Originalism and Legitimacy

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ABSTRACT

This Article expounds and defends a distinctive originalist theory of the legal content and interpretation of American constitutional law against the non-originalist view presented by Richard Fallon in Law and Legitimacy in the Supreme Court. *In addition to developing a strong but workable conception of what fidelity to the Constitution demands, I rebut the familiar claim that originalism does not have the resources to reach some normative results that have widely been taken to be constitutive of any acceptable theory of constitutional law.*

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Originalism is a family of theories about the content of American statutory and constitutional law and the role of the judiciary in applying it. In assessing these theories, it is useful to begin with the preamble to the Constitution.

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.[1]

This trope, *We the people. . . do ordain and establish*, in which the Constitution fictionally presents itself as written by the American people, introduces a contract between its author-sovereigns and the government officials authorized to act on their behalf. Writing in this way to a broad and indeterminate population which they hoped would endorse their product, the real authors of the document—Gouverneur Morris, the drafting committee at the Philadelphia convention, James Madison, and others—were inviting their audience to buy into their vision, thereby turning it into a reality. Because some of the document's provisions were hotly contested, it was not obvious that they would. But once the Constitution was ratified, winners and losers of different debates came together to support the fledgling republic. A fascinating case of a fiction struggling to become fact, the Constitution is authoritative because we, its putative authors, take it to be.

I. WHAT IS LEGITIMACY?

This sketch touches a key theme of Richard Fallon's fascinating book. In discussing the legitimacy of law, he distinguishes moral legitimacy, which depends on moral fact, from sociological legitimacy, which depends on the cognitive and emotive attitudes of various subpopulations and the population as a whole. Since one can describe the normative attitudes of others without committing oneself to endorsing or repudiating them, one can describe a legal system as sociologically legitimate without endorsing it oneself. The same cannot be said for moral legitimacy. To say that a legal system is morally legitimate in Professor Fallon's sense is to say that the fact that it requires, or forbids, certain actions counts as a moral reason worthy of serious consideration in deciding whether or not to perform them.

Why, apart from fear of punishment, do people obey the law? One reason for obeying some laws is that everyone else does. In the U.S., drivers are, unless otherwise instructed, legally required to drive on the right side of the road; in the UK, driving on the left is mandated. Either way, the conformity of others provides one with a reason to conform oneself. Because the value of coordinated behavior on the road outstrips the chaos of uncoordinated behavior, we willingly

1. U.S. CONST. pmbl.

obey. In this case, different rules are equally good, if they are obeyed. In other cases, different rules are better than having no rule, even though certain rules are much better than others. Because of this, the legitimacy of a legal system typically depends on more than the mere fact that its way of coordinating behavior is better than having no coordination at all.

There are three main sources of sociological legitimacy of a legal system. One is *prudential*; many must judge the system to be reasonably effective in enhancing their welfare and that of those they care most about. The second source of legitimacy involves *substantive justice*. Many must think that the system enhances the general welfare, relative to other achievable systems, that natural rights are protected in important ways, and that the burdens and benefits the system imposes are not grossly unfair. The third source of legitimacy is *participatory*. Many must believe that the law-making process is, to a reasonable degree, representative of the governed, and so capable of being influenced by them.

Sociological legitimacy is a graded notion. Citizens of all minimally legitimate systems recognize some reasons, apart from the fear of punishment, for obeying the law; in more highly valued systems, their motives for uncoerced compliance are stronger. But perfection along any dimension of legitimacy is not required. When a system ranks high in all dimensions, citizens will feel a strong *prima facie* obligation to obey its laws. But a system need not reach this level to be minimally legitimate. It is enough that people accord enough authority to its directives to take themselves to have some substantial reasons, beyond fear of punishment, to obey them.

Still, the participatory dimension of legitimacy is especially important for the American legal system. Because we are a democratic republic with a written constitution defining the scope and limits of governmental authority, and the obligations of public officials authorized to act on our behalf, the sociological legitimacy of our public institutions is hostage to the degree of fidelity to the Constitution the populace demands, which remains substantial. Since the Supreme Court is uniquely charged with preserving the Constitution, its sociological legitimacy is heavily dependent on judgments about what that fidelity amounts to. It is our difference on this point, more than anything else, that marks the debate between Professor Fallon and originalists like me.

He and I may also have differences about *moral legitimacy* and its relation to sociological legitimacy. Unlike the latter, the moral legitimacy of the Supreme Court is tied to *facts*, not opinions, widely shared or not. Although the relevant facts are broadly moral, not all such facts are equally relevant to the moral relationship between a people and its governing institutions. Those that are clearly relevant include the effectiveness of the system in advancing the welfare of individuals, the degree of substantive justice it achieves, and the procedural justice of its law-making processes. These non-cosmopolitan normative facts provide a basis for evaluating the moral relationship between a nation and its people, without significantly assessing moral and political relationships between the nation-state and other states, or between it and the people of the world.

An inquiry into moral legitimacy seeks to determine what members of a legal system owe one another (as opposed to all humanity). This is significant when considering the discretion the Supreme Court *is* legally authorized to exercise versus the discretion it *morally ought*, as an institution of the government of the United States, to be authorized to exercise. Theories of the Court's duties can be offered as descriptions of its actual legal duties or as prescriptions of what its legal duties ought to be. Only the non-cosmopolitan sense of normativity is relevant to the latter, normative enterprise. In assessing the moral duties of the nation's highest court in settling disputes about the contents of its laws, the Court is required to prioritize the nation's people over those of other nations in ways that private citizens need not.

II. FALLON'S MORALISTIC CONCEPTION OF THE SUPREME COURT

The central theme of Professor Fallon's book is the moral legitimacy of the Supreme Court when deciding cases in which the Constitution does not speak clearly or determinately.[2] In these cases, he maintains, "Law in the Supreme Court . . . calls for the exercise of judgment, including judgment with an ideological component."[3] He says, "When the Court refers to others' obligations of obedience to its decision, I take it to speak in a moral, and not just a legal [i.e., sociological] sense."[4] Shortly thereafter he adds:

> The notion of moral authority is crucial. . . . When the Court speaks in the name of the law in resolving contentious issues, it almost necessarily claims to make the morally and practically best decisions that the law allows. The Constitution vests the Court with its powers based on the premise that its decisions will produce better and fairer results—within the limits that the law allows—than would occur otherwise.[5]

There are three salient points to notice. First, although Fallon understands the Court as having wide discretion in many cases, he recognizes that it is constrained to act within the limits of the law. Second, in cases in which the Court has discretion to act as a significant lawmaker, Fallon maintains that its chief obligation is to produce the morally best policy that is practically achievable. Third, according to Fallon, the Constitution vests the Supreme Court with precisely this moral and legal authority. Although there is some truth in each of these propositions, I do not think points two and three are quite right. The disputed questions are about the legal limits of the Court's discretion, and about what principles properly guide such discretion when it is called for.

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2. RICHARD FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 10 (2018).
3. *Id*. at 3.
4. *Id*. at 9.
5. *Id*. at 10.

III. AN ORIGINALIST OVERVIEW OF THE CONSTITUTION AND CONSTITUTIONAL LAW

The Constitution and Bill of Rights were fully ratified by 1791. As a compromise between two groups of states with different social institutions and economic systems, already deeply divided over slavery, the Constitution was, for the most part, law binding the federal government. It specifies the structure of government, federal offices, terms of office and methods of appointment or election, legal responsibilities of different branches, and of office holders, plus the scope and limits of federal power. No person, and no institution, is identified as the sovereign, or supreme authority. Rather, the citizens are sovereign. We, collectively, choose the leaders and provide the government with its legitimacy by taking fidelity to the Constitution to be our supreme *rule of recognition*, allowing us to recognize genuine laws that are more than commands backed by force, in part because of their constitutional provenance.

The addition of seventeen new amendments has changed the Constitution since ratification. But, although the Constitution itself changes in no other ways, *constitutional law* does. The Supreme Court is one source of change. When it applies constitutional text to facts brought before it, its first task is to discern original constitutional content. When applying that content to facts of a case logically determines a unique result, the Court's duty is to return that verdict. When it is indeterminate whether the facts do, or do not, fall under that content, the Court may need to extend or precisify the content in order to determine a unique verdict.

Because there are always different ways of doing this, a theory of constitutional law owes us an account of the principles that may *legitimately* be employed by the Court in (i) determining original content, and (ii) extending or precisifying it when the Court is presented with new facts. The best originalist theories do this. Because the principles governing (i) and (ii) are richly substantive, they sharply constrain the Court's legitimate discretion. Because they aren't algorithmic, they channel, rather than eliminate, discretion. The result is often a restricted range of outcomes, any of which would be legally justified. But, when the Justices select an outcome, they modify previously existing constitutional law *whether or not their outcome falls within the authorized range of judicial discretion*. Either way, the Constitution does not change. Its original contents and purposes continue to serve as touchstones against which new, judge-made constructions can be revised or invalidated, if a later Court shows them to be inferior to constructions that are more in harmony with original constitutional contents and purposes.

Constitutional law also changes when constitutional provisions are quietly ignored and replaced by extra-constitutional practices that go unchallenged. When dealing with such cases the Court should (a) articulate the content of the relevant practice, (b) incorporate past precedents, and (c) blend both with the original constitutional content, preserving as much of the latter as possible without radically undermining important and legitimate reliance expectations created

by previous practices and precedents. Although originalists have not, to my knowledge, said much about (a), their theories directly address (b) and (c).

IV. ONE VERSION OF ORIGINALISM

Originalism is a rather recent approach. Having gone through several iterations, it is an evolving family of theories that remains a work in progress. Thus, when I speak in some detail, I will reference my own version of the theory, called "deferentialism."[6] The descriptive version of the theory asks *What are the duties of judges in the legal system of the United States?* and *What, according to widely accepted (Hartian) norms, are they supposed to do when interpreting legal texts?* Normative versions of the theory ask, *What should our legal norms, including the duties of judges, be?* and *What realistic alternatives, if any, would be morally (normatively) and politically superior to our present norms?*

My theory starts with Article I Section 1 of the Constitution, "*All legislative power herein granted shall be vested in the Congress of the United States."*[7] To take this seriously is to recognize that although judicial interpretation plays a role in the lawmaking process, broadly conceived, the courts are not themselves directly authorized to legislate. The first task in judicial interpretation is to determine what a legal provision says, asserts, or stipulates. *Saying*, *asserting*, and *stipulating* are speech acts (of individual or collective agents). Each involves taking a stance toward the thought content expressed by a use of language. To *say* or *assert* something is to commit oneself to that content's being true. To *stipulate* is to make something true by asserting it. For a proper authority to stipulate that the speed limit on highways is 60 mph is for the authority to state that the speed limit is 60 mph and for the very act of making that statement to be a, or the, crucial component in making what is asserted true. Precedent-making Supreme Court decisions are stipulations in roughly the same sense.

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 is not 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 publicly available features of the context of the utterance, would rationally take the speaker's use of S to commit the speaker to.

In ordinary interpersonal communication, all parties know (and presuppose that the other conversational participants know) the linguistic meanings of the words and sentences used. They also know (and presuppose that the others also know) the

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6. *See* Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013); Scott Soames, *Deferentialism, Living Originalism, and the Constitution, in* THE NATURE OF LEGAL INTERPRETATION 218–40 (Brian G. Slocum ed., 2017) [hereinafter *Living Originalism*]; Scott Soames, *Comments on Rosen, in* THE NATURE OF LEGAL INTERPRETATION 272–81 (Brian G. Slocum ed., 2017) [hereinafter *Comments*].

7. U.S. CONST. art. 1, §1.

overall purpose of the communication, the questions currently at issue, and the relevant facts about what previously has been assumed, asserted, or agreed on. Because of this, what is asserted can usually be identified with *what the speaker means* and *what the hearers take the speaker to mean* by the words used on that occasion. Applying this to legal interpretation, originalists look for what the lawmakers meant and for what an ordinarily reasonable person—who understood the linguistic meanings of their words (including the legal meanings of special legal terms of art), the publicly available facts, the recent history in the lawmaking context, and the background of existing law into which the new provision is expected to fit—would take them to have meant. That, more or less, is the content of the law.

In saying this, 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 an assertion is. Although its primary function is to share information, one *never* has to look into the purely introspective contents of individual or collective speakers, or of individual or collective audiences, to determine what is asserted by a communicative use of language. Anything that is purely private is, by definition, excluded.

