a political community" is the kind of entity capable of reasoning toward and achieving reflective equilibrium. Each of the members of a community can participate in collective deliberation with other members and take others' views into account. At the end of the deliberation, all might arrive at identical judgments and hold views about various relevant matters that are in reflective equilibrium. Nevertheless, if we can say that a community's views are in reflective equilibrium, it is only because each member of the community, reasoning for herself about how best to take others' views into account, has reached a reflective equilibrium that brings her relevant individual judgments into a relationship of mutual consistency and support.

At some points, Solum acknowledges as much. "Broad reflective equilibrium can only be achieved in actual politics, but the perspective of broad reflective equilibrium can be taken up by constitutional theorists in the here and now," he writes.[58] But if the claim is that theorists should take the reasonable views of others into account, I not only agree completely, but also, as I have said, incorporate this requirement into the deliberative ideal of "wide reflective equilibrium."

A correct grasp of the nature of wide reflective equilibrium as a deliberative ideal also answers Solum's recurrent complaint that my theory would allow a role for judges' personal values in the choice and application of a constitutional theory.[59] I agree with Solum that judges seeking to satisfy "the liberal principle of legitimacy" should rely only on values that all reasonable people could be

54. *Id*. at 151 (quoting JOHN RAWLS, POLITICAL LIBERALISM 217 (1993)).
55. *Id*. at 149–51.
56. Solum, *supra* note 2, at 322.
57. *Id*. at 289.
58. *Id*. at 323.
59. *See id*. at 343–49.

expected to respect.[60] But insofar as there is room for reasonable disagreement about what those values are, and insofar as determining the content of an ideal of reasonableness itself requires a partly moral judgment, what Solum calls a judge's "personal" values cannot be wholly excluded. It is impossible to make moral judgments without appealing to values that in some way or at some level are one's own. Even if I determine that I morally ought not base constitutional conclusions on my "personal" moral views, my decision to eschew reliance on (some of) my views depends at bottom on a moral judgment for which I must take responsibility based on my personal efforts to gauge the force of relevant moral reasons.

Having resisted one of Solum's proposed terminological clarifications, I enthusiastically embrace another, involving his distinction between "ideal theory" and theories suitable for immediate application in a less-than-ideal world sometimes characterized by malevolence and unreasonable disagreement.[61] Nevertheless, we may disagree about the nature and implications of that distinction, as reflected by my emphasis on a closely analogous distinction that Solum's critical discussion overlooks.

Law and Legitimacy in the Supreme Court distinguishes between "minimal" and "ideal" conceptions of moral legitimacy.[62] Ideal legitimacy depends on perfect realization of the desiderata that contribute to moral legitimacy. In the history of the world, it is likely that no legal regime has ever achieved ideal legitimacy. In contrast, minimal legitimacy—which is a matter of degree—marks the point along a spectrum at which imperfect regimes become morally justified in enforcing their laws coercively and conscientious citizens accrue moral obligations of respect for laws that they oppose.

In our era of deep disagreement about ideal legitimacy, including in constitutional adjudication, it should suffice for minimal legitimacy, I argue, if the Justices of the Supreme Court adopt reasonable interpretive theories and apply them in consistent good faith, even if some reasonable citizens disagree with some decisions. To demand more, by insisting on an actual overlapping consensus supporting every principle relevant to all judicial decisions, would erect an impossible standard. Once again, amid widespread reasonable disagreement that shows no signs of abating, the crucial role of moral legitimacy as a value partly distinct from justice is to support and even demand conclusions along the lines of, "I disagree with both the conclusions of a Supreme Court opinion and with one or more of the premises on which it rests, but I nevertheless respect the decision and its authors based on considerations that include the Justices' methodological integrity and their reasoning in good faith."

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60. *See id.* at 337 (identifying Rawls's "liberal principle of legitimacy" as pertinent to one "dimension" of normative legitimacy and asserting that it "would be violated if the Supreme Court were to rely on a particular moral, religious, or ideological doctrine as the basis for its decisions").

61. *Id.* at 322–23.

62. FALLON, *supra* note 1, at 24–35.

To summarize: Outside the domain of ideal theory, unanimous agreement is a mirage. Neither the Justices nor the rest of us should allow that mirage to stop us in our tracks. Nor should it cause us to give up on the possibility that, even in the face of reasonable and sometimes unreasonable disagreement, Justices of the Supreme Court could decide cases in ways that are minimally morally legitimate.[63]

III. COMPARISONS BETWEEN MY THEORY AND PUBLIC MEANING ORIGINALISM

Much of Professor Solum's paper aims to parse the relative merits of my Reflective Equilibrium Theory and Public Meaning Originalism. As I emphasized in the Introduction, that comparison is inapt or at least misleading. PMO is a first-order constitutional theory. Reflective Equilibrium Theory is a framework for developing and choosing among first-order theories. Accordingly, different practitioners of Reflective Equilibrium will develop or choose different first-order theories, imaginably including some version of originalism.

But Solum is right, of course, that in deploying Reflective Equilibrium Theory in *Law and Legitimacy in the Supreme Court*, I embrace a number of substantive and methodological commitments that furnish at least the outlines of a first-order constitutional theory.[64] He is also correct that my explicit and implicit commitments diverge enough from leading versions of PMO to permit a meaningful comparison—not between PMO and Reflective Equilibrium Theory, but between PMO and the elements of a first-order theory that emerge from my various discussions in *Law and Legitimacy in the Supreme Court*.

This Part addresses challenges to and questions about my first-order theory that Professors Solum and Soames raise in their contributions to this Symposium. The second Section of this Part defends my claim that there are multiple senses of constitutional "meaning," including original meaning, among which Justices and other participants in constitutional argument may need to choose. The third Section deals with issues concerning the extent to which original meanings

63. Professor Metzger argues that my effort to ground ideals of morally legitimate judging in norms of practice and demands for reasonable, good faith judging within the bounds that the law allows suffers from a "level-of-generality problem." Metzger, *supra* note 2, at 362. In her view, disagreement about "the bounds of reasonable constitutional argumentation" appears to mark an end to "the legitimacy of the Supreme Court's constitutional decision making." *Id.* at 361 If Professor Metzger intends this as a point about the sociological legitimacy of the Court's decision making, I agree. Sociological legitimacy is group-relative. FALLON, *supra* note 1, at 23. But my account of moral legitimacy is self-evidently normative, not empirical or sociological, and aims to explain when reasonable citizens *ought* to regard judicial decisions as legitimate, even when they disagree. Without repeating the arguments that *Law and Legitimacy in the Supreme Court* advanced, I believe that we as individuals sometimes should accept decisions as legitimate even when we disagree with those decisions and one or more of their premises and when some people (not us) believe that the supporting opinions strayed beyond "the bounds of reasonable constitutional argumentation."

