

Themes from Fallon on Constitutional Theory

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ABSTRACT

Law and Legitimacy in the Supreme Court by Professor Richard Fallon explores the relationship between normative legitimacy and the Supreme Court's role in constitutional interpretation and construction. This essay interrogates Fallon's ideas in the context of the great debate between originalism and living constitutionalism via the development of the themes. The first theme focuses on the relationship between Fallon's views and the originalist claim that constitutional interpretation and construction should be constrained by the original public meaning of the constitutional text. The second theme focuses on Fallon's development of the idea of reflective equilibrium as a method for constitutional theory and practice. The third theme focuses on the structure of normative constitutional legitimacy, contrasting Fallon's focus on the substantive justice of constitutional norms with an alternative approach that conceptualizes constitutional legitimacy as a multidimensional process value. The essay begins and ends with praise for Law and Legitimacy in the Supreme Court: Fallon's book is important, wide-ranging, and deep; it is essential reading for constitutional scholars.

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INTRODUCTION

Professor Richard Fallon's *Law and Legitimacy in the Supreme Court* is a deep, original, and important contribution to constitutional theory.¹ Fallon's book is extraordinary, ranging across fundamental issues in normative constitutional theory and connecting to important ideas from political philosophy, metaethics, and the philosophy of language. This essay explores three themes from Fallon and reflects on the significance of Fallon's work for contemporary constitutional theory.

The first theme concerns the originalist idea of constraint by the constitutional text: Fallon challenges the claim that the legitimacy of judicial review requires that judges be bound by the original meaning of the constitutional text. Part I of this essay situates Fallon's challenge in the context of contemporary originalist constitutional theory. Discussion of the first theme aims to reveal difficulties with Fallon's claim that the existence of multiple kinds of meaning undermines certain forms of constitutional originalism.

The second theme derives from Fallon's exploration of the foundational role of the idea of reflective equilibrium in normative constitutional theory. Part II of this essay suggests that the role of constitutional theory requires that reflective equilibrium be reconceptualized in terms of intersubjective agreement among citizens who affirm a plurality of moral, religious, and ideological perspectives: in other words, it is a *we* and not an *I* that should aim for a relationship of consistency and mutual support between our considered constitutional judgments. Exploration of the second theme aims to reveal a difficulty with a first-person singular approach to reflective equilibrium.

The third theme is prompted by Fallon's exploration of the idea of legitimacy. Part III of this essay suggests that constitutional legitimacy has a complex structure, including both multiple dimensions and functions. Investigation of the third theme aims to uncover the ways in which constitutional legitimacy constrains the options available to normative constitutional theory.

The three themes are woven together in the final part of the essay, which reflects the implications of Fallon's work for the great debate between originalism and living constitutionalism. Part IV of the essay suggests the ways in which

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

originalists might respond to Fallon's important, deep, and learned challenges to the case for constitutional originalism.

For readers who are already familiar with the landscape of contemporary constitutional theory, I suggest that you turn directly to Part I.B, which begins on page 302. Part I.A provides a survey of the scholarly debate between originalism and living constitutionalism and explains foundational concepts such as the interpretation-construction distinction: this part of the essay will be essential for readers who have not been immersed in recent scholarship that addresses the great debate between originalists and living constitutionalists. If you are not up on recent debates about different forms of contemporary originalism, Part I.A is for you.

I. FIRST THEME: CONSTRAINT BY THE MEANING OF THE CONSTITUTIONAL TEXT

Chapters Two and Three of *Law and Legitimacy in the Supreme Court* investigate ideas about the meaning of the constitutional text. Chapter Two, subtitled "Original Public Meaning," poses direct challenges to Public Meaning Originalism.² Chapter Three, subtitled "Varieties of History That Matter," makes the case for the relevance of post-ratification history to the meaning of the constitutional text. The discussion that follows contextualizes these chapters via a brief introduction to the great debate between originalism and living constitutionalism.

A. *A Short Introduction to Originalism and Living Constitutionalism*

The great debate between originalism and living constitutionalism has a long history and a complex structure. Both originalism and living constitutionalism are families of constitutional theories. The contemporary version of the debate is decades old and the many arguments and counterarguments with rebuttals and rejoinders defy concise summary. The discussion that follows will introduce the most prominent form of originalism, Public Meaning Originalism, and then briefly explore some of the more important forms of living constitutionalism.

1. Public Meaning Originalism

The word "originalism" was introduced in 1980 by Professor Paul Brest in an article entitled, "The Misconceived Quest for the Original Understanding,"³ in which Brest defined his new word:

By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.⁴

2. See FALLON, *supra* note 1, at 71–82.

3. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Brest reports that he believes he coined the term. E-mail from Paul Brest, Professor Emeritus, Stanford Law School, to author (Dec. 2, 2009, 6:01 PM) (on file with author).

4. Brest, *supra* note 3, at 204.

Brest's definition encompasses two distinct versions of originalism, one focusing on the original *intentions* of the Framers and Ratifiers, and a second that focuses on the *meaning* of the constitutional text.⁵ Beginning in the 1980s, Public Meaning Originalism emerged as the dominant form of originalism. As Fallon observes,

Today, most originalists maintain that the Constitution's meaning is its "original public meaning"—defined, roughly, as the meaning that a reasonable and informed member of the public would have ascribed to it at the time of its promulgation.⁶

The discussion that follows will focus on three core claims made by public meaning originalists; a full discussion would include many other ideas.⁷ The first idea is that the meaning of the constitutional text is fixed at the time each constitutional provision is made public. The second idea is that this fixed meaning should constrain practice. The third idea is that the meaning of the constitutional text is best understood as its public meaning—the meaning communicated to the public at the time each provision was made publicly available. Each of these three ideas is explored in the discussion that follows.

The Fixation Thesis is the claim that the meaning of the constitutional text is fixed at the time each constitutional provision is made public.⁸ The case for the Fixation Thesis relies on general facts about the way we interpret old texts. Imagine that you wanted to determine the meaning of a letter written in the eighteenth century. Because the meaning of words changes over time, you would want to know what the words meant at the time the letter was written. And because meaning is influenced by context, you would want to know about the context in which the letter was written. You would not want to know what the letter would have meant if it had been written today, using a contemporary vocabulary.

The fact that conventional semantic meanings change over time is called "linguistic drift" or "semantic shift." The phrase "domestic violence" now refers to violence within a family, including spouse abuse, child abuse, and elder abuse. The same phrase appears in Article IV of the Constitution, but in the eighteenth century, this contemporary meaning was unknown. When Article IV was drafted, "domestic violence" referred to riots, insurrections, rebellions, and other forms of

5. Since the 1980s, additional forms of originalism have emerged including Original Methods Originalism and Original Law Originalism. The discussion that follows focuses on Public Meaning Originalism.

6. FALLON, *supra* note 1, at 47.

7. Public meaning originalists advance many other claims, including but not limited to the following: (1) the claim that the constitutional text is only moderately underdeterminate, (2) the claim that there is a rigorous and replicable methodology for discovering the original meaning of the constitutional text, (3) the claim that adherence to the original meaning of the constitutional text is feasible, and (4) the claim that a transition to originalism is possible giving realistic assumptions.

8. Lawrence B. Solum, *The Fixation Thesis: The Original Meaning of the Constitutional Text*, 91 NOTRE DAME L. REV. 1, 1 (2015).

political violence within the boundaries of a state.⁹ The Fixation Thesis states the obvious: the meaning of Article IV is the eighteenth century meaning and not the meaning that the same words might have if they were included in a legal text written in the twenty-first century.

Fallon's stance towards the Fixation Thesis is somewhat unclear. He writes, "some of the puzzles about the meaning of constitutional language may stem from the possibility—and I would say the fact—that meanings can change over time."¹⁰ Originalists recognize that words and phrases change their meaning over time (linguistic drift), but deny that the communicative content of the constitutional text itself changes. The accident of linguistic change should not be viewed as a mechanism for constitutional amendment. For example, the phrase "domestic violence" in Article IV should not be viewed as an authorization for Congress to pass legislation addressing spouse abuse, child abuse, and elder abuse, although at least one scholar has argued for the plausibility of that result.¹¹ A more important example is the word "commerce," which arguably has come to have a broader meaning today than it did in 1787.¹²

It is not clear whether Fallon believes that the content conveyed by the constitutional text changes after the fact because of linguistic drift—an implausible view.¹³ Or he might be making the descriptive claim that the meanings assigned to the constitutional text by the Supreme Court are sometimes inconsistent with the original meaning: if this is his claim, then originalists agree. This kind of "multiple meaning" is the focus of originalist critiques of some forms of living constitutionalism.

The *Constraint Principle* is the claim that the original public meaning of the constitutional text should constrain constitutional practice, including the decision of cases by judges and constitutionally salient actions by executive and legislative officials and institutions.¹⁴ The version of the Constraint Principle that will be discussed in this essay is Constraint as Consistency: the basic idea is that the norms of constitutional law should be consistent with and fairly derivable from the public meaning of the constitutional text.¹⁵ A more precise version of the Constraint

9. See *id.* at 16–18.

10. FALLON, *supra* note 1, at 48.

11. See Mark S. Stein, *The Domestic Violence Clause in "New Originalist" Theory*, 37 HASTINGS CONST. L.Q. 129 (2009).

12. See Randy E. Barnett, *The Original Meaning of Commerce*, 68 U. CHI. L. REV. 101 (2001).

13. See generally Solum, *supra* note 8.

14. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (March 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

15. The Constraint Principle applies to all constitutional practice, including actions other than judicial decisions that do not involve the articulation of general norms of constitutional law. The statement in text would need to be amended to make it clear that all constitutional practice should be consistent with the constitutional text—articulated constitutional norms are subset of constitutional practice.

Principle is provided in a footnote.¹⁶ Because the Constraint Principle is a normative claim, it must be justified by normative arguments. A detailed summary of the case for the Constraint Principle is beyond the scope of this essay. Elsewhere, I argue that the best case for constraint rests on two clusters of arguments. The first cluster focuses on the idea of the rule of law. The second cluster focuses on the idea of legitimacy: the relationship between legitimacy and constraint is discussed in the remainder of this essay in connection with the discussion of Fallon's exploration of constitutional legitimacy in *Law and Legitimacy in the Supreme Court*.¹⁷

The *Public Meaning Thesis* is the claim that the best understanding of the meaning of the constitutional text is its original public meaning.¹⁸ Getting precise about the Public Meaning Thesis is tricky, because the word "meaning" is itself ambiguous.¹⁹ The Public Meaning Thesis is not about "meaning" in the sense of purpose or legal effect: it is a claim about the sense of the word "meaning" that points to the communicative content of the constitutional text, roughly the set of propositions that were conveyed by the text in the context in which the text was made public.²⁰ The Public Meaning Thesis has both a descriptive and normative

16. Here is the current version of Constraint as Consistency as formulated in Solum, *The Constraint Principle*:

Constraint as Consistency. Constraint as Consistency is the conjunction of three requirements and three qualifications as follows:

Requirement One: Constitutional doctrines and the decisions of constitutional cases must be consistent with the "translation set." The translation set consists of the propositions of law that express the communicative content of the constitutional text.

Requirement Two: All of the communicative content of the constitutional text and its logical implications must be reflected in the legal content of constitutional doctrine.

Requirement Three: All of the content of constitutional doctrine must be fairly traceable to the direct translation set, with traceable content including precisifications, implementation rules, and default rules presupposed (or otherwise supported) by the text.

Qualification One: Requirements One, Two, and Three operate only to the extent that the communicative content of the constitutional text is epistemically accessible given appropriate levels of epistemic reasonableness; they are not violated by departures from unknown communicative content.

Qualification Two: If Requirements One, Two, and Three are not satisfied, then constitutional practice should be brought into compliance with constraint over time, giving due regard to the effects of constitutional change on the rule of law.

Qualification Three: Requirements One, Two, and Three are defeasible in limited and extraordinary circumstances, as specified by the best theory of defeasibility.

Solum, *supra* note 14.

17. *See infra* Part III.

18. Lawrence B. Solum, *The Public Meaning Thesis* (Aug. 20, 2015) (unpublished manuscript) (on file with author).

19. *See infra* text accompanying note 66.

20. The word "proposition" is used to refer to the norm or norms communicated by a clause or set of clauses. Propositions are to sentences as concepts are to words and phrases. Just as the word "law" represents a concept that can be represented by other words (*loi*, *ley*, *recht*) in a language other than English, so too do constitutional clauses represent propositions that could be formulated by using other words, either in English or in another natural language. The content of the constitutional text is the set of propositions conveyed by the text given the context of constitutional communication. The original

dimension. Descriptively, the Public Meaning Thesis expresses the idea that the constitutional text was written for the public, usually in ordinary English but sometimes using technical terms. Those technical terms were recognizable as such and thereby accessible to the public with reasonable effort. Normatively, the Public Meaning Thesis expresses the claim that in cases of divergence between the communicative intentions of the drafters of particular constitutional provisions and the public understanding of those provisions, it is the public meaning (and not the private drafters' meaning) that should constrain constitutional practice.

The full case for the Public Meaning Thesis is provided elsewhere.²¹ On this occasion, however, we can briefly preview some of the evidence for the claim that the constitutional text was written for the public. One source of evidence draws on the history of the ratification process. The historian Pauline Maier described that process as follows:

Constitutional conventions and direct popular ratification of constitutions entered American practice only because the townsmen of Massachusetts not only understood the prevailing theoretical assumptions of their time but found ways of reducing them to practice. In effect, the sovereign people invented the institutions through which they could exercise their sovereignty.²²

The idea that the constitution was written for the public has been widely accepted by judges and scholars. Here is how the first Justice Roberts put it: “[t]he Constitution was written to be understood by the voters.”²³ The great Supreme Court Justice and treatise writer Joseph Story expressed the idea this way:

In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.²⁴

public meaning of the text is the set of propositions conveyed by the text to the public at the time each provision was framed and ratified.

21. See Solum, *supra* note 18.

22. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* 139 (2010).

23. *United States v. Sprague*, 282 U.S. 716, 731 (1931).

24. JOSEPH L. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 451 (1833); see also *State of Rhode Island v. Palmer*, 253 U.S. 350, 398 (1920) (“[I]n the exposition of statutes and constitutions, every word ‘is to be expounded in its plain, obvious, and common sense, unless the

In other words, the situation of constitutional communication includes the public in the intended audience of the constitutional text; in an important sense, citizens were the primary intended readership of constitutional text. Given that the constitution aims to communicate to the public (but also to officials, including judges, legislators, and executive officers), the drafters of the constitutional text needed to write a document that had a publicly accessible meaning, using words and phrases in their ordinary senses and limiting technical language and terms of art to limited instances that could be identified by the public.²⁵

A full understanding of contemporary public meaning originalism requires the introduction of three additional ideas: the distinction between expected applications and meaning, the distinction between interpretation and construction, and the notion of moderate constitutional underdeterminacy.

The first additional idea is the distinction between “original expected applications” and “original public meaning.” Some early originalists may have believed that the application expectations of the Framers (or ratifiers or the public) should be binding. As Fallon puts it, “some originalists assume that the relevant inquiry should focus on how people in the Founding generation would have expected relevant language to be applied.”²⁶ Thus, if the Framers believed that capital punishment would not be prohibited by the Eighth Amendment, their application belief itself should be binding on us today. Most public meaning originalists reject this idea. Application beliefs are evidence of communicative content. If the Framers believed that capital punishment was not cruel, that is evidence that counts in favor of an understanding of the meaning of cruel that would not apply to capital punishment.²⁷ But this evidentiary role is not binding. If the balance of evidence favors an interpretation of cruel that applies to capital punishment, then it can, at least in principle, turn out that the application beliefs of the Framers were mistaken.

The second additional idea is the interpretation-construction distinction, which differentiates “meaning” from “legal effect.” The distinction can be formulated as follows:

context furnishes some ground to control, qualify or enlarge it,’ and there cannot be imposed upon the words ‘any recondite meaning or any extraordinary gloss.’”) (citing STORY at § 451).

25. From the perspective of Public Meaning Originalism, the key idea is that the meaning of the constitutional text should be publicly accessible. Technical meanings that are apparent on the face of the text, given the context of constitutional communication, are permissible. Hidden technical meanings are not.

26. FALLON, *supra* note 1, at 48.

27. This example is fictional, because the actual constitutional text uses the phrase “cruel and unusual.” The word “unusual” may play an important role in the actual meaning of the clause. See John Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); John Stinneford, *The Original Meaning of “Cruel”*, 105 GEO. L.J. 441 (2017).

Constitutional Interpretation is the activity that discerns the meaning (understood as communicative content conveyed by linguistic meaning in context) of the constitutional text.

Constitutional Construction is the activity that determines the legal effect (including the decision of constitutional cases and the specification of constitutional doctrines) given to the constitutional text.

Sometimes, the interpretation-construction distinction is parsed as a description of two alternative activities (either interpretation or construction): for example, Fallon writes, “Some originalists use the term “construction” to refer to the judicial function of resolving ambiguities and giving content to vague constitutional commands.”²⁸ On this point, Fallon’s understanding is incorrect. Every time the meaning of the constitutional text is applied to a particular issue or case, both interpretation and construction are involved. Interpretation and construction are best understood via a two-step model. Step one is interpretation, discovering the meaning (communicative content) of the constitutional provision or structure. Step two is construction, determining the legal effect to be given to the constitutional text. This two-step model is a rational reconstruction; the psychological processes may be more complex: for example, a judge might start with a hypothesis about legal effect, then track back to meaning, and then revise the tentative view of legal effect. There are many other possibilities. The important point is that interpretation and construction are always involved when the meaning of the constitutional text is applied to a particular case or issue.

Although the idea that interpretation and construction are mutually exclusive alternatives is incorrect, this mistake is understandable, because interpretation and construction interact differently in cases in which the meaning of the text is underdeterminate and those in which the meaning is sufficiently precise to resolve the issue or case at hand. When the meaning of the constitutional text is sufficiently precise so as to determine the outcome of the issue or case, then we might say that we are in the “interpretation zone.” The phrase “interpretation zone” should be understood as a metaphor for the set of issues and cases in which the meaning of the constitutional text suffices to resolve the issue or case.²⁹ Originalists believe that cases in the interpretation zone should always be controlled by the original public meaning of the constitutional text, but living constitutionalists disagree.