Since the point is important, it is worth spelling out. In ordinary conversation, a speaker A asserts a proposition p (i.e., a given piece of information or misinformation) by uttering a sentence S with the intention of communicating, to B, A's commitment to p. For the communication to succeed, normally B must recognize A's intention. Typically, this requires knowledge of S's linguistic meaning, plus, depending on the case, knowledge of salient features of the time and place of the conversation, the relationship in which the participants stand to one another, the conversational agenda, what has previously been said, and the questions currently being addressed. Since a rational speaker A realizes this, A normally won't use S to assert p unless A has reason to believe that B is on the same page, and can work out that A's message is p. However, what A actually asserts *is not determined* by A's private intention, nor does it *depend* on B's private uptake. Rather, what a speaker uses a sentence S to assert in a context is *what a reasonable hearer who knows the linguistic meaning of S, and is aware of the intersubjectively available features of the conversation and context of utterance, would rationally take the speaker to be trying to say*. Because it is possible for speakers to misjudge these factors, sometimes the asserted content of a speaker's remark may diverge, in some respects, from what the speaker intended to assert. No matter; assertion is a move in a social language game that carries its own obligations on those who perform it. Thus, the proposition to which speakers commit themselves is that which they have given their reasonable and informed audience sufficient grounds to believe was intended.

In applying this model to lawmaking, we understand what lawmakers assert in issuing or adopting a text through what a reasonable and informed audience—an audience which understands the public linguistic meaning of the text, the publicly available facts, the lawmaking history, and the background of existing law into which the new law is expected to fit—would rationally take them to intend to say

or stipulate. Sometimes the primary lawmaker is a chief executive issuing an order or a single judge deciding a case. Sometimes it is a legislative body or an administrative agency, and sometimes it is a court majority whose written opinion modifies an earlier version of a law.

It is not necessary that the various institutional addressees, or the populace itself, possess detailed and extensive knowledge of the contents of all laws relevant to them, though it is necessary that they have recourse to legal experts to whom the contents of the laws are more directly accessible. It is also not required that all, or in some cases any, members of a legislative body have complete and precise knowledge of all aspects of the assertive content of the long and complicated bills that a majority of them have adopted on the basis of their individually partial, but collectively overlapping, understanding. What is required is that the assertive content of the bill be identified with *what is rationally derivable from its public linguistic meaning plus the public context of its adoption*. The fact that the assertive or stipulative speech acts of institutional actors have the force of law is determined by their position in the constitutionally-based legal system that their institutional audiences and the populace as a whole acknowledge as authoritative.

This all-but-universal practice of articulating what lawmaking bodies assert or stipulate requires treating them as rational agents that use language to communicate with rational audiences. This, in turn, requires attributing various intentions to them, including intentions to assert or stipulate certain contents. Such intent is not an aggregate of subjective intentions of individual lawmakers. In an age in which major pieces of legislation routinely contain thousands of pages of text written by armies of staffers, no legislator may be familiar with the whole text, and many may not see any of it. To imagine that one could ask each legislator what he or she intended to use the text to assert—and, by aggregating, converge on a meaningful result—is absurd. This is not a special fact about intent or the legislature. We routinely speak of the goals, beliefs, statements, promises, and commitments of collective bodies, even though the goals, etc., aren't 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-and-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.

Canons of interpretation involving such simple things as resolving linguistic ambiguity and correcting scrivener's errors illustrate the point. Both depend on an interpreter's ability to identify—based on the text as a whole and the context of its adoption—what problem the lawmakers were addressing, what kind of solution they aimed to achieve, and what they must, therefore, have intended their use of the text to assert. The resulting disambiguation or correction is then taken to settle what the legislature asserted, despite unartfully having done so. Since we can identify assertive intent in these cases, we have reason to think that we can do so in a wider range of other cases as well.

These considerations provide the foundation for the first task of a proper theory of interpretation, which is to identify the contents of legal provisions. My simplified summary principle is D1.

> D1. The content of a legal provision is what was asserted or stipulated by lawmakers and/or ratifiers in approving it. Although the linguistic meaning of the text is one component in determining that content, it is not the only component; in many cases, other features of context play important roles.

The second task of such a theory is to distinguish cases in which applying the content of a legal provision to the facts of a case yields proper verdicts from those in which it does not. My simplified summary principle is D2.

> D2. In applying the law to the facts of a case, the legal duty of a judge is to reach the verdict determined by the pre-existing content, unless (a) that content is vague and so does not, when combined with the facts of the case, determine a definite verdict, or (b) the content, surrounding law, and facts of the case determine inconsistent verdicts, or (c) the content plus new facts of a kind that could not reasonably have been anticipated or taken into consideration by the original lawmakers transparently contradict crucial elements of the law's rationale, which is the publicly stated purpose that supporters advanced to justify it.

This principle covers cases in which judges must, in some way, move beyond existing legal content. The job of the courts is to mediate between the immense and unforeseeable variety of possible behaviors that may occur and the legally codified general principles designed to regulate that behavior. Often this requires judges to *precisify* legal provisions in order to reach determinate decisions. This happens when vague contents of the relevant laws neither determinately apply nor determinately fail to apply to the facts of a case. Inconsistency is also a concern. Since the body of laws today is enormously complex, the task of maintaining consistency is never-ending. Typically, the inconsistency is not generated by two laws that flatly contradict each other—so that no possible behavior could conform to both. Instead, it is generated by the combination of two of more laws with unanticipated behavior. Since the range of behavior that would generate inconsistency, if it occurred, is without foreseeable bounds, no legislative process, no matter how careful, precludes the need for judicial resolution of inconsistencies. The same can be said for inconsistencies between a law's content and its rationale that are generated by unanticipated circumstances following its implementation.

In facing the interpretive challenge of fitting previously asserted legal content to new, unanticipated factual situations, it is important to remember that this challenge is simply one instance of the challenge of fitting all action-guiding language to changing or unanticipated factual circumstances. Because the general challenge is ubiquitous, there is, I think, a way of applying it to legal interpretation that has long been understood by everyone, including by the authors and ratifiers of the Constitution, without being explicitly formulated.

The general challenge can be illustrated by simple cases in ordinary life in which we are given vague, contradictory, of self-defeating instructions. Suppose A's wife says, "*Please pick up a large, inexpensive hat for me from the shop. I need it to keep the sun off my face when we go out later*." This request is *vague* because it is not precise what counts as *large* or what counts as *inexpensive*. When A reaches the shop, he finds no hat that is clearly large. Although the hats vary in price, none is clearly inexpensive, either. Knowing the purpose of his wife's request, A selects one that will keep the sun off her face reasonably well, without costing more than any that would do equally well. Although A cannot claim to have done *exactly* what his wife literally asked him to do, he has minimized the degree to which he failed to do so, while maximizing the degree to which her purpose could be fulfilled. When he reports back, she is pleased. This is analogous to the situation faced by the judge when asked, in a case of type D2(a), to apply a law that is vague about a crucial fact to which it must be applied.

For a situation analogous to D2(b), involving inconsistency, imagine that A's wife says, "*I am dying for a soda. Please bring me the largest bottle of soda in the fridge*." On reaching the fridge, A sees it contains two bottles of soda identical in size. Since the request presupposed there would a bottle of soda larger than any other, the request was *inconsistent with the relevant facts*, making it impossible for A to do precisely what was asked. Nevertheless, he has no trouble. Noticing that one bottle is open, causing the soda to lose its fizz, A brings the other to his wife, thereby fulfilling the purpose of her request, while minimizing the degree to which he fails to do what was requested—bring the one bottle of soda larger than any other such bottle.

The analogy with D2(c), involving inconsistency with the intended purpose, is a slight variant of the previous case. In the new case, A's wife makes the same request as before, but the fridge contains only the large open bottle of soda that has lost its fizz plus two smaller, unopened bottles, one larger than the other. Knowing his wife cannot stand flat soda, A realizes that although he could do what was literally asked, doing so would defeat the purpose of his wife's request. To avoid this, he brings her the larger of the unopened bottles, fulfilling her purpose to the maximum degree possible, consistent with minimizing the degree to which he failed to do what he was asked to do.

These examples illustrate a fact about the use of words to guide action that applies both in ordinary life and in the law. When words guide us, we calculate the asserted content of the use of the words and the evident purpose of that assertion. These, together with relevant non-linguistic facts, typically determine our action. In my examples, A discharges the obligations imposed by his wife's request, despite either being unable to do what was literally requested because the request is vague or inconsistent, or being able to do what was asked only at the cost of making it self-defeating. In each case, A minimizes the degree to which his action deviates from the content of his wife's request while, having achieved that, maximizing the degree to which he fulfills its intended purpose.

Applying this lesson to judges gives us our third principle of interpretation, which specifies how judges are authorized to make new law by modifying legal content when they have to. My first principle for such cases is D3.

> D3. In cases of type (D2a,b), the judicial authority is authorized to *make new law* by *articulating a minimum change in existing law that maximizes the fulfillment of the original rationale for the law*.

This principle limits judicial lawmaking by requiring what is, in effect, judicial legislation to be maximally deferential to original lawmakers, whomever they may be. Judges or justices are required to reach a decision by resolving vagueness and inconsistency in ways that balance two potentially competing values—minimizing changes in antecedent legal content and maximizing the advancement of the rationale of the original lawmakers for adopting that content. Since this is not an algorithmic process, it leaves some room for judicial discretion in choosing among changes that are equally minimal and equally successful in fulfilling original rational. But if the rule is followed in good faith, it requires that discretion to be grounded in the goals and intentions of the original lawmakers, rather than in the moral or political values of the judges or justices.

My next principle, D4, applies to relatively rare cases in which judges are allowed to contradict or suspend otherwise uncontradicted content—as opposed to merely supplementing vague, or modifying inconsistent, contents.

> D4. In cases of type (D2c), the judicial authority is authorized to *make new law* by *articulating a minimum change in existing law that is necessary and sufficient to avoid subversion of the law's original rationale*.

Here, judges or justices are authorized to modify pre-existing legal content when failing to do so would subvert the original rationale for that content by generating previously unforeseen consequences that undermine key elements of the rationale. If there are several different, but equally minimal, changes in content that preserve original rationale, judges and justices are required to select one that advances the original rationale at least as well as all the others. This means that judges and justices are authorized to base their decisions on their own moral or political values *only when* choosing among options that pass these tests.

It shouldn't be assumed that the deferential legislation authorized by D4 always takes the form of modifying the legal content of a specific law or legal provision. Sometimes the content of the relevant rule remains intact, but its operation is suspended by special circumstances. Consider H.L.A. Hart's *No-Vehicles-In-The-Park* example.[8] When an ambulance races through the park on a life-saving mission to the hospital, it does not violate the law, even though (it

8. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 629 (1958).

would seem) the content of the law has not changed. Instead, the ordinance may be understood to have been temporarily suspended, as many traffic laws are suspended, rather than rewritten, in emergencies.

Something similar might be said about Dworkin's[9] use of *Riggs v. Palmer*[10], in which a New York court decided that a man who murdered his grandfather cannot inherit the dead man's property, on the grounds that "*No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime*."[11] This general Dworkinian principle might potentially affect a mass of what the court called "statutes regarding the making, proof, and effect of wills, and the devolution of property," without individually rewriting each one of them.[12] What is the source of this legal principle? Perhaps it does not have one specific source, but rather is derivable from the purposes, or rationales, of the body of laws cited by the court in *Riggs*, along with, perhaps, related bodies of law. If so, this kind of "judicial legislation" is an instance of the originalist principle D4, prompted by a special case of D2(c), in which literal application of legal content to unanticipated cases would lead to results that clearly undermine the discernible purposes or publicly stated rationales supporting the enactment of that content.

In order for D2–D4 to work properly, the rationale of a law must be understood to consist not of the aggregate of causally efficacious factors that motivated individual legislators to pass it, but rather of the chief reasons, publicly offered, to justify its adoption. The Affordable Care Act of 2010 offers a good illustration.[13] Among the motivators for individual members of Congress were: political payoffs in the form of special benefits for their states or districts; political contributions from groups favoring, and companies profiting from, the act; the desire to advance the fortunes of their party and the agenda of their president; plus an ideological commitment to expanding government control over the economy and introducing a more socialistic system of medicine. But none of these were part of the rationale of the legislation in the sense relevant to D2–D4. Its rationale was (i) to expand health insurance among the previously uninsured without jeopardizing existing plans with which the already insured were satisfied, (ii) to reduce the amount the nation spends on health care without sacrificing quality, (iii) to reduce the cost of health insurance and health care for most citizens, especially the poor, who would be subsidized, (iv) to equalize access to health care while preserving free choice of health care providers, and (v) to make health insurance and health care more reliably available by loosening their close connection with employment.[14]

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9. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967).
10. Riggs v. Palmer, 22 N.E. 188 (1889).
11. *Id*. at 190.
12. *Id*. at 189.
13. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119–30 (2010).
14. *See* Ctr. for Consumer Info. & Ins. Oversight, *Shining a Light on Health Insurance Rate Increases*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 21, 2010), http://www.healthcare.gov/news/factsheets/2010/07/ health-disparities.html [https://perma.cc/US75-YRZR].