64. *See* Solum, supra note 2, at 329 ("Fallon wants us to employ reflective equilibrium to select general principles, suggesting that he views reflective equilibrium as a meta-theory. But Fallon also wants judges to employ reflective equilibrium on a case-by-case basis, suggesting a view that is a normative theory of constitutional practice.").

should determine Supreme Court decision-making. On this point, my theory affords greater weight to precedent than do stringent versions of PMO.

I begin this Part, however, with a further framing of the comparison between my first-order theory and PMO. I do so because Professors Soames and Solum not only emphasize my theory's incomplete and provisional character, but also depict reliance on case-by-case judgments to resolve indeterminacies as an important drawback.[65] But neither comes fully to grips with the many testing issues that would arise in attempting to apply PMO to disputed cases. If the question on the table is whether my theory is more or less choice-worthy than PMO, it is important to have a clear view of the conceptual as well as practical challenges that implementation of PMO would present.

A. Fixing the Terms of Comparison

When probing my first-order theory and comparing it with PMO or deferentialism, Professors Soames and Solum both appear to assume that whereas my theory begins with many gaps or indeterminacies, PMO is fully worked out and substantially more determinate. Neither, I should emphasize, claims complete determinacy for PMO. Yet both suggest that while my theory recurrently invites judges to decide cases based on their personal preferences, PMO keeps judges tied to the publicly knowable and frequently determinate facts of original public meaning.

In my view, Professors Soames and Solum overdraw the contrast on both ends. In *Law and Legitimacy in the Supreme Court*, I emphasize the constraints that my theory imposes through its demands for adherence to law and, in cases in which the law is reasonably disputable, through the obligation of reasoning in good faith.[66] Here, with the aim of deepening the discussion in which Professors Soames and Solum have engaged me, I want to emphasize a number of gaps or indeterminacies in extant versions of PMO.[67] For so long as those gaps or indeterminacies remain, applying PMO will require judges to make far more case-by-case judgments about how to specify relevant variables than public meaning originalists have generally acknowledged in their criticisms of non-originalist theories that call for case-by-case and sometimes normative judgment in application.

The underdeterminacy of extant versions of PMO is evident along at least three dimensions. The first involves the apparent commitment of PMO to interpret constitutional provisions as if they were utterances in ordinary conversation,[68] the "assertive" or "communicative" content of which depends substantially on biographical and historical facts about speakers, target audiences, and the speakers'

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65. *See* Solum, supra note 2, at 340–41; Soames, supra note 2, at 272 (criticizing my theory for seeking to "maximize [judges'] normative options while maintaining a semblance of fidelity to the Constitution itself").

66. FALLON, *supra* note 1, at 11–13, 130–32.

67. Although I make this point in my book, *id*. at 126, I offer further arguments here.

68. *See* Soames, *supra* note 2, at 247 ("I extend a well-understood model of linguistic communication among individuals to linguistic communication between collective speakers and collective audiences. To understand this, one must understand what assertion is.").

and audiences' shared assumptions. In fact, there are many relevant differences between constitutional provisions and conversational utterances that would require major adaptations in what I shall call "the model of conversational interpretation"[69] as applied to the constitutional context. Insofar as I can tell, few if any theorists of PMO have specified how to make the requisite adaptations in a way that would significantly restrain interpreters' discretion in reasonably doubtful cases.[70]

Professor Soames's exegesis illustrates the difficulties that the idea of constitutional provisions' "assertive" or "communicative" content presents. Soames equates the Constitution's assertive or communicative content with what an informed reader in 1787 (or 1866, when the Equal Protection Clause was proposed, or at the time of other constitutional amendments) would have understood the Constitution's authors as asserting or stipulating. He writes:

> To discover what the law asserts/stipulates is to discover what the lawmakers asserted/stipulated in adopting a text. As with ordinary speech, the content of an assertion usually isn't a function of linguistic meaning alone; the background beliefs and presuppositions of participants are also involved. What a speaker uses a sentence S to assert in a given context is, roughly, what an ordinarily reasonable and attentive hearer or reader who knows the linguistic meaning of S, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of S to commit the speaker to.[71]

Although this account explains the asserted content of utterances in ordinary conversation, when public meaning originalists propose to apply the model of conversational interpretation to the Constitution, questions immediately arise about who the relevant speaker or speakers are. Are they individual drafters, the members of the Constitutional Convention or subsequent proposing Congresses, or the ratifiers in state conventions and legislatures? In his paper for this Symposium, Soames equivocates: "The content of a legal provision is what was asserted or stipulated by lawmakers and/or ratifiers in approving it."[72] The lack of specificity becomes acute in light of Soames's further stipulation that interpreters should base their determinations partly on an assessment of disputed provisions' "intended purposes."[73] It is notorious that different framers of legal provisions may have different and even conflicting purposes.

In responding to the problem that different framers may have had different purposes or communicative intentions, Professor Soames insists that practitioners of

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69. *See* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 275 (2019).

70. For a fuller elaboration of this thesis, see *id*.

71. Soames, *supra* note 2, at 246.

72. *Id*. at 249.

73. *Id*. at 267.

his theory need not worry about combining or cumulating the subjective intentions of individual lawmakers: "Such intent is not an aggregate of subjective intentions of individual lawmakers."[74] By itself, this is an important deviation from the model of conversational interpretation, in which biographical information about a particular speaker, sometimes including a speaker's likely subjective intentions, can be highly relevant. Soames then continues:

> We routinely speak of the goals, beliefs, statements, promises, and commitments of collective bodies, even though the goals, etc. are not aggregated sums of individual cognitive attitudes. Collective bodies routinely *investigate whether such-and-such*, *conclude and assert that so-and-so*, and *promise to do this and that*. Since they can do these things, legislatures can intend, assert, and stipulate *that such is such is to be so and so*. The contents of these linguistic acts are what is, in principle, derivable from the relevant, publicly available, linguistic and non-linguistic facts.[75]

This argument raises as many questions as it answers. It is true that we sometimes speak of collective bodies as exercising agency that does not depend on "aggregated sums of individual cognitive attitudes." As work on group agency has demonstrated, sometimes people intend to do things together and form "we-intentions" rather than just "I-intentions."[76] Familiar examples are taking a walk together and cooking dinner together. But some references to collective bodies are best understood as aggregative claims. When we say that "the committee concluded that Jones acted illegally," we may sometimes mean that the committee's members concluded individually that Jones acted illegally. If someone responded to such an assertion by pointing out that one or more members dissented, we would clarify that "a majority of the committee concluded that Jones acted illegally." At this point it would be clear that we were aggregating the conclusions of individual members.