The third additional idea comes into play when the communicative content of the constitutional text is underdeterminate. This can occur for a variety of reasons, including (1) the constitutional provision is vague or open-textured,³⁰

28. FALLON, *supra* note 1, at 43.

29. Samuel P. Jordan & Christopher K. Bader, *State Power to Define Jurisdiction*, 47 GA. L. REV. 1161, 1213 (2013) (using the phrase “interpretation zone”); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 456 (2018).

30. Vague terms admit of borderline cases. “Open texture” is more complex, but as I use the term it refers to words and phrases that have a core of determinate meaning and can be extended in various ways. Family resemblance concepts are open textured.

(2) the provision is irreducibly ambiguous,³¹ (3) the constitutional structure creates a gap,³² or (4) the constitutional text involves a contradiction with respect to a particular issue or case.³³ In such cases, we might say that the constitutional text creates a “construction zone.”³⁴ Given that the communicative content of the constitutional text is underdeterminate, some method or theory of constitutional construction must be employed to resolve the issue. One prominent approach is based on the idea that cases and issues in the construction zone should be guided by the original function which the underdeterminate constitutional provision was designed to serve.³⁵ There are other approaches; for example, constitutional construction might be guided by a default rule of deference to democratic institutions.³⁶ In the construction zone, a theory of constitutional construction provides guidance for resolving underdeterminacy within the limits imposed by the text.

2. Living Constitutionalism and the Alternatives to Originalism

For the purposes of this essay, I will simply stipulate that nonoriginalist constitutional theories are forms of “living constitutionalism.”³⁷ Nonoriginalist theories usually deny the truth of the Constraint Principle: in other words, most living constitutionalists deny the normative claim that constitutional practice should be consistent with the original public meaning of the constitutional text.³⁸ This negative feature of living constitutionalist theories is almost always combined with some account of an alternative to originalism.

31. By irreducible ambiguity, I mean to refer to ambiguity that is not resolvable by context. Irreducible ambiguity is rare, because almost all cases of constitutional ambiguity are easily resolved by context. For example, the word “state” is ambiguous. In one sense it refers to “states of affairs” and in another sense it refers to the constituent “States” of the United States of America. The constitutional text uses the word “State” in the second of these two senses; readers typically resolve the ambiguity automatically, without even noticing its presence.

32. “Gaps” exist when the constitutional structure requires a constitutional norm to resolve an issue but fails to provide the norm. The lack of a constitutional provision governing the removal of executive officials may be an example of a gap.

33. It is not clear that there are any contradictions in the constitutional text that are not resolved in familiar ways. For example, amendments may create contradictions. The Eighteenth Amendment (prohibition) is inconsistent with the Twenty-First Amendment (repeal of prohibition), but this contradiction is resolved by the Article V amendment process and the established legal rule that a later enactment can repeal an earlier enactment.

34. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).

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

36. For discussion of the default rules approach, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 511-524 (2013).

37. This stipulation finesses a complex set of terminological and conceptual debates. See Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (exploring distinctions between “originalism,” “living constitutionalism,” and “hybrid theories”).

38. However, it is possible for nonoriginalists to deny other originalist claims. For example, a nonoriginalist could deny the Fixation Thesis and claim that the meaning of the constitutional text changes over time in response to linguistic drift. A nonoriginalist might accept Fixation and Constraint but affirm the radical indeterminacy of the constitutional text with the implication that almost any conceivable constitutional doctrine can be squared with the (indeterminate) meaning of the text.

One way to approach the contemporary debate between originalists and living constitutionalists is to identify the various forms of living constitutionalism. Here are some of the major forms:

Constitutional Pluralism: this is the view that law is a complex argumentative practice with plural forms of constitutional argument. Professors Philip Bobbitt, Stephen Griffin, and Richard Fallon have all advanced versions of pluralism.³⁹

Moral Readings: this is the view that the constitutional law is the outcome of the constructive interpretation of the legal materials that makes the law the best that it can be. This view originates in the work of Ronald Dworkin and is now associated with James Fleming.⁴⁰

Common Law Constitutionalism: this is the view that the content of constitutional law should be determined by a common-law process. This theory is associated with Professor David Strauss.⁴¹

Popular Constitutionalism: this is the view that “We the People” can legitimately change the Constitution through processes such as transformative appointments that do not formally amend the text. Different versions of this theory are associated with Bruce Ackerman, Barry Friedman, and Larry Kramer.⁴²

Extranational Constitutionalism: this family of theories holds that constitutional norms outside of a national legal system permit judges to adopt constitutional norms that invalidate, alter, or supplement a national constitution. Members of the family include the following:

Transnational Constitutionalism: this is the view that transnational constitutional norms, discovered via comparative constitutionalism and international law norms, should inform the interpretation of the Constitution.⁴³

39. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”).

40. See RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–3 (1996). The Moral Readings theory is now strongly associated with James Fleming’s Dworkinian theory of constitutional interpretation and construction. See James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 515 (2014).

41. DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015).

42. 1 BRUCE ACKERMAN, WE THE PEOPLE (1991); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

43. See Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CON. L. 606 (2015).

Global Constitutionalism: this is the view that a global unwritten constitution can be enforced by domestic courts.⁴⁴

Treaty Constitutionalism: this is the view that international treaties are superior in the hierarchy of authority to the United States Constitution and that such treaties authorize domestic courts to engage in living constitutionalism.⁴⁵

Multiple Meanings: this is the view that the constitutional text has multiple linguistic meanings and that constitutional practice should choose between these meanings on a case by case basis. Versions of this idea can be found in the work of Richard Fallon and Cass Sunstein.⁴⁶

Superlegislature: this is the view that the Supreme Court should act as an ongoing constitutional convention with the power to adopt amending constructions of the constitutional text on the basis of the same kinds of reasons that would be admissible in a constitutional convention. Although the superlegislature view is rarely endorsed in public, Professor Brian Leiter has explicitly endorsed the idea that the Supreme Court should be viewed as a superlegislature.⁴⁷

Thayerianism: this is a family of views that require courts to defer to Congress, with three variants:

Constrained Thayerianism: this is the view that courts should defer to Congress but that Congress itself should be constrained by the original meaning of the constitutional text.⁴⁸

Unconstrained Thayerianism: this is the view that courts should defer to Congress and that Congress should have the constitutional power to revise the constitutional text, either by adopting amending legislation or creating implicit amendments through ordinary statutes.⁴⁹

Representation Reinforcement Thayerianism: this is the view that courts should defer to Congress except when judicial review is necessary to preserve democracy, including protection of discrete and insular minorities and protection of democratic processes.⁵⁰

44. See Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 GERMAN L.J. 1 (2012).

45. So far as I know, this view has no adherents who endorse it explicitly, but it may be implicit in the idea that the international human rights articulated in various treaties should shape domestic constitutional law.

46. Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); Cass R. Sunstein, *Formalism in Constitutional Theory*, 32 CONST. COMMENT. 27 (2017); Richard H. Fallon, Jr., 1235–1308.

47. Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

48. James Bradley Thayer, *The Origin and Scope of American Constitutional Law*, 7 HARV. L. REV. 129 (1893).

49. It is unclear to me whether this view has been endorsed explicitly.

50. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

Constitutional Antitheory: there are four views that are “antitheoretical”⁵¹ in the sense that they deny that constitutional practice should be guided by any normative theory, whether that theory be originalist or nonoriginalist:

Particularism: this is the view that constitutional practice should be guided by salient situation-specific normative considerations in particular constitutional situations.⁵²

Pragmatism: this is a similar view, associated with Judge Richard Posner⁵³ (and in a different form with Daniel Farber and Suzanna Sherry⁵⁴) that constitutional decisions should be made pragmatically on the basis of various normative considerations.

Eclecticism: this is the view that different judges should embrace different approaches to constitutional interpretation and construction, and that even a single judge should adopt different approaches on different occasions.⁵⁵

Opportunism: this is the view that theoretical stances should be deployed strategically to achieve ideological or partisan goals.⁵⁶

Constitutional Rejectionism: these views reject the United States Constitution as an authoritative source of law.⁵⁷

Anticonstitutionalism: this is the view that the communicative content of constitutions, in general, should play no role in constitutional practice.⁵⁸

Constitutional Replacement: these theories would allow the text of a normatively attractive replacement constitution to play a role in constitutional practice but reject any constraining role for the current Constitution of the United States.⁵⁹

51. See ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM (Stanley G. Clarke & Evan Simpson eds. 1989); SOPHIE GRACE CHAPPELL, INTUITION, THEORY, AND ANTI-THEORY IN ETHICS (2015); NICK FOTION, THEORY VS. ANTI-THEORY IN ETHICS: A MISCONCEIVED CONFLICT (2014).

52. For an introduction, see Jonathan Dancy, *Moral Particularism*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/moral-particularism/> (2013); see also JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004); Brad Hooker, *Moral Particularism—Wrong and Bad*, in MORAL PARTICULARISM (Hooker & Little eds. 2000).

53. Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004) (“The ultimate criterion of pragmatic adjudication is reasonableness.”).

54. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

55. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 135 (2016).

56. So far as I know, no one owns up to being an opportunist.

57. Constitutional Rejectionist theories might be classified as different in kind from other forms of Living Constitutionalism. To the extent that they affirm constitutionalism, but reject the constitutional text, I believe they are best classified as versions of Living Constitutionalism. To the extent that they reject constitutionalism altogether, then they ought to receive a different classification.

58. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012).

59. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

In addition to these ten versions of living constitutionalism, Fallon seems to add an eleventh in *Law and Legitimacy in the Supreme Court*:

Reflective Equilibrium Theory: this is the view that the decision of constitutional cases should proceed through a process of reaching reflective equilibrium between the judge's considered views of particular cases and issues, on the one hand, and their more general judgments regarding matters of constitutional principle, on the other.⁶⁰

Fallon's views on reflective equilibrium will be discussed in greater detail below in Part II of this essay.

These eleven forms of living constitutionalism all reject the Constraint Principle. There is, however, a twelfth version of living constitutionalism that accepts constraint but rejects the Fixation Thesis:

Contemporary Ratification Theory: this is the view that the contemporary meaning of the constitutional text should constrain constitutional practice, because that meaning is supported or accepted by contemporary majorities. Changes in meaning produced by linguistic drift or successful judicial alteration of meaning should constrain constitutional actors, even if the meaning resulting from these linguistic changes are inconsistent with original meaning.⁶¹

It seems likely this list is incomplete and that new variations of living constitutionalism will continue to arise. In addition, there is the possibility of hybrid views, which combine elements of originalism and living constitutionalism.⁶² For example, one might affirm the view that originalism should govern the structural provisions of the constitution, but that some form of living constitutionalism should govern the rights-conferring provisions. Many other permutations are possible, including hybrid forms of living constitutionalism; for example, common-law constitutionalism might be employed for some constitutional provisions, while others were governed by a Thayerian approach of deference to democratic institutions.

Once we attempt to list the various forms of living constitutionalism, it becomes apparent that the contrast among different forms of living constitutionalism is

60. It is not completely clear that Fallon views Reflective Equilibrium Theory as a distinct first-order normative constitutional theory. It is at least possible that he views it as a second-order meta theory—a theory about the kinds of normative considerations that should govern selection of first-order normative constitutional theories. Even if this is the case, Reflective Equilibrium Theory occupies a position in the space of first-order normative constitutional theories. For further discussion of this issue, see *infra* text accompanying notes 107–108.

61. See Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269 (2013). Hillel Levin has developed a Contemporary Meaning Theory of statutory interpretation. See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103 (2012).

62. See Solum, *supra* note 37 (discussing hybrid constitutional theories).

substantial. Common Law Constitutionalism is very different from Unconstrained Thayerianism; the Moral Readings Theory is fundamentally opposed to Constitutional Particularism. For this reason, it is important to realize that the great debate between originalism and living constitutionalism actually consists of many different debates—including debates between and among living constitutionalists.

Because there are multiple and diverse forms of originalism and living constitutionalism, meaningful discussion cannot proceed by comparing “generic originalism” with “generic living constitutionalism.” Instead, what is required is “pairwise comparison” of a particular originalist theory with a particular form of living constitutionalism.⁶³ This essay undertakes a partial pairwise comparison of Public Meaning Originalism with Reflective Equilibrium Theory—with an emphasis on the qualifier “partial,” since the discussion here is incomplete in many respects.

B. Fallon on Multiple Meanings

At this point, we turn from the general structure of the great debate to Fallon’s distinctive position on constitutional meaning. In particular, Fallon advances the claim that the constitutional text has multiple meanings from which courts can choose. The Public Meaning Thesis denies this and claims that the original public meaning of the constitutional text should play an exclusive role in constitutional practice. Fallon introduces his idea of multiple meanings as follows:

[T]here are multiple senses of meaning, different ones of which may seem more apt or salient in some contexts than in others, depending on the reasons for which the question of an utterance’s meaning arises.⁶⁴

Unpacking this idea requires us to grasp both the essential truth of Fallon’s insight and the problematic implications that Fallon wrongly believes are consequences of the phenomenon of multiple meanings.

1. The Meaning of Meaning

As noted above,⁶⁵ the word “meaning” has multiple senses; it is ambiguous.⁶⁶ Sometimes “meaning” is used to refer to legal effects or applications. For example, one could ask, “What does First Amendment freedom of speech mean for my defamation suit? Does it provide me a defense?” We can call this *meaning in the*

63. See Solum, *supra* note 37 (making the case for pairwise comparison).

64. FALLON, *supra* note 1, at 48–49.

65. See *supra* text accompanying notes 18–20.

66. On the ambiguity of “meaning,” see C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* 186–87 (1923) (exploring different senses of “meaning”); Michael L. Geis, *The Meaning of Meaning in Law*, 73 WASH. U. L.Q. 1125 (1995); A. P. Martinich, *Four Senses of ‘Meaning’ in the History of Ideas: Quentin Skinner’s Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009); Lawrence B. Solum, *Intellectual History As Constitutional Theory*, 101 VA. L. REV. 1111, 1115–16 (2015).

applicative sense. This kind of meaning involves constitutional construction: the meaning of a constitutional provision can be its legal effect.

“Meaning” is also used in a completely different sense that involves the purpose or motive that produced a constitutional provision. For example, we can ask the question “What did the drafters mean to accomplish through the Privileges or Immunities Clause of the Fourteenth Amendment?” We can call this *meaning in the purposive sense*. Purpose or motive may be relevant to constitutional interpretation, because the public purpose of a constitutional provision may aid in the resolution of semantic or syntactic ambiguities.

Finally, “meaning” can be used in the sense of the communicative content of a legal text. We sometimes call this “linguistic meaning,” but communicative content is a function of both language and context—or “semantics” and “pragmatics,” to use more technical terms.⁶⁷ For example, we might ask what the framers meant by using the phrase “arms” in the Second Amendment: were they referring to weapons or the upper limbs of the human body? We can call this *meaning in the communicative sense*. It is this third kind of meaning that is the object of constitutional interpretation for originalists.

2. Linguistic Meanings

The next step in our recovery of the essential truth in Fallon’s insight is crucial. There is more than one kind of linguistic meaning. Fallon suggests the following list:

But I begin with examples drawn from constitutional law in identifying no fewer than 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.⁶⁸

The discussion that follows investigates each of these five types of meaning in relationship to original meaning.

a. Intended Meaning

First, consider Fallon’s notion of “intended meaning.” Because of the ambiguity of the word “meaning” itself,⁶⁹ the phrase “intended meaning” is ambiguous. In one sense, it can refer to intended applications or legal effects, but that kind of “intended meaning” is not a form of content or linguistic meaning. In the context of “linguistic meaning,” the relevant kind of “intended meaning” is the

67. The distinction between semantics and pragmatics can be theorized in different ways. For one explication of the distinction, see Kent Bach, *The Semantics-Pragmatics Distinction: What It Is and Why It Matters*, S.F. ST. UNIV. DEP’T PHIL., Dec. 11, 2008.

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

69. See OGDEN & RICHARDS, *supra* note 66.

communicative content that the author of a constitutional provision intended to convey to readers. We might call this kind of intention a “communicative intention.” The great philosopher of language, Professor Paul Grice, suggested that this kind of “intended meaning” should be understood as what he called “speaker’s meaning,” an idea that we can restate as follows:⁷⁰

Speaker’s Meaning: the speaker’s meaning of an utterance is the meaning that the speaker intended to convey to the listener via the listener’s recognition of the speaker’s communicative intention.

Grice used the phrase “speaker’s meaning” because he was focused on conversations—face-to-face oral communication. Written communications involve writers, authors, or drafters—so we need another term for written legal texts.

The equivalent of Grice’s idea of speaker’s meaning in the context of constitutional communication is drafter’s meaning:

Drafter’s Meaning: the drafter’s meaning of a constitutional provision is the meaning that the drafter of the provision intended to convey to the readers via the reader’s recognition of the drafter’s communicative intentions.

This kind of meaning is a prerequisite to the process of constitutional communication. Without drafter’s communicative intentions, the process of constitutional communication could not begin. Drafter’s intentions are required to get the “meaning ball” rolling. But drafting is just the start of a complex communicative process with multiple stages, e.g., drafting, debating in convention, ratifying, and implementation.

One of the earliest criticisms of original intentions originalism was the so-called “summing problem.”⁷¹ There were many Framers and ratifiers, and it would be difficult for their first-order communicative intentions to mesh. Notice, however, that the delegates to the Philadelphia Convention did not draft the constitutional text: that task was performed by individuals and individuals can form communicative intentions. Most of the constitutional text of 1787 was drafted by Gouverneur Morris. When the text of the constitutional text passed from Morris

70. See Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005) (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 112–16 (1989)); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005) (citing PAUL GRICE, *Utterer’s Meaning, Sentence-Meaning, and Word-Meaning*, in *STUDIES IN THE WAY OF WORDS* 117, 123 (1989)); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006) (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989)).