When the rationale for a law is understood in this way, it is typically both public and knowable. Since recognizing that rationale need not involve endorsing it oneself, judges who use it to modify the content of the law in resolving hard cases are not, thereby, substituting their own normative judgments for those of the original legislators. This is crucial if the judiciary is to be deferential or originalist.[15]

The application of this theory of interpretation to the Constitution rests on four basic realities. (i) The Constitution contains principles, the contents of which encompass a clearly determinate core and an indeterminate periphery. (ii) To apply this content to new circumstances requires periodic adjustments of content. (iii) Making these adjustments is primarily the job of the Supreme Court. (iv) Because the Court does *not* have the constitutional authority to act as an independent political body, the adjustments it makes must preserve the core assertive contents of constitutional provisions to the maximum extent possible, while authorizing only those changes that preserve or advance the original rationales of constitutional provisions.

A. Positivistic Originalism

So far, my argument has been descriptive. Judicial interpretation of legal texts is governed by legal norms. Although the norms have evaluative consequences, the claim that they are taken by citizens to be authoritative is descriptive. My theory tries to adhere to them, and so to describe the actual legal duties of judges and justices in the U.S. The point is positivistic. I claim that the picture sketched so far conforms to our Hartian, sociological rule of recognition.

It is, of course, true that many Supreme Court decisions have not been originalist. But, by itself, this does not show that our *law* is not originalist. There is no originalist doctrine of Supreme Court infallibility. Roughly put, our rule of recognition stipulates that the originally asserted contents of laws passed by institutions set up by, and operating in accord with, the originally asserted content of the Constitution remain legally valid *unless they have been overturned by recognized constitutional processes*. It further recognizes the Supreme Court to be the highest authority in applying constitutional content to new circumstances. Thus, the fact that Americans have accepted its decisions as genuine law, *whether or not they have believed the cases to have been rightly decided*, should be seen as supporting rather than undermining the originalist picture.

Everyone admits that some standards of constitutional interpretation are better than others, that the justices sometimes make mistakes, and that there are limits to what they are authorized to do. This raises a question, "*What standards are correct and why?*" By "correct," I mean "*What legal standards are judges and justices authorized to use in applying law to the facts of a case?*" I claim that this question is answered by the principles I have outlined. Roughly this, and no more, must be included in the rule of recognition governing the Supreme Court if the American legal system today is to be correctly deemed originalist.

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15. *Living Originalism*, *supra* note 6, at 218–40; *Comments*, *supra* note 6, at 272–81.

Is our system originalist? On the plus side, there is the continuing respect paid to the constitutional separation of powers and its delegation of legislative authority to Congress alone. Although it is widely recognized that justices sometimes must make new law by adjusting constitutional content to new circumstances, they are widely expected to be maximally deferential to the Constitution when they do. Deferentialism spells this out. On the minus side, large parts of the population often want particular results, which they are willing to accept without being too scrupulous about how the results are grounded in the Constitution when things go their way. For this reason, we have a divided legal culture, which sometimes swings one way and sometimes swings another.

Nevertheless, I believe the balance of the evidence favors an originalist conception of our positivistic rule of recognition concerning the judiciary. Although originalism is an increasingly well worked-out, easy-to-understand legal philosophy, I do not see a comparably consistent, well worked-out, widely accepted counter to it. True, non-originalists outnumber originalists among federal judges and greatly outnumber originalists among American law professors and federal officeholders. So, it may seem that those most influential in conferring positivistic legitimacy on legal norms, in fact, validate non-originalist norms.

One reason it's not clear that they do is that non-originalists lack a unifying positive doctrine to bring them together. If the Supreme Court always pushed in one direction—left, right, or center—a coherent ideology empowering it as an independent political institution might be articulated and widely embraced. But, as recent decades have shown, the Court is no longer ideologically predictable. Law professors are often results-oriented, approving social and political decisions that advance their favored agendas while disdaining those of their opponents. Federal officeholders, and politicians aspiring to be, are also results-oriented. Because the Constitution limits their power, many aren't originalists either. But since they differ on who should have the power to do what, they haven't united around any single widely accepted legal philosophy. Finally, the non-originalism of federal judges—which often reflects their decades-old experience in the law—is diminishing as originalism grows in stature and influence.

This, it must be admitted, is a muddy picture, which, by itself, does not establish the positivistic predominance of originalism. But the reason it does not is that the most important determinant of positivist legitimacy—the rule of recognition, as applied to the Supreme Court and the judiciary in general—hasn't been sufficiently articulated. There are, I believe, two very different analytical approaches to this enterprise.

One approach is historical and practice-oriented. It looks at the evolution, over time, of standards governing lasting court decisions, winning legal arguments, and widespread opinions of the legal elite, consisting of justices, judges, lawyers, legal academics, and the legal profession in general. The norms guiding these practitioners are identified with the norms of the legal system. Hence they are thought to provide the content of our Hartian rule of recognition as far as the judiciary is concerned. When looked at in this way, our system is not predominantly

originalist; rather, it is a motley of different perspectives with ever-changing emphases over time.

Although this approach may accurately describe the norms of some possible legal systems, it does not accurately describe the legal norms of our system. The source of legal legitimacy in a democratic, representative republic that has ratified a written constitution by a super majoritarian process—thereby detailing the structure, power, and limits of government as an agent of a sovereign people—*is not* the evolving practice of a legal elite. The source of the sociological legitimacy of our legal system is the continuing respect accorded by the people to 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.

From this perspective, the central descriptive dispute between Professor Fallon and originalists like me is not about whether the sociological legitimacy of the Supreme Court requires it to be faithful to the Constitution. He agrees that it does. The central dispute is rather over what that fidelity amounts to. Believing that the originalist account is too restrictive, he mounts an ambitious attack on it, while articulating and defending a rival theory focused on the political and moral authority of the Supreme Court. We originalists should welcome his challenge. Believing our own to be a coherent, widely attractive philosophy that gives substance to Americans' reverence for the Constitution, we doubt that there is strong support for explicitly authorizing the Court to non-deferentially legislate, independent of the democratically elected branches. The expectation that the justices are not to do so is, we think, the reason why they have lifetime tenure, why they are appointed rather than elected, why they are held to a non-partisan code of conduct, and why, in justifying their decisions, they advertise their results as deriving from traditional constitutional principles rather than from their own moral or political views.

B. Normativity and the Limits of Positivistic Originalism

My positivistic defense of originalism recognizes that there are inherent limitations in our Hartian rule of recognition. It is one thing to specify the scope of legitimate institutional authority—in this case, judicial authority. It is quite another to identify optimal policies within that range. D1–D4 attempt the former, but not the latter. D3 and D4 implicitly recognize this by directing judges to perform a task—striking a proper balance between minimizing changes in content and advancing fulfillment of intended purpose—which can often be done more or

less equally well in several ways. What should guide judges in choosing among them?

This is a question of normative political theory. Would we do better by authorizing judges:

(i) to exercise their own moral judgment in selecting the best of the remaining equally deferential policy alternatives;

(ii) to decide the individual case at hand while refusing to provide a general rationale favoring any of the equally deferential alternatives, thus eschewing the precedential status of the decision and leaving the policy choice to the democratic branches, to voters, or, in constitutional cases, to the amendment process; or

(iii) to exercise their own discretion, treating their decision as precedential when the issues raised by the alternatives are relatively minor, while leaving broadly consequential policy issues to the people or the democratic branches?

Although I believe (iii) is likely to produce the best results, positivistic originalism is compatible with all three, as long as D1–D4 are satisfied.

The same issues arise when epistemological difficulties restrict our ability to identify original content or intended purpose with sufficient clarity to confine authorized judicial discretion within a narrow range. In these cases, we need a *normative* theory to guide us. As John McGinnis and Michael Rappaport point out in *Originalism and the Good Constitution*, such a theory may itself be a normative form of originalism. There, they argue that the form of democratic government that produces the best consequences in securing liberty, stability, and consensus while advancing the general welfare is a system that relies on super-majoritarian rules and processes, as exemplified by the super-majoritarian ratification of the original Constitution, the super-majoritarian amendment process, and the super-majoritarian features of federalism, separation of powers, and a bicameral legislature.[16] From this perspective, options (ii) or (iii) above are promising normative extensions of positivistic originalism.

One of their most interesting points concerns constitutional amendments, which would seem to be the best way of updating a governing document that is more than 225 years old. Today, doing so is often regarded as too difficult. But is it? The Constitution has been amended seventeen times since the ratification of the Bill of Rights in 1791, including twelve amendments in the twentieth century (all but one before 1972). Why the current dearth of amendments? McGinnis and Rappaport argue that rampant judicial activism starting in the 1930s has been an important, but unfortunate, cause. It has been unfortunate because, although vast changes in the economy may well have justified increased governmental powers

16. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

of oversight, the piecemeal adjustments made by an unrepresentative and economically unsophisticated Supreme Court preempted what might have been more informed, efficient, and consensual constitutional amendments.[17] Matters were made worse when the rising tide of judicial activism over several decades produced divisive social results that undermined faith that the Court could be trusted not to subvert any new constitutional content that might be added by amendment.[18]

A related normative question is *How should past changes in constitutional law produced by extra-constitutional means, including the evolution of non-constitutional governmental practices, be handled?* Changes of this sort occur when constitutional provisions are quietly ignored and replaced by extra-constitutional practices that go unchallenged. For example, Article I, Section 8 of the Constitution gives Congress alone the power to declare war. Nevertheless, that power was compromised by the Korean War, the War in Viet Nam, and the First and the Second Gulf Wars. The United States never issued a formal declaration of war in Korea, though the war it fought left 36,000 American soldiers dead. Although the other wars were sanctioned by congressional resolutions, they weren't official declarations of war, and in Viet Nam, the resolution followed military involvement rather than initiating it. This result has, arguably, shifted American constitutional law.

Barack Obama's *Iran Deal*, as it was commonly called, is another example. Although it was clearly a treaty with a foreign nation, the President did not submit it to the Senate, the approval of which by a two-thirds majority is constitutionally required. As with limited wars, a congressional fig leaf was offered instead. Of course, Obama's deal has now been repudiated by President Donald Trump. But if Obama's practice is repeated, the clause concerning foreign treaties might also become a dead letter.

A reasonable normative strategy for dealing with such cases would be for the Court to first articulate the content of the currently understood practice. The Court might then replace it with the original asserted content and intended purpose of the heretofore ignored constitutional provision, leaving any later changes in that content to the amendment process. Or, when this is impractical, the Court might revise the current content of the practice by bringing it as close as possible to the original content and purpose, without seriously undermining important and legitimate reliance expectations created by the practice.

Non-originalist precedents could be treated similarly. When the Court finds that the facts of a current case create a serious conflict between the original content and intent of a constitutional provision, on the one hand, and a constitutional precedent L* produced by an earlier *mistaken* decision, on the other, the task is to change L* in a way that narrows the previous error (by bringing the interpretation

17. *Id*. at 81–99.

18. See McGinnis and Rappaport's discussion of the failure to ratify the Equal Rights Amendment. *Id*. at 81.

of the provision closer to what is now seen to be correct) while minimizing legitimate reliance costs associated with the change. This should be done to the extent that the consequences of the rectification of L* for settled law are foreseeable and reasonably localized. When this is not so—when the mistaken L* is inextricably entrenched in a complex body of surrounding law—the goal may have to be reduced to creating a carve-out for L* that leaves it in place, while isolating it and preventing its influence from spreading. Reapplication of this rule over time may gradually narrow the impact of past erroneous judicial decisions while avoiding unpredictably destabilizing effects on the body of existing law. In this way, the rectification of previous error may proceed, and become cumulative, without inviting disastrous or quixotic quests. How precisely this is achieved is a normative question about which different views, compatible with our originalist Hartian rule of recognition, are possible.

V. ORIGINALISM: CRITICISM AND RESPONSE

Professor Fallon's critique of originalism begins with genuine difficulties arising from all-too-common confusions conflating (i) the linguistic meanings of words and sentences, (ii) the contents of assertions made using those words and sentences, and (iii) the expected applications of provisions adopted by lawmakers to concrete particulars or situations.

