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TOWARD A REFLECTIVE  
EQUILIBRIUM: MAKING OUR  
CONSTITUTIONAL PRACTICE SAFE  
FOR CONSTITUTIONAL THEORY

BOOK REVIEW: LAW AND LEGITIMACY IN THE  
SUPREME COURT,\*

RICHARD H. FALLON, JR.

ANDRÉ LEDUC†

Richard Fallon has written another important book about American constitutional law.<sup>1</sup> Indeed, it brings to mind Hilary Putnam’s definition of a classic: the smarter you get, the smarter it gets. Fallon presents a rich, thick description of our constitutional law and practice and an argument for how we may best continue and improve this practice. While intended to be accessible to a broad readership, Fallon’s arguments cut to the core of much current constitutional scholarship, even while urging us to move past many of these sterile debates. Most importantly, Fallon takes seriously his mission of speaking to the Court, as well as to the academy, and takes a real run at changing how the Justices decide cases and articulate their decisions.<sup>2</sup> He accomplishes all of this in a startlingly concise book, running only 174 pages of text and 36 pages of notes and without even a subtitle.

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†. I am grateful to Laura Litten for comments on an earlier draft of this review. © 2018 André LeDuc.

1. Another reflects books Fallon has himself written, including *The Dynamic Constitution* and *Implementing the Constitution*.

2. Other academics may claim the same ambition, of course, but the disconnect between how those scholars write about the Court and Constitution and how the Justices write about their decisions reveals how implausible that claimed mission is.

Fallon sets out to explain the nature of constitutional law, the constitutional disagreements of cases, constitutional argument, and the nature of the legitimacy of Supreme Court decisions and, ultimately, the Court itself. That's a tall order for a little book, but Fallon can make a claim to have accomplished his mission.

Contemporary constitutional scholarship falls into two dominant styles. Most common are the systematic works. They articulate a unifying theory of the Constitution, prescriptively reinterpreting the nature of our process of constitutional adjudication and resulting constitutional doctrine to create a systematic, unifying account of our constitutional law. These projects are often embodied in dense and lengthy tomes with catchy titles like *The Living Constitution*,<sup>3</sup> *The Invisible Constitution*,<sup>4</sup> *The Unwritten Constitution*,<sup>5</sup> *The Flexible Constitution*,<sup>6</sup> *Living Originalism*,<sup>7</sup> and *The Classic Liberal Constitution*,<sup>8</sup> among others.<sup>9</sup> The second style of analysis is marked by its granularity and attention to the details of constitutional doctrine and the particularity of our constitutional practices. They are rarely self-consciously therapeutic, but they are edifying, urging the reader to enrich her understanding of our constitutional law and practice, not to radically revise her view of what the Constitution says or requires. Prominent examples of such an approach include classics like Charles Fried's *Saying What the Law Is*, Laurence Tribe's *Constitutional Choices*, and John Hart Ely's *Democracy and Distrust*. Fallon undertakes something like the scholarship of this minority, edifying style in *Law and Legitimacy*, despite its aspirational title. He pursues his task of explaining the nature of constitutional law and legitimacy modestly, eschewing the common practice of discovering (and christening) a new Constitution. He is comfortable acknowledging the ways in which his views have developed and the views that he no longer holds.<sup>10</sup>

3. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

4. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

5. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

6. SEAN WILSON, *THE FLEXIBLE CONSTITUTION* (2013).

7. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

8. RICHARD A. EPSTEIN, *THE CLASSIC LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

9. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); LOUIS MICHAEL SEIDMAN, *THE UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001). Admittedly, Fallon has already gone down that road with *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*.

10. Thus, for example, Fallon disavows his 1987 claim that linguistic meanings would not conflict in ways that would generate constitutional controversies. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 80, 193 n.42 (2018) [hereinafter FALLON, *LAW AND LEGITIMACY*].