Again, I do not mean to deny the possibility of group intentions. But I do mean to insist that sometimes the only way to make sense of claims about group intentions is to understand them as claims about the individual intentions of a group's members. Accordingly, when the publicly available facts establish that different members of a collective body had different goals, intentions, or assumptions—as seems sometimes to have been the case with those who wrote and ratified the Constitution—I do not understand how the fact that "[w]e routinely speak" of groups as having collective attitudes helps in any way to resolve which collective attitudes or intentions we should ascribe to the framers or authors of the Constitution, taken as a collective.

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74. *Id*. at 248.

75. *Id*.

76. Leading works in developing accounts of group agency and group intention include MICHAEL E. BRATMAN, FACES OF INTENTION (1999) and CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY (2011).

Professor Solum proposes to solve the problem of ascribing communicative intentions to a multi-member group by relying on a notion of second-order communicative intentions.[77] Solum would posit that all of the Constitution's drafters—whoever they were—intended to "convey [the] public meaning" of the text, whatever the public meaning might be.[78] The problem is two-fold. First, the second-order intention that Solum posits is not necessarily anyone's actual, historical intention. It is a theorist's construct, devised to solve a problem that otherwise would arise in ascribing communicative intentions to groups. Second, the "solution" falls short of its goal. The model of conversational interpretation that Solum wants to apply to constitutional interpretation makes "the assertive content" of an utterance depend on reasonable inferences about the specific, first-order communicative intentions and assumptions of a text's authors. If the meaning of a text or utterance depends on what one would reasonably conclude that the author sought to convey, to posit that the authors of a constitutional provision intend to convey whatever the public would think they intend to convey affords no help to a reader who is puzzled, substantively, about what a text asserts. In conversation, if uncertain about the meaning of an utterance, I would try to identify what the speaker was trying to convey by inquiring into her first-order communicative intentions. Solum's reference to second-order intentions provides no comparable reference point. Being told that a collective speaker intended to convey whatever I would reasonably think that its utterance conveyed leaves me spinning in circles.

At this point, I would venture an expression of skepticism. An evident ambition of PMO is to frame questions about the assertive content of constitutional provisions as ones about matters of linguistic fact, not implicating potentially controversial normative judgments. But insofar as identifying the assertive content of constitutional provisions requires the imputation of collective (rather than aggregative) assumptions, goals, and intentions to the Constitution's diverse authors and ratifiers (the latter of whom may or may not count as authors), I suspect that the pertinent linguistic "facts" will need to be constructed or invented, not discovered. If so, theories of PMO are not only incomplete insofar as they have not yet specified how we should go about identifying "what the speaker means . . . on the particular occasion" when "the speaker" is a group, not an individual, and the membership of the group has not been fully specified. Such theories also bear a burden of establishing how their gaps could be filled without reliance on normative judgment about how best to construct group intentions in light of the distinctive features of law, including as a vehicle for the administration of coercive force, and legal adjudication.

Comparable but even more daunting questions arise when we seek to identify the relevant audience for constitutional provisions whose "reasonable" judgments concerning the assertive content of constitutional provisions matter so crucially. What if different members of the audience have different assumptions about

77. Solum, *supra* note 2, at 304–305.
78. *Id*. at 305.

matters of history and context that would be relevant to the determination of what a provision meant? The problem here is far from purely theoretical. Public meaning originalists sometimes speak of "reasonable" listeners, but this term, which may be understood as involving the capacity for sound, normatively inflected judgment, surely cries out for explication.

Professor Soames again appears to believe that moving from individuals to collectives in applying the model of conversational interpretation poses no substantial problem: "[W]hen 'speaker' and 'audience' are collective . . . the default interpretation of the asserted content of the communication is what one would expect a reasonable and rational individual who understood the words and knew all of the relevant and publicly available facts of the context of use would take it to be."[79] This account may work well enough in cases that everyone agrees about. When the Constitution says "four years,"[80] everyone agrees that it means four years. But the unsolved problem, which arises in nearly every case of interpretive disagreement, is that "reasonable and rational individual[s]" often disagree about matters of constitutional interpretation.

Indeed, the historical record reveals that members of the generation that drafted and ratified constitutional provisions often disagreed among themselves. Well-known examples involve disagreement among members of the Founding generation about whether the Sedition Act, which criminalized criticism of the president, violated the First Amendment's Free Speech Clause;[81] whether the provision of Article III providing federal jurisdiction over a suit against a state by a citizen of another state abrogated the states' sovereign immunity from suit in federal court;[82] and whether any provisions or provisions of Article I empowered Congress to charter a Bank of the United States.[83]

Soames acknowledges that judges may need to exercise normative judgment in cases in which the "content" of a constitutional provision "is vague and so does not, when combined with the facts of the case, determine a definite verdict."[84] Accordingly, he provides criteria to guide the exercise of judicial judgment or

79. Soames, *supra* note 2, at 262.

80. U.S. CONST. art. II, § 1 (providing for a presidential term of four years).

81. *See, e.g.*, JAMES J. MAGEE, FREEDOM OF EXPRESSION 22–24 (2002); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 19–22 (2011).

82. The Supreme Court answered in the affirmative in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), but its decision apparently prompted widespread outrage and was effectively overturned by the Eleventh Amendment. For a barebones account of the history, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 905–06 (7th ed. 2015).

83. That question, to which Alexander Hamilton and George Washington responded in the affirmative, while Thomas Jefferson and James Madison answered in the negative, *see* Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 21–23 (2000), was resolved in the affirmative by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

84. Soames, *supra* note 2, at 249.

discretion in such cases.[85] His resistance to my views, and mine to his, partly appear to reflect a division of judgment about the frequency with which cases of linguistic underdeterminacy arise. In this regard, I cannot help noting the occasions on which Professor Soames's paper pronounces confident judgments about the apparent uniquely linguistically correct interpretations of provisions that others—based on extensive historical research—have identified as subjects or historical debate or uncertainty.[86]

In appraising these conclusions, I recall Soames's equation of the "assertive content" of constitutional provisions with what a "reasonable and rational" historical person would have concluded. For that formula to have resolving power in cases of documented disagreement, the phrase "a reasonable and rational individual" would need to be replaced by something like "the individuals who are most reasonable and rational." But at least insofar as constitutional provisions are concerned, I do not know of versions of PMO that have offered even remotely determinate criteria for ascertaining which citizens were most reasonable. Nor do I believe that the criteria for determining who or what counts as "most reasonable" could be exclude normative evaluation.