The Eighth Amendment is one of his examples: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[19] The asserted content of the first two clauses promises that bail exceeding the amount needed to deter flight and fines disproportionate to the seriousness of an infraction won't be imposed. The asserted content of the third clause promises *that no one will be subjected to punishments that are both disproportionately severe in relation to the seriousness of the offense and without sanction in recent tradition and legal practice*. Nothing is said about specific monetary ceilings for bail or fines connected with various offenses, or about the scales by which either crimes or punishments are ranked for severity. Of course, common knowledge about these matters existed in 1788, along with even greater knowledge about *usual* (i.e. traditionally sanctioned) vs. *unusual* punishments for different crimes. Because of this, citizens could confidently predict how the Amendment would be applied then. Because capital punishment was not *unusual*, there was then no ground then for thinking that it was *cruel and unusual*, or would be so judged anytime soon.

The asserted content of the Amendment is silent about these well-founded expectations. It does not say that bail and fines *widely considered* to be excessive won't be imposed, nor does it say that punishments *widely considered* cruel (i.e., unduly severe) and unusual (i.e., without sanction in recent tradition and legal practice) won't be. It does not say this now, and it did not say that when adopted;

19. U.S. CONST. amend. VIII.

it never said it. Hence, there is nothing in originalism that, by itself, dictates a unique outcome about capital punishment.

What should be said about its constitutionality? Since there have been nearly 1500 legal executions in the U.S. in the last forty-two years, it would be hard to make an originalist case that capital punishment has not been sanctioned by decades of legal practice during this period. Still, over half the executions have been in just three states. Moreover, the number of executions has dropped sharply, so capital punishment is now rare and at best legally contentious in most states. Whether or not it is also cruel, and so at least arguably unconstitutional, is a matter of opinion. If you believe that capital punishment is cruel (and unusual), you should regard a ruling finding it to be so to be originalist—provided that the Court makes the naked moral assertion that it *is* cruel, without pretending to be articulating the general will, the arc of history, or any other convenient fiction. By the same token, if you do not take it to be cruel, you should regard such a ruling as non-originalist—while recognizing that the Court, because of its moral views, may have been attempting to do its originalist duty.

The matter is complicated by the fact that polling data indicates that a clear, but shrinking, majority of Americans *do not* believe capital punishment to be cruel—i.e., disproportionately severe. How, if at all, should this affect justices who do regard it to be cruel? One factor to be considered is how damaging it might be to our democracy for a tiny body of unelected justices to defy a majority of citizens in deciding this important issue, and so removing it from the normal give and take of future democratic politics. Professor Fallon, who largely approves of the Court's assertion of moral authority, rightly identifies this kind of moral cost as a proper restraining factor on the Court.[20] Nevertheless, it is arguable that at some time—or in some, perhaps restricted, ways—that price may be worth paying. What is crucial for originalism is not the decision that is reached about capital (or other) punishments, but the basis for reaching it. Since the Constitution, to which the justices must be faithful, uses the contentious moral term "cruel," the justices are authorized to make a moral judgment on the matter. For this reason, both originalism and democracy would be served if prospective justices were asked and expected to answer, before being confirmed, whether they believe capital punishment to be unconstitutionally cruel.

Fallon also rightly criticizes some originalists, including Justice Scalia, for putting too much weight on how the founding generation *expected* the language to apply.[21] There are really two errors here: taking expected application to be a species of meaning, and taking the content of a legal provision—what the lawmakers said or asserted in adopting it—to be a species of meaning. Although both are related to meaning, neither is a kind of meaning.

The point can be illustrated with another of Fallon's examples—the Free Speech Clause of the First Amendment. "Congress shall make no law . . .

20. *See* FALLON, *supra* note 2, at 33–34, 128–29, 159, 161, 167.
21. *Id*. at 48, 51–52.

abridging *the freedom of speech*, or *of the press*."[22] Other than the expansive use of "speech," there are two important linguistic points to notice. (i) The Clause includes two *tenseless* descriptive phrases: "the freedom of speech" and (implicitly) "the freedom of the press." (ii) The Clause also contains "abridge," which means to truncate or diminish something that already exists. Understanding these linguistic facts allows us to see how the asserted content of the Clause—what it was used to assert and so to promise—is anchored in time despite the fact that the linguistic meaning of the Clause is not so anchored.

The meaning of an unambiguous sentence S may usefully be thought of as the constant contribution it makes to the propositions expressed by uses of S in different contexts. To understand S is, essentially, to know how the information semantically encoded by S contributes to the contents asserted by uses of it in different situations. For example, to learn what the sentence "*I* won't be back *here* until *tomorrow*" means is to learn how the asserted contents of uses of the sentence vary with the speaker, time, and place of utterance. A further case is the sentence "The owner of the Harrison St. house is away on business," which contains the *tenseless* description "*the owner of the Harrison St. house*." If the sentence is uttered shortly after the house has burned down, making it necessary to notify the owner, what is asserted is that the person who, *in the past*, owned the house is temporarily away. In other contexts, what is asserted is that the person who *presently* owns it is away. Although what is asserted changes, the linguistic meaning of the sentence does not. Because the *meaning* is temporally nonspecific, it can be used to *assert* different temporally specific thought contents in different contexts.

With this in mind, recall the phrases "the freedom of speech" and "the freedom of the press" in the Free Speech Clause. In using the Clause, the Framers and ratifiers were making a promise. To understand the promise, you must know that one cannot abridge something that is not already a reality. To abridge *War and Peace* is to truncate the original. So, to abridge *the freedom of speech and of the press* is to truncate or diminish the kinds of freedom to speak and publish that existed *at the time the Constitution was adopted*. Roughly put, the Clause asserts that Congress will not truncate or diminish freedoms of the kind long recognized in America at the time of ratification to speak and publish information and opinion.

Although this content continues to protect some communicative activities today, it is indeterminate about some activities that did not exist then. So we may ask, "*Which new forms of activity are freedoms of the kinds originally protected?*" When, for a new activity, the question is determinately answerable, the original content requires no fine tuning. When there is no such answer, because the new activities fall within its penumbra of vagueness, precisification of the original asserted content is needed. Since precisification changes the law, it must be deferential. To accomplish this, the justices must identify what the Framers

22. U.S. Const. amend. I.

and ratifiers were trying to achieve plus the reasons they publicly offered to justify what they were doing. My own rough and ready view is that what they were trying to protect included *the free and rational exchange of ideas by individuals, groups and organizations about matters of public or political importance*. Their writings and much of the public discourse then indicate that they judged such freedom to be a right of free citizens and a necessary feature of a self-governing republic. If this view of their original intended purpose is correct, it should guide the application of the Free Speech Clause today.

This example, involving the contextual enrichment of temporally underspecified phrases, indicates the importance of understanding how semantically incomplete linguistic meaning interacts with contextual factors to determine originally asserted content. The grammatically complete but semantically incomplete sentence "I am finished" is another example. When it is used, the completion may come from the non-linguistic situation of use, the larger discourse, or the presuppositions of speaker/hearers. This is not linguistic ambiguity arising from multiple linguistic conventions; it is semantic under specification. Another example is "She is going to a nearby restaurant." Nearby what? Our present location? Her present location? A location she, or we, will be visiting next week? It depends on the context. Since there is no end to the possible completions of utterances like these, to think of sentences like this as ambiguous is to think of them as having indefinitely many meanings, arising from indefinitely many pre-established linguistic conventions. There is no such multiplicity. These sentences have single under-specified meanings that require contextual completion on the fly.[23]

The verb "use" is similar. Whenever one uses something, one uses it to do something. When we say, "Fred used a hammer," we often have in mind what he used it for. When the purpose is not known to our audience, we may say more, for example, "Fred used a hammer to break the window." When the purpose is obvious—to pound in a nail—we often leave it implicit, knowing others will understand. Sometimes we may say, having found a hammer on the floor, "I know Fred used it for something, but I don't know what." But this is just one possible completion of the semantic meaning of "Fred used a hammer." Lacking a purpose-clause, the sentence is silent about purpose just as the meaning of "I am finished" is silent about what was finished.

This was the reality that Justice Scalia intuitively tracked when, in *Smith v. United States*, he tried to discern what Congress *asserted* using the words:

> Whoever . . . uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years.[24]

23. SCOTT SOAMES, PHILOSOPHY OF LANGUAGE (2010).
24. 18 U.S.C. § 924(c)(1) (2006).

The question was, "Does an attempt to trade a gun for drugs constitute *a use of a firearm in a drug trafficking crime* in the sense covered by the law?" Scalia thought not. He observed:

> *When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon. . . I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered "no" to a prosecutor's inquiry whether he had ever "used a firearm," even though he had once sold his grandfather's Enfield rifle to a collector.*[25]

Scalia correctly identifies *what question is asked* by one who says, "Do you use a cane?" and *what is asserted* by one who answers "No" to a prosecutor's question, "Have you ever used a firearm?" His observations support the view that in adopting the statutory text Congress asserted (stipulated) that using a firearm as a weapon subjects one to extra punishment. However, he misstated his conclusion, claiming that the *ordinary meaning* of "anyone who uses a firearm" only covers uses of a firearm as a weapon.

The Court's majority caught him on this mistake:

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning . . . Surely petitioner's treatment of his [gun] can be described as "use" [of the firearm] within the everyday meaning of that term. Petitioner "used" his [gun] in an attempt to obtain drugs by offering to trade it for cocaine.[26]

Of course, Smith's action can be described as a use of a firearm in an attempt to obtain drugs. And of course, this description is one in which the phrase is used with its ordinary meaning. The semantic meaning of "uses an N" is *silent* about how N is used. So, when "uses a firearm" occurs in a sentence, the assertion must be *completed*, either by adding more words (e.g., "as a weapon," or "in any way") or by extracting the needed content from the presuppositions of the language users (here the Congress and its audience). In a case of this type—when "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. So understood, Scalia's natural interpretation of what Congress asserted is plausible. Whether or not it is correct, however, his framing of the issue in terms of the *ordinary meaning* of the

25. Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (emphasis added).
26. *Id*. at 228 (O,Connor, J.).

Congressional language, rather than what Congress asserted/stipulated, weakened his case.

The Compact Clause of the Constitution (Article I Section 10)—"[N]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"[27]—is also semantically under specified. This can be seen by comparing it with an ordinary case of under specification in which a football coach wishing to keep the opposing team from learning his strategy for the big game says, addressing his players, "No one may, without my permission, speak to any reporter," thereby telling them that no team member may, without his permission, speak to any reporter *about the upcoming game*. This does not restrict team members running for student government from speaking to reporters about their candidacies. The same is true of the Compact Clause, which asserts that no state shall, without consent of Congress, enter into any agreement or compact with another state *that diminishes federal supremacy or undermines the federalist structure of this Constitution*. If this is right, then constitutional construction is needed to determine what *federal supremacy* or *federalist structure* amounts to in light of the Clause's intended purpose in 1788, but it is *not* needed merely to conclude that its original content did not forbid all possible agreements between states.

In one sense, these examples are grist for Fallon's mill. By illustrating the subtle factors that may affect the content of a legal provision, they demonstrate the need for sophisticated judgment to determine which factors are relevant in which cases. But in another sense, they cut against him. Since, except for the isolated case of what constitutes cruel punishments, the required judgments are not moral, political, or ideological, they do not involve the kind of judicial discretion Fallon most wishes to defend. In order to defend his case, he must identify kinds of "constitutional meaning" that differ from those illustrated here. He writes as if there were many kinds of constitutional meaning from which the justices are free to select in order to advance their moral or political vision. I do not think there are.

Fallon lays the basis for his *ur-criticism* of originalism in chapter 2. There he lists *"five senses in which the word 'meaning' has been or can be used in disputes about constitutional meaning in the Supreme Court: (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, and (5) intended meaning*."[28] I find this misleading. Although the word 'meaning' occurs in many ways in ordinary speech, some have nothing to do with language and others have to do, not with *what is said*, but with the *reasons* something is said or its immediate *desired effect*. Though not irrelevant, these are not central to originalism or to the interpretation of legal texts. The use of 'meaning' most relevant to originalism tracks the systematic contributions to *what a speaker asserts*

27. U.S. CONST. art. 1, § 10, cl. 3
28. FALLON, *supra* note 2, at 51.

made by information conventionally encoded by the sentence used to make the assertion. This is the notion of *semantic meaning*, or *semantic content*, that has emerged in the last 50 years from the sciences of language and information.[29]

The idea (simplifying a bit and focusing on declarative sentences) is that to understand a language is to be able to identify what uses of its sentences assert in various contexts. Suppose, in an ordinary case, that A, in talking to B, asserts a thought content C by uttering S with the intention of communicating A's commitment to the truth of C. Successful communication normally requires shared understanding of S's semantic meaning. Often, it also requires shared knowledge of what has previously been said, and of the questions currently under discussion. Realizing this, A normally will not use S to assert C unless A has reason to think that B can identify C as the content to which A wishes to commit. In short, asserted content is intended to be, and usually is, readily discernable.