71. The summing-problem objection to originalism was first identified in Paul Brest, *The Misconceived Quest for the Original Understanding*, *supra* note 3, at 214–15, and traces its origins to a similar critique of intentionalism as a theory of statutory interpretation, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).

to the Committee of Style, the other members of the Committee were readers to whom Morris conveyed his communicative intentions. The Committee of Style then proposed Morris's draft to the whole Convention; once again, the members of the Convention are readers, who aim to recover the drafter's meaning of the text. The same process is iterated when the Philadelphia Convention proposes the text for ratification and the text is read by members of the ratifying conventions, who then ratify the text, giving it the force of law.

How can this complex multistage process involving multiple actors produce a singular public meaning (communicative content accessible to the public)? The answer to this question involves the distinction between first-order and second-order communicative intentions. This distinction was baked into Grice's idea of Speaker's Meaning: a speaker forms a first-order communicative intention (the proposition to be conveyed) and then forms a second-order communicative intention, to convey the first-order communicative intention via the listener's recognition of the first-order intention. The members of the Philadelphia Convention formed an intention to propose the text of the constitution. To do this, they first had to form a second-order communicative intention to propose the Drafters' Meaning of the text. But forming that intention did not require that the Framers' first-order intentions meshed. This is obvious in the case of a legislature, where individual legislators form a second-order intention with respect to bills that they have not even read.

The Public Meaning Thesis maintains that at each stage of this complex multistage process of constitutional communication, the participants understand the text as communicating to the public.⁷² Thus, the Framers formed a second-order intention to convey the public meaning of the text to the public and the delegates to the ratifying conventions. The members of the ratifying conventions formed a second-order intention to convey public meaning to the officials and judges who would implement the new Constitution. Complex multistage communication requires the meshing of second-order communicative intentions, but that does not require that the participants form identical first-order communicative intentions. Public meaning requires that drafters, Framers, and ratifiers form a second-order intention to convey public meaning—and that is what happened in the actual process of constitutional communication.⁷³

This same point can be conveyed without the technical jargon. Everyone understood the constitutional text was drafted by individuals. They did what we always do when we grasp the meaning of an utterance or writing; they figured out what the drafter was trying to convey. And they understood that the constitutional text was written for the public. So, they looked for the public meaning. We do similar things all the time when we read any text (whether it be a judicial opinion

72. Solum, *supra* note 18.

73. This picture of constitutional communication does not assume that each and every participant forms a second-order communicative intention to convey public meaning. Something like substantial agreement would suffice.

or the rules of a club) that goes through a multistage process. We aim to recover the communicative content of the text—based on our understanding of the intended audience for which the text was written—among other things. Of course, the rules of a club are written for club members, not the public; judicial opinions are written for lawyers and judges, not the public. But the basic structure of the communication process is the same. What is remarkable is that many legal theorists talked themselves into the idea that the summing problem made this kind of communication impossible, when they had overwhelming evidence that it is not only possible, but it actually happens countless times each and every day.⁷⁴

b. Literal Meaning

What is the relationship of Drafter's Meaning and Original Public Meaning to what Fallon calls "literal or semantic meaning" (number two on his list)? Grice used the phrase "sentence meaning"⁷⁵ to refer to the idea to which Fallon points. The sentence meaning of an utterance or text is acontextual and independent of the intentions of the speaker or drafter on a particular occasion.

Literal meanings are enabled by regularities in usage. Words and phrases have conventional semantic meanings, roughly expressed by dictionary definitions. The conventional semantic meanings of words and phrases are combined by syntax, the regularities in the structure of sentences that we sometimes call rules of grammar and punctuation. Therefore, literal meanings are compositional: the literal meaning of a text is a function of the meanings of words and phrases (units of meaning) and syntax and punctuation (relationships between the units of meaning).

Semantic or literal meaning is a building block of communicative content, but the literal meaning of the constitutional text would not have been understood by the participants in the process of drafting, ratification, and implementation as the relevant meaning. Bare semantic meaning is sparse and ambiguous. Read literally, many provisions of the constitutional text would appear to apply to all the world, but in context it is clear that many of them are implicitly restricted to the territory or government of the United States. Read literally, many provisions are radically ambiguous: "Senate" could be the Roman Senate, but in context it is clear that "Senate" refers to the newly created chamber of the United States Congress. Literal meaning exists, but it is not a plausible candidate as an object of constitutional interpretation.

74. There is a summing problem for a different kind of intention. Sometimes when we discuss the intentions of the Framers or legislative intention, we are interested in the "will" or application intentions of the body that authorizes a text. Thus, we might ask whether the Framers intended the interstate commerce clause to authorize a particular kind of regulation (e.g., a prohibition on interstate shipment of lottery tickets). These are first-order application intentions: the summing problem does apply to them, as do many other problems, including the obvious problem that in many cases the members of the authorizing body will not have formed application intentions at all. This problem is not solved by resorting to the idea of a second-order application intention, but discussion of that issue is outside the scope of this essay.

75. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 117–37 (1989).

c. Contextual Meaning

What Fallon refers to as “‘contextual meaning,’ as framed by the shared presuppositions of speakers and listeners” closely approximates original public meaning. Because the drafters, Framers, ratifiers, and implementing officials understood the constitutional text as communicating to the public, the relevant meaning of the text would have been understood by all of these groups as its public meaning. It is, of course, possible for constitutional communication to misfire. The drafter of a constitutional provision might misunderstand the conventional semantic meaning of a word or phrase or be mistaken about the way in which the public would grasp intended contextual enrichments (such as the implicit restriction of some provisions to the territory of the United States). Public Meaning Originalism takes the position that in such cases, constitutional practice should be guided by the meaning communicated to the public—and not the private first-order communicative intentions of the drafters, Framers, or ratifiers. Public meaning could not exist without drafter’s meaning, but it is the public meaning that counts.

d. Moral Conceptual Meaning

Fallon also refers to “moral conceptual meaning,” offering the following explanation:

Some prominent lawyer philosophers argue that when legal provisions employ moral terms—as “equal protection” and “freedom of speech” arguably are—then the original meaning of constitutional provisions that contain those terms might depend on what is morally true or correct. To use a nonlegal example, if I tell my children, “Always do the right thing,” I do not mean—and they should not understand me as meaning—“Always do what I think is right.” “Right” means right. If this analysis carries over to constitutional law, then moral conceptual meanings would open another path to the conclusion that the original public meaning of the Equal Protection Clause, when properly understood, actually forbids racially segregated public schools and many forms of gender-based discrimination. If these practices are inconsistent with the moral ideal of equality or equal protection, then the Equal Protection Clause forbids them and in principle has always forbidden them, even if the generation that ratified the Fourteenth Amendment did not so recognize. Some have applied a similar analysis to the case of “cruel and unusual” punishments.⁷⁶

This idea is famously associated with Ronald Dworkin who deployed the concept-conception distinction to differentiate the general moral concepts of “equality” and “cruelty” from specific conceptions of those concepts. Dworkin argued that provisions like the Equal Protection Clause and the Cruel and

76. FALLON, *supra* note 1, at 55.

Unusual Punishment Clause deployed these general concepts and the duty of judges was to articulate the best conception of these concepts.⁷⁷

There are two possibilities for the relationship of “moral conceptual meaning” to original public meaning. The first possibility is that the original public meaning of some constitutional provisions was the Dworkinian moral conceptual meaning. In that case, “moral conceptual meaning” is just a particular subcategory of what Fallon is calling “contextual meaning, as framed by the shared presuppositions of speakers and listeners.” If the first possibility is correct, then “moral conceptual meaning” is not a genuine alternative to original public meaning.

The second possibility is that original public meaning of these terms was not the moral conceptual meaning. For example, it might be the case that the original meaning of “cruel” was tied to a particular conception of cruelty; in that case, neither the drafters, Framers, ratifiers, or implementing officials would have understood the Cruel and Unusual Punishment Clause to authorize the Supreme Court to revise the meaning of the Clause to bring it in line with their own moral theories about the nature of cruelty.⁷⁸

Which of these two possibilities is correct is an empirical and historical question. But from the perspective of originalist constitutional theory, the answer to that question is crucial. Originalists maintain that substituting the moral theories of contemporary judges for the original public meaning is illegitimate. Some living constitutionalists may believe that the Supreme Court does have the legitimate authority to adopt amending constructions of the constitutional text in the name of “interpretation.”⁷⁹ What seems clear is that the question of legitimacy is not resolved merely by identifying the possibility of adopting a new and altered meaning.

e. Reasonable Meaning

The final form of meaning on Fallon’s list is “reasonable meaning.” He offers the following explication:

Yet another important sense of “meaning” in constitutional law is reasonable meaning. Constitutional law exhibits many examples of reliance on reasonable meanings, even if they are not always recognized as such. A paradigm case comes from the interpretation of otherwise absolute constitutional language, such as that of 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. In perhaps the most historically and rhetorically celebrated example, Justice Oliver Wendell Holmes Jr. pointed out that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Today, the Supreme

77. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1252 (1997); see also Solum, *supra* note 8, at 46–47.

78. Solum, *supra* note 8, at 42–55.

79. Note that the substitution of a new meaning for the actual communicative content of the constitutional text is actually “construction” and not “interpretation.” This substitution might be described as an “amending construction.”

Court regularly recognizes that restrictions on the rights of speech and the free exercise of religion are permissible if necessary to protect a “compelling” government interest. Why do we assume that otherwise applicable rights involving speech, religion, and the equal protection of the laws must sometimes yield to compelling governmental interests? The answer lies in widely shared, and thus in widely imputed, notions of reasonableness.⁸⁰

This passage does not provide a clear sense of the concept to which “reasonable meaning” is supposed to refer. There are many possible understandings of the freedom of speech that do not presuppose a special and distinct sense of “meaning.” First, the phrase “freedom of speech” might, in context, have referred to a preexisting set of legal rights, which were not absolute. There are other constitutional provisions that clearly do refer to preexisting legal rights, including, for example, the Seventh Amendment right to jury trial. Second, the freedom of speech might have been understood as referring to some particular conception of free speech. For example, it might have been understood as referring to a right to be free of prior restraints combined with a requirement that laws providing for after-the-fact criminal or civil responsibility for harmful speech must be reasonable. Both of these possibilities would involve a meaning (communicative content) for the First Amendment “freedom of speech” that is not absolute but does not require a special “reasonable meaning.”

Fallon’s discussion seems to assume that the literal meaning of the First Amendment Freedom of Speech Clause is an absolute right to speak freely without consequence and that the only alternative to this literal meaning is “reasonable meaning.” But Fallon does not support this assumption with historical evidence of the relevant conventional semantic meanings. Rather, it seems to be armchair speculation based on Fallon’s contemporary linguistic intuitions about the meaning of the words and phrases. Whether Justice Holmes’s interpretation of the Freedom of Speech Clause is correct from the perspective of Public Meaning Originalism is an empirical question, but it is simply wrong to argue that it can only be understood on the assumption that “reasonable meaning” was the basis for his opinion.

Fallon clarifies the nature of “reasonable meaning” in a subsequent discussion:

Reasonable meaning similarly has a place in ordinary language use, especially in cases involving unforeseen circumstances. If my dean instructs me, “Come to my office at 2 p.m.,” I do not understand her as having commanded me to arrive at that time even if, for example, I encounter someone on the way who urgently needs me to drive her to the hospital. I can say, accordingly, that the dean’s directive did not mean that I must come, regardless of any emergencies that might arise.⁸¹

80. FALLON, *supra* note 1, at 55–56.

81. FALLON, *supra* note 1, at 61.

In this example, Fallon is collapsing an important general distinction that lies behind the legal distinction between interpretation and construction. One way to describe this distinction is via the notions of “content” and “force.” The content of the Dean’s instruction is perfectly clear. The content of the Dean’s utterance, “Come to my office at 2 p.m.,” would be something like the following: *Richard Fallon is instructed to come to John Manning’s office, located at Griswold Hall, Room 200, at 2:00 p.m. today, April 12, 2019.* The communicative content is richer than the semantics, because in context the pronoun “you” refers to Fallon; the possessive pronoun “my” before the word “office” points to John Manning’s office, Griswold 200; and the date is implicit from the context of utterance. Presumably, Fallon would agree that all of this content is part of what Fallon calls “contextual meaning, as framed by the shared presuppositions of speakers and listeners.”⁸²

When Fallon writes “the dean’s directive did not *mean* that I must come, regardless of any emergencies that might arise,” he has shifted from the *content* of the directive to its *force*. He is using the word “mean” in a new sense. The speech act of instructing a faculty member to come for an appointment does not create an unqualified obligation to obey, come what may. Rather, the force of such a command is defeasible. One is not obligated to obey under all circumstances. Thus, if Fallon missed the appointment because of a medical emergency, we would not say that he obeyed the instructions. Instead, we would say that his failure to obey was justifiable (or reasonable) under the circumstances.

Speech acts like instructions, orders, and directions usually have defeasible force—although the defeasibility conditions may vary given different kinds of speech acts. For example, if Fallon were serving in the Army during an armed conflict, and Manning were a general giving Fallon an order to move his company to a certain position in the field of battle at 2:00 p.m. on April 12, a medical emergency involving a subordinate would not justify noncompliance. Military orders have a different force than do Dean’s instructions.⁸³ Content and force are conceptually distinct, and we sometime use the ambiguous word “mean” in a sense that refers to one and sometimes we use it to refer to or the other.

With this distinction between content and force in mind, we can return to the context of constitutional communication. The communicative content of a constitutional provision is its original public meaning, which is the kind of meaning that is the object of interpretation in the sense specified by the interpretation-construction distinction. The legal force of a constitutional provision will depend on views about normative constitutional theory. Originalists who affirm the Constraint Principle believe that the communicative content of the constitutional text should constrain constitutional practice with very limited defeasibility conditions.⁸⁴ When Fallon uses the phrase “reasonable meaning,” the word “meaning”

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

83. Or so all faculty members hope.

84. See *supra* note 16 (describing constraint as consistency as including defeasibility as limited to extraordinary circumstances).

refers to a different concept than communicative content. What Fallon calls “reasonable meaning” is actually “reasonable force.” For this reason, Fallon’s discussion conflates the distinction between force and content. This creates the misleading impression that the defeasibility conditions that could limit the constraining force of the constitutional text are in fact built into the meaning of the text. Once we unpack force and content, the misleading impression disappears.

The view that constitutional provisions should have that force which judges determine to be reasonable can be translated into the vocabulary of the interpretation-construction distinction. Fallon’s position is that reasonable constitutional constructions can override the communicative content discovered by constitutional interpretation. In other words, the move to “reasonable meanings” amounts to a rejection of the Constraint Principle, which requires that constitutional practice be consistent with the original public meaning of the constitutional text.

3. Multiple Meanings and the Public Meaning Thesis

The Public Meaning Thesis is based in part on the fact that the constitutional text was written to communicate to the public. In more technical words, the situation of constitutional communication produced a pervasive second-order communicative intention to convey the public meaning of the text. This second-order intention was reflected in: (1) the opening words of the constitutional text, “We the People,” (2) the public nature of the ratification process, and (3) the widely shared belief that the meaning of the constitutional text was its public meaning.

There is no corresponding argument that the second-order communicative intentions of the drafters, Framers, and ratifiers was to create, propose, and enact “multiple meanings.” This would have been a very peculiar second-order communicative intention. Indeed, it is difficult to imagine a member of one of the state ratifying conventions giving the following speech:

Today, we decide whether to ratify this great document, with its multiple meanings. We entrust to future generations, the power to pick and choose between the drafter’s meaning, the literal meaning, the public meaning, the reasonable meaning, the moral conceptual meaning, the meanings created by judicial decision, and the new meanings that may arise as language evolves. One of the chief virtues of this Constitution is its radical ambiguity of the text, an ambiguity that we can expect to grow as time passes.

While the Constitution does include general and abstract language which permits its adaption to changing circumstances, the difference between generality and ambiguity is profound. It is highly unlikely that the second-order communicative intention of the participants in the Philadelphia Convention and the ratifying conventions of the several states was to convey a multiplicity of inconsistent and conflicting meanings. Yet, it is plausible that they did intend to convey some meanings that were general and abstract, and hence adaptable to changing circumstances.

Anyone who affirms a right of constitutional actors to pick and choose between multiple meanings, including a counterfactual reasonable meaning, must explain why it is legitimate for judges, Justices, and other officials to override the public meaning in violation of the Constraint Principle. Whether we should reject the Constraint Principle is a question of normative legal theory to which we shall turn in Parts II and III of this essay.

C. Fallon on the Role of History

In Chapter Three of *Law and Legitimacy in the Supreme Court*, Fallon addresses the role of history in constitutional interpretation and construction. Fallon usefully provides a simplified model of the process, identifying three points in time which I will describe using the theoretical vocabulary of Public Meaning Originalism:

T1: the time in the past when the constitution was framed and ratified, and the point at which the communicative content of the constitutional text is fixed. Constitutional interpretation focuses on linguistic and contextual facts at T1, although if T2 is proximate in time to T1, events at T2 may provide evidence of communicative content at T1.

T2: the time in the past at which a constitution is applied to some case or issue. Constitutional interpretation and construction with respect to that case or issue occurs at T2.

T3: the time in the present at which a constitutional actor (such as the Supreme Court) engages in constitutional interpretation (discovering the meaning of the constitutional text) and constitutional construction (giving the text legal effect by creating some doctrine of constitutional law or deciding a particular constitutional case, or both).⁸⁵

Fallon then identifies four different ways in which constitutional interpretation and construction at T2 could affect constitutional interpretation at T3. I have added paragraph breaks for clarity, but otherwise the indented material is a direct quotation from Fallon:

First, can T2 decisions authoritatively resolve any vagueness or indeterminacy that otherwise might have existed in T1 meaning and thereby bind the Supreme Court at T3?