Even if problems in adapting the model of constitutional interpretation to the distinctive features of constitutional meaning were worked out, a second set of issues would require further solutions for PMO to be a complete and substantially determinate theory. Public meaning originalists frequently insist that there is an important distinction between interpretation, which identifies the meaning or assertive content of constitutional provisions, and construction, which requires determination of the legal significance of the Constitution's assertive content.[87] As some public meaning originalists emphasize, hugely important issues arise in "the construction zone," especially but not exclusively when the assertive content of the constitutional text is vague, ambiguous, open-textured, or otherwise underdeterminate. So far as I know, very few originalists have attempted to work out a full theory of how courts should resolve issues arising in the "construction zone." Professor Solum's contribution to this Symposium quotes briefly from an unpublished manuscript of his in which he maintains that "constitutional doctrines must be consistent with the 'translation set' . . . [consisting] of the set of doctrines that themselves directly translate the communicative content of the text."[88] Professor Randy Barnett has recently argued that decisions about constitutional construction should be consistent with the "spirit" as well as with the assertive content of

85. Soames, *supra* note 2, at 251 (insisting that "discretion be grounded in the goals and intentions of the original lawmakers, rather than in the moral or political values of the judges or justices.").

86. For example, he draws conclusions about the significance of the provision authorizing Congress to declare war, *id*. at 257, the assertive content of the Establishment Clause, *id*. at 267, and the permissibility of school segregation under the Equal Protection and Privileges or Immunities Clauses, *id*. at 275–85.

87. *See* Solum, *supra* note 2, at 295–96 (explicating "the interpretation-construction distinction").

88. *See* Solum, *supra* note 16, at 293.

relevant constitutional language.[89] Yet even this prescription is quite vague. At least insofar as published scholarship is involved, much more work remains to be done to give PMO a full, reasonably determinate theory of constitutional construction.

Third, a fully developed theory of PMO would need to specify the authority, if any, of precedent in the multitude of diverse contexts in which precedent might plausibly be relevant. Although a theory of precedent could fall under the umbrella rubric of "construction," issues involving *stare decisis* are sufficiently multifarious and important to call for a heading of their own. When do prior judicial glosses on or attempted liquidations of vague or ambiguous constitutional language become authoritative and binding? When can precedents that seem incompatible with the original public meaning nevertheless be retained or embraced? Professors Soames and Solum have both suggested that courts should go slowly in overturning some erroneous precedents.[90] If so, public meaning originalists would need to determine which kinds of precedents should be phased out on which schedules. This could easily prove a large chore—though it would be impossible to know until, once again, methodological issues involving specification of the "assertive content" of constitutional provisions were resolved.

To be clear, in identifying gaps in the leading versions of PMO, I do not mean to suggest that originalists should rush to make their theories as determinate as possible as fast as possible. To the contrary, I believe that the most promising way for originalists to develop their theories would be to adopt a reflective equilibrium approach, refining and sometimes revising their methodological premises in response to issues generated by new and unforeseen cases. Nevertheless, head-to-head comparisons of my theory with current versions of PMO should recognize that both are works in progress that will require case-by-case judgments to work out and operationalize. In short, my first-order theory—which I present as admittedly incomplete in relevant respects—should be compared with actual competitors, not imagined and idealized alternatives that are more complete and determinate than any theory currently on offer.

Under these circumstances, I think it a virtue of my theory that it is candid about its limitations and that it provides a mechanism for filling its gaps. Until originalists acknowledge the lacunae in their theories that result from the imperfect fit between conversational interpretation and constitutional interpretation, non-originalists will worry about the potential for motivated reasoning to influence originalists' determination about which kinds of evidence matter most, even if the underlying psychological mechanisms are wholly subconscious.[91]

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89. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

90. Soames, *supra* note 2, at 257–58; Solum, *supra* note 2, at 27–28; Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018).

91. *See* Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) (defining "motivated reasoning" as "the

B. Response to Criticisms of My Multiple Meanings Thesis

My first-order constitutional theory relies importantly on the premise that there are multiple senses of constitutional "meaning" among which judges sometimes have to choose in order to determine the outcome of disputed cases. Among these is "contextual meaning, as framed by the shared suppositions of speakers and listeners,"[92] which constitutes the closest approximation of what Professors Soames and Solum call assertive or communicative content. But my list also includes semantic or literal meaning, real conceptual or moral meaning, intended meaning, reasonable meaning, and interpreted meaning.[93] None, I claim, is necessarily fixed as authoritative and controlling at the time of a provision's initial ratification.

Professors Soames and Solum both disagree. In rejecting my "multiple meanings" thesis, each acknowledges that there are several possible senses of the word "meaning," though they think not as many as I identify.[94] But they invoke or defend versions of originalism in which the invariably pivotal sense of meaning for purposes of constitutional interpretation is a provision's communicative or assertive content, defined, roughly, as "what the speaker means and what the hearers take the speaker to mean" on a particular occasion.[95] In the view of Soames and Solum, all of the alternative senses of meaning that I have identified ought to be analyzed as contributors to assertive or communicative content, with the exception of interpreted meaning.[96] Interpreted meaning, they maintain, is not a relevant sense of meaning at all.[97]

I begin with a brief comment about "interpreted meaning." Part of Solum's argument against my treatment of interpreted meaning as a species of constitutional meaning is normative—a matter that I shall take up later. But if I understand correctly, he also draws on a linguistic and conceptual argument that he advances to support what he calls PMO's Fixation Thesis, according to which "the meaning of the constitutional text is fixed at the time each constitutional provision is made public."[98] "The case for the fixation thesis relies on general facts about the way we interpret old texts,"[99] he writes. When we interpret old texts, we want to know what they meant at the time they were written, not what they might otherwise be thought to mean at some later time.

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unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.").

92. FALLON, *supra* note 1, at 51.

93. *Id*. at 71–82.

94. Solum, *supra* note 2, at 302 ("the word 'meaning' has multiple senses"); Soames, *supra* note 2, at 263 ("the word 'meaning' occurs in many ways in ordinary speech").

95. Soames, *supra* note 2, at 247.

96. *See* Solum, *supra* note 2, at 303; Soames, *supra* note 2, at 269.

97. Solum, *supra* note 2, at 320 (arguing that in using interpreted meaning, "the Supreme Court overrides the communicative content of the constitutional text.").

98. *Id*. at 291.

99. *Id*.