Fallon's mastery of the literature is impressive<sup>11</sup> and his treatment of its authors is both penetrating and charitable (sometimes perhaps too charitable).<sup>12</sup>

The infelicities in Fallon's account are few. Notably, he rarely distinguishes between indeterminacy and underdetermination of legal texts and rules.<sup>13</sup> That's an important distinction, however. Recognizing that legal authorities are underdetermined is consistent with an account of how the argument and resolution of constitutional controversies are channeled and constrained. These constraints make our practice of constitutional law far less vulnerable to challenges of radical indeterminacy or lawlessness. (Fallon believes that the practice of constitutional law is constrained in this way, so the error is more one of infelicity of expression than of substance.)<sup>14</sup> Sometimes the charity of Fallon's reading of other scholars' work glosses over profound issues. For example, he appears to accept the New Originalists' move to distinguish constitutional provisions that require only interpretation from those that allow construction without ever questioning whether the two types of provisions can be adequately distinguished and, if not, what the implications of that failure would be for New Originalism.

The richness of Fallon's argument and analysis requires a reviewer to choose among the important themes of the book. I will engage two principal subjects. First, I focus on what Fallon doesn't address and suggest what those omissions tell us about the direction of American constitutional legal scholarship in the early twenty-first century. Those omissions generally do not reflect significant gaps in Fallon's argument. They instead are part of a subtle strategy to redirect our approach to the Constitution and the Court in our Republic. Underlying Fallon's argument is an implicit account of who's not who, as it were, in the current pantheon of American constitutional scholarship. But Fallon gracefully (and graciously) does this only by showing how our discourse should proceed, rather than stating his argument that we need not engage these theorists expressly.

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11. See, e.g., *id.* at 188, nn.149–54 (discussing Scott Soames's philosophical arguments). The index, unfortunately, does not adequately capture the depth of Fallon's analysis, either substantively or in its entries for the scholars and scholarship that Fallon addresses.

12. Examples of Fallon's charity include his characterization of Steven Sachs's arguments for a positivist originalism as "bracing," and Bruce Ackerman's radical theory of *de facto* constitutional change as "theoretically ambitious and highly provocative," and his willingness to glide past continuing confusion in the New Originalist camp over the distinction between the broader concept of linguistic meaning and the narrower, less relevant concept of semantic meaning. *Id.* at 204 n.7 (Sachs), 196 n.28 (Ackerman).

13. See *id.* at 48–49, 137–40.

14. See *id.* at 48–49.

Second, I explore the two most important elements of Fallon's book, his project to move us beyond the current debates about constitutional theories of interpretation and his argument that the Court ought to adopt a process of pursuing a reflective equilibrium in its constitutional decision and constitutional practice in order to enhance the legitimacy of our constitutional law and the Court. The first strategy is commendable, but his proposed path reflects an unstated and misplaced commitment to the logical priority of theory. Fallon purports to articulate an account of constitutional practice, but he cannot cast off a fundamental commitment to the priority of concepts, theory, and interpretation. The second argument for a practice of reflective equilibrium may generate a more plausible account of constitutional adjudication than the dominant models in the legal academy, but Rawlsian reflection—even in the situated, historical, thick sense defended by Fallon—is not likely the path forward in understanding the nature of constitutional decision in adjudication or in enhancing the legitimacy of the Constitution and the Court.

## I

Fallon begins his account of law by outlining a theory of legal meaning and legal interpretation. His analysis comprises one of the most detailed parts of the book, reflecting the importance Fallon accords the linguistic meaning of the constitutional text and the importance of interpretation of the text in constitutional adjudication. Fallon has previously explored originalism's claims about constitutional language and its interpretation in some depth.<sup>15</sup> In his earlier analysis he was more critical of originalism, denying that originalism could be reconciled with our actual practice and emphasizing the inadequacy of originalist approaches to non-originalist precedent.<sup>16</sup> His account is more sympathetic in *Law and Legitimacy*, although he does not endorse the complete originalist theory. Fallon is more sympathetic to originalism because his own analysis and constitutional theory has moved more deeply into questions of the nature of constitutional language and its interpretation.