Speakers can, of course, be unclear, or ignorant of gaps in the background knowledge of their hearers, and hearers can be inattentive or misinformed. When they are, the communication may misfire. But, as noted earlier, the notion of assertive content is designed to ensure that this is the exception rather than the rule. *What a speaker uses sentence S to assert* is (roughly) *what an ordinarily reasonable and attentive hearer who knows the semantic meaning of S, and is aware of the most relevant intersubjectively available features of the context of utterance, would be rationally justified in taking the speaker's use of S to commit the speaker to*. Anything merely private to the speaker, to which the hearer cannot be expected to have access, is excluded. Thus, asserted contents are publicly available. Being the common currency of linguistic communication, they are what originalists have in mind when they speak of *public meaning*, even though, strictly speaking, assertive content is not itself *meaning* in any sense of 'meaning' recognized in current linguistic science.

Applying this idea to legal interpretation, we say that, as a rule, *what lawmakers assert in adopting a text T* is *what a reasonable and attentive audience who understands the linguistic meaning of T(including any legal terms of art), the publicly available facts, relevant lawmaking history, and the background of existing law into which the new law is expected to fit, would be rationally justified in taking lawmakers to have enacted*. This is the content to which originalists wish to be faithful. Sometimes—for example, when the Constitution says "The House of Representatives shall be composed of members chosen every second year"[30]—this content may, for all practical purposes, be identical with the semantic meaning of the sentence. In other cases, the asserted content will not be the semantic meaning. But it can never be something which, by its very nature, is hidden, or to which the various audiences of the lawmakers have no reasonable access, either on their own, through the press, or with the help of legal experts.

29. SOAMES, *supra* note 23.
30. U.S. CONST. art. 1, § 2.

Returning to Professor Fallon's five senses of constitutional meaning, among which he imagines the justices to have discretion in deciding to what to be faithful, I maintain that there are no such five senses and no such discretion. At the first stage of interpretation, which aims at discerning the asserted content of a provision, there is simply a fact to be discerned. As in other historical inquiries, the passage of time may sometimes make this difficult to discover, in which case we must opt for the candidate best supported by the evidence we can gather, which is what we do in all empirical inquiries. There may be problems involving vagueness, indeterminacy, or inconsistency in *applying* the content we discover to the facts of a case. But as I have stressed, these problems are handled at the second stage of judicial interpretation, at which good faith discretion is possible, but highly constrained.

There are further, more specific, worries connected with Fallon's five-sense scheme. One involves reading original expected applications of the Eighth and Fourteenth Amendments into their "contextual meanings," wrongly seen as their original constitutional contents.[31] As noted earlier, the meaning of "*cruel and unusual punishments*" was not *derived from* its expected application; its expected application was *derived from* its ordinary meaning plus widespread agreement about which possible punishments were, and which were not, cruel and unusual. Because it is a phrase, rather than a single word, this virtually had to be so (assuming that it was not entirely a legal term of art). Since meanings of linguistically complex expressions are generally compositional functions of their syntax plus meanings of their parts, "*cruel and unusual punishment*" means (roughly) *punishment that is disproportionately severe in relation to the seriousness of the offense and (in addition) not sanctioned by longstanding legal practice*. Because this semantic meaning was the chief contributor to the asserted content of the Amendment, it was, thereby, a constituent of its original constitutional content.

Although Fallon's discussion of the Fourteenth Amendment also seems initially to put too much weight on original expected applications, his final conclusion corrects this:[32]

> If we appeal to the literal meaning of the Equal Protection Clause in this way [i.e., as the Court did in Brown] do we necessarily abandon fidelity to the Fourteenth Amendment's original meaning? I would say not. "Literal meaning" [Fallon's sense two] is as familiar a sense of meaning as is that of contextual meaning, as defined by shared assumptions about application and nonapplication . . . We could say . . . correctly, that there can be a gap between a statute's meaning—at least in the literal semantic sense—and its originally understood or intended applications . . . In my view we can sensibly understand modern constitutional doctrines under the Equal Protection Clause that bar discrimination on race and on gender . . . as enforcing the literal or

31. FALLON, *supra* note 2, at 51–55.
32. *Id*. at 52–54.

> semantic meaning of the Fourteenth Amendment, even if few in the generation that wrote and ratified [it] would have anticipated its application in these ways. . . . [M]y point . . . is . . . that there is a possible sense of "original public meaning"—which constitutional law has sometimes adopted—that equates original meaning with original literal meaning and that recognizes the possibility of a gap between original meaning and originally expected applications.[33]

My only criticism here – apart from the suggestion that *equal protection* rather than *privileges or immunities* was the chief driver of the Fourteenth Amendment – is with the suggestion that there are two "meanings" between which justices may choose, based on their normative views of the most desirable outcomes. There is only the originally asserted content (supplemented by original intended purpose), to which semantic meaning makes a contribution and about which originally expected applications can, at most, play an evidentiary role.[34]

The importance of insisting on this goes beyond the analysis of this case. Whatever the source of what I take to be Fallon's errors about meanings and his failure to recognize the role of asserted content, the effect of these shortcomings on his theory of constitutional interpretation is to greatly expand the range of the Supreme Court's moral and political discretion. He writes:

> [T]he variety of possible senses of meaning, including possible conceptions of a provision's original public meaning, creates occasions for the exercise of judicial judgment in determining which is most salient in a particular context. Imagine that a disparity exists between the Equal Protection Clause's contextual meaning [Fallon's purported sense one above], as framed by shared understandings and expectations at the time of its ratification, and its literal or its moral conceptual meaning [Fallon's senses two and three]—as applied, for example, to cases of gender discrimination. Which sense of meaning *ought to control outcomes* in the Supreme Court? *The decision requires normative judgment*.[35]

This, as I have argued, is not where judicial discretion properly lies.

What of Fallon's other purported senses of *meaning*—(3) moral and conceptual, (4) reasonable, and (5) intended? "Moral and conceptual meanings" are just semantic meanings of moral terms. There is nothing particularly notable about them, except for the fact that disputes over the *truth* of the moral claims they are used to make are often more controversial and harder to resolve than other disputes. What about "reasonable meaning"? The idea, I take it, is that if someone says something that cannot be taken at face value, we may ask, "What is it

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33. *Id*. at 53–54.

34. U.S. CONST. amend. XIV. I will discuss the Fourteenth Amendment at greater length later in this Article.

35. FALLON, *supra* note 2, at 57 (emphasis added).

reasonable to suppose she meant by that?" with the intention of finding the most plausible hypothesis about what she was trying to get across.

This, I think, is the sort of thing that Fallon has in mind in the following passage:

> Constitutional law exhibits many examples of reliance on reasonable meanings. . . A paradigm case comes from the interpretation of otherwise *absolute* constitutional language, such as the first Amendment's guarantees of freedom of speech and religion ("Congress shall make no law . . . abridging the freedom of speech,") as contemplating at least some exceptions.[36]

Fallon goes on to cite the familiar idea that no one would take the Free Speech Clause to protect someone from prosecution for causing panic in a crowded theater by shouting "Fire!" Of course not. But this is not a problem for an originalist identification of the constitutional content of the Free Speech Clause with its original asserted content. First, I presume that it is a crime to intentionally cause panic in a crowded theater, with or without using language to do so. Hence no speech law is needed to prohibit one from doing so. Second, I conjecture that something similar would have been true at the founding, in which case continuing to prohibit such behavior after ratifying the Constitution would not count as abridging—i.e., truncating or diminishing—the freedom of speech enjoyed then. The underlying mistake is to read the language in the First Amendment as "absolute" and so brooking no restrictions of any kind on speech. As I have already argued, the contextual introduction of a time designation into the tenseless descriptive clauses in the Amendment brings with it a limitation of its guarantees to *the kinds of freedoms enjoyed at the time of the founding*.

The Establishment and Free Exercise Clauses of the First Amendment may be better examples of Fallon's point. "*Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof*."[37] Deriving the original constitutional contents of the two Clauses from their original asserted contents and intended purposes is more challenging. I think the Establishment Clause asserts that Congress will pass no law making any sect, church, or denomination the established, or official, religion of the country in the way that some states had established churches then, which is far from requiring strict neutrality on all matters concerning religion. Although I am not sure about the original asserted content of the Free Exercise Clause, I do not rule out that it literally asserts what it seems to say—namely that *Congress will pass no law whatsoever prohibiting anyone from freely exercising his or her religion*. The Founders probably did not imagine that any genuine religion might grow up in this country that would require the performance of acts—like human sacrifice, murder or forced

36. *Id*. at 55 (emphasis added).
37. U.S. CONST. amend. I.

conversion of infidels, burning widows to death, or consumption of powerful hallucinogenic drugs—which cannot legally be tolerated.

But whether or not they contemplated such possibilities is probably not crucial. The intended purpose of the Free Exercise Clause was, I suggest, to guarantee *that acts not already punished, forbidden, or discouraged independently of religion will not be so treated because they are required by some religion*. If so, that may have been what they were rightly taken to assert, in which case there is no further "reasonable meaning" needed to determine the content of the Free Exercise Clause. Alternatively, that content may be reached via the deferentialist principle D4, which guides application of original content to unanticipated and unimagined new circumstances.

This discussion of the effect of *original intended purpose* on constitutional content also applies to Professor Fallon's "intended meaning," which is his "fifth sense" of constitutional meaning. Though what he has in mind is not itself a kind of meaning, he is right in insisting on the fact that imputed *objective intent or purpose* sometimes plays an important role in determining constitutional content. [38] It plays this role because constitutional principles are sometimes stated in language the broad purpose of which is pretty plain, even though its purely linguistic meaning may be overly general. The intent in these cases is to articulate the Framers'' and ratifiers' goal, the advancement of which may, over time, involve qualifications that cannot initially be completely foreseen. The highly general language of some provisions serves to keep the goal in mind, while signaling that the actions required to adhere to it may, to a limited degree, be up for negotiation. Originalism explains the nature of the evolving negotiation by (i) recognizing that original intended purpose may sometimes contribute to original asserted content, and (ii) identifying a rule, D4, for resolving conflicts if they arise when the purpose a provision was designed to serve clashes, typically at the margins, with original asserted content.

In addition to claiming that there are five senses of "constitutional meaning," Fallon claims that the same senses—contextual, semantic, moral, reasonable, and intended—characterize ordinary meaning.[39] He says, "*People in ordinary conversation recurrently invoke the term 'meaning' in ways that reflect all the interests and concerns that are exhibited in the five senses of legal meaning*."[40] Yes and no. As I have already noted, the word 'meaning' is used in many ordinary ways, some of which reflect concerns about language and some of which do not. Linguistic meaning is more specific. The bearers of linguistic meaning are words, phrases, and sentences. People do not ask "What is the *reasonable meaning* of this word, or the *moral meaning* of that word?" They do ask "What is the meaning of 'trabajo' in Spanish?" or "What is the meaning of 'e pluribus unum' in Latin?" in more or less the same way

38. FALLON, *supra* note 2, at 56–57.
39. FALLON, *supra* note 2, at 59–61.
40. *Id*. at 61–65.

that a linguist asks "What is the *semantic content* of that word (in Spanish) or that phrase (in Latin)?" Ordinary people also ask "What did *she* mean by her use of that word?" in attempting to find out what *she intended* to use the word *to assert or express* on some occasion. But since words do not have intentions, people do not ask "What is *the intended meaning* of a word?" isolated from any specific use by a particular speaker. And, although people know that context is important to determining what a sentence is used to assert on a given occasion, they do not regularly speak of "contextual meaning."

Labeling aside, Fallon's five categories do correspond to significant features of language in both ordinary and legal contexts. The important points are what and how they contribute to asserted content. The *semantic meaning* of a term is just its linguistic meaning, which is its contribution to the linguistic meaning of a sentence containing it. The (semantic) meaning of a sentence is what the sentence itself—apart from contextual features of the context of use—contributes to what the sentence is used to say or assert in the various contexts in which it is used. The *moral meaning* of a term is just the (semantic) meaning of a moral term. Fallon's "contextual meaning" of a sentence corresponds to what the sentence is used to say or assert in a particular context (which is determined by contextual factors plus semantic meaning). His "intended meaning" is what someone intended to say or assert by a use of a sentence on a given occasion in a particular context—whether or not the person succeeded in asserting that. Finally, what he calls the "reasonable meaning" of a use of a sentence is the most reasonable (typically charitable) revision (in light of a speaker's evident purpose in making the remark) of what was literally asserted, when that content cannot be taken at face value.