Second, can decisions made at T2 ever alter the meaning of the Constitution or give rise to new senses of constitutional meaning, such that, for example, language the meaning of which did not forbid race or gender discrimination by the federal government at T1 can forbid such discrimination today, at T3?

85. FALLON, *supra* note 1, at 71–72.

Third, insofar as there can be disparities between or among T1 and T2 authorities, does one or the other possess lexical priority over the other, or can there be genuine conflicts among legally legitimate authorities?

And fourth, if so, how does and should the Supreme Court resolve those conflicts in light of its legal obligations and backward- and- forward-looking considerations of moral legitimacy?⁸⁶

Fallon's four questions raise a variety of issues, but in the discussion that follows, I will organize the issues somewhat differently than Fallon does. I will use the phrase "subsequent history" to refer to post-ratification interpretation and construction by constitutional actors, including both courts and other officials. I will differentiate "judicial precedent" (interpretation and construction by courts, especially the Supreme Court) from "historical practice" (constitutional practice by nonjudicial actors, such as Congress and the President). The category of "historical practice" will be further subdivided into three categories: (1) I shall use the phrase "evidentiary historical practice" to describe the use of post-ratification historical practice that is proximate in time to ratification as evidence of original meaning; (2) I shall use the term "liquidation"⁸⁷ to refer to the use of historical practice to resolve irreducible ambiguities (where ambiguity is understood as the existence of multiple senses);⁸⁸ (3) I shall use the term "gloss" to refer to the use of historical practice to establish that a constitutional construction should be considered enduring and that extraordinary justifications are required to displace it. From the perspective of Public Meaning Originalism, evidentiary historical practice, liquidation, and gloss play conceptually distinct roles in the process of constitutional interpretation and construction. For the purposes of this essay, my terminology is a set of stipulated definitions—others might cut terminological slices from the conceptual pie differently.

Now consider Fallon's first question: "[C]an T2 decisions authoritatively resolve any vagueness or indeterminacy that otherwise might have existed in T1 meaning and thereby bind the Supreme Court at T3?" From the perspective of Public Meaning Originalism, this first question ought to be formulated more precisely. One version of the first question goes to the role of evidentiary practice in cases of constitutional ambiguity. If the meaning of a given string of constitutional text (or clause C1) is ambiguous and could have two senses (S1 and S2),

86. FALLON, *supra* note 1, at 72.

87. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001).

88. I am using the word "ambiguity" in a stipulated technical sense. A word is ambiguous if it can refer to more than one concept. Thus, the word "cool" has multiple senses: one associated with temperature, another associated with temperament, a third associated with style, a fourth associated with a genre of jazz, and a fifth with a general positive evaluation. Thus, the word cool has five distinct meanings in the following sentence: "It is so cool that Miles Davis kept his cool when he was playing cool jazz in a club where the air conditioning was out and the temperature definitely wasn't very cool; and that outfit he had on was so cool."

and constitutional actors at a time, T2, that is proximate to framing and ratification of C1, engaged in actions (A1, A2, . . . An) that provide evidence that they believed the meaning was S1 and not S2, then those actions are evidence that the meaning was in fact S1. This first version of Fallon's question is about the evidentiary value of practice in determining original meaning.

Notice that the evidentiary value of historical practice may not be decisive. For example, if T2 is not proximate in time to the framing of ratification of C1, then its evidentiary value is diminished. And even early historical practice provides evidence that we must evaluate and weigh against other evidence: early historical practice might reflect mistaken beliefs about original meaning or a deliberate circumvention of the true meaning for various reasons.

A second version of Fallon's first question involves what I call "irreducible ambiguity." If a constitutional provision is irreducibly ambiguous, historical practice can liquidate the irreducible ambiguity. What is "irreducible ambiguity?"⁸⁹ Semantic ambiguities are pervasive, both generally and in the constitutional text. Words frequently (perhaps almost always) have multiple senses—if context is not taken into account. Most semantic ambiguities are easily resolved by context. But some ambiguities may remain even after context is taken into account. Sometimes the source of irreducible ambiguity is epistemic. In epistemic cases, we lack sufficient information about context to resolve the ambiguity. In other cases, an ambiguity might be deliberate, as when a legislature deliberately chooses ambiguous language when the legislators are unable to resolve a difficult question and "kick the can down the road." In such cases, historical practice can liquidate the irreducible ambiguity.

From the perspective of Public Meaning Originalism, the use of historical practice for the liquidation of irreducible ambiguity is a form of constitutional construction. Irreducible ambiguity creates a particular kind of construction zone. When faced with the underdeterminacy of communicative content created by irreducible ambiguity, constitutional actors need to choose a constitutional construction that either (1) chooses one meaning over the other or (2) adopts a legal norm that compromises between the alternative meanings. Both choice and compromise are mechanisms of constitutional liquidation. Whether liquidation at T2 should be considered binding at T3 is the kind of question that requires a theory of constitutional construction, but it seems likely that various theories that give liquidation binding effect may be consistent with the Constraint Principle and hence with Public Meaning Originalism. Working up a full-scale theory of constitutional construction is beyond the scope of this essay.

A third version of Fallon's first question involves a constitutional text that is vague or open textured. Given my stipulated vocabulary, this third situation involves what I am calling historical gloss. Historical practice at T2 provides a

89. The phrase "irreducible ambiguity" has a stipulated meaning. An ambiguity is irreducible if it cannot be resolved by consideration of context. There are many kinds of ambiguity, including semantic and syntactic ambiguity.

precisification or implementation rule that resolves the underdeterminacy created by the vague or open-textured constitutional text. Giving historical gloss binding effect at T3 is once again a matter of constitutional construction. Whether or not gloss should be binding is a question to be answered by a theory of constitutional construction; this question is not answered by the Constraint Principle. In cases of underdeterminacy, there are multiple options that are consistent with the constitutional text.

My discussion so far has focused on historical practice, defined so as to exclude judicial precedent, but the role of precedent is not fundamentally different from that of historical practice from an originalist perspective. Early precedent can play an evidentiary role: a judicial decision at T2 may provide evidence of the original meaning at T1, especially if the precedent is proximate in time to T1. Precedent can resolve irreducible ambiguities; whether a precedent at T2 should be honored at T3 is a matter of one's theory of constitutional construction, which will include a component theory of constitutional precedent. Precedent can also provide implementing rules or precisifications that resolve underdeterminacies created by vague or open-textured constitutional language

From the perspective of Public Meaning Originalism, most of what Fallon says about his first question is unproblematic because it involves the use of historical practice and precedent in ways that are consistent with the Constraint Principle. The more interesting and controversial issues arise in connection with Fallon's discussion of his second question: "can decisions made at T2 ever alter the meaning of the Constitution or give rise to new senses of constitutional meaning . . . ?" Fallon distinguishes two issues raised by the second question. The first issue concerns linguistic drift and the Fixation Thesis. The second issue involves precedent that is inconsistent with original meaning and the Constraint Principle. On both issues, Fallon advances positions that are in tension with the core commitments of Public Meaning Originalism.

Fallon's discussion of the first issue begins with the following: "First, consistent with ordinary language usage, the Constitution, like other texts, can sometimes acquire new meanings, which we then might contrast with its original meanings. This is one linguistically natural way to account for the role of at least some leading precedents in constitutional law."⁹⁰ In this passage, Fallon might be referring to the phenomenon of linguistic drift. The words and phrases in the constitutional text can and do acquire new meanings over time, but this does not entail the more radical and implausible conclusion that the meaning of the constitutional text itself changes. No one should believe that when the phrase "domestic violence" came to refer to spousal abuse, child abuse, and elder abuse, this change altered the meaning of Article IV.⁹¹

90. FALLON, *supra* note 1, at 78.

91. A much fuller explanation is provided in Solum, *supra* note 8. A key distinction developed in *The Fixation Thesis* is that between constitutional text as a token (i.e., the authoritative version of the constitutional text approved by the Philadelphia Convention in 1787), and the constitutional text as a

Fallon suggested a more plausible view in his prior article, *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*.⁹² Fallon wrote:

It now seems widely (though not universally) acknowledged that a poem, play, or novel can sometimes acquire new meaning in light of events subsequent to the time when it was written. And in law, as I have noted, we frequently use “meaning” to refer to “interpreted meaning.” Even if that usage is sometimes controversial, it often provokes no resistance. Fortified by these analogies, I see no reason to exclude the possibility that a prescriptive utterance could acquire an interpreted meaning, including—sometimes, anyway—one that conflicted with its original literal or contextually understood meaning.⁹³

In this passage, Fallon is referring to his idea of “interpreted meaning,”⁹⁴ which is distinct from the phenomenon of linguistic drift. Linguistic drift refers to changes in conventional semantic meaning produced by shifting patterns of usage. Linguistic drift alters what Grice calls “sentence meaning”—the acontextual meaning of utterances. The sentence meaning of a string of text at T1 can be different than the sentence meaning of the same string of text at T2 because of linguistic drift.

However, Fallon’s notion of interpreted meaning is distinct from linguistic drift. One way to approach Fallon’s idea is via the standard Gricean picture of speaker’s meaning. Recall that the speaker’s meaning of an utterance is the meaning the speaker intended to convey to the listener via the listener’s recognition of the speaker’s communicative intention. In cooperative communication, listeners aim to recover the speaker’s meaning, but there is no guarantee that they will be successful. Communication can misfire, and listener’s meaning can diverge from speaker’s meaning. In such cases, the listener has misunderstood what the speaker said. Sometimes this is the fault of the speaker; the speaker might have used a word incorrectly. Sometimes miscommunication is the fault of the listener, as when a listener has an erroneous belief about the meaning of a word or phrase. In standard cases of cooperative communication, the gap between speaker’s meaning and listener’s meaning is due to some error or mistake.

type (i.e., the string of words “freedom of speech” in the First Amendment), which can be used with new meanings on subsequent occasions. It is communicative content of the authoritative token of the constitutional text that should constrain constitutional practice. Reuse of the same words (the type) in a new text (e.g., the Constitution of South Africa or an opinion of the United States Supreme Court) involves a new token expression which may have a new and different meaning. However, it is a conceptual mistake to attribute the communicative content of the new token expression to the original and authoritative constitutional text. See FALLON, *supra* note 1, at 35-42.

92. Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1263 (2015).

93. *Id.* To me, *Fallon’s Law & Legitimacy* seems to get at Fallon’s idea and refers back to the discussion of “interpreted meaning” which Fallon discusses on page 1251 of *The Meaning of Legal “Meaning”* cited in footnote 92.

94. FALLON, *supra* note 1, at 78; Fallon, *supra* note 92, at 1251.

Sometimes legal communication is cooperative. There is a wide range of cases in which the reader of a legal text is attempting to recover the drafter's meaning—the meaning that the drafter intended to convey to the reader via the reader's recognition of the drafter's communicative intentions. But this is not always the case. Legal actors use legal texts to achieve multiple objectives, some of which may conflict with the recovery of the drafter's meaning. Lawyers may offer an interpretation of a legal text that “passes the laugh test” because the interpretation is consistent with the acontextual semantic meaning of the words and phrases. The laugh test is passed even though the proffered interpretation is inconsistent with the drafter's meaning, as that meaning would have been understood by an interpreter making a good faith attempt to recover the drafter's meaning in light of the relevant context. This is one of many possible scenarios in which “interpreter's meaning” can differ from “drafter's meaning.”

Just as lawyers can twist words to produce meanings that serve their legal objectives but are inconsistent with drafter's meaning, so too can judges. The judicial “interpretation” of the constitutional text can arise from deliberate misunderstanding that aims to change the meaning of the text. Once a judicial interpretation has entered legal discourse, it can become “sticky,” and initiate a process of linguistic drift. In the brief compass of this Article, I cannot provide fully developed examples that are supported by evidence, but the following two “toy” examples may help to illustrate the point. In each of the two examples, I simply stipulate an original meaning, contrast it with a Fallonian “interpretive meaning,” and suggest that the interpreted meaning has altered contemporary linguistic practice:

- The phrase “due process of law” originally referred to procedures that are legally required or “due as a matter of law.” The Supreme Court adopted an interpretation of the phrase that equated “due process” with fair process. The fair process interpretation then was adopted by the linguistic subcommunity of lawyers and judges and gradually was adopted as the ordinary meaning of the phrase. “Due process” now means “fair process” and not “legally required process.”
- The phrase “equal protection of the law” originally referred to legal protection of life, liberty, and property against invasions, such as murder, false imprisonment, and theft. The Supreme Court adopted an interpretation of the phrase that equated “equal protection” with a requirement that laws have content that does not discriminate on the basis of race or other suspect or quasi-suspect classification. The new meaning did not require states to provide equal enforcement of laws against murder, false imprisonment, and theft. The new meaning gradually became the standard technical meaning and later became the ordinary meaning of the phrase. “Equal protection” now means “consistent with antidiscrimination norms” and not “equal enforcement of legal norms that protect against threats to life, liberty, or property.”

In each of the two examples, the constitutional text acquires a new meaning that is created by a kind of deliberate misunderstanding. The constitutional text is twisted in a way that preserves the semantic meaning of individual words but creates new communicative content. Because of the phenomenon of linguistic drift, the new content alters linguistic practices and diffuses from the linguistic sub-community of lawyers to the public as a whole. As a result, “interpreted meanings” can replace original meanings. This can happen as a result of deliberate distortion of meaning, but it can also happen unintentionally as a result of an unintended misunderstanding.

Public Meaning Originalists maintain that constitutional change produced by either deliberate or unintentional misunderstanding is illegitimate. The Fixation Thesis asserts that the relevant meaning of the constitutional text is the original meaning. Linguistic drift does not change the content the text communicates, although it can change our beliefs about that content. The Public Meaning Thesis asserts that the meaning which the text communicates is the meaning the Framers communicated to the public at the time each provision was framed and ratified. The Constraint Principle asserts that the fixed original public meaning ought to constrain constitutional practice today.

To the extent that Fallon believes that the Supreme Court should have the power to override the original public meaning of the text by introducing “interpretive meanings” that diverge from the original public meaning, he is denying the Constraint Principle. Ultimately, whether the Constraint Principle is true or correct is a normative question, implicating questions of legitimacy to which we shall turn in Part III below.

Recall Fallon’s second question: “[C]an decisions made at T2 ever alter the meaning of the Constitution or give rise to new senses of constitutional meaning . . . ?” This question involves two issues, the first of which I have already investigated. The second issue involves the use of precedent to create new meanings. Fallon describes the second issue as follows:

Second, however one judges the conceptual possibility of precedential meanings, Justices of the Supreme Court—from the very beginning of the nation—have openly and notoriously maintained that T2 precedents can sometimes excuse them from their obligations to adhere to T1 constitutional meanings. Indeed, I can put the proposition more strongly. Judicial recognition of precedent as establishing the legally valid and binding law of the United States has been a central, widely accepted feature of our constitutional practice almost from the beginning.⁹⁵

It is surely the case that many Supreme Court precedents have deviated from original meaning. I am not sure that I agree with Fallon that the opinions of the court “have openly and notoriously” affirmed the proposition that the Court has

95. FALLON, *supra* note 1, at 78–79.

the power to override the original meaning of the constitutional text. As Professor William Baude has argued, there is substantial evidence that the deep structure of the Supreme Court constitutional jurisprudence is consistent with the claim that “originalism is our law,” even while the surface structure includes many decisions that depart from original meaning.⁹⁶ My view, which I cannot defend here, is that the Supreme Court rarely claims the power to override the constitutional text in a fully explicit or “open and notorious” way. The significance of that fact, as it relates to for the question whether originalism is supported by legal positivism, is a deep question that is far beyond the scope of this essay.

As a normative matter, the question what to do about nonoriginalist precedent is important. My own views on that question are summarized in *Originalist Theory and Precedent: A Public Meaning Approach*.⁹⁷ If there is a compelling case for the Constraint Principle, then precedent that is inconsistent with the original public meaning ought to be revised over time, in due course. But no sensible version of the Constraint Principle should require an “originalist big bang,” in which the original public meaning of the constitutional text is restored in a single “superterm” of the Supreme Court. Even if the Supreme Court were staffed by nine originalist judges, the transition to originalism could only take place gradually, with a substantial transition period:

The length of the transition period would depend on the extensiveness of the changes required by originalism and judgments about the rapidity with which they could be effected without damage to the rule of law. And this might depend on reactions from the political system: for example, an initial decision suggesting the unconstitutionality of one independent regulatory agency might create political conditions that would enable a constitutional amendment that squared such agencies (with proper safeguards) with the rule of law.⁹⁸

Of course, the current Supreme Court does not consist of nine originalist judges, and this fact surely must be taken into account by those judges who may affirm originalism as a matter of ideal theory. As members of a collegial court with a majority or supermajority of nonoriginalists, an originalist Justice is required to compromise with precedent as a practical matter in order to serve as a functioning member of the Court in constitutional cases.

At the end of the day, the normative questions that Fallon’s first and second issues pose are similar. The first issue involves “interpretive meanings” that are inconsistent with the original public meaning of the constitutional text. When the Supreme Court deliberately manipulates the constitutional text to produce an interpretation that departs from the original meaning, its actions amount to amendment by constitutional construction. When the Supreme Court uses

96. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

97. See Solum, *supra* note 29.

98. Solum, *supra* note 29, at 462.

precedent to do the same thing openly, the functional effect is the same. In both cases, the Supreme Court overrides the communicative content of the constitutional text. Whether such overrides are justifiable, however, is a normative question. As a preliminary step to answering this question, we now turn to the second theme raised by Fallon's *Law and Legitimacy in the Supreme Court*—what methodology should guide normative constitutional theory? One answer to that question begins with the idea of reflective equilibrium, the topic of the next Part of this essay.