Fallon makes Scott Soames's philosophical analysis of the meaning and interpretation of legal texts a central anchor of his own analysis of constitutional meaning.<sup>17</sup> Soames, along with his former colleague at the

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15. Richard H. Fallon, Jr., *Implementing the Constitution* 13–25 (2001).

16. *Id.* at 3, 15–16.

17. FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 61–64; Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597 (2013) [hereinafter Soames, *Deferentialism*]; 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, in *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT IS AND HOW WE USE IT* 403 (2009).

University of Southern California Andrei Marmor, is among the leading philosophers of language who have explored the particular issues of meaning in legal texts. Soames argues for a version of an originalist theory he terms deferentialism.<sup>18</sup> In this theory the spare semantic meaning of the text is expressly augmented with the force of its pragmatics and the shared presuppositions that the linguistic community holds.<sup>19</sup> It is a representational account that views language as representing the world.<sup>20</sup> It is also an interpretative account that accords priority to the original linguistic meaning of the constitutional text, not a later linguistic meaning or its purpose, although intent figures as an evidentiary matter in determining the legal text's meaning.<sup>21</sup> But while Soames recognizes the performative dimension of legal texts, his focus on legal texts as stipulations (assertions that make something so) allows him to focus on the element of assertion in the legal text. It is to the assertions made by legal texts that Soames directs his linguistic philosophical analysis.

For reasons I have defended elsewhere, I think Soames has it backwards: the analysis should begin with what the legal text does, not what it says. The enacting legislature was principally concerned to *do* something, not to *say* something. When we begin with what the constitutional text is *doing* rather than what it is *saying*, the analysis proceeds differently, without overemphasis upon linguistic meaning. Fallon follows the philosophers into this same error.

Fallon is not concerned to match the academic philosophers of language nuance for nuance, distinction for distinction.<sup>22</sup> He is expressly satisfied to articulate a practical account of meaning.<sup>23</sup> It's a theory of meaning that's good enough to use for our constitutional theory. Moreover, Fallon argues that the determination of the nature of constitutional meaning is a matter of our ordinary practice of language and law.<sup>24</sup> Accordingly, Fallon argues, philosophers do not have a persuasive claim to special knowledge with

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18. Soames, *Deferentialism*, *supra* note 17, at 597 (characterizing deferentialism as originalism without the baggage). While characterizing deferentialism as jettisoning originalism's baggage Soames never expressly articulates what he thinks he has accomplished. I think he means to claim that he has eliminated some of the more implausible claims originalists have made about the determinacy of semantic meaning, and dispensed with a need for those claims by amplifying the recourse to semantic meaning with reference to the pragmatics of utterances and texts.

19. *Id.* at 597–98.

20. SCOTT SOAMES, *PHILOSOPHY OF LANGUAGE 1* (2010) (“The central fact of language is its representational character.”).

21. Soames, *Deferentialism*, *supra* note 17, at 597.

22. See FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 61–62.

23. *Id.* at 62–65.

24. *Id.* at 64.

respect to the analysis and description of such meaning.<sup>25</sup> At a more conceptual level, Fallon, like Soames, adopts a *representational* account of language.<sup>26</sup> Language represents the world and constitutional language represents the Constitution-in-the-world. But that implicit foundation receives little attention in *Law and Legitimacy*. This commitment is, however, more express in one of the articles preceding *Law and Legitimacy*, *The Meaning of Meaning*.<sup>27</sup>

There are alternative, non-representational accounts of language, linguistic meaning, and linguistic truth.<sup>28</sup> Even if we endorse these theories, however, it is not clear that Fallon's representational theory of language leads his constitutional theory astray. Even if Fallon's tacit representational account of constitutional language is wrong, because of the limited granularity with which Fallon wants to articulate his account of constitutional meaning and employ it in his account of the Constitution and legitimacy, it is not clear that the error has damaging consequences. Fallon's account of meaning is employed principally to show the sources and extent of ambiguity, polysemy, and underdetermination of constitutional texts and authorities.<sup>29</sup> Those claims of ambiguity, polysemy, and underdetermination—and the implications of those features of constitutional language—are as applicable to constitutional language understood on a representational theory as of an inferentialist, non-representational theory.<sup>30</sup>