Despite what Fallon appears to think, my conceptual framework incorporates all these concerns. What I add that he does not 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 sometimes contributes to originally assertive content, and sometimes plays a role in revising that content (in ordinary as well as legal contexts). By correcting for these omissions, we can provide a constitutional theory of interpretation that offers a principled identification of legal content with assertive content (original or revised). Given this theory, justices must always look for one thing, not five different kinds of things among which they may choose based on their own moral and political values. Once they have found it, they must decide whether it should be revised, not because they prefer something else, but because it seriously conflicts with its original intended purpose, or with other constitutional provisions, or because it is too vague to determinately apply to new facts. When pre-existing constitutional content needs revision for one of these reasons, the task of the justices is to make a minimum change in content that advances its original intended purpose. Only then might the moral and political values of the justices be used to resolve remaining indeterminacies among outcomes found to be equally deferential.

This brings me to a putative sixth sense of meaning that Fallon dubs "interpreted or precedential meaning" toward the end of Chapter two. He says:

> In life, as in law, it is often natural to say that a directive has acquired an "interpreted meaning." Imagine that a golf or tennis club has a long-standing written rule that says only members of the club may eat in the dining room. Further imagine that a practice develops under which members are routinely permitted to bring guests into the dining room as long as they personally accompany those guests. At some point we might begin to say that, whatever the rule originally meant, it has acquired an interpreted or precedential meaning under which guests are in fact permitted into the dining room as long as they are personally accompanied by members.[41]

Just as the original rule of the imagined club has, by being ignored, become a dead letter, and so is supplanted by a revised content (which need not have been written down) that fits the later practice, so, Fallon suggests, the original contents of some constitutional provisions have, by being ignored, become dead letters, and so have been supplanted by revised contents that fit what has become long-standing governmental practice. Although I agree that this can happen—and I explained (two sections back) how it can be treated in an originalist framework—I disagree with Professor Fallon's suggestion that modern cases relying on the Equal Protection Clause of the Fourteenth Amendment are good examples of it.

> [W]e might similarly say . . . that whatever the meaning of the Equal Protection Clause, for example, it has acquired a precedential meaning that bears on how courts should apply it. It seems impossible to reconcile the notion of "interpreted meaning" with Professor Soames's equation of meaning with the asserted content of an utterance in its linguistic and historical context.[42]

Since the issues surrounding the Amendment are complex, I will reserve them for the final section of this paper.

Here it is more important to combat his claim that my version of originalism rests on an insertion of technical concepts from the philosophy of language into a domain of theorizing in which they have no special relevance. Professor Fallon says:

> Nor . . . do I feel constrained to yield to the distinctive expertise of philosophers of language regarding what "meaning" is or means. "Meaning" is a concept routinely used by ordinary people for ordinary purposes. Philosophers of language can propose better, more perspicuous understandings of concepts than most ordinary speakers have already achieved. But philosophers have no distinctive authority to determine how concepts in ordinary use can be

41. *Id*. at 64.
42. *Id*.

> employed correctly in the contexts in which ordinary people ordinarily use and understand them. When philosophers offer claims about the concept of meaning as it functions in ordinary language, we—you and I—are entitled to test their theoretical claims against our own linguistic intuitions and related explanatory judgments, each for himself or herself. Philosophers of language have no authority to legislate how you and I properly use nontechnical concepts.[43]

What an extraordinary reaction! I have not tried to legislate anyone's speech. 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. The items that have meaning in this sense are words, phrases, and sentences, which may be written or spoken. They are expression types, in the sense that the word 'word' is a single word, even though there are three different *occurrences* of it in this sentence. As I have noted, the meaning of a word is the contribution it makes to the meanings of sentences containing it—a fact to whch any theory of interpretation must be sensitive. When one learns a language, one learns the meanings of its words plus how the meaning of a sentence arises from them together with how the words are syntactically combined. This should be familiar, without any special theoretical background.

Contemporary theories of language go further, attempting to state principles that track the construction of complex sentential meanings out of simpler word meanings. They also attempt to identify what one who uses a sentence in a context *says* or *asserts* as a function of the meaning of the sentence used plus features of that particular context. These theoretical tasks do get technically complex, but the basic ideas are simple, while the technical details are not central to theories of constitutional interpretation. 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.

VI. FALLON'S THEORY OF CONSTITUTIONAL INTERPRETATION

Having come this far, I will try to formulate Fallon's theory of interpretation as succinctly as I formulated my own. He does not provide a succinct summary himself, but he does make far-reaching claims about the moral and sociological

43. *Id*. at 64–65 (footnotes omitted).

legitimacy of the Supreme Court, highlighting important cases in which he views the Court's normative decisions to have enhanced its legitimacy. My reading of his most important points suggests the following summary.

Fallon's Theory

F1. Constitutional provisions have five different kinds of meaning—contextual, semantic, moral, reasonable, and intended—which, taken together, are properties of the constitutional text to which the Court must be faithful.

F2. In deciding a constitutional case, the Court is legally authorized to select the *most reasonable* of the five types of constitutional meaning for accomplishing the Court's normative goals.[44]

F3. In general, the legally authorized normative goal of the Court in deciding a constitutional case is, and ought to be, to articulate and advance a policy that yields the greatest moral value that is politically and sociologically achievable.[45]

F4. The moral value of an outcome that is to be maximized in a constitutional case is the positive value of the substantive justice it generates, discounted by the anti-democratic procedural cost of being imposed by unelected justices, and thereby removed from normal democratic politics.[46]

Although there is some overlap between Professor Fallon's view and mine, our overall pictures are very different. Whereas I recognize that the moral and political views of justices may properly play a minor and tightly circumscribed role in exercising their authorized discretion, Fallon takes those views to be central to the proper performance of their duties. Whereas I recognize that the justices' primary duty is to be faithful to original assertive content and intent, he takes them to be free to choose among a variety of factors whatever best and most reasonably advances their normative goals. The point of the variety in F1 is, it seems, to maximize their normative options while maintaining a semblance of fidelity to the Constitution itself.

IX. REFLECTIVE EQUILIBRIUM AND MORAL FIXED POINTS

In this and the following section, I will respond to a familiar argument against originalism that employs a methodology Professor Fallon calls, following Rawls[47], "reflective equilibrium." When constructing a theory of an important philosophical concept C—e.g., *goodness, rightness, justice*, or *knowledge*—we often find that there are things to which C obviously applies – e.g. societies which are good, acts which are right, institutions which are just, and propositions which are known – as well as other things to which C obviously does not apply.

44. *Id*. at 66–67.
45. *Id*. at 67–68; *see also id*. at 3, 9–10.
46. *Id*. at 33–34, 128–29, 159, 161, 167.
47. JOHN RAWLS, A THEORY OF JUSTICE (1971).

However, we also encounter unclear cases of C about which we need guidance – e.g. societies, acts, and institutions about which we are unsure whether or not they are good, right, or just, as well as propositions about which it is unclear whether we know them or not. This leads us to search for general principles involving C that entail decisions about some of the unclear cases. When a principle classifies most pretheoretically positive (or negative) cases of C as genuinely positive (or negative), we have some reason to trust its verdicts on the unclear cases.

But our inquiry is not over. Since different principles may do comparably well on clear cases, while disagreeing with each other on unclear cases, we must assess the plausibility of the principles themselves. This raises the possibility of trade-offs between our confidence in a principle vs. our confidence in particular cases about which it issues verdicts, including some involving cases we initially took to be clear. Since a plausible principle may yield unintuitive verdicts on a few cases, we must be prepared to revise the principle in light of the cases, while also being prepared to revise outcomes of some cases in light of the verdicts generated by a plausible principle. What we seek is reflective equilibrium, when our total confidence in a principle and its verdicts exceeds that produced by any other principle.

Applying this method to constitutional interpretation requires assessing the plausibility not only of interpretive principles, but also of particular verdicts we intuitively take to be correct on independent grounds. The result in *Brown v. Board of Education*, taken by Professor Fallon to rest on the Equal Protection Clause, is often used in this way. Since, it is argued, the result was both vital and correct, but could not have been reached by any originalist route, originalism cannot be correct.

This, I think, is what Professor Fallon had in mind earlier (two citations back) when speaking of the "precedential meaning" the Equal Protection Clause has acquired and the supposed inability of my version of originalism to accommodate it. He returns to this theme in the following passages:

> [T]he Supreme Court, during the 1970s devised a formula under which it will uphold legislation that will otherwise violate the First and Fourteenth Amendments . . . if it is "necessary" to protect a "compelling" governmental interest.
>
> The precise terms of the "strict scrutiny" test have no roots in either the language or the history of the First or Fourteenth Amendment. In my view, it is a sensible formula, well within the legitimate authority of the Supreme Court . . . . [T]he strict judicial scrutiny formula . . . required independent normative judgment . . . .
>
> Myriad other examples would amplify . . . the point that purely linguistic and historical facts could not, even in principle, establish a sufficiently determinate original meaning to resolve most of the kinds of constitutional cases that come to the Supreme Court. For the Justices, there is no escaping the burdens of moral and practical judgment.[48]

48. FALLON, *supra* note 2, at 68 (footnotes omitted).

> *Brown v. Board of Education* is now an unshakable precedent, even though many believe that it deviated from the best account of the original public meaning of the Equal Protection Clause, because *Brown's* technical legal error—if it committed one—advanced rather than retarded substantive moral justice.[49]

My view is different. Although I judge the Court's reasoning in *Brown* to have been deficient, I believe that there is an originalist route to the unconstitutionality of racially segregated state schools that generalizes more naturally, and to better moral effect, to related issues than the reasoning in *Brown* and its progeny did.[50] But before I argue this, I will say a word about what Fallon's use of the method of reflective equilibrium amounts to.

In rightly characterizing it as a method, Fallon implicitly invites the question, *What is it a method for doing?* In Rawls's hands, reflective equilibrium was a method for specifying the necessary and sufficient conditions for a society to be just, or, as we may put it, for telling us what social justice is. That inquiry is clearly normative. Thus, it would seem, Fallon's is as well. Presumably, his goal is to best use the power of the Supreme Court in the evolving political system of the United States to advance the justice of American society.

How does this goal square with the task of faithfully interpreting, as opposed to covertly amending, the Constitution? The answer, I think, is that it does not. The chief goal in interpreting a non-fictional text is to tell us what it asserts or stipulates. Sometimes—for example, in interpreting a philosophical text—one may think the text can be improved by substituting certain new content for some of the text's original content. When rightly done, this causes no confusion. The gaps, flaws, and shortcomings of the original are laid bare, and the philosophical interpreter is held responsible for the alleged improvements. Even if the resulting view turns out to be philosophically attractive, no one would argue that the method of reflective equilibrium led the interpreter to the most accurate account of what the original philosopher actually said or thought.

Nor, of course, does the method lead to a *genuinely faithful* constitutional interpretation, which may be derived by identifying the originally asserted content of the Constitution and (a) narrowing penumbras of vagueness in light of originally intended purposes when required by new facts, (b) similarly resolving inconsistencies generated by new circumstances, and (c) saving constitutional provisions from self-defeating applications to unforeseeable facts. *On the contrary, the method of reflective equilibrium leads to the elevation of moral and political values of the interpreter over and above those of the Founders and ratifiers.* To adopt the method of reflective equilibrium in the sense that Fallon does is tacitly

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49. *Id.* at 100–01.

50. My view on this matter has been strongly influenced by John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

to admit that, though not irrelevant to one's task, fidelity to the Constitution is *not* an overriding goal.

X. ORIGINALISM, *BROWN*, AND THE FOURTEENTH AMENDMENT

I now turn to my originalist interpretation of *Brown*. The road to it begins with an observation about the architecture of Section 1 of the Fourteenth Amendment.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor shall deny any person within its jurisdiction the equal protection of the laws.[51]

The Amendment starts by identifying citizens of the United States in a way that recognizes all blacks born in the United States as citizens, including those who had been slaves. The next clause forbids any state from abridging their privileges or immunities. To understand this, one must realize that "privileges or immunities" is an important legal term with a history in American law. Since it is used here with its legal meaning, that meaning must be explicated. Before doing so, however, one should note that the use of the word "citizens" precedes the use of the word "persons," which follows in the Due Process and Equal Protection Clauses. It is significant that *citizens*—not just *persons* visiting, or residing in, the country or state—are the primary subjects of Section 1 of the Amendment. They—those who make up the body of the nation—are the beneficiaries of all, rather than only some, of the Amendment's profoundly important guarantees. This suggests that the rights reserved for them are paramount.

The wording of Section 1 suggests another aspect of the priority of *privileges or immunities* over *due process* and *equal protection*, The language, "*no state shall make or enforce any law*" restricting privileges or immunities directs that no new laws shall be enacted that arbitrarily grant certain rights to some while denying them to others, nor shall any old laws with that effect be enforced. Here, and here alone, are where the guarantees of substantive justice are to be found in the Fourteenth Amendment. What follows in Section 1 – due process and equal protection – are essentially guarantees of fair and equal processes of adjudication and application of laws the substance of which are already required to pass muster.