II. SECOND THEME: REFLECTIVE EQUILIBRIUM IN CONSTITUTIONAL THEORY AND PRACTICE

The notion of “reflective equilibrium,” familiar from the work of John Rawls,⁹⁹ has been invoked as providing an appropriate method for resolving theoretical debates in normative constitutional theory.¹⁰⁰ Richard Fallon deploys Rawls's idea in his “Reflective Equilibrium Theory.” Fallon is offering Reflective Equilibrium Theory as a normative constitutional theory: a theory to guide constitutional practice.¹⁰¹ From the perspective of the interpretation-construction distinction, Reflective Equilibrium Theory is a theory of constitutional construction: it is offered as a guide for judges and other officials when they determine what legal effect should be given to the communicative content of the constitutional text. Of course, the word “interpretation” is also used in a broad sense to refer to both interpretation as discovery of meaning and construction as the determination of legal effect. Using the word “interpretation” in this broader sense, Fallon's Reflective Equilibrium Theory is a theory of constitutional “interpretation.”

The discussion that follows begins with the general idea of reflective equilibrium. The discussion then moves to Rawls's distinction between “wide” and “narrow” reflective equilibrium, before introducing a third idea, which I call “broad” reflective equilibrium. After laying this foundation, we turn to Fallon's exposition of Reflective Equilibrium Theory.

A. *The Idea of Reflective Equilibrium*

We can imagine a variety of general methods for justifying normative constitutional theories. For example, we might use the deductive method, introducing self-evident normative axioms and then deducing the conclusions of constitutional theory from them. The difficulty with the deductive method is that the

99. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

100. See Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 246 (Grant Huscroft & Bradley Miller eds., 2011); Richard H. Fallon, Jr., *Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017).

101. The distinction between reflective equilibrium as a meta-theory and reflective equilibrium as a normative theory for the guidance of constitutional practice is discussed below. See *infra* Part II.D.

plausible candidates for the axioms are contested. For example, we might start from general propositions in moral philosophy. Utilitarians would adopt the constitutional theory that produced the greatest good for the greatest number. Deontologists would adopt the constitutional theory required by a set of moral rights and obligations. Virtue ethicists would adopt the constitutional theory that would best realize human flourishing as constituted by the human excellences or virtues. But in a pluralist society, there is no set of axioms upon which reasonable citizens or judges can agree. In theory, one might try to show that a normative constitutional theory was required by all of the reasonable moral and religious theories of the good and the right, but it seems very unlikely that all such theories will agree on all of the issues of constitutional law that must be resolved. Moreover, the task of demonstrating that a given normative constitutional theory is entailed by all of the reasonable moral and religious theories is daunting, the work of a lifetime or of many lifetimes.

The method of reflective equilibrium provides an alternative to a deductive approach. Instead of self-evident axioms or deep principles of moral philosophy, we can start with our prereflective beliefs about various matters. For example, we might start with beliefs like “*Brown v. Board* was rightly decided”—a belief that is relatively concrete and particular. And we also have prereflective beliefs at a more abstract and general level; for example, “[t]he rule of law values of predictability, certainty, consistency, and publicity are an important component of political morality.” The method of reflective equilibrium examines the relationships between our prereflective beliefs. When our beliefs are inconsistent, one or more of the beliefs may need to be reexamined and revised. Our unreflective beliefs will gradually become considered judgments. A wholly successful constitutional theory will bring all of our considered judgments into reflective equilibrium, a relationship of consistency and mutual support.

B. Narrow, Wide, and Broad Reflective Equilibrium

The process that I have described so far is based on the assumption that reflective equilibrium is a function of the considered judgments of an individual. But in a pluralistic society, it seems likely that different individuals would reach different points of reflective equilibrium and hence would affirm distinct and inconsistent views about constitutional theory. Rawls addressed an analogous issue by drawing a distinction between wide and narrow reflective equilibrium. Because the exegesis of Rawls’s theory is unimportant for the matters at hand, I will introduce a third idea, “broad reflective equilibrium,” which is the specific notion that is deployed in the argument that follows.

For the purposes of this essay, I will simply stipulate the following definitions:

Narrow Reflective Equilibrium: the considered judgments of an individual on constitutional theory are in narrow reflective equilibrium when they are consistent and mutually supportive with each other.

Wide Reflective Equilibrium: the considered judgments of an *individual* on constitutional theory are in wide reflective equilibrium if they consider the “conditions under which it would be fair for reasonable people to choose among competing principles [of constitutional theory], as well as evidence that the resulting principles constitute a feasible or stable conception of justice, that is, that people could sustain their commitment to such principles.”¹⁰²

Broad Reflective Equilibrium: the considered judgments of a *political community* are in broad reflective equilibrium when a broad group of citizens are in wide reflective equilibrium such that there is an overlapping consensus on constitutional principles that are sufficiently similar to provide adequate guidance for constitutional practice.

Given these definitions, it is clear that there could be narrow reflective equilibrium at the individual level but deep and serious disagreement about constitutional theory. For example, we could imagine that each Justice on the Supreme Court was in narrow reflective equilibrium but that each Justice affirmed a different normative constitutional theory. One Justice affirms a progressive constitutional theory that maximizes the role of positive rights to equality of wealth and income; a second Justice affirms a libertarian theory that emphasizes the protection of property rights and minimizes the power of government to engage in redistribution of wealth and income; a third Justice affirms a conservative theory that preserves the constitutional status quo.¹⁰³

Moreover, it is possible and perhaps likely, that there can be wide reflective equilibrium at the individual level, but that different individuals reach different conclusions about what constitutional principles can be the focus of a stable agreement. The requirement of wide reflective equilibrium requires that each individual take the views of others into account, but in the end, wide reflective equilibrium allows each individual to make their own judgments about what commitments reasonable citizens can make and sustain. Different judges are likely to form different beliefs about the characteristics of “reasonable” citizens and the sustainability of a normative constitutional theory over time. Even wide reflective equilibrium is consistent with serious disagreements about normative constitutional theory.

The notion of broad reflective equilibrium addresses the problem of persistent disagreement about constitutional theory that seems likely to result from employment of the methods of narrow or wide reflective equilibrium. The key to broad reflective equilibrium is the move from the individual to the political community. Given a pluralist society, this means that broad reflective equilibrium must be based on public reasons—reasons that can be affirmed by citizens who hold different moral or religious conceptions of the good and the right. Broad

102. Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA PHIL. (Apr. 28, 2003, revised Oct. 14, 2016), at Section 3.2.1, <https://plato.stanford.edu/entries/reflective-equilibrium/> [<https://perma.cc/S9HD-H3VQ>]. Daniels’s definition is not specific to constitutional theory.

103. For further development of this hypothetical, see *infra* Part IV.E.

reflective equilibrium seeks a constitutional consensus on a normative constitutional theory.

Why should we seek broad reflective equilibrium on matters of constitutional theory? The answer to this question requires reflection on the role of constitutionalism in a democratic society. Constitutionalism aims to provide a framework for the resolution of disagreement in a pluralist society. For constitutionalism to fulfill this aim, constitutional practice needs to rely on reasons that can form the basis of a principled compromise among citizens who disagree with each other on fundamental matters, as reflected in the plurality of moral, religious, and ideological views. Broad reflective equilibrium provides the basis for an overlapping consensus on the appropriate principles for the guidance of constitutional practice.

Broad reflective equilibrium can only be achieved in actual politics, but the perspective of broad reflective equilibrium can be taken up by constitutional theorists in the here and now. This requires the constitutional theorists to take pluralism seriously and to work hard to overcome the natural tendency to take one's own perspective as the baseline for reasonableness. This is not an easy task. I regard my own views about fundamental matters as true, but when I take up the perspective of broad reflective equilibrium, I am required to examine at my own views from the perspective of others who regard them as false. If I believe strongly in economic equality, I am required to imagine that I believed in economic liberty—and vice versa. If I believe that implied fundamental rights are pernicious, I am required to take up the perspective of those who regard them as essential—and vice versa. I am required to expand my conception of the reasonable and contract the set of views that I regard as beyond the pale.

From the perspective of broad reflective equilibrium, constitutional theory is a negotiation and not a competition. The goal is a constitutional theory that can serve as a basis for principled agreement among citizens who disagree about fundamental matters. The ideal would be unanimous agreement, but that ideal is utopian; in the real world, the most that we can hope to achieve is broad agreement. "What should count as broad?" is a practical question, but it might be given a rough and ready operationalization as follows: we will have achieved broad agreement if a supermajority of the Justices nominated by opposing political parties affirm constitutional principles that converge on a wide range of the basic questions of constitutional theory.

In an era of political polarization, we face the reality that the constitutional theory itself is polarized: "My constitutional theory is true and reasonable; your theory is bunk, obviously false, and dogmatic." This approach dooms constitutional theory to eternal theoretical deadlock. The warring camps occasionally meet on the battlefield to decry the irrationality of their opponents and then retreat to their own camps. Progress in constitutional theory will only be possible if scholars are willing to detach from their political commitments and their theoretical prejudices. Narrow reflective equilibrium permits agreement among the like-minded, but that kind of agreement is not sufficient to permit constitutional theory to perform its vital task, enabling an overlapping consensus on the principles that

guide constitutional practice. Constitutional theory must take into account the wide range of views that characterize our public political culture. A consensus of law professors at elite institutions is not the appropriate standard for broad reflective equilibrium.

C. *Ideal Theory and Constitutional Possibility*

The distinction between narrow and broad reflective equilibrium is related to another important idea, the distinction between ideal and nonideal constitutional theory.¹⁰⁴ Ideal constitutional theory assumes the possibility of perfect compliance.¹⁰⁵ In the world of ideal theory, judges and political actors will internalize the constitutional principles advanced by the theory. For constitutional theory to get off the ground, some degree of idealization is required. The alternative is constitutional determinism, in which our constitutional future is predetermined by history and causal forces. Constitutional theory requires that there be a space of constitutional possibilities; we might call that space the “feasible choice set.”

The next question is about the degree of idealization is appropriate for constitutional theory. How do we define the feasible choice set? Normative constitutional theories aim to guide constitutional practice in the actual world. Pure ideal theory may enable us to identify constitutional Utopias—constitutional systems that approximate perfect justice but are unattainable in the actual world. This kind of constitutional theory may be valuable. The construction of constitutional Utopias may yield important insights and ideas. But purely ideal constitutional theory brackets the question whether the world it imagines can ever be achieved given the constraints imposed by human psychology and sociology. Purely ideal theory is an academic exercise, not a bad thing, but also not the only thing.

A purely nonideal theory would take the actual world as it is today and make recommendations for how those who buy into the theory should act, given the fact that most judges and political actors do not accept the best ideal theory. This kind of nonideal theory focuses on compromises and practical strategies. For example, a nonideal version of originalism would take seriously the fact that originalist judges are members of collegial courts and that no federal appellate court in the United States (including the Supreme Court) has a majority of originalist judges. Given those facts, originalist judges cannot adhere to the Constraint Principle in each and every case; if they did, they would dissent or concur separately in almost every constitutional case and cease to be functioning members of the court. Nonideal theory requires a more pragmatic approach that provides a substantial role for precedent and compromise. A judge or Justice who is committed to originalism as an ideal theory might be a constitutional pluralist who

104. These issues are explored in Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307 (2008).

105. See, e.g., Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654, 655 (2012) (stating that the full compliance version of ideal theory assumes that “all relevant agents comply with the demands of justice applying to them . . .”).

frequently emphasizes the priority of original public meaning as a second-best strategy in nonideal theory.

Ideal and nonideal theory are not the only alternatives. Constitutional theorists can adopt the perspective of partially ideal theory, accepting realistic constraints on the feasible choice set. A partially ideal constitutional theory begins with the constitutional status quo, including the fact of political polarization, the fact of ideological and moral pluralism, and the fact that judicial practice is eclectic.¹⁰⁶ A partially ideal theory needs to acknowledge these facts. Partially ideal theory assumes that constitutional actors are open to persuasion by reason and, at the same time, acknowledges that ideological and moral pluralism is likely to be a permanent feature of a free society. For this reason, partially ideal theory must take a long-run perspective. It must answer the question how we can get from the constitutional status quo to a realistic constitutional future in which the partially ideal theory is supported by an overlapping consensus, despite the fact of pluralism.

D. Fallon on Reflective Equilibrium and Constitutional Practice

What then is Fallon's Reflective Equilibrium Theory? How does Fallon deploy the idea of reflective equilibrium as a guiding principle for constitutional practice? Fallon introduces this idea in the following passage:

In constitutional law as in morality, we should aim at principled consistency, and we should want our Justices to decide cases with that aim in view. Nevertheless, the reflective equilibrium model helps to persuade me that we should not think it requisite or necessarily even desirable to begin our quest for principled consistency with a full set of unbending principles or wholly fixed methodological premises. In constitutional law as in morals, we do better to develop our commitments on a partially rolling basis, with concrete cases—concerning which we may already have quasi-intuitive judgments of correctness—in mind. When previously unanticipated cases arise, the reflective equilibrium model suggests that the Justices, along with the rest of us who participate in constitutional arguments in good faith, should feel not only free but obliged to reconsider previous methodological commitments if the implications would prove disturbing. In the resulting reconsideration, we should not assume that prior methodological commitments should always yield to case-specific intuitions or judgments of constitutional correctness. Rather, we should reflect critically on both our substantive judgments and our methodological premises, without prejudging where the adjustment needed to achieve overall consistency should occur.¹⁰⁷

106. Status quo judicial eclecticism is multidimensional. Different judges adopt different sets of constitutional principles. Eclectic judges pick and choose among constitutional principles and theories; the same judge may employ originalism in one case, Thayerian deference in another, and a moral readings approach in a third. Some judges may employ different constitutional theories in a single opinion.

107. FALLON, *supra* note 1, at 143–44.

Fallon's approach emphasizes the idea of *revisability*: he believes that judges should revise their constitutional theories "on a partially rolling basis." It is not clear what Fallon means by "a partially rolling basis," but the gist of his idea is that our constitutional theories should be dynamic rather than static. If we imagine a constitutional theory as a set of general principles that guide constitutional practice, a dynamic theory would involve principles that change over time. New principles enter the set; old principles leave. Individual principles are revised and amended. For example, exceptions might be added or deleted.

As a result, Fallon's theory is potentially quite different than normative constitutional theories with more definite and stable content. For example, Public Meaning Originalism is committed to the Constraint Principle, which establishes a general framework for constitutional practice. Representation Reinforcement Thayerianism is committed to a regime of deference with a limited set of exceptions for constitutional doctrines that preserve democratic processes. These theories are intended to be stable. That is not to say that the theories that aim at stability are completely static: theorists make mistakes, and an unanticipatable state of affairs might prompt a theorist to "go back to the drawing board." But in the case of theories like Public Meaning Originalism and Representation Reinforcement Thayerianism, the aim of the theorist is to get it right the first time and produce a stable theory. As understood by Fallon, the aim of Reflective Equilibrium Theory is different. Fallon aims to produce a theory that will change over time.

Thus, Reflective Equilibrium Theory is a form of "living constitutionalism" at two distinct levels. At the first level, Reflective Equilibrium Theory involves *living doctrines*, norms of constitutional law that change in response to changing circumstances and values. At the second level, Reflective Equilibrium Theory involves *living principle*, the methods that generate and constrain the doctrines also change over time.

Fallon states that our constitutional theories should be revised "if the implications would prove disturbing." What does Fallon mean by *disturbing implications*? And when would such implications justify a revision in our general normative constitutional theories? Some additional clarity is provided by the following passage:

In applying Reflective Equilibrium Theory to concrete constitutional cases, we should have a relatively strong presumption in favor of adhering to methodological premises that we have endorsed in the past. Sometimes . . . we will need to refine our interpretive approaches. Through this process, we can expect our theories or methodologies to become more dense and determinate, even if more complex, over time. Sometimes, moreover, new cases may provoke a rethinking of previously accepted methodological premises. If and when we revise our methodological premises, no breach of the obligation of good-faith argumentation about constitutional cases necessarily occurs. We can say, and should say without apology, that we now believe our prior judgments to have been mistaken. No more in constitutional law than in the domain of morality should an ideal of principled consistency require us to persist in what we

conscientiously believe to be past errors, especially when issues of legal and moral legitimacy are at stake.¹⁰⁸

I am not sure that I fully understand Fallon's notion of revisability on a rolling basis in response to case-specific intuitions. One possibility is that Fallon believes that our normative constitutional theories should accommodate our intuitions about outcomes that are morally disturbing. He may believe that in cases in which "contextual meaning" (or Original Public Meaning, if the Public Meaning Thesis is true) leads to a morally disturbing outcome, we then ought to select another form of meaning to guide constitutional practice. For example, if the contextual meaning of the Equal Protection Clause did not support a right to same-sex marriage and if the lack of such a right is morally disturbing, then we should deploy the "reasonable meaning" or the "moral conceptual meaning" meaning in order to avoid the morally disturbing outcome. If this were Fallon's view, then the Reflective Equilibrium Theory is inconsistent with the Constraint Principle: the moral views of individual judges would provide reasons to override the original public meaning of the constitutional text.

But it is not clear that this is Fallon's view. Consider the following passage in which Fallon addresses the Rawls's distinction between wide and narrow reflective equilibrium:

In introducing Reflective Equilibrium Theory, I have so far emphasized the possibility of a process of mutual consideration and reconsideration that involves only two elements—case-specific intuitions and methodological premises. But the quest for reflective equilibrium in constitutional deliberations can, and should, reach across a broader range of considerations, including appraisals of moral reasonableness. In *Political Liberalism* and elsewhere, Rawls distinguished between narrow reflective equilibrium, which imagined the simultaneous assessment and sometimes the adjustment of just two variables, and "wide" reflective equilibrium, which potentially encompasses many more. As a second-order theory of constitutional decision making, Reflective Equilibrium Theory can and should treat the specification of the notion of reasonable moral judgment in resolving disputable cases as potentially involving adjustment as part of a quest for wide reflective equilibrium. The "liberal principle of legitimacy," as Rawls terms it, demands justifications for the exercise of judicial power that all reasonable people could be expected to respect "in the light of principles and ideals acceptable to their common human reason." But there is no pre-fixed standard for gauging compliance with that ideal. Efforts by the Justices of the Supreme Court to reach the kind of moral judgments necessary to the legitimate exercise of their office also might include reference to and possible reformulations of ideals of substantive justice, procedural fairness in the allocation of lawmaking power, and the rule of law.¹⁰⁹

108. FALLON, *supra* note 1, at 145.

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

Wide reflective equilibrium would seem to rule out a judge's reliance on personal views about what is morally disturbing. Instead, judges would have to limit their moral premises to "public reasons." But Fallon's exposition here is not clear on this point, as he suggests that the Justices may rely on "ideals of substantive justice." Does this mean that the Justices should rely on their own views of substantive justice, revising their constitutional theories when their existing views would lead to an outcome that is morally disturbing? Or would Fallon insist that judges refrain from reliance on controversial views about substantive justice, limiting themselves to those ideals of substantive justice that are the subject of wide and deep agreement among citizens who affirm a plurality of moral, religious, and ideological views? I do not know the answer to these questions, although this may well be my fault and not the fault of Fallon's exposition in *Law and Legitimacy in the Supreme Court*.