Yes, I would reply, we often and perhaps typically want to know what old texts meant when they were written, but sometimes we also want to know if they do or could mean something different now. We sometimes speak of novels, plays, and poems as acquiring new meanings in light of historical events subsequent to their initial publication. For example, we can describe some of Shylock's speeches in *The Merchant of Venice* as having a different meaning today from their meaning in productions by Shakespeare's contemporaries. The change need not result from what Solum calls "linguistic drift,"[100] involving alterations in the definitions of individual words. In referring to how the meanings of some of Shylock's speeches have changed from the sixteenth to the twenty-first century, we might call attention to differences in listener or reader assumptions about or cognition of Shylock's attitudes arising from additions to knowledge and changes in moral sensibility. More prosaically, we can also describe the rules of sports and social organizations as acquiring interpreted meanings through customary practice that accepts deviations from original or literal meanings. For example, we could refer to the strike-zone in baseball as having acquired an interpreted meaning at variance with the original meaning of the written rules.

Especially if I am correct about extra-legal practice, then if there are good reasons to exclude interpreted meanings from the lexicon of constitutional interpretation, and for constitutional interpreters to be interested only in original meanings, those reasons would have to be either legal or moral ones, not derivable from general facts about old texts. In fairness to Professor Solum, I repeat my acknowledgment that he recognizes that it requires normative arguments to defend the Constraint Principle, which he interprets as foreclosing judicial ratification of precedents that are not consistent with original meaning.[101] If there is any reason to quarrel separately about whether "interpreted meaning" is a species of constitutional meaning, it involves rhetorical advantage or disadvantage in arguments about the Constraint Principle.[102]

I should emphasize, however, that my claim that there are multiple senses of constitutional meaning extends to original meanings. *Law and Legitimacy in the Supreme Court* argues that we can, and that judges sometimes do, use the term "original meaning" in different senses that rely on different kinds of evidentiary support. For example, lawyers and judges point to different kinds of facts to support their claims about original intended meanings, literal meanings, and reasonable meanings.

In response to this argument, Professors Soames and Solum both maintain that originalists can and do treat kinds of "meaning" that I describe separately (except

100. *Id.*

101. *Id.* at 293 ("Because the Constraint Principle is a normative claim, it must be justified by normative arguments.").

102. If so, the disagreement would be an example of normatively grounded metalinguistic negotiation about the best or most appropriate usage of term of an otherwise ambiguous term. *See* David Plunkett & Timothy Sindell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 LEG. THEORY 242, 259–65 (2013).

for interpreted meaning) as contributors, rather than alternatives, to the "assertive content" that they seek to privilege.[103] In other words, "assertive content" depends partly on what I call intended meaning, literal meaning, reasonable meaning, and so forth. In their view, moreover, reliance on a composite notion is a virtue: it ties together a variety of otherwise diverse phenomena that matter to interpretation and permits explanation of how they contribute to assertive content.

Even if Soames and Solum are correct about the conceptual possibility of treating other senses of meaning as contributors to assertive content, the linguistic parsimony that they champion would come at a cost. The case for recognizing multiple senses of legal meaning includes theoretical and normative as well as descriptive strands. As I argue in *Law and Legitimacy in the Supreme Court*, legal interpretation sometimes relies on all of the senses of meaning that I distinguish. It is possible to pick out cases in which judges appeal almost exclusively to the kinds of historical evidence that would tend to support ascriptions of literal, intended, or reasonable meanings to constitutional provisions.[104] Accordingly, my classificatory scheme better illuminates actual constitutional practice by clarifying how ascriptions of different senses of meaning rest on different kinds of factual claims than does an aggregative approach. My approach also has the advantage of avoiding reliance on a notion of assertive content that was developed to analyze utterances by particular, identifiable speakers to known audiences who are presumed to share a variety of background assumptions. As I explained above, the ascription of assertive content to constitutional provisions—which have multiple or collective authors and have diverse audiences—poses a variety of conceptual difficulties that have yet to be resolved adequately.[105]

A final strand of argument supporting my multiple-meanings thesis is normative. In my view, recognizing different senses of meaning (including interpreted meaning) as relevant to constitutional law might sometimes make it possible for judges to reach normatively more attractive results than a singular focus on "assertive content" would license (if and when originalists solve the various difficulties in giving content to that notion that I discussed above). Professor Solum's paper takes note of relevant normative issues but does not purport to resolve them definitively.

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103. *See, e.g.*, Soames, *supra* note 2, at 269 ("Despite what Fallon appears to think, my conceptual framework incorporates all these concerns. What I add that he doesn't is (i) the centrality of assertive content in terms of which his other notions can be defined, thereby tying all his linguistic concerns together, and (ii) the way in which original intended purpose sometime contributes to originally assertive content, and sometimes plays a role in revising that content (in ordinary as well as legal contexts).").

104. FALLON, *supra* note 1, at 51–57.

105. *See also* Fallon, *supra* note 69.

Professor Soames's argument for the centrality of assertive content, as I understand it, differs slightly from the one that Professor Solum ascribes to PMO. Soames writes:

> The word 'meaning' is used in ordinary speech to express several distinct concepts. Since ambiguous theoretical terms invite confusion that I wish to avoid, I employ one of them, which is also the central concept of meaning used in contemporary cognitive science and theoretical linguistics.[106]

In this formulation, the argument for Soames's division of the conceptual terrain to exclude all but one of the multiple senses of meaning that I identify and explicate involves an aspiration to clarity. He sees benefit to bringing discussion of meaning in law into alignment with "the central concept of meaning used in contemporary cognitive science and theoretical linguistics." Although I would be intrigued to hear further elaboration of this practically grounded argument, I am not immediately persuaded in light of what I have described as the ill-fit between conversational interpretation and constitutional interpretation. In other words, I am skeptical that the concept of meaning that best serves the needs of cognitive science and theoretical linguistics is necessarily the one that most helpfully illuminates what we do or should have in mind when we talk about the "meaning" of legal texts.[107]

After having cited the potential clarifying benefits of reserving the term "meaning" for a constitutional provision's assertive content, Soames's argument continues:

> What is central is the notion of asserted content. Everyone wants to know what the Constitution says or asserts (and thereby promises, guarantees, or requires). Thus, to make the identification of asserted content (original or revised) the goal of constitutional interpretation (while explaining its relation to linguistic meaning and the context of language use) is *not* to introduce foreign subject matter into legal theorizing; it is to address some of the most fundamental questions that theories of constitutional interpretation are charged with answering.[108]

This argument is fundamentally right in one sense. To equate constitutional meaning (exclusively) with "asserted content" does indeed address some of the most fundamental questions of constitutional interpretation. But the argument is also question-begging insofar as it depends on the premise that "[e]veryone wants to know what the Constitution . . . asserts." Whether that is what everyone wants to know is an empirical question, the answer to which is that many participants in constitutional argument are not exclusively interested in "what the Constitution

106. Soames, *supra* note 2, at 271.
107. FALLON, *supra* note 1, at 62–65.
108. Soames, *supra* note 2, at 271.

. . . asserts" in the special, limited sense in which Soames uses the term. And whether everyone ought to be interested exclusively in "assertive content" is a normative question that only normative arguments can answer.