What, then, are the *privileges* or *immunities* the Amendment guarantees as birthrights of all citizens after victory in the cataclysmic conflict fought to ensure that this constitutional government "shall not perish from the earth"? The phrase was, of course, adapted from the Comity Clause of Article IV, Section 2 of the Constitution.

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51. U.S. CONST. amend. XIV.

> *The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens of the several States*.[52]

What it required of each state, was that it grant to citizens of other states, when visiting or temporarily residing there, the same rights it grants to each of its own citizens. Since not all citizens of any state were then eligible to vote, the guarantee did not include the right to vote in the state. (For example, women, who were citizens, could not vote in any state.) In addition, there are other reasons why (both then and now) citizens of one state are not entitled by the Comity Clause to vote in elections of a second state. Since outcomes of local and state elections, up to and including those for state electors to the Electoral College, are to represent citizens of the state, outsiders may not participate.

Still, the class of rights covered by state citizenship and implemented by state law was, it would seem, substantial. This is borne out by the decision of Justice Bushrod Washington in the 1823 case, *Corfield v. Coryell*, in which he held that the *privileges and immunities* of citizens of United States included the enjoyment of life and liberty, the right to acquire and possess property of every kind, and the pursuit and attainment of happiness and safety. [53] Thus, our initial clues as to the content of *privileges or immunities* in the Fourteenth Amendment suggest that it includes the rights just mentioned from the Washington decision plus any other non-political rights that a state grants to all its citizens, and so must extend to visiting citizens of other states.

Equally important to identifying the legal content of *privileges or immunities* in the Fourteenth Amendment is the Civil Rights Act of 1866, which the Fourteenth Amendment was intended to constitutionalize.[54] These rights, which did not include political rights, did include many others. Section 1 of the Civil Rights Act stated that

> [All] persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have *the same right*, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other . . . .[55]

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52. U.S. CONST. art. 1, §2.

53. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

54. Harrison, *supra* note 50, at 389–90.

55. Act of April 9, 1866, ch. 1, § 1 14 Stat. 27 (1866) (emphasis added). The Act was introduced by Senator Trumbull of Illinois in response to discriminatory state laws in the South, commonly referred to as "Black Codes." His announced purpose in introducing the bill was to destroy the discrimination inherent in the denials of rights of freedmen and the imposition of penalties on them by the codes. *The Civil Rights Bill of 1866*, HIST. ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES (last visited

The first thing to note is that this list of specific rights emphasizes economic rights, all of which had been denied to slaves, who could not hold property and did not even own their own labor. This emphasis reflected a belief shared by Republican supporters of the bill that legislation was needed to prevent the South from replacing slavery with a form of peonage that would make it difficult, if not impossible, for former slaves to become economically independent. The second thing to note is that the rights are the kind normally granted to citizens by the laws of their states, which when extended to blacks, would provide them with the ability to live normal lives. These rights seem to be included in those covered by the Comity Clause and the decision in *Corfield v. Coryell*. Whether they exhaust those rights is not obvious. Nor is it obvious what, if anything, the Civil Rights Act stipulates about rights arising from state laws that do not appear, on their face, to be "for the security of person and property."[56] But one thing is clear. Whatever rights might fall under the scope of the Act, the rights enjoyed by all citizens of a state were to be *the same*—not corresponding, or comparable, or separate-but-equal rights. Each individual citizen of a given state was to be guaranteed *the same rights* as every other citizen of that state.

When it came to race, this meant that the rights in question were to be color-blind. Every white citizen was to have the same rights under the act as every black citizen, and every black citizen was to have the same rights as every white citizen—and similarly for citizens of other races. This was the view of congressional supporters of the of the Civil Rights Act of 1866, which followed logically from what many originalist's call its original public meaning, which is really its original asserted content. Since the Fourteenth Amendment was meant to constitutionalize the act, this content bears heavily on originalist interpretations of that Amendment.

How are we to ascertain the full range of the privileges or immunities of citizens of a state? Speaking a few years after ratification, a supporter, Representative Boutwell of Massachusetts, advises us to

> see what the rights and privileges and immunities of citizens of the State generally are under the laws and constitution of the State. . . . The Government of the United States can take the humblest citizen in the State of Ohio who by the constitution or the laws of that State may be deprived of any right, privilege, or immunity that is conceded to citizens of that state generally, and lift him to the dignity of equality as a citizen of that State.[57]

Jun. 29, 2020) https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/ [https://perma.cc/DPE2-WYTR].

56. The rights arising from laws *for the security of person and property* ended up being secured, not only for all citizens, but also for all persons by the Due Process and Equal Protection Clauses of the Amendment. *See* Harrison, *supra* note 50, at 1433–54.

57. 3 CONG. REC. 1793 (1875). Boutwell, who later became a Senator, was a member of the House of Representatives in the 39th Congress, which passed the Civil Rights Act (when he was a member of the Joint Committee on Reconstruction), as well as the 40th and 41st Congresses.

With some qualifications, this comment suggests that Fourteenth Amendment privileges or immunities include any essentially civil (as opposed to political or social) rights that arise from common or positive state law that are applicable to citizens generally.[58] If so, the Clause would not allow states to employ arbitrary categories, especially those that may reflect animus (like race), to diminish rights of citizens in those categories to enjoy the benefits of any state law.

On this reading, individual states can decide what rights they give to citizens. What they cannot do is give some classes of citizens more rights than others—to own property, to start businesses, to pursue the profession of their choice, and so on. One way of thinking of this was made explicit by some of the congressional supporters of the Fourteenth Amendment. What the *Privileges or Immunities Clause* of the Fourteenth Amendment did was to apply the already existing Comity Clause of Article IV of the Constitution inside a state. Any citizen inside a state shall have all the (non-political) privileges and immunities that the Comity Clause requires the state to grant to visiting citizens of other states.

This interpretation of Privileges and Immunities Clause is, I believe, the one that best fits (i) the original meaning of the Clause, (ii) the original content that its most prominent congressional supporters intended to assert by adopting it, and (iii) the original intended purpose of virtually all its congressional supporters, which was (a) to constitutionalize the Civil Rights Act of 1866 and (b) to outlaw the Black Codes that had grown up in the states of the old Confederacy, while (c) leaving the states free to determine the substance of their laws, so long as they were applied in the same way to members of all races. This last point is important. It was assumed from the beginning by the Republican sponsors of the Fourteenth Amendment that their task was to assure uniform, non-discriminatory treatment of all citizens of a state, while allowing individual states to determine the substance of the benefits provided to, and the obligations imposed on, their citizens.

The nature, power, and generality of this interpretation is illustrated by how it was understood by leading Republicans in the years immediately following ratification. For example, on February 1, 1872, one of the country's most prominent lawyers, Republican Senator Matthew Hale Carpenter of Wisconsin, proposed penalties on a variety of institutions, including public accommodations, common carriers, and public schools, that make "*any distinction as to admission or privileges* therein against any citizen of the United States because of race, color, or condition of previous servitude."[59] Speaking of the Fourteenth Amendment, he added, "If no State can make or enforce a law . . . to abridge the rights of any citizen, it must follow that the *privileges and immunities* of all citizens are the same."[60] Carpenter applied the same point in a brief he submitted at about the same time in *Bradwell v. Illinois*, supporting Myra Bradwell's claim, under the Fourteenth Amendment, that the state had violated her right to admission to

58. For illuminating discussions, see Harrison, *supra* note 50, at 1416–20, 1454–57.
59. CONG. GLOBE, 42nd Cong., 2nd Sess. 760 (1872) (emphasis added).
60. *Id.* at 762 (emphasis added).

the state bar because of her sex. There, Carpenter argued, "If no State may 'make or enforce any law' to abridge the *privileges* of a citizen, it must follow that the privileges of a citizen are *the same*."[61]

In 1872, turning to the question of the state's power to regulate its public schools, he said, as if speaking to the government of a state:

> Your power to regulate your own affairs, your schools, to say how many you shall have, how they shall be supported, and all that, is a power of your own; we cannot interfere with it, *but if you have a school, and supported it by taxes on all citizens, then you shall not discriminate between the children of different citizens*.[62]

Carpenter's point was not that the states had to provide integrated public education; it was that if they chose to provide public education, it could not legally be segregated.

His argument assumed that attending schools financed by general taxation would be a privilege of all citizens generally. That assumption would surely be true if applied to mid-20th century America, in which access to high quality education was rightly seen as a virtual pre-requisite for future success. However, it is less clear that it was true in 1868. Think again about the Comity Clause. If a state, prior to the passage of the Fourteenth Amendment, had state-supported public schools open to some citizens at any level K-12 or beyond, would the right to attend those schools have been understood as a privilege guaranteed by the Comity Clause to the children of citizens of other states temporarily residing in the state? I do not know and I suspect that the question may not have been legally tested because education, as a right of citizenship, was not a robust concept in 1868.

Systems of public education were virtually non-existent in some states immediately after the Civil War and they were still in their infancy in others. It was not until 1867 that there were any taxpayer-funded schools in the South at all. Even the nation's leader of public education, Massachusetts, passed its first compulsory school attendance law (requiring just twelve weeks of schooling for children between 8 and 14) in 1852. By 1885 only sixteen states had such laws, many of which were not rigorously enforced. By 1870 only 48% of the children between 5 and 19 in the United States were estimated to be enrolled in schools of any sort (public or private), with roughly three times as many students attending private schools as attended public schools.[63] It was not until 1894 that the New York State Constitution mandated the maintenance and support of free common schools in which all children could be educated.

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61. Brief for Plaintiff in Error at 6–7, Bradwell v. Illinois, 83 U.S. 130 (1873) (emphasis added).

62. CONG. GLOBE, *supra* note 59, at 762 (emphasis added).

63. THOMAS D. SNYDER, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT (National Center for Education Statistics et al. eds., 1993).

The decidedly minor role that public education played in the life of the nation in 1868 does not preclude the inclusion of access to public education (on the same terms as anyone else) as a *privilege or immunity*, under the Fourteenth Amendment, of all citizens of any state that offered some form of publicly financed education to any of its citizens. However, it may help explain why the answer to the question of whether or not it really was so included might have been far from obvious to the Framers and ratifiers of the Amendment. It was not obvious because neither a clear understanding of the *Privileges and Immunities* Clause of Article IV nor a firm commitment to the rights enumerated in the Civil Rights Act of 1866 would then have clearly and decisively settled the matter. Nor, it seems, would the intended purpose of the Amendment and the act—namely to prevent the imposition of a new form of social and economic servitude that would cripple the ability of former slaves and their descendants to become economically independent. Since education was not then the vital component for individual success it was later to become, one can understand why providing a constitutional guarantee of it might not have been widely viewed as necessary.

This is not to say that Carpenter was alone in taking the Fourteenth Amendment to forbid segregated public education. Far from it. Prominent congressional supporters in debates that occurred in the run up from the early 1870s to the Civil Rights Act of 1875 took essentially the same position, reflecting their common (though not universal) understanding of the Privileges or Immunities Clause of the Fourteenth Amendment.[64] This expansive interpretation of the asserted content and intent of the Privileges or Immunities Clause of the Fourteenth Amendment was shared by majorites in Congress and used as a basis for further action until the disastrously mistaken *Slaughterhouse* decision in 1873, after which the efforts of many Republicans were less effectively focused on the Equal Protection Clause.[65]

That was historically unfortunate. Had the correct interpretation of *privileges or immunities* been maintained, it would have become clear, before too many decades had passed, that equal access to public education was, like the rights enumerated in the Civil Rights Act of 1866, among the most important rights of citizens arising from state law that had to be extended to blacks, if the guiding purpose of the Fourteenth Amendment was to be fulfilled. My point is not that, with the passage of the decades prior to *Brown*, our interpretation of the *words* used in the Fourteenth Amendment changed. My point is that the nation and its institutions changed into one in which right to reap the full benefits of public education became, without doubt, *a privilege in the original sense of the Fourteenth Amendment*—the same right for each and every citizen. To paraphrase Bushrod Washington, this right is part of the right to pursue happiness and safety, which is

64. Harrison, *supra* note 50, at 428–29.

65. Michael W. McConnell, "Originalism and the Desegregation Decisions," 81 Virginia Law Review 947 (1995)

inextricably bound up with the economic rights derived from the Civil Rights Act of 1866 that the Fourteenth Amendment sought to constitutionalize.[66]

The logic of applying the Fourteenth Amendment to interracial marriage is similar. Harrison summarizes it as follows.