There is another puzzle about Fallon's view of the role of reflective equilibrium in normative constitutional law theory. We can bring out this puzzle by distinguishing two different roles that reflective equilibrium could play:

Reflective Equilibrium as a Meta-Theory: Reflective equilibrium would operate as a meta-theory if it were the method of choice among first-order normative constitutional theories.

Reflective Equilibrium as a Normative Theory of Constitutional Practice: Reflective equilibrium would operate as a normative theory of constitutional practice if judges used the method of reflective equilibrium to decide particular cases.

In other domains of normative theory, reflective equilibrium operates as a meta-theory and not as a normative theory of choice by moral or political actors. Thus, Rawls employs reflective equilibrium to choose between theories of justice that govern the basic structure of society.¹¹⁰ In the constitutional realm, the analogous application would be the choice between normative constitutional theories. For example, we would use reflective equilibrium to choose from a list of candidate theories, e.g., Public Meaning Originalism, Thayerianism, and Common Law Constitutionalism. We might say that reflective equilibrium as a meta-theory is a tool for constitutional theorists.¹¹¹

Using Reflective Equilibrium as a Normative Theory of Constitutional Practice is quite different. This use of reflective equilibrium involves constitutional actors directly resorting to the method of reflective equilibrium on a case-by-case basis to decide particular cases. This use of reflective equilibrium is similar to Professor Ronald Dworkin's theory of law as integrity. Dworkin's imaginary judge, Hercules, devises the moral theory that best fits and justifies the

110. RAWLS, *supra* note 99.

111. I am grateful to Tara Grove for remarks that clarified the distinction between meta-theoretical and normative roles for reflective equilibrium. Any errors in the text are mine and not hers.

law as a whole. As many commentators have observed, this approach is very similar to Rawls's idea of reflective equilibrium.¹¹² We might say that reflective equilibrium as a normative theory of constitutional practice is a tool for judges.

Fallon wants us to employ reflective equilibrium to select general principles, suggesting that he views reflective equilibrium as a meta-theory. But Fallon also wants judges to employ reflective equilibrium on a case-by-case basis, suggesting a view that is a normative theory of constitutional practice. This suggests to me that Fallon may not accept the distinction between meta-theory and normative theory or that he may believe that reflective equilibrium should perform both roles simultaneously.

III. THIRD THEME: THE STRUCTURE OF NORMATIVE CONSTITUTIONAL LEGITIMACY

Constitutional legitimacy is the single most important theme in *Law and Legitimacy in the Supreme Court*. The discussion that follows begins with a summary of Fallon's views and then proceeds to some reflections on the adequacy of his account.

A. Fallon's Understanding of Moral Legitimacy

Fallon's exploration of constitutional legitimacy is deep and learned, the most impressive work on the topic of which I am aware. Fallon begins by carefully distinguishing sociological and normative legitimacy. He defines sociological legitimacy as follows:

Sociological legitimacy involves prevailing public attitudes toward governments, institutions, or decisions. It depends on what factually is the case about how people think or respond—not on what their thinking ought to be. A regime or decision can be widely approved (and thus sociologically legitimate) but morally misguided and illegitimate.¹¹³

Fallon then defines "moral legitimacy":

As a first approximation, we invoke the concept of moral legitimacy, or illegitimacy, to answer the questions whether citizens have an obligation to respect or obey their governments and whether governments have a right to rule those within their territory. A morally legitimate regime is one with the power to alter normative obligations (though I postpone, for the moment, the question of which normative obligations). In order to have that moral power, a legal regime must satisfy certain moral conditions.¹¹⁴

112. Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 273 (1992); Ken Kress, *The Interpretive Turn*, 97 ETHICS 834, 839 n.11 (1987); Barbara Baum Levenbook, *The Sustained Dworkin*, 53 U. CHI. L. REV. 1108, 1109 (1986); James P. Spica, *The Rationality of Normative Expectations*, 24 J. CONTEMP. L. 259, 261 n.9 (1998).

113. FALLON, *supra* note 1, at 21.

114. FALLON, *supra* note 1, at 24.

The key question is, what are the moral conditions that create the moral power to alter normative obligations?

Fallon identifies three ideals that structure his view of the moral conditions that are required for moral legitimacy. I have added paragraph breaks and italics to make the structure of the three ideals clear:

The first ideal involves relative substantive justice. Is the regime's set of institutions and rights guarantees at least reasonably just?

The second involves political democracy and fair allocations of decision-making power. In a less than ideal world characterized by reasonable moral and political disagreement, we cannot sensibly insist on unanimous agreement as a test of legitimacy. Nevertheless, we can respect the principle that everyone's interests and opinions count by insisting that all citizens should have rights of democratic participation. Accordingly, democratic decision making is an important source of moral and political legitimacy, even if it is not the exclusive source under less than ideal conditions.

A third criterion concerns fairness in the application of reasonably just and reasonably democratic laws. Fair procedures for judicial and quasi-judicial decision making can also contribute to a regime's moral legitimacy in the minimal or relative sense.¹¹⁵

Thus, there are three moral conditions for moral legitimacy: (1) reasonable justice of institutions and rights, (2) democratic decision-making, and (3) fair procedures for the application of the laws. We will examine each of the three moral conditions, but first, we will take a step back and examine four very general features of constitutional legitimacy.

B. Four General Features of Normative Constitutional Legitimacy

Normative legitimacy is a complex concept.¹¹⁶ Reflection on Fallon's views of constitutional legitimacy can begin with the identification of four general and defining features of legitimacy as a concept.

First, legitimacy is distinct from justice. Legitimacy should be distinguished from justice or rightness. It is possible for a just law to lack legitimacy (because an unelected dictator imposed it), but nonetheless, be substantively just. Likewise, a legitimate law (made by an elected legislature employing the proper procedures) might be unjust.

Second, legitimacy is a reason-providing process value. That a law is legitimate is a reason to consider it authoritative, providing a *pro tanto* reason¹¹⁷ for

115. FALLON, *supra* note 1, at 29 (emphasis added) (footnotes omitted).

116. For an introduction to the concept of legitimacy, see Fabienne Peter, *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL. (Apr. 24, 2017), <https://plato.stanford.edu/entries/legitimacy/> [<https://perma.cc/J8KP-RUDR>].

117. This discussion makes controversial assumptions about the nature of authority. In particular, I do not discuss Raz's idea that authority provides decisive or preemptory reasons for action, nor do I

action that stems from characteristics of the law other than the moral rightness of its substantive content. For example, democratically enacted laws may provide reasons for voluntary compliance, even to citizens who disagree with the content of the laws. In the case of democratically legitimate laws, it is the process for law-making and not the content of the law that provides the reason for compliance.

Third, legitimacy is a matter of degree. Another important conceptual feature of legitimacy is that it is a scalar and not a binary. That is, the legitimacy of a constitutional regime is not like an on-off switch, either wholly legitimate or wholly illegitimate. Constitutional legitimacy is best understood as a matter of degree. Constitutional regimes possess legitimacy-making features to a greater or lesser extent. When we compare a pair of normative constitutional theories, one dimension of comparison is the degree to which the two theories realize the value of legitimacy.

Fourth, legitimacy is multidimensional. One of the most important features of legitimacy as a concept is that legitimacy itself involves several dimensions. One way of getting at the multidimensionality of legitimacy is to think about the characteristics of a constitutional regime that would defeat legitimacy. For example, if a constitution were imposed on a political community by a colonial power, the lack of democratic input would defeat legitimacy. But a democratically adopted constitution might be illegitimate if a democratic majority made no attempt to provide reasonable justifications for the constitution to minority groups who opposed some of its features. And a democratic constitutional norm for which reasonable justifications are offered might nonetheless be illegitimate if extralegal means were used to secure its adoption. Not only is legitimacy multidimensional, these dimensions are not commensurable: when the dimensions conflict, there are no algorithmic procedures for assessing “on-balance legitimacy.” Assessing legitimacy in conflict cases requires the exercise of practical judgment, assessing the relative salience and importance of the dimensions in particular situations.

C. Five Dimensions of Normative Constitutional Legitimacy

These abstract points about the nature of legitimacy can be made more concrete by examining five dimensions of constitutional legitimacy. The list provided here overlaps with the three ideals outlined by Fallon, but there are important additions and differences. This list is not intended to exhaust the dimensions of constitutional legitimacy, but the five dimensions discussed here are among those that are most important in the constitutional context.

discuss his service conception of authority. See generally Tom Christiano, *Authority*, STAN. ENCYCLOPEDIA PHIL. (Jan. 11, 2012), <https://plato.stanford.edu/entries/authority/> [<https://perma.cc/F6D2-99TZ>].

1. Democratic Legitimacy

The first dimension of constitutional legitimacy involves the democratic character of the lawmaking process. In the constitutional context, democratic legitimacy applies at two distinct levels. The first level involves the process of constitution making. A constitutional regime is more legitimate if it provides opportunities for popular participation in the constitution making process. Thus, a constitution approved by a supermajority of citizens (either directly or through elected representatives) is more legitimate than a constitution approved by unelected officials.

The second level of democratic legitimacy involves the processes of lawmaking created by the constitution. For example, a constitution that creates a democratically elected parliament with plenary legislative power would be more democratic than a constitution that confers legislative power on a group of hereditary aristocrats. Likewise, a constitution that allows for direct democracy in the form of initiatives and referendums enjoys more democratic legitimacy than a constitution that limits the legislative process to a bicameral legislature that requires supermajority votes to enact ordinary statutes.

Our overall assessment of the democratic legitimacy of a constitutional regime involves both levels (constitution making and democratic legislative institutions). A constitution might combine greater legitimacy at one level with a lower level of legitimacy at another. For example, a popularly adopted constitution might create relatively undemocratic legislative processes. Conversely, a constitution imposed by a colonial power might create majoritarian democratic legislative institutions.

The dimension of democratic legitimacy is especially important to the constitutional legitimacy of the Supreme Court (and other courts with the power to invalidate actions by elected officials). Serious questions of democratic legitimacy arise at the first level if a constitutional court assumes the power to override a democratically adopted constitutional text. Similarly, the exercise of the power of judicial review raises the “countermajoritarian difficulty”: a judicial power to invalidate legislation undermines the second-level democratic legitimacy conferred by vesting legislative power in democratic processes (elected legislatures or direct democracy). Judicial review poses especially serious problems of democratic legitimacy when the first and second level problems are combined. If a court invalidates democratically enacted legislation on the basis of constitutional norms that the court itself has created without democratic authorization, the court’s action faces a double democratic deficit. At the other end of the spectrum, judicial review is most democratic when judicial review employs a democratically created constitutional norm to invalidate laws created by undemocratic legislative processes.

Assessing the overall democratic legitimacy of the constitutional regime in the United States is difficult, to say the least. At the first level of democratic legitimacy, a complex picture emerges. The original constitution drafted in 1787 was ratified by a process that involved substantial democratic participation by the

standards of the time but excluded meaningful participation for several overlapping reasons: the grounds of exclusion included gender, enslavement, race, and economic status. Although the ratification process involved unprecedented democratic participation as measured by the standards of the time, it fell far short if judged by today's standards.

The constitutional amendment process became more democratic with the enactment of the Fifteenth and Nineteenth Amendments, but the promise of voting rights for many groups was not substantially realized until after the enactment and enforcement of the Voting Rights Act. The Article V amendment process imposes supermajority rules: all of the amendments approved to date have been approved by two-thirds of both houses of Congress and three-fourths of the state legislatures. This process ensures that amendments must have supermajority democratic support to be approved. As a result, however, this process blocks constitutional amendments that would have been approved by a more democratic process (such as a national majority-vote referendum).

Issues of democratic legitimacy arise in the context of the great debate between originalism and living constitutionalism. One of the primary arguments for originalism in general, and particularly the Constraint Principle, is based on the concept of democratic legitimacy.¹¹⁸ Whereas the public meaning of the constitutional text is the product of supermajoritarian democratic procedures, Supreme Court decisions are made by majority vote: five of nine unelected Justices can adopt a judicial construction that has the same effect as a constitutional amendment.

The question whether Public Meaning Originalism and the Constraint Principle are supported by the value of democratic legitimacy cannot be answered in the abstract. Some forms of living constitutionalism authorize antidemocratic judicial constructions that override the constitutional text, examples include: Moral Readings Theory, Common Law Constitutionalism, and Constitutional Pluralism. Other forms of living constitutionalism are superior to Public Meaning Originalism along the dimension of democratic legitimacy. For example, Thayerian theories are designed to insure the democratic legitimacy of Supreme Court decisions. We will return to the status of Reflective Equilibrium Theory in Part IV.D below.

2. Legitimacy and Legality

The second dimension of constitutional legitimacy is legality. The general idea here is a familiar one: the illegality of an action by a government official counts against its legitimacy. In the constitutional context, there are again two levels. At the first level, the legitimacy of constitution making and of constitutional amendments is a function of the legality of the processes of constitutional change. At the second level, the legitimacy of a constitutional regime is a function of the degree to which the regime functions in accord with the ideal of the rule of law.

118. Solum, *supra* note 14.

The constitutional regime in the United States arguably suffers from a variety of legality problems. The Philadelphia Convention did not follow the amendment processes specified by the Articles of Confederation. Serious questions have been raised about the legal validity of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Legitimacy-as-legality questions also arise in the context of judicial review. Originalists argue that violations of the Constraint Principle are illegitimate because the Supreme Court does not have legal authority to override the constitutional text. Some living constitutionalists might counter this argument by claiming that the rule of recognition in the United States authorizes the Supreme Court to depart from the constitutional text, so long as the departures conform to legal norms governing the jurisdiction of the Court and the requirement that it act on a case-by-case basis using common-law methods of reasoning.

Originalists might counter that the emergence of relatively unconstrained judicial power was illegitimate as judged by the preexisting legal norms in effect at the time the Court began to systematically depart from the original meaning of the constitutional text. Moreover, some originalists have claimed that our current rule of recognition does not permit the Supreme Court to amend the Constitution by construction. Proponents of this view may include William Baude¹¹⁹ and Scott Soames.¹²⁰ If Reflective Equilibrium Theory (or any other version of living constitutionalism) authorizes violations of the Constraint Principle, and if such violations are not lawful under the rule of recognition, then pairwise comparison of Fallon's theory with Public Meaning Originalism favors the latter over the former with respect to the legality dimension of legitimacy.

3. Legitimacy as Transparency

The third dimension of constitutional legitimacy is transparency. The central idea is that constitutional decisions are rendered more legitimate to the extent that the motives and reasons for the decisions are made public and offered in good faith. The flip side of the coin is that constitutional decision making is illegitimate to the extent that it is based on reasons that are not disclosed or justified by reasons offered in bad faith. Once again, there are two levels. The first level involves transparency in the framing and ratification of the constitutional text. The second level is implicated in the implementation of the constitution by officials and judges.

There may well be legitimacy problems with the United States Constitution at the first level. It might be argued that the Federalist advocates of the Constitution were deceptive in various ways, minimizing the extent of national power during the ratification debates and arguing for an expansive conception of national power after the Constitution had been approved. If this characterization is correct,

119. Baude, *supra* note 96.

120. Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241 (2020).

then this constitutional “bait and switch” counts against the legitimacy of the United States Constitution.

Transparency problems arise in the context of judicial review as well. Originalists claim that some versions of living constitutionalism involve systematic deception about constitutional interpretation and construction. Living constitutionalist judges almost never acknowledge that their decisions are contrary to the original meaning of the constitutional text. Furthermore, they rarely acknowledge that their decisions are based on the Justices’ moral or ideological beliefs. Fallon discusses this issue in *Law and Legitimacy in the Supreme Court*, taking note of the attitudinal model, which “postulates that Supreme Court Justices consistently vote to decide cases in ways that directly reflect their ideological values.”¹²¹ But the transparency critique is also leveled at originalists; critics argue that so-called originalist judges make ideological decisions, but dress them up in the garb of original meaning.¹²²

Assessing the impact of legitimacy as transparency to the great debate requires pairwise comparison. Actual implementation of Public Meaning Originalism would provide a very high degree of transparency: judicial decisions would be made on the basis of the constitutional text. Some versions of living constitutionalism fare poorly on this score; this is especially true of Constitutional Eclecticism and Constitutional Opportunism, theories that permit judges to conceal the true basis for their decisions. This same point may apply to Common Law Constitutionalism, especially in the version advocated by David Strauss, which allows judges great flexibility with respect to precedent.¹²³ Other versions of living constitutionalism would be transparent if faithfully executed. For example, the Moral Readings Theory would require judges to transparently explain the role of moral reasoning in their decisions. Reflective Equilibrium Theory does not take an explicit stand on transparency: the word “transparency” (and related forms of “transparent”) does not appear in *Law and Legitimacy in the Supreme Court*.¹²⁴ It is difficult to assess in advance whether judges in reflective equilibrium would adopt a norm of transparency; it is possible that different judges would reach equilibria that differ on this score.

121. FALLON, *supra* note 1, at 122.

122. Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443, 1443 (2016).

123. This feature of Strauss’s view comes out in the following passage:

[P]rovisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward—on subsequent decisions and on judgments about the direction in which the law should develop.

David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015).

124. Search performed on “transparency” and “transparent” in the Kindle version of *LAW AND LEGITIMACY IN THE SUPREME COURT*.