One further issue belongs on the table. As both Soames and Solum recognize, one of the senses of meaning that I identify—"contextual meaning"—closely approximates what they term "assertive content." As my recognition of this sense of constitutional meaning signals, I do not question that original meanings that approximate assertive content can be ascribed to constitutional provisions. But in light of the difficulties of adapting the model of conversational interpretation to cases of constitutional interpretation—as discussed above—we may need to rely on law, not linguistics, to determine who relevant speakers are, how divergent communicative intentions should be combined, and what characteristics and beliefs should be ascribed to the Constitution's imagined audience.[109] Insofar as the legal questions are currently unsettled, normative considerations may matter once again.

C. Constraint by Original Meaning

In a series of important articles, Professor Solum has repeatedly identified what he calls "the Constraint Principle" as a defining feature of PMO and as a central line of division between PMO and various non-originalist rivals.[110] In his contribution to this Symposium, Solum introduces the Constraint Principle in terms that I would endorse: "The *Constraint Principle* is the claim that the original public meaning of the constitutional text should constrain constitutional practice, including the decision of cases by judges and constitutionally salient actions by executive and legislative officials and institutions."[111] I agree, as I suspect nearly everyone does, that historically understood meanings—insofar as they can be identified and have controlled past interpretation—should influence and often determine current interpretation.

In comparing my theory with PMO, however, Solum adopts a more stringent interpretation of the Constraint Principle: "The version of the Constraint Principle that will be discussed in this Essay is Constraint as Consistency: the basic idea is that the norms of constitutional law should be consistent with and fairly derivable from the public meaning of the constitutional text."[112] I could not endorse this version, which would categorically preclude reliance on interpreted meaning as a permissible alternative to a constitutional provision's original assertive content. But neither, I might add, does Professor Soames endorse the

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109. For an ambitious and challenging account of the role that law might play, though one that I view as over-optimistic about law's likely determinacy, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1093-97 (2017).

110. *See, e.g.*, Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (March 24, 2017) (unpublished manuscript); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 460–61(2013).)

111. Solum, *supra* note 2, at 292.

112. *Id.*

Constraint Principle that Solum ascribes to PMO. In his contribution to this Symposium, Professor Soames explains that he would not insist on unsettling all nonoriginalist precedents when the damage to "legitimate reliance expectations" would be too great.[113] Indeed, even Professor Solum himself, in past writings, has appended an important qualification to the Constraint Principle. He has allowed that the Supreme Court might sometimes need to tolerate a time lag before flatly overruling mistaken precedents and shutting down all programs and practices that depend on them.[114] Professor Solum's paper for this Symposium adds a further equivocation. Although he interprets PMO as requiring the sooner-or-later overruling of all nonoriginalist precedents, he says that he has not meant to offer a final verdict on whether PMO should be preferred to my first-order constitutional theory after all relevant empirical calculations—apparently including the damage that the overturning of all nonoriginalist precedents might inflict—are done.[115]

With Professor Solum having left matters in that posture, and with Professor Soames having recognized that consequences ought to matter in determining how stringently original meanings ought to constrain constitutional decision-making, I have little to add to my arguments in *Law and Legitimacy in the Supreme Court* about the authority of nonoriginalist precedents and their occasional capacity to prevail over original meanings in constitutional adjudication. In laying out the case for PMO (although stopping just short of endorsing it), Solum writes that "[o]ne of the chief virtues of Public Meaning Originalism is that it provides a known destination" for those charged with responsibility to interpret the Constitution authoritatively: they should "navigate toward the original public meaning."[116] As indicated above, I would offer a different specification of the end at which judges and Justices should aim. The goal, in my view, should be the most morally legitimate constitutional regime, the specification of which would require taking account of both backward and forward-looking considerations. Because the Constitution and its ratifiers are legitimate authorities, current interpreters must look back to them and their actions. But past Supreme Court decisions can also be legitimate authorities. Moreover, in otherwise doubtful cases, judges should look forward, as well as backward, in order to render rulings that will themselves warrant respect and obedience in the future. It is hard to be more specific without getting down to cases. Would PMO entail the abandonment of constitutional prohibitions against gender discrimination, the application of the Bill of Rights to the states, and one-person, one-vote principles? Would Social Security, paper money, and much of the modern regulatory and welfare state be

113. Soames, *supra* note 2, at 257–58.

114. Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); *see also* Solum, *supra* note 2, at 318–19.

115. Solum, *supra* note 2, at 350 ("In this Essay, I do not attempt to reach a bottom-line conclusion and pronounce a final judgment on the relative merits of Public Meaning Originalism and Reflective Equilibrium Theory.").

116. *Id.*

invalidated? Although I do not know the answers to these questions, I would think it irresponsible to embrace a strong version of the Constraint Principle without with some assurance against morally and practically catastrophic consequences.

I would also reiterate my rejection of the view—which many originalists endorse—that considerations of democratic legitimacy weigh heavily on the side of PMO and against any form of nonoriginalism.[117] According to a familiar originalist argument, the people of the United States spoke when they ratified the Constitution and its various amendments, thereby endowing the Constitution's original assertive content with democratic legitimacy, and any judge-driven deviation from original public meaning suffers from a disturbing deficit of democratic input. In my view, it is important that the original Constitution was adopted over 200 years ago by a citizenry that excluded women and nearly all African-Americans—most of whom were held in bondage—from the franchise and that otherwise differed from Americans living today in many material respects. The Americans who adopted the Constitution also sought to make constitutional change extraordinarily difficult: constitutional amendment is impossible without the concurrence of two-thirds of both Houses of Congress and three-quarters of the states. Under that system, states containing as little as five percent of the total population of the United States can block a constitutional amendment. Largely in response to the difficulties of amendment, we have developed traditions of judicial interpretation and construction of the Constitution that have made constitutional law reasonably responsive to "the will of the people" of the here and now, sometimes in seeming deviation from constitutional provisions' original assertive content.

When we judge originalist and non-originalist constitutional theories against this backdrop, I am far from certain that originalism dominates non-originalism along the dimension of democratic legitimacy. To determine which was preferable, I believe, confidently, that we need to take other factors—including substantive justice and procedural fairness—into account.