> One of the most vexing questions during Reconstruction concerned race-conscious state laws that were nevertheless symmetrical and therefore arguably equal. Typical examples included anti-miscegenation statutes, which prevented whites from marrying blacks just as they prevented blacks from marrying whites. . . . [T]he Fourteenth Amendment forbids restrictions on privileges or immunities that take race into account. . . . No rule that requires reference to a citizen's race in order to know that citizen's rights . . . will give citizens of all colors the same rights. . . . The question is easier under the Privileges and Immunities Clause than it is under the orthodox reading of the Equal Protection Clause. The latter's reference to equal protection makes it possible to claim that the races are equal because the restrictions are symmetrical. . . . Under a symmetrical discrimination [provided by the Privileges and Immunities Clause] people's rights are abridged. . . . *A white person's right to marry a black person is abridged. The fact that a black person's right to marry a white is also abridged makes the statute more unconstitutional, not less*.[67]

The application of this logic to legally segregated public schools, as in *Brown*, is the same. The question whether it is theoretically possible for legally segregated schools to be "separate but equal" is irrelevant. A better-informed decision in *Brown* would have recognized this, overturned Justice Miller's reasoning in the *Slaughterhouse* cases, and reinstated the original asserted content of the *Privileges or Immunities* Clause. It is a virtue, rather than a vice, of this originalist understanding of the Privileges or Immunities Clause that it would have avoided both then duplicitous claim *that separate not only could be, but in fact was, equal*, but also the unsupported and insulting claim *that separate not only was not, but never could be, equal* (made in *Brown* and its progeny).[68] It is also a virtue, rather than a vice, that this originalist understanding fits the eloquent *colorblind* oral argument of Thurgood Marshall in *Brown*, better than the reason given by the Court in rendering its decision in 1954.

What about interracial marriage? The perception that the Fourteenth Amendment would, if adopted, render state bans on interracial marriage and interracial education unconstitutional was more widely recognized in the immediate aftermath of the Civil War than most realize today. In the case of education, I have cited some of the considerable evidence marshaled by John Harrison and Michael McConnell

66. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

67. Harrison, *supra* note 50, at 1459–60 (emphasis added).

68. *See* Raymond Wolters, *Constitutional History, Social Science, and Brown v. Board of Education, 1954–1964*, 5 THE OCCIDENTAL Q. 7, *reprinted in* RACE AND EDUCATION *1954–2007* (University of Missouri Press ed., 1st ed. 2008).

demonstrating awareness and approval of this consequence by leading congressional Republicans (plus awareness and disapproval by some congressional Democrats). Unfortunately, Harrison and McConnell do not say much about what Republicans took the consequences of the Amendment to be for interracial marriage. At the time they wrote, it was widely accepted that in the immediate aftermath of the Civil War no important congressional Republicans believed that the Fourteenth Amendment would invalidate state laws banning interracial marriage.[69]

The significance of this putative fact has not been lost on opponents of originalism, who maintain that it lacks the resources to explain why such laws would be unconstitutional.[70] However, this view, along with the historical understanding on which it is based, has now been examined and found wanting by David R. Upham in his "Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause."[71] Upham reports:

> (1) that before the [Fourteenth] Amendment, most (but not all) authorities concluded that such laws [banning interracial marriage] abridged a pre-existing right recognized at common law, which represented a privilege of citizenship; (2) that during the adoption of the Amendment, both proponents and opponents generally (though not unanimously) declared, acknowledged, or conspicuously failed to deny, that the Amendment would invalidate such laws; (3) that . . . within five years of the Amendment's ratification, racial-endogamy laws [banning interracial marriage] were either non-existent or unenforced in a clear majority of the states, in large part because Republican officials—including virtually *every* Republican judge to face the question—concluded that African Americans' constitutional entitlement to the status of privileges of citizenship precluded the making or enforcing of such laws; and (4) that the contrary holdings were made by Democratic judges hostile to Reconstruction, whose hostility was frequently manifest in their implausible interpretations of the Amendment.[72]

If Upham, who makes a strong case, is right, then another arrow in the anti-originalist quiver seems to have missed its mark.

In offering my interpretation of *privileges or immunities*, I follow McConnell in holding that a majority of the congressional Framers of Fourteenth Amendment recognized and approved of its far-reaching implications for education.[73] However, I have not made the same claim about its implications for marriage. Nor have I argued that most ratifiers expected to see those applications of the Amendment for

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69. This was the view of the widely cited, Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

70. Among others, see Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291–97 (2007).

71. David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. Q. 213 (2015).

72. *Id*. at 216.

73. McConnell sections I-III.

either education or marriage after its passage. Perhaps they did not. If they didn't, why didn't they? Part of the answer, pertaining to education, has already been given. It was unclear in 1868—even to many who understood the privileges or immunities of citizens deriving from state law to be a robust set of crucially important rights—that access to publicly funded education rose to the level necessary to be included among them. Hence it was not a prominent focus and not high on the agendas of many ratifiers of the Amendment. All of this is, as I have stressed, compatible with the view that equal access to publicly funded education was, by the mid-20th century, clearly a privilege of citizens guaranteed by the original asserted content and intended purpose of the Fourteenth Amendment.

But what does equal access amount to? Here we return to section 1 of the Civil Rights Act of 1866 with its declaration (i) that everyone born in the United States and not subject to the jurisdiction of a foreign power is a citizen, and (ii) that every individual citizen is to have *the same*—not equal, or comparable, or separate but equal—*rights* as every other citizen. Since this is what the Fourteenth Amendment was intended and proclaimed to constitutionalize, it is the logic of *identical rights*—not equal rights—that governs its privileges or immunities guarantee. Think of the difference between saying that citizens have *the same* rights versus saying that they have *equal* rights. Although the latter is compatible with the rights being different, though equal in some respect, the former is not. But, as we have seen, it is precisely the logic of *the same rights*, as opposed to the distinct logic of *potentially different, but supposedly equal rights*, that leads to the unconstitutionality of bans on both interracial marriage and public education that is racially segregated by law.

Since marriage was a pre-existing right at common law in 1868 and a privilege of citizens, laws banning interracial marriage were, arguably, inconsistent with the asserted content of the Privileges or Immunities Clause of the Fourteenth Amendment—just as Republican judges ruled in the early days of reconstruction. The fact that this application of the Amendment may not have been widely anticipated by ratifiers of it does not refute the interpretation adopted here. Because the differences between the logic governing identical rights versus the logic governing equal rights are subtle and complex, it is hardly surprising that a substantial number of supporters and ratifiers may have failed to grasp it fully enough to appreciate its implications for interracial marriage (which would have then been rare even if legally recognized). Nevertheless, expected applications, or non-applications, are *not* a form of public meaning, and certainly do not trump asserted legal content.

The same failure to appreciate the difference between identical versus equal rights may have influenced how, if at all, some supporters and ratifiers of the Fourteenth Amendment expected it to apply to education. Since, as we have seen, it was not clear that equal access to public education would then have properly been seen as a privilege of citizenship, many may have expected it to have little or no effect on education. Even those who did judge it to be such a privilege may have included some who, understandably, did not grasp the difference between

the logic of identical versus equal rights. Thus, there are multiple explanations of why many ratifiers of the Amendment did not expect it to outlaw legally segregated education—none of which would have been a valid originalist obstacle to reaching the central result in *Brown*.

The Court, under the influence of Felix Frankfurter and his precocious clerk Alexander Bickel, did not see this because (i) they did not seriously consider reviving the *Privileges or Immunities* Clause after its evisceration in *Slaughterhouse*, and (ii) they confused the arguably correct claim that the historical record did not vindicate the idea that most ratifiers of the Amendment expected it to outlaw racially segregated public schools with the incorrect claim that this settled the matter of whether the original asserted content of the Amendment outlawed such schools in mid twentieth century America. Had the Court looked more carefully into privileges or immunities and been equipped with a sophisticated theory specifying the nature of, and relationship between, *original public meaning*, *original asserted content*, and *original intended purpose*, it would have been in a position to see why *the original expected applications* of the Fourteenth Amendment were not determinative of its content. This, unfortunately, is a lesson that many of today's non-originalists have yet to learn.

Had *Brown* been properly adjudicated according to the version of originalism advocated here, we would have had a rejection of Chief Justice Miller's reasoning in *Slaughterhouse*, ending with a colorblind victory for the plaintiffs in *Brown*. The moral and political consequences of this for education, affirmative action, and the advancement of African Americans and other minorities would, I contend, have been superior to those actually achieved. A colorblind reading of the Privileges or Immunities Clause would have banished legally segregated education without contributing to the counterproductive upheaval and educational decline so widely experienced in large public systems across the country as a result of attempts at forced integration and racial balancing influenced by the reasoning in *Brown*, and mandated by its progeny.[74] This understanding of the Fourteenth Amendment might also have restricted affirmative action while, at the same time, resulting in greater advancement of African Americans and other minorities.[75]

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74. The fault was less with *Brown*, which merely misidentified the colorblind source of the constitutional ban on legally segregated public schools, and more with its progeny, beginning with *Green v. School Board of New Kent County*, 391 U.S. 431 (1968), which conferred on local authorities "an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," thereby moving the country down the road to affirmative action and mandatory racial balancing. *Id.* at 437.

75. The colorblind reading of the Fourteenth Amendment and its relation to affirmative action is illuminatingly discussed in Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV 71 (2013). The contention that affirmative action has often been detrimental to its intended beneficiaries is supported by sophisticated and extensive historical and statistical analysis in ABIGAIL THERNSTROM & STEPHEN THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997), RICHARD SANDER & STUART TAYLOR JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS ITS INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (Lori Hobkirk ed.,

Do not misunderstand. I am *not* arguing that originalism *correctly describes* the actual legal obligations of the Supreme Court, *because* following originalist principles will, in general, produce better moral and political results than those produced by following any reasonable alternative. Such an argument would confuse the *descriptive* claim that our existing legal norms are originalist with the *normative* claim that they *should be*. Because I believe in the structure of our constitutional government, I do believe that the *normative* case for ensuring that the Court remains within its originalist bounds is stronger than any *normative* case to the contrary. But that is a larger argument than any I have attempted here.

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, by which we identify, and affirm the authority of the legal obligations imposed and the legal powers conferred on citizens and government officials. Originalism would not be implicit in the rule of recognition if it were, as Professor Fallon suggests, routinely incapable of producing outcomes we recognize to be vitally important. My intent in discussing *Brown* is to rebut that suggestion.

CODA

This is not the place to discuss the defects in the Court's actual reasoning in *Brown* and its extension to related cases. However, I will mention its companion case, *Bolling v. Sharpe*, invalidating legalized school segregation in the District of Columbia. Decided concurrently with *Brown*, the ruling could not honestly be justified by appealing to Fourteenth Amendment restrictions on the states. The key factor articulated in the decision seems, instead, to have been nakedly political, as indicated by the following passage from the Chief Justice's decision.

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lessor duty on the Federal Government.[76]

This non-originalist reasoning is unacceptable. I would hope that the inference from:

> **Premise**: *The idea that such-and such is constitutional would offend my sense of justice*
> *to*
> **Conclusion:** *Therefore such-and-such is unconstitutional*

2012), and Gail L. Heriot, *A "Dubious Expediency" : How Race Preferential Admissions Policies Hurt Minority Students* HERITAGE FOUND. SPECIAL REPORT NO. 167 (2015).

76. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

would be an embarrassment to any serious theory of constitutional interpretation. But I am afraid it is not. Regarding *Bolling*, it may have been unthinkable immediately following *Brown* in 1954 that the states should be forbidden from maintaining racially segregated systems of public education while the federal government was allowed to operate such a system in the District of Columbia. But, as far as I can see, our actual Constitution did allow it. For this reason, I take it to be an argument *for* originalism that it does not justify *Bolling*, while taking it to be an argument *against* any non-originalist theory that validates it.

Normative considerations point in the same direction. Although the Constitution is not perfect, it could, I believe, have been amended after Brown in 1954 to declare that the status of publicly mandated racial segregation in schools in the District of Columbia must conform to that of the rest of the country. Had ratification taken time, an interim solution could have been provided by congressional legislation, which would, I expect, have quickly been forthcoming. The resulting involvement of the people and their elected representatives in outlawing legally segregated public education would have been of important benefit to the nation, which was sacrificed to the Court's unprincipled action in *Bolling*.

Considerations like these extend far beyond *Bolling*. As the examples piled up over the next several decades in which the Court clearly became unmoored from the Constitution, the idea inevitably took hold that it was capable of playing the role of a powerful and often partisan institution. The price we have paid for this is mounting and needs to be rolled back. A principled and invigorated originalism—which must never be tied to partisan passions of the moment—is urgently needed.