4. Legitimacy and Justifiability

The fourth dimension of legitimacy is connected to the concept of justification by publicly accessible reasons. This idea was articulated by Rawls as the liberal principle of legitimacy:

Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.¹²⁵

In the constitutional context, this form of legitimacy is engaged at two levels. First, the constitution itself and subsequent amendments are legitimate to the extent that the provisions of the constitution can be justified by public reasons—reasons that are accessible to citizens who affirm a variety of moral, political, and religious views about the good and the right. Second, the implementation of the constitution, including the decisions of the Supreme Court, are rendered legitimate if the Court articulates publicly accessible reasons for its decisions.

What counts as a public reason will vary over time. For example, the voting rights enforcement mechanism in Section Two of the Fourteenth Amendment is explicitly restricted to males.¹²⁶ It is at least conceivable that this restriction could have been viewed by citizens as supported by reasons accessible to all of them at the time the amendment was adopted, but that this provision would lack an adequate justification at later date, for example, after the adoption of the Nineteenth Amendment. It seems clear that many provisions of the Constitution are difficult to justify on the basis of public reasons that are accessible to citizens today.

Many of the most problematic provisions have been corrected by constitutional amendment, including the pro-slavery provisions of the original constitution that were overruled by the Thirteenth Amendment. The equal suffrage of states in the Senate, however, is still in effect and this provision is entrenched by Article V, which provides that “no state, without its consent, shall be deprived of its equal suffrage in the Senate.”¹²⁷ This provision is particularly difficult to justify on the basis of public reasons that are accessible to all citizens: citizens in large states could reasonably believe that the apportionment of the Senate denies them equal citizenship for reasons that now seem arbitrary and historically contingent.

Even if particular provisions of the Constitution cannot be justified by public reasons today, it may be the case that the Constitution as a whole can be justified by public reason, not as an ideal constitution but as a constitutional regime that is sufficiently good and just in comparison to the alternatives. Some alternatives,

125. JOHN RAWLS, *POLITICAL LIBERALISM* 137 (2d ed. 2005).

126. U.S. CONST. amend. XIV, § 2.

127. U.S. CONST. art. V.

such as the imposition of a “revolutionary constitution”¹²⁸ through violent regime change, involve substantial risks of disorder and human suffering. Other alternatives, such as an extraconstitutional amendment process resembling the Philadelphia Convention, are less risky, but setting another constitutional convention in motion would create an unpredictable process of constitutional change. One can imagine that a case grounded in public reasons could be made against the initiation of a Constitutional Convention that would operate outside of Article V.

At the level of implementation, the justifiability dimension of legitimacy requires judges to offer publicly accessible reasons in support of their decisions. This requirement would be violated if the Supreme Court were to rely on a particular moral, religious, or ideological doctrine as the basis for its decisions. For example, if the Supreme Court were to reverse *Roe v. Wade* on the basis of Catholic moral theory or reaffirm *Roe* on the basis of utilitarian moral philosophy, its decision would suffer a legitimacy problem.

The paradigm case of a public reason for a judicial decision is that the decision is required by the constitutional text. If the Public Meaning Thesis is correct, then Supreme Court decisions are justified by public reasons to the extent that they are supported by the original public meaning of the constitutional text. But when the Supreme Court makes decisions that violate the Constraint Principle (and hence are inconsistent with the constitutional text), the Court must offer publicly accessible reasons for its decisions that rely on values, goals, or principles that are shared by all or almost all reasonable citizens. Providing such reasons will be especially difficult in cases that involve controversial questions of political morality, where some accept, and other citizens accept, and other citizens reject, the moral basis for a constitutional doctrine.

Again, the application of legitimacy as justifiability by public reason requires pairwise comparison. The Moral Readings Theory allows resort to nonpublic reasons, at least in the form articulated by Ronald Dworkin.¹²⁹ Other versions of living constitutionalism do well on this ground: if Thayerian judges announce that deference to Congress is the basis for their decisions, then the justification sounds in public reason. Once again, it is difficult to assess Reflective Equilibrium Theory, as different judges might reach different conclusions with respect to the role of public reason: Fallon himself elides this question in a footnote, stating that both Rawls’s requirement for justification by public reasons and Dworkin’s rejection of that view are plausible; Fallon speculates that other views may be plausible as well.¹³⁰

128. For discussions of the idea of revolutionary constitutionalism, see BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS* (2019); Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 *INT’L. J. CONST. L.* 173 (2017).

129. See Ronald Dworkin, *Rawls and the Law*, 72 *FORDHAM L. REV.* 1387, 1399 (2004) (rejecting a requirement of justification by public reason).

130. FALLON, *supra* note 1, at 203 n.1.

5. Legitimacy as a Sufficiently Reliable Process for Ensuring Reasonable Justice

Recall that Fallon's first ideal of constitutional legitimacy was substantive justice. Fallon believes that the legitimacy of a constitution requires that the "set of institutions and rights guarantees" provided by the constitutional regime are "at least reasonably just."¹³¹ The concept of legitimacy is complex and contested, and it seems likely that different theorists will have different views about the nature of the concept. On the view set out above,¹³² normative or moral legitimacy is distinguished from substantive justice. Legitimacy is understood as a process value, whereas substantive justice is characteristic of outcomes. For this reason, I believe that Fallon was mistaken to include substantive justice as a component of legitimacy. That is not to say that substantive justice is not a requirement that must be satisfied; one might believe that a legitimate system that produces intolerably unjust outcomes is not worthy of respect, and that its laws do not generate obligations of obedience. Even if Fallon is wrong to use the label "legitimacy," the substance of his point seems correct. We are not obliged to cooperate with a constitutional system that is evil or wicked.

There is, however, a process value that is closely connected to Fallon's ideal of substantive justice. One might believe that a constitutional regime is more legitimate to the extent that it establishes a process that reliably leads to just outcomes. Likewise, a constitutional regime would be less legitimate to the extent that it establishes processes that lead to unjust outcomes. Randy Barnett's procedural conception of legitimacy is an example of such a process theory of legitimacy. Barnett describes his view as follows:

[C]onstitutional legitimacy can be seen as a product of procedural assurances that legal commands are not unjust. The narrow thesis defended here concerns only the proper conception of constitutional legitimacy, not all the conditions that may lead to the conclusion that a particular constitutional regime is or is not legitimate. To assess the legitimacy of any given legal system would require both this procedural conception of legitimacy and a conception of justice by which to assess the adequacy of lawmaking procedures.¹³³

This view of legitimacy as a reliable process is closely related to Fallon's view of legitimacy and perhaps the difference between substantive justice of outcomes and reliability of the process leading to those outcomes is of secondary importance.

As applied to the United States Constitution, the reliable-process view is likely to be viewed differently by different groups. Members of some groups may well view the constitutional regime as substantially unjust with respect to both

131. FALLON, *supra* note 1, at 29.

132. See discussion *supra* Part III.B.

133. Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 113 (2003).

outcomes and processes. For example, members of racial minority groups may believe that the Constitution has produced massive and pervasive injustice and that the constitutional system entrenches injustices in a variety of ways. One such entrenchment mechanism might be the Article I legislative process, which effectively requires supermajority support for legislative change and thereby creates barriers to remedying injustice through ordinary legislation. Other groups are likely to have very different critiques. For example, it might be argued that democratic legislative processes are captured by special interest groups and frequently result in rent-seeking that unjustly transfers wealth and income between certain groups. Given the deep and persistent disagreement about substantive justice, it will be difficult to reach an agreement or overlapping consensus about the question whether our constitutional regime is sufficiently reliable to be regarded as legitimate. This point applies to Fallon's ideal of substantive justice as well.

The difficulty of reaching overlapping consensus on substantive justice is important. If such a consensus is a prerequisite to the legitimacy of a constitutional regime, then legitimacy may, as a practical matter, be unobtainable. And the moral illegitimacy of the constitutional regime would create severe problems if translated into sociological illegitimacy, dissolving the bonds of obligation to comply with the constitution. In such circumstances, the question becomes whether the other dimensions of legitimacy can bear the extra burden created by dissensus about substantive justice. When agreement on substantive justice is unobtainable, democratic legitimacy, legality, transparency, and public justification must do the work of providing citizens with reasons to accept the legitimacy of the constitutional order.

The application of the reliable process theory of legitimacy originalism and living constitutionalism would require pairwise comparison and the articulation of alternative theories of justice. Such an enterprise is far beyond the scope of this essay.

D. The Function of Normative Constitutional Legitimacy

It is important to remember that legitimacy has both a normative and positive dimension. It is possible for a constitutional regime to retain positive legitimacy, even if that legitimacy lacks good normative foundations. Likewise, a system that possesses normative legitimacy might lose positive legitimacy for a variety of reasons. Nonetheless, the two aspects of legitimacy may be related in the long run. In the absence of good reasons, sociological legitimacy must be sustained by propaganda and deception—and there may well be limits to the ability of these techniques to sustain legitimacy over time. For the purposes of this discussion, let us assume that a substantial degree of normative legitimacy is required for positive legitimacy to persist in the long run.

Normative constitutional legitimacy is important in a society that is characterized by pluralism and ideological conflict. Different groups of citizens will have different views about constitutional substance. One way to see this dissensus is

simply to list some of the controversial constitutional questions about which there is deep and persistent disagreement:

- *Roe v. Wade* has prompted deep and persistent disagreement about the constitutional status of a woman's right to choose whether to carry a pregnancy to term and the moral status of the unborn.
- *Obergefell v. Hodges* elicited deep divisions between the advocates and opponents of a constitutional right to same-sex marriage.
- *Bush v. Gore* resulted in a bitter controversy over the legitimacy of the Supreme Court's decision that the process for recounting ballots in Florida for the 2000 presidential election violated the Equal Protection Clause.

In cases like these, moral justness of the Supreme Court's decisions is likely to be challenged irrespective of the outcome. In such cases, for a normative constitutional theory to confer legitimacy on the Supreme Court's decisions, the theory must provide reasons for those who disagree with the outcome to regard the decision as legitimate. The problem of legitimacy is especially acute in cases in which the stakes are high and either side would view a loss as creating a fundamental injustice. If such cases are isolated and occasional, it may be possible to view the system as a whole as legitimate, despite the occasional illegitimate decision. But if there is a pattern of decisions that are regarded as both unjust and illegitimate by large numbers of citizens, there may come a point at which constitutional legitimacy is endangered.

There are good reasons to believe that the Supreme Court is now perceived by many citizens as a partisan political institution. A Pew Research poll reported:

Seven-in-ten Americans (70%) say that in deciding cases, the justices of the Supreme Court "are often influenced by their own political views." Just 24% say they "generally put their political views aside" when deciding cases. The belief that justices are swayed by their own political views spans partisan and demographic groups. The survey also finds that a majority of the public (56%) says the court should consider the views of most Americans when deciding cases; 39% say they should not be influenced by public opinion.¹³⁴

Similar data regarding the beliefs of key political actors (Senators, staffers, Presidents, and the key players in judicial selection) is unavailable, but it seems reasonable to assume that their view of the role of politics in the Supreme Court is no better and quite likely worse. If the Justices vote their politics in politically salient cases, then the selection of Supreme Court Justices can come to be viewed

134. *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RESEARCH CENTER (July 29, 2015), <https://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> [<https://perma.cc/6AJL-YN3H>, <https://perma.cc/Q8RM-A6TZ>].

as no different in principle than other decisions driven by considerations of partisan politics.

What are the consequences of a loss of positive constitutional legitimacy? If the persistent losers in constitutional conflicts also regard the Supreme Court's decision as illegitimate, then they may regard themselves as no longer bound by either the hard rules of constitutional law or the soft norms of constitutional practice that provide constitutional stability. Once groups with significant political power regard themselves as no longer bound by constitutional law and constitutional norms, they may be tempted to play constitutional hardball.¹³⁵

One particularly dangerous scenario involves what might be called a "downward spiral of politicization."¹³⁶ Given the perception that the Supreme Court's decisions are systematically illegitimate, there would be good reason to attempt to pack the Court with partisan Justices who will "vote the right way." The other side will then pull out all the stops to block the appointment of such Justices. If one side successfully stacks the Court with its partisans, the other side may be tempted to engage in court packing when they regain the political ascendancy, expanding the Court and appointing partisan Justices to tip the balance back in their favor.¹³⁷ And one round of court packing might provoke another, with no end in sight. While, in the early stages of a downward spiral, partisans might maintain the fiction that their actions aim to restore the rule of law, at some point, the falsehood of the fiction will become transparent. The end result of a downward spiral of politicization could be an openly and thoroughly politicized Supreme Court; such a court would view every case as an opportunity for partisan political advantage, including the reward of political supporters and the punishment of political opponents.

The downside of a loss of constitutional legitimacy is very substantial, but the upside of enhanced legitimacy can be substantial as well. At a minimum, constitutional legitimacy can produce acquiescence in the decisions of the Supreme Court by those who disagree with the outcomes. But it is possible that legitimacy can also elicit genuine respect for the Court and Constitution. If the losers in high stakes constitutional controversies view the Court as worthy of respect, this may

135. See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

136. On the idea of a downward spiral of politicization, see Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 270 (2018); Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 661 (2005); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 203 (2003).

137. Recently, Neil Siegel wrote, "[t]here are no serious proposals in the political branches calling for Court-packing," Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 170 (2018), but in 2019 that assertion may not be true. See Jordain Carney & Rachel Frazin, *Court-packing becomes new litmus test on left*, THE HILL (Mar. 19, 2019), <https://thehill.com/homenews/senate/434630-court-packing-becomes-new-litmus-test-on-left> [<https://perma.cc/J57W-VU6U>] (discussing support for court packing by noted Democratic political figures).

lead to reconciliation and a de-escalation of the bitter and persistent disagreements that sometimes characterize constitutional conflicts.

IV. REFLECTIONS ON FALLON AND THE GREAT DEBATE

In *Law and Legitimacy in the Supreme Court*, Fallon investigates meaning, reflective equilibrium, and constitutional legitimacy. I have explored each of these three themes and expressed agreement with Fallon on many points, disagreement on others, and raised a variety of additional questions. At this point, I will step back and consider the implications of these explorations for the great debate between originalism and living constitutionalism. The discussion that follows will focus on the question whether Public Meaning Originalism or Reflective Equilibrium Theory offers the more likely path to constitutional legitimacy.

A. *Contrasting Public Meaning Originalism and Reflective Equilibrium Theory*

Law and Legitimacy in the Supreme Court has many virtues, but the book does not provide a detailed account of the application of Reflective Equilibrium Theory to a set of concrete examples or cases. For that reason, the discussion that follows must rely on a certain amount of guesswork about the way that the theory would work in practice. It may well be that I will fail to provide the best version of Fallon's theory, but even if this is the case, my failures may enable readers to correct my errors and formulate Fallon's views in their best and most defensible form.

Public Meaning Originalism and Reflective Equilibrium Theory differ with respect to the three central claims made by public meaning originalists:

- Public Meaning Originalism affirms the Public Meaning Thesis, but Fallon argues that the constitutional text should be viewed as having multiple meanings, including "reasonable meanings" and "interpretive meanings."
- Public Meaning Originalism affirms the Fixation Thesis, but Fallon maintains that "reasonable meanings" and "interpretive meanings" can change over time.
- Public Meaning Originalism affirms the Constraint Principle, but Fallon maintains that the Supreme Court should have the power to create new "interpretive meanings," to discern "reasonable meanings" and "moral conceptual meanings," and to follow precedent in ways that override, alter, or replace the original public meaning of the constitutional text.

In my view, the key disagreement between Fallon and public-meaning originalists concerns the Constraint Principle. Ultimately, Fallon could agree with the Public Meaning Thesis and the Fixation Thesis but still affirm that the Theory of Reflective Equilibrium provides a better normative constitutional theory than Public Meaning Originalism. Fallon believes that the Theory of Reflective

Equilibrium better realizes the value of legitimacy than does adherence to the Constraint Principle. Public meaning originalists believe the opposite.

I cannot explore all of the issues raised by pairwise comparison of the Theory of Reflective Equilibrium and Public Meaning Originalism in this brief essay, but in the following discussion, I hope to highlight some of the most important issues. My aim is to identify important questions; I will not attempt to provide definitive answers. The first of these questions concerns the structure of the Reflective Equilibrium Theory itself.

B. The Role of the Moral Beliefs of Judges and Justices

To what extent does Fallon's Reflective Equilibrium Theory allow or require judges to consider their moral beliefs in the process of constitutional interpretation and construction? I am unsure of the answer to this question, but there are reasons to believe that a judge employing Fallon's theory would be required to weigh moral concerns heavily and that preexisting constitutional meanings would not be a source of meaningful constraint. Recall that Fallon begins with the proposition that there are multiple forms of meaning and that judges are authorized to pick among these meanings on the basis of moral reasons. The forms of meaning include the literal meaning of the constitutional text, the shared contextual meaning (which approximates original public meaning), the moral conceptual meaning, reasonable meanings, and interpretive meanings. And the Court is authorized to depart from any or all of these forms of meaning on the basis of precedent. Several of these forms of meaning are themselves a function of moral beliefs, including moral conceptual meanings, reasonable meanings, and interpretive meanings. In addition, literal meaning (or bare semantic meaning) is almost always sparse because the literal meaning of the constitutional text allows semantic ambiguity to operate, and hence for judges to pick whichever of the semantically available senses of a word or phrase is best suited to that judge's moral beliefs about how the case ought to come out. If this reading of Fallon is correct, then Reflective Equilibrium Theory would seem to require Justices and judges to give their moral beliefs substantial weight in the process of constitutional interpretation and construction.