IV. THE RELEVANCE OF SOCIOLOGICAL LEGITIMACY TO MORAL AND LEGAL LEGITIMACY

Emphasizing the distinctions that my book draws among moral, sociological, and legal concepts of legitimacy, Professor Gillian Metzger presses the question of how courts should respond to tensions among the different kinds of legitimacy in a polarized era. Metzger believes that *Law and Legitimacy in the Supreme Court* fails to deal adequately with several matters involving sociological legitimacy. Her most central normative concerns involve the issue of whether courts

117. Professor Solum adopts an evenhanded approach: "it seems clear that a reasonable case can be made that Public Meaning Originalism fares better than Reflective Equilibrium Theory (understood as a method employed by judges) on this score—although a reasonable case can be made for the opposite conclusion. Playing out all of the arguments and counter arguments would require extensive discussion, at least a very long law review article." *Id.* at 346.

should ever take sociological legitimacy into account in deciding cases and, if the answer is yes, whether they must be candid about having done so. Although Metzger briefly discusses how those questions ought to be resolved within the framework of my theory,[118] she devotes more space to providing an original analysis. I admire her discussion and will not seek to critique its fine points here.

As Professor Metzger recognizes, my theory would allow judges to weigh considerations of sociological legitimacy in some cases, but it is important to be precise about how. If we ask whether judges should take account of sociological legitimacy in choosing a first-order constitutional theory, I believe that they should. If a first-order constitutional theory would tend to render the courts sociologically illegitimate, then this consideration would militate against choosing it, even though other factors should also enter into the calculus. Partly for this reason, *Law and Legitimacy in the Supreme Court* argues that the Justices should accord more deference to Congress than their recent practice reflects.[119] Although other considerations also undergird this recommendation, a more deferential posture might promote the Supreme Court's sociological legitimacy by helping to dispel impressions that the Justices routinely find ways to vote in accordance with their political preferences.

It is a separate question whether a first-order constitutional theory should either allow or require Justices to consider whether particular decisions might adversely affect the sociological legitimacy of the Supreme Court when ruling on individual cases. Again, we need distinctions. Metzger suggests that Justice Owen Roberts may have taken account of sociological legitimacy when abandoning some of his interpretations of the Commerce and Due Process Clauses in the famous "switch in time that saved the nine"[120] in 1937 and after.[121] Even if so, Justice Roberts's shift would appear to have involved an overall revision of his constitutional theory. Beginning in 1937, Justice Roberts relatively consistently joined Court majorities in openly embracing and systematically applying interpretive premises that called for broad deference to the political branches. The main exception involved the categories of cases outlined in the famous *Carolene Products* footnote.[122] My Reflective Equilibrium Theory explains, contemplates, and potentially applauds decisions by Justices and others to revise their first-order theories when experience persuades them that they have good reason to do so.[123]

Other cases that Professor Metzger discusses raise different issues. She focuses mostly on cases in which Justices experience acute political, sociological, or prudential pressures to resolve particular cases contrary to their understanding of what the law would require if properly construed and applied. In such cases, she suggests, there may be a tension between the demands of sociological and legal

118. *See* Metzger, *supra* note 2, at 370.
119. *See* FALLON, *supra* note 1, at 159–61.
120. JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 135 (1938).
121. Metzger, *supra* note 2, at 372.
122. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
123. *See* FALLON, *supra* note 1, at 145–47.

legitimacy.[124] Once again, however, distinctions come into play. In *Planned Parenthood v. Casey*,[125] some of the Justices cited considerations of sociological legitimacy as supporting their decision to reaffirm "the central holding" of *Roe v. Wade*.[126] But their framing of their argument made clear that they thought reliance on those considerations was legally legitimate under the circumstances.[127]

Although I could offer more distinctions, I can imagine cases that would force me, and my theory, to line up on one or the other side of the question—also pressed by Professor Tara Grove[128]—of whether sociological considerations could ever justify the Justices' adoption of a position that they viewed as legally incorrect. The World War II case of *Ex parte Quirin*[129] may furnish a testing example. *Quirin* arose when would-be Nazi saboteurs waded onto shore in the United States in the early days of World War II, removed their uniforms in violation of the laws of war, and set out in search of opportunities to inflict damage.[130] Following the Nazis' detention, the government proposed to try them before military commissions, not Article III courts, and to execute them swiftly.[131] When the prisoners filed petitions for habeas corpus, it emerged that at least one of the Nazis was an American citizen, with a colorable claim of right to a trial in an Article III court.[132] For purposes of argument, let us assume that a conscientious Justice would have concluded that any American citizen would have had such a right. Let us further assume that if the Court had ruled in the petitioner's favor, President Franklin D. Roosevelt would have defied the decision (as he apparently communicated to the Justices that he would[133]), that the public would have supported the wartime president, and that the Court's sociological legitimacy would have suffered a major blow. Perhaps in response to that threat, the Court issued an order rejecting the petitioners' submissions almost immediately following oral argument, with the explanation that an opinion would follow in due course.[134] When that opinion came, it fumbled unpersuasively in attempting to distinguish a

124. Metzger, *supra* note 2, at 362–63 (citing a "tension").

125. 505 U.S. 833, 865 (1992).

126. 410 U.S. 113 (1973).

127. *See* 505 U.S. at 864–66. For a thoughtful defense of the Court's approach, see Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995).

128. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2263 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

129. 317 U.S. 1 (1942).

130. For an account of the case, see David J. Danielski, *The Saboteur's Case*, 1996 J. SUP. CT. HIST. 61 (1996).

131. *See id.*

132. *See id.*

133. *See* PIERCE O'DONNELL, IN TIME OF WAR 213 (2005) (detailing private communications between Roosevelt Administration and Justices leading up to decision); Danielski, *supra* note 130, at 69 (discussing fears among Justices during preliminary discussion that Roosevelt would execute petitioners despite Court action).

134. Quirin, 317 U.S. 1, 18 (1942) (reproducing the per curiam opinion in an unnumbered footnote).

prior case holding that a U.S. citizen detained in the U.S. in a state where the ordinary courts were open could not be tried in a military tribunal.[135]

If we ask what the Justices should have done in *Quirin*, issues of moral as well as legal legitimacy loom large. If the case could appear hard, it is primarily because the Justices could reasonably have believed that a principled ruling would have outraged a large segment of the wartime public, who would have viewed the Court as overstepping its authority by intervening in military matters. The Justices might further have believed that a ruling for the citizen-petitioner would have proved ineffectual in enforcing his rights anyway, since the President would not have acceded to an adverse decision. If the public rallied behind the President, not the Court, the Court would have suffered a further blow to its sociological legitimacy through the revelation of its impotence under the circumstances. In my view, potential adverse consequences, including damage to the Court's sociological legitimacy, are sometimes relevant to how the Justices should decide cases. Yet among the most unyielding requirements of morally legitimate judicial decision-making, and of constitutional argumentation more generally, is one of argument in good faith.[136] And if the Justices had sought to satisfy that obligation by ruling against the petitioner's claim, yet acknowledging that concerns about the Court's sociological legitimacy drove their decision, their candor would have proved self-defeating. No one would have respected the Court for announcing that it had deliberately misconstrued the law. Accordingly, by confessing the true ground for their decision, the Justices would have subverted the sociological legitimacy that they wished to preserve. Under these circumstances, *Quirin* was wrongly decided. The proper resolution—as is characteristic in clashes among different types or senses of legitimacy—comes from the demands of moral legitimacy or respect-worthiness.