Fallon argues from the ambiguity, polysemy, and underdetermination that he identifies in the meaning of authoritative constitutional texts to a different conclusion than Lawrence Solum and Scott Soames, however. Fallon asserts that such linguistic indeterminacy permits and requires Justices to make choices among potential interpretations and associated decisions. Because the nature of the underdetermination of meaning is so expansive for Fallon, even the New Originalist strategy of distinguishing

25. *Id.* at 64–65.

26. Admittedly, Fallon does not make this claim expressly. But in discussing other theorists who are committed to a representational account of language he expresses no reservations about those accounts. *Id.* at 188, nn.50–56.

27. Richard H. Fallon, Jr. *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1307 (2015) [hereinafter Fallon, *Meaning*] (unreflectively writing of the referents of interpretations of meaning).

28. André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131 (2014).

29. See FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 49–51.

30. By contrast, many of the participants in the debates over constitutional originalism employ their representational accounts of language to make claims about the precision and determinativeness of language that fit more easily with representational theories. See André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JURIS. REV. 263 (2015).

constitutional texts requiring interpretation and those permitting a more open-ended construction is inadequate to encompass the authorities Fallon wants to recognize and the interpretations he wants to adopt for the decision process he endorses.<sup>31</sup>

Academic concerns with the legitimacy of the Supreme Court and its decisions focused upon two problems in the late twentieth century. The first was the countermajoritarian dilemma. First articulated by Alexander Bickel, the countermajoritarian dilemma asserts that judicial review by an unelected Court is inconsistent with democracy.<sup>32</sup> While some scholars have rejected that challenge, others continue to believe that Bickel articulated a genuine problem in our constitutional theory and practice.<sup>33</sup> The second problem, emphasized by Ronald Dworkin's response to the dominant positivist jurisprudence,<sup>34</sup> was the role of judicial discretion in constitutional adjudication. Twentieth century constitutional theorists worried that judicial discretion undermined the rule of law and the dominant positivist theory of law. Neither problem figures prominently in Fallon's analysis of legitimacy. Indeed, to the extent that Fallon welcomes the inevitable role of normative values in constitutional decision, he rejects the positivist premise.<sup>35</sup>

The countermajoritarian dilemma receives only passing attention in Fallon's account.<sup>36</sup> Although Fallon has explored the countermajoritarian arguments and offered his own proposed solution, he doesn't apparently think that addressing those issues is particularly important for his contemporary analysis of the legitimacy of the Constitution and the Court. Although he doesn't expressly explain why the problem of judicial review can be so easily passed over, I think his argument can be reconstructed along the following lines. First, our constitutional practice has accepted and

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31. See FALLON, LAW AND LEGITIMACY, *supra* note 10, at 43–44, 76–78.

32. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (arguing that the fundamental challenge of constitutional theory is to explain the legitimacy of judicial review).

33. See, e.g., Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006) (concluding that judicial review is inappropriate as a matter of democratic political philosophy in reasonably democratic societies).

34. See RONALD M. DWORKIN, *The Model of Rules: I*, in TAKING RIGHTS SERIOUSLY 14, 43–45 (1977).

35. Here, too, Fallon is indifferent to the jurisprudential debate between legal positivists and natural law theorists. While asserting the importance of moral commitments in deciding constitutional cases and thereby determining our constitutional law, he nevertheless presses Hart's positivist notion of a rule of recognition into service.

36. Fallon offered his defense of judicial review in Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (arguing against Waldron's indictment of judicial review and offering an affirmative theoretical defense thereof). Alexander Bickel, *The Least Dangerous Branch*, and the countermajoritarian difficulty do not even merit entries in the brief index.

incorporated the practice of judicial review. Judicial review therefore has a sociological legitimacy. Second, judicial review has a moral legitimacy because it is important in protecting constitutionally protected rights.<sup>37</sup> These two sources of legitimacy explain why there is no fundamental problem with judicial review in our democratic republic.