C. Reflective Equilibrium and Revisability

A second feature of Reflective Equilibrium Theory is Fallon's emphasis on ongoing revisability. The importance of this feature can be brought out by contrasting two different pictures of the role of reflective equilibrium in constitutional theory and practice. Let us call the first picture "Theoretical Stability." We can imagine that a normative constitutional theory is relatively stable. It might take quite some time to build a constitutional theory through a process of reflective equilibrium, but once the theory is built, it would be quite stable. Occasional minor repairs might be needed, but the main structural features of the theory would not be subject to ongoing revision. Of course, we could reject a theory after putting it into practice. Or, we could see that the theory needs major revision, like

a ship that needs to return to drydock for refitting. Public Meaning Originalism aims for Theoretical Stability; features like the Constraint Principle are intended to be stable and not the subject of ongoing revisions on a case-by-case basis.

Let us call the second picture “Theoretical Revisability.” On this picture, constitutional theories are always works in progress. This does not mean that the theory is radically unstable. There may be periods of relative stability in which the major elements of the theory do not change. But, as new cases arise, the theoretical structure will be rebuilt, with basic principles undergoing revision and alteration on an ongoing basis. In a regime of Theoretical Revisability, a constitutional theory could be like the Ship of Theseus,¹³⁸ in which every plank and mast was replaced during a long voyage. Fallon’s Reflective Equilibrium Theory seems to aim at Theoretical Revisability and reject Theoretical Stability.

Fallon’s commitment to Theoretical Revisability has the consequence that the judges and Justices who implement that theory will not consider themselves bound by a set of guiding principles. Instead, they would see themselves as having a duty to consider revision of their principles in response to new legal issues, new cases, and changing circumstances and values. If this understanding is correct, then Reflective Equilibrium Theory would truly be a form of living constitutionalism. This feature of Fallon’s theory has consequences for the ability of the theory to provide meaningful constraint once it is implemented. Because judges view themselves as having an obligation to consider ongoing theoretical revision, their attitude towards constraint will necessarily be mixed. Constraint is always provisional and subject to revision.

In addition to positing a multiplicity of meanings and ongoing theoretical revisability, Fallon’s Reflective Equilibrium Theory is committed to a direct role for the moral beliefs of judges in the process of judicial decision-making. This direct role is explicit in his description of the process of reflective equilibrium and in his understanding of constitutional legitimacy. For Fallon, the legitimacy of a constitution depends on whether it is “reasonably just.” Recall that in Fallon’s discussion of wide reflective equilibrium, he states: “Efforts by the Justices of the Supreme Court to reach the kind of moral judgments necessary to the legitimate exercise of their office also might include reference to and possible reformulations of ideals of substantive justice, procedural fairness in the allocation of lawmaking power, and the rule of law.”¹³⁹

Judges who seek to implement Reflective Equilibrium Theory will be required to employ their moral beliefs on an ongoing basis in two ways. First, in the application of the theory to particular cases, they are required to employ their moral beliefs to the question about which type of constitutional meaning to employ. Shared contextual meaning (or Original Public Meaning) is one possibility, but they must also consider reasonable meaning, moral conceptual meaning, literal meaning, and interpreted meaning. And, if their moral beliefs steer them toward

138. PLUTARCH, PARALLEL LIVES.

139. FALLON, *supra* note 1, at 151.

reasonable meaning or moral conceptual meaning, their moral beliefs will be directly engaged in determining what that meaning actually is. Second, in the process of ongoing revision of the principles that guide their decisions, their moral beliefs will play an important role in determining when revisions are required and what the content of those revisions will be. By emphasizing the role of moral beliefs, I do not mean to imply that Reflective Equilibrium Theory does not include other factors. Fallon believes that precedent is important, and his theory of legitimacy incorporates democratic legitimacy as an important value. The moral beliefs of judges will need to be balanced against these considerations. But, when the first-order moral beliefs of the judges are in tension with these factors, the method of reflective equilibrium would seem to require judges to take their second-order moral beliefs into account in resolving the tensions. For example, Reflective Equilibrium Theory would seem to require judges to consider their second-order moral beliefs in deciding whether moral legitimacy requires the overruling of precedent.

One final observation about Fallon's notion of revisability. It may be important to distinguish the role of judge from the role of constitutional theorist when thinking about revisability. It might be argued that constitutional theorists ought to consider their theoretical views as open to ongoing revision. It is plausible to see truth as the highest value for constitutional theorists. If so, then constitutional theorists must be open to revision whenever they come to believe that their current views are false or that an alternative view is stronger. The role of a judge is different—or so I have argued in this essay. Judging is a practical activity, not a theoretical one. Judges may have good practical reasons to stick to principles of constitutional law that are both reasonable and the subject of a consensus, even if they come to believe that some other theory is more attractive on purely theoretical grounds. As a practical matter, judges need working principles to guide their decisions. Constant theoretical revision may be inconsistent with the practical realities of the role of judge. For these reasons, it may be the case that constitutional theorists should be open to ongoing and regular revision of their views, while judges should regard their revisions as settled with revisions limited to extraordinary circumstances.

D. Comparisons with Respect to Legitimacy

I am not sure that I have gotten Fallon's Reflective Equilibrium Theory right. But for the sake of argument, suppose that I have. The next step is to compare Public Meaning Originalism with Reflective Equilibrium Theory on the five dimensions of legitimacy that I identified above.¹⁴⁰

First, consider democratic legitimacy. Public Meaning Originalism specifies that the communicative content of the constitutional text is provided by its original public meaning, and that meaning was adopted by a super-majoritarian political process, via either the ratifying conventions or the Article V amendment

140. See *supra* Part III.C.

process. That process was only imperfectly democratic because many groups were denied the right to vote. Reflective Equilibrium Theory is a form of Living Constitutionalism that vests a power of constitutional revision in the Supreme Court, a group of nine unelected judges, five of whom can engage in constitutional construction that is the functional equivalent of a constitutional amendment. The question as to which theory better realizes the value of democratic legitimacy is obviously complex, but it seems clear that a reasonable case can be made that Public Meaning Originalism fares better than Reflective Equilibrium Theory (understood as a method employed by judges) on this score—although a reasonable case can be made for the opposite conclusion. Playing out all of the arguments and counter arguments would require extensive discussion, at least a very long law review article.

Second, consider legitimacy as legality. The case for Public Meaning Originalism on this score is clear and compelling. Public Meaning Originalism limits judges to the role of law application and denies them the ability to adopt amending constitutional constructions. Reflective Equilibrium Theory gives Supreme Court Justices a substantial lawmaking role. This is not to say that Fallon's theory would make the Supreme Court a lawless institution. Fallon would require the Justices to attach their decisions to meaning of some form or to precedent; Reflective Equilibrium Theory would not authorize the Court to adopt formal constitutional amendments or to announce a new constitutional doctrine that radically altered our form of government. But legality is a scalar and not a binary: Public Meaning Originalism better realizes the value of legality than does Reflective Equilibrium Theory.

Third, consider legitimacy as transparency. When we consider the relationship of constitutional theories to this value, I think it is important that we compare good faith implementation of Public Meaning Originalism to good faith implementation of Reflective Equilibrium Theory. One of the chief advantages of Public Meaning Originalism is its transparency. Justices are bound by the original public meaning of the constitutional text and are obliged to provide evidence of that meaning in their opinions and to clearly state their reasons for resolving evidentiary conflicts. Achieving transparency will be more difficult for judges who employ Reflective Equilibrium Theory, but it would, I think be possible. It would be important for the Justices to be clear about the kind of meaning that they were employing. For example, if the Justices were to select reasonable meaning and reject original public meaning, they would be obliged to say so and to explain the nature of "reasonable meaning." And they would be obliged to provide the reasons for their choice of reasonable meaning over other forms of meaning and to disclose the role of their moral beliefs in that choice. But, if these requirements were met, then I think that Reflective Equilibrium Theory could satisfy legitimacy as transparency to a degree that equaled, or closely approximated, that obtained by Public Meaning Originalism.

Fourth, consider legitimacy as justifiability by public reasons. It seems clear that Public Meaning Originalism scores well on this dimension of legitimacy.

Justifying a constitutional decision by appealing to the original public meaning of the constitutional text in no way requires resort to nonpublic reasons. The deep and controversial premises of particular moral, religious, or ideological views play no role in originalist reasoning. Moreover, the justifications for the Constraint Principle itself are public in nature. The case for the Constraint Principle rests on public values such as the rule of law and legitimacy. It is more difficult for Reflective Equilibrium Theory to achieve the goal of justifiability by public reasons. Much depends on the issues discussed above in connection with the distinction between narrow, wide, and broad reflective equilibrium.¹⁴¹ If Reflective Equilibrium Theory were to rely on narrow reflective equilibrium, then it could not satisfy the requirements of legitimacy as justifiability by public reasons. The nonpublic moral, religious, or ideological beliefs of the Justice would be playing an important role in both individual cases and in their ongoing revisions of the principles that guide their decisions. This problem could be addressed by moving to wide or broad reflective equilibrium. Because Fallon's views on this topic are not fully developed in *Law and Legitimacy in the Supreme Court*, it is difficult to reach firm conclusions about Reflective Equilibrium Theory in its current state of development.

Fifth and finally, consider legitimacy as reliability. Comparison of Public Meaning Originalism with Reflective Equilibrium Theory on this dimension is too large a project to undertake in this essay. Is the process provided by Public Meaning Originalism a sufficiently reliable guarantee of reasonable justice so as to be legitimate? Answering that question would require us to develop a theory of reasonable justice, discover the original meaning of the constitutional text, and consider the implications of an originalist Supreme Court for the likelihood of constitutional amendments. Similar questions would arise in connection with the assessment of Reflective Equilibrium Theory, but that theory has the advantage that it makes substantive justice an explicit consideration for the Justices. However, that very feature of the theory has consequences for its implementation in the real world of politics. To the extent that political actors distrust the ability of the Justices to confine their deliberations to widely shared political values, they will have incentives to politicize the court. The impact of such politicization on substantive justice would depend on complex political processes that may well be unpredictable. Again, the resolution of the empirical questions is far outside the scope of this essay.

E. Comparisons with Respect to Justice

Fallon's understanding of legitimacy is different than the one that I have offered here. His notion of legitimacy does not clearly distinguish moral legitimacy from justice. Thus, for Fallon, the key question of legitimacy with respect to a normative constitutional theory concerns the justice of the outcomes which the theory yields. In this regard, it might be helpful to consider the following

141. See *supra* Part II.B.

thought experiment involving the reasoning of three imaginary justices choosing among three simplified constitutional theories. Here are the three simple theories:

Theory One is Public Meaning Originalism, requiring that courts decide constitutional cases in accord with the original public meaning of the constitutional text.

Theory Two is Common Law Constitutionalism, requiring that courts decide constitutional cases on the basis of a common-law method that gives great weight to precedent but allows common-law evolution through interstitial judicial legislation.

Theory Three is Representation-Reinforcement Thayerianism, requiring courts defer to Congress except when judicial review is required to preserve majoritarian democratic processes.

And here are the three imaginary justices and their reasoning using narrow reflective equilibrium as their meta-theory and emphasizing the question as to which theory yields just outcomes:

Justice Sosyalis believes that justice requires equality of wealth and income and also believes that both Common Law Constitutionalism and Public Meaning Originalism will protect property rights and contractual rights in ways that would preclude a transition to democratic socialism. Justice Sosyalis chooses Representation-Reinforcement Thayerianism on the ground that it allows democratic processes to move towards equality.

Justice Libèrètèr believes that justice requires respect for individual rights, including the rights specified in the first eight Amendments and incorporated via the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Libèrètèr believes that of the three theories, Public Meaning Originalism will most likely lead to just outcomes.

Justice Konsèvatif believes in a Burkean ideal of justice, which emphasizes the value of tradition and the dangers of change. Justice Konsèvatif believes that Common Law Constitutionalism is the best way to achieve outcomes that preserve the status quo and minimize harmful changes.

Each Justice is in narrow reflective equilibrium. Each Justice believes that their preferred theory will produce just outcomes. But the Justices each come to reflective equilibrium in support of a different normative constitutional theory. Each Justice would be willing to endorse Reflective Equilibrium Theory if they could be assured that their view would command a majority on the Supreme Court, but no Justice would be willing to do so if they knew that another view would prevail.

This thought experiment suggests that viewing moral legitimacy as justice fails to provide a basis for convergence in constitutional theory. In a pluralist society, one aim of constitutional theory is to provide both judges and citizens with views

like Sosalis, Libèrètèr, and Konsèvatif with an approach they can all endorse, despite their disagreements about what outcomes are just. And this is precisely the function of a process understanding of normative legitimacy. Democratic legitimacy, legality, transparency, and justifiability are process values. The point of appealing to such values is that they provide a basis for agreement among reasonable persons who disagree about which outcomes are just and which are unjust.

F. *The Problem of Uncertainty*

Consider one final aspect of the great debate. When we choose between constitutional theories, there are serious problems of uncertainty. In the case of originalism, these uncertainties are introduced by the fact that there are significant gaps in our knowledge about the meaning of important constitutional provisions. The meaning of the Privileges and Immunities Clause, for example, is debated by originalists and no clear consensus has emerged.¹⁴² Moreover, because sophisticated originalist scholarship is a relatively recent development, there are many issues in constitutional law where relatively little has been written from an originalist perspective. But in the case of originalism, we have the benefit of knowing what the constitutional text says—and this limits possibilities for surprising results. With originalism, uncertainty is mostly a result of “known unknowns.”¹⁴³

The same cannot be said of many forms of living constitutionalism. Common law constitutionalism reduces the scope of short-term uncertainty, because the common-law method requires judges to proceed one case at a time: big and surprising changes usually require many cases and hence mostly occur over the long run—although there may be exceptions. At the extremes, the Superlegislature Theory and Constitutional Eclecticism are so amorphous that it is difficult to know how we would even begin to assess the consequences of adopting these theories in the long run. Unconstrained Thayerianism generates uncertainty in a different way. We know how judges will decide cases—they will defer to the legislature. What we don’t know is what an unconstrained legislature will do in the absence of constitutional constraints.

142. Compare Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, NOTRE DAME L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348680 [<https://perma.cc/ZMW9-DLLW>], with Kurt T. Lash, *The Enumerated Rights Reading of the Privileges or Immunities Clause: A Response to Randy E. Barnett and Evan D. Bernick’s ‘The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment,’* NOTRE DAME L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3351142, [<https://perma.cc/4E9P-V2NZ>].

143. On the idea of “known unknowns,” see generally David C. Logan, *Known Knowns, Known Unknowns, Unknown Unknowns and the Propagation of Scientific Enquiry*, 60 J. EXPERIMENTAL BOTANY 712 (2009). Because of the uncertainty regarding the original meaning of some important provisions, it might be argued that the commitment to originalism should be provisional. This is a fair point, but as with so many other issues in the great debate, it is important to ask the question, “What is the alternative?” Many forms of living constitutionalism involve greater uncertainties. Thus, when we engage in pairwise comparison, uncertainty may count in originalism’s favor. And uncertainty is only one of many variables in the great debate. As with many other arguments for and against originalism, it seems unlikely that uncertainty provides a decisive reason either way.

One of the difficulties with assessing Reflective Equilibrium Theory is that there is no way of knowing in advance where the search for reflective equilibrium will lead. Once we are engaged in the process of trying to bring all of our considered judgment about both particular cases and general principles into a relationship of consistency and mutual support, there are no assurances about what will have to give way.¹⁴⁴ We set out on a journey without a fixed destination. For this reason, Reflective Equilibrium Theory, when viewed as a practical method for constitutional practice, gives rise to unknown unknowns. The ship of Theseus is rebuilt plank by plank on a voyage to an unknown continent, navigating without a chart or compass.

One of the chief virtues of Public Meaning Originalism is that it provides a known destination: we navigate toward the original public meaning, and our chart is the constitutional text. Our vessel may be a bit old-fashioned; after all, the keel was laid in 1787, but our job is to keep it in good repair and not to rebuild it from top to bottom. We may need to replace a defective sail or a broken mast, but that is what amendments are for. We are on a long voyage with the usual uncertainties, unanticipated storms and unmarked shoals, the known unknowns. We might wish that things were otherwise. We might wish that we sailed a sea of tranquility to a land of milk and honey, each of us navigating to our own Utopia. We might wish that each of us could be guided by a different North Star, that each of us could arrive at our own ideal of a perfectly just society. But we must sail together to a common destination, guided by our old and musty chart, binding ourselves to the mast lest we succumb to the Sirens' sweet seductive song.¹⁴⁵

CONCLUSION

In this essay, I do not attempt to reach a bottom-line conclusion and pronounce a final judgment on the relative merits of Public Meaning Originalism and Reflective Equilibrium Theory. Rather, my more modest aim was to identify many of the questions that would need to be answered in order to render such a judgment. These questions do not have easy answers, but one of the chief virtues

144. This point is deep, and I cannot explore it adequately on this occasion, but the basic idea is that reflective equilibrium entails that even the general principles at the core of our web of belief are subject to revision if they are in tension with our beliefs about particular cases at the periphery. Thus, Fallon endorses the idea that our constitutional principles might change in response to disturbing implications for particular cases. The picture of core and periphery is inspired by the work of Professor Willard Van Orman Quine. See Willard Van Orman Quine, *Two Dogmas of Empiricism* in FROM A LOGICAL POINT OF VIEW 20–46 (2d ed. 1980); Willard Van Orman Quine, *Carnap and Logical Truth* in THE WAYS OF PARADOX AND OTHER ESSAYS 107–32 (2d ed. 1976); see also Peter Hylton & Gary Kemp, *Willard Van Orman Quine* in STAN. ENCYCLOPEDIA PHIL. (2019), <https://plato.stanford.edu/entries/quine/#CarnPrinToleQuinObje> [<https://perma.cc/PJ4J-6PE5>] (Section 3.1 is especially helpful.). I am grateful to Tyler Burge for my understanding of these issues.

145. HOMER, THE ODYSSEY.

of *Law and Legitimacy in the Supreme Court* is that it asks the hard questions. Fallon's book combines a magisterial command of constitutional theory with a deep knowledge of political philosophy. Fallon's Theory of Reflective Equilibrium is a serious candidate for the best form of living constitutionalism, and it is an important rival for all forms of originalism. Like many important books, Fallon's book opens new lines of inquiry and sheds light on old and familiar debates. It is a magnificent achievement.