Nevertheless, I would not insist categorically that the Justices must never, no matter what, rule based on sociological considerations that they could not discuss publicly without the disclosure defeating their prudential objectives. In previous writing, I have expressed sympathy for a position in moral philosophy sometimes labeled "threshold deontology."[137] Threshold deontologists maintain that moral duties almost always continue to hold even when the costs outweigh the benefits as measured in consequentialist terms.[138] Right and wrong are not defined solely by consequences. Nevertheless, threshold deontologists affirm, there may be rare

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135. *Quirin* purported to distinguish the earlier case, Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), on the ground that Milligan was not an enemy combatant under the laws of war. Quirin, 317 U.S. at 45–46. In fact, Milligan, who had allegedly aided the Confederacy, was specifically charged with violating the laws of war. *Milligan*, 7 U.S. (4 Wall.) at 6.

136. FALLON, *supra* note 1, at 146.

137. Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 368–69 (2013).

138. See, e.g., CHARLES FRIED, RIGHT AND WRONG 10 (1978) (explaining that even absolute norms have boundaries and exceptions); John Rawls, *Fifty Years After Hiroshima*, *in* COLLECTED PAPERS 565, 566–67 (Samuel Freeman ed., 1999) (noting that even under a "strict interpretation," human rights might give way "in times of extreme crisis"); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 323 (1989) (finding "an exception to the norm against torturing" and other bad acts when their commission "is the only means to prevent the death or injury of others").

cases in which the costs of adherence to a moral norm would be unbearably high. I am not sure how to specify the threshold above which costs, as measured in the currency of sociological legitimacy, might justify a Justice in violating the demands of strict legality and then lying about it. Although such cases should rarely if ever arise, my theory does not wholly rule out their possible existence. As I said earlier, I think it a virtue, not a vice, of my theory that it postpones decision of some issues that might emerge in the future but are currently difficult to frame in all of their potentially relevant complexity.

V. LEGITIMACY DEFICITS IN HISTORICAL CONTEXT AND PROSPECTS FOR THEIR FUTURE REMEDIATION IN A POLARIZED ERA

Professor Keith Whittington's paper for this Symposium takes up the question whether we actually confront a crisis of constitutional and judicial legitimacy in the sociological sense.[139] Although his answer is nuanced, he appears to believe that we do, and he further explores the character of that crisis and the prospects for its resolution by the Supreme Court.

Whittington offers an especially informative historical perspective. He notes that we have had polarized politics before, but he also identifies discontinuities between the current era and other eras of sharp partisan division.[140] "What might be unusual about our recent political environment is not the polarization but the gridlock," he writes.[141] In contrast with prior periods of deep polarization, today neither of our major parties has decisively triumphed over the other and forced it "to yield to the dominant party's values and preference."[142] Whittington also expresses doubt[143] about whether there is much that judges could do to enhance confidence in the courts among a populace that is likely to appraise judicial decisions from partisan perspectives. Most people do not read judicial opinions. If not, most Americans cannot be impressed—either positively or negatively—by the Justices' fidelity or infidelity to norms of judicial craft and argument in good faith. A point made by Professor Metzger also complements Whittington's thesis. Strategic efforts to promote sociological legitimacy could fall flat or even backfire.[144]

I agree with all of these submissions. With respect to a number of empirical and sociological matters, I am delighted that my book has provoked interventions into a conversation about law and legitimacy in the Supreme Court from which I have already learned much and from which I look forward to learning more.[145]

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139. See Whittington, *supra* note 2, at 238.

140. *See id*.

141. *Id*.

142. *Id*.

143. *Id*. at 236–37.

144. Metzger, *supra* note 2, at 379 ("If paying attention to the public impact of the Court's decisions makes the Justices seem more like politicians and to be acting extraconstitutionally, then their candor may cause the very damage to the Court's sociological legitimacy that they were trying to avoid.").

145. I refer here not only to the papers by Whittington and Metzger, but also to Grove, *supra* note 128.

In the realm of moral legitimacy, my diagnoses and prescriptions speak more confidently. Even if we do not have a legitimacy crisis, we have a deficit, including at the highest levels. We have reason to question whether judges and Justices are arguing in good faith when, so far as the concerned reader can tell, their premises seem to shift from case to case to align with outcomes that we would expect them to find ideologically congenial whenever the stakes are high.[146]

With regard to matters of moral legitimacy, Professor Whittington—although he is a distinguished political theorist as well as a political scientist—is reticent in his contribution to this Symposium. "The immediate strategic question for the Court," Whittington writes, "is whether it needs to concern itself with its ideological foes" or whether it can safely roll over them on the way to ideologically preferred results.[147] Yet Whittington does not suggest that the "strategic question" is the only one worth asking or trying to answer. Political morality does not cease to matter if or because people widely fail to behave in morally appropriate ways. If the question is whether we should care about moral legitimacy and whether judges and Justices should care, only a moral cynic could answer in the negative.

At the end of his thoughtful meditations, Professor Whittington muses briefly about what "we" might do, including by floating the possibility that, at some point, "we" might "embark on 'the long and difficult task of reconstructing the legalized Constitution.'"[148] As he emphasizes, however, the difficulty in an era of acute political division lies in finding common ground on which entrenched partisan opponents might successfully come together.

In recognition of the disunity that currently prevails, the conviction that animates *Law and Legitimacy in the Supreme Court* is that the question of what "we" should do should, for some purposes, be reframed in the first-person singular. When the question takes that form, Whittington creeps toward it, but then turns away by concluding that "[t]he question"—his question—"really is" what calculations the Justices will make about whether particular rulings "are worth it and are politically sustainable."[149] Although I may read too much into this remark, Whittington seems implicitly to suggest that academic theorizing about what the Justices ought to do will predictably prove ineffectual in altering constitutional practice.

That view may be correct, but I am not sure. Ideas that gain currency in colleges, universities, and law schools in one era may shape the views of future leaders. Once again, however, I prefer to take my stand on normative ground. Even if those who care about the moral legitimacy of our constitutional regime fail to move even a single judge or Justice, now or in the future, I believe that the effort is worthwhile.

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146. *See* FALLON, *supra* note 1, at 170–74.
147. Whittington, *supra* note 2, at 238.
148. *Id.* at 239.
149. *Id.*