Fallon's argument reduces the legitimacy of judicial review to these two disjunctive forms. Judicial review also has a legal, constitutional legitimacy that his theory ignores. While that form of legitimacy may be described as sociological because, as a matter of legal positivism, it is a matter of social fact, constitutional and legal legitimacy (I here conflate the two) also have a normative dimension, as captured by H. L. A. Hart's concept of the internal point of view. The legal legitimacy of our constitutional practice of judicial review is more than a shared social behavior. It is freighted with normative commitments and beliefs, but these are not principally moral commitments and beliefs. It is not clear that these normative commitments are moral commitments. We can imagine a judge or citizen endorsing our practice of judicial review while believing that as a matter of political morality a more direct form of democracy would be preferable.

In light of Fallon's defense of judicial review, why does he recommend greater deference by the Court to the legislature's judgment? Fallon grounds his argument for the desirability of greater deference to the legislature on constitutional questions as a matter of enhancing and reinforcing democracy in the Republic. Thus, Fallon appears at once to stand Ely's defense of the democracy-enhancing judicial activism on its head and to tacitly acknowledge Bickel's countermajoritarian challenge after having neatly dispatched it.

But both appearances are largely unfair. First, Fallon wants to focus the exercise of greater deference on highly controversial, politicized issues. Matters of procedural fairness—which would encompass much of the Warren Court jurisprudence that Ely wanted to put on a firm foundation—would not be entitled to greater deference on Fallon's account. While counseling greater deference as a means to enhance and revivify American democracy, Fallon's does not argue that the exercise of stricter judicial review would be illegitimate. It would, however, prejudice a fuller development of American democracy and compromise the pursuit of democratic legitimacy.<sup>38</sup>

Fallon's argument would appear to face the celebrated *Brown v. Board*

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37. See FALLON, LAW AND LEGITIMACY, *supra* note 10, at 159–60.

38. See *id.* at 159–165.

of *Education* challenge<sup>39</sup> and would seemingly fail the challenge even more clearly with respect to *Bolling v. Sharpe* and *Loving v. Virginia*. Those decisions, striking down state and federal legislation, would not appear to easily satisfy Fallon's test for a more assertive judicial review. The Court's efforts, led by Justice Frankfurter, to avoid challenges to state anti-miscegenation statutes for more than a decade after *Brown* is powerful evidence for this claim. But the price of deference would have been to permit the continued enforcement of statutes that we now almost universally recognize as morally repugnant. Fallon makes it very clear that he endorses *Brown* as a litmus test for plausible theories of constitutional theories and accounts of the Court's legitimacy.<sup>40</sup>

Although Fallon thus acknowledges this concern with how he can reconcile his theory with *Brown* (and expressly asserts his commitment to the decision in *Brown*), it is not clear how he would reconcile his argument for a more deferential practice of judicial review.<sup>41</sup> He argues, somewhat unpersuasively, that his theory is not meant to discredit *Brown*. His argument is not persuasive because while his argument might not discredit *Brown*, once decided, it is hard to see how his call for increased deference could have allowed the Warren Court to have decided *Brown* as it did and to reject *Plessy v. Ferguson*. It may be that the importance of the moral commitments that Fallon would include in constitutional argument and to support constitutional decision would allow him an exception to his principle of greater deference. How do we tell which moral propositions have this constitutional force? I am not sure Fallon explains, and I suspect that an explanation might require him to introduce a discussion of constitutional judgment that would fit only awkwardly into his theoretical account. Alternatively, it may simply be that his call for enhanced judicial deference to the legislature is best heard as a whisper.

Fallon's analysis of the challenge of legitimacy for the Court and the Constitution focuses less on the academy and more on the polity as a whole. He is less worried with theoretical puzzles like the counter-majoritarian dilemma and the scope of judicial discretion than with fundamental questions of when and how the Constitution and the Court provide authoritative legal obligations that are accepted and followed by the citizens.<sup>42</sup> In Hartian terms, he is interested both in when we can say from

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39. The *Brown* challenge asserts that any constitutional theory that characterizes *Brown* as wrongly decided (as distinguished from wrongly reasoned) is thereby discredited and must be rejected.

40. See FALLON, LAW AND LEGITIMACY, *supra* note 10, at 145, 162.

41. See *id.* at 162–63.

42. *Id.* at 22–24, 41–46.

the external point of view that there is a shared behavior and when we can say from the internal point of view that such shared behavior follows the law. This is a welcome and important move in our constitutional jurisprudence. I don't know if the legitimacy of the Court and the Constitution are more in question than they were in the wake of either the *Dred Scott* or *Brown* decisions, but the nature of the confirmation process for many recent nominees to the Court and our constitutional rhetoric certainly reveal significant live questions about legitimacy.

Fallon's account of the moral legitimacy of the Court and the Constitution does not expressly address the challenge of moral relativism, but it is arguably compatible with it. Moral relativism challenges the claim that moral obligations are timeless and universal for all persons, instead arguing that moral obligations may vary over time and across communities. The challenge of moral relativism to non-positivist theories of the Constitution underlies some important threads in both the originalist canon<sup>43</sup> and the efforts of critics like Philip Bobbitt and John Hart Ely to rehabilitate the legacy of the Warren Court.<sup>44</sup> In each case, concern about the difficulties inherent in finding common moral ground led those theorists (with the exception of Bobbitt) to a positivist account of constitutional legitimacy that was not grounded on moral theory. Fallon discounts these concerns by welcoming Justices' non-constitutional normative values into their decision process, on the grounds that such a role is both inevitable and proper.<sup>45</sup>

Judicial discretion does not figure in Fallon's analysis as an important problem in constitutional theory or for the legitimacy, either for the Court or for the Constitution, because Fallon argues that judicial decision is circumscribed in a number of institutional and normative ways, and he describes how.<sup>46</sup> He understands that judicial authorities are underdetermined, not entirely indeterminate.<sup>47</sup> The sources of that constraint are several; the constraints imposed by the constitutional text are not a significant part of Fallon's practice-centered account. Linguistic meaning, as informed by our understandings and practices, and our constitutional and institutional practices and expectations are all important.<sup>48</sup> These constraints

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43. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting The Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45–46 (Amy Gutmann ed., 1997).

44. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

45. See FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 68.

46. See *id.* at 105–24.

47. See *id.* at 48–49.

48. See *id.* at 107–09.

on judicial discretion are, for Fallon, sufficient to disarm the nihilist challenge of indeterminacy and the more traditional concerns with judicial discretion. While I think there are somewhat richer ways to describe the sources of the constraint and to reconcile them with the authority and discretion Justices have, the core of Fallon's analysis seems right.<sup>49</sup>

Fallon believes that the fundamental problems of legitimacy facing the Court and the Constitution are both sociological and moral.<sup>50</sup> We need to explain both why we do accept the Court's authority and why we should accept that authority. We need constitutional practices that reinforce this acceptance and the associated authority of the Court. Expressed in these more general terms, Fallon's restatement of the problem of legitimacy is a twenty-first century account. While Fallon is right to emphasize both the sociological and moral dimensions of constitutional legitimacy, inherent in his dichotomy is a disregard for, or at least a lack of interest in, a third dimension of legitimacy, legal legitimacy. In the current divided political climate that has deeply shaped the Justices' confirmation process and the public reactions to the Court's decisions, the Court's legitimacy is not only an academic concern.

Having set a bold agenda, Fallon's account of the moral legitimacy is cautious and almost anodyne. While he acknowledges the challenge that racial discrimination poses for claims of legitimacy, he doesn't explore the extent to which this discrimination affects minorities and, indeed, all of us. He does not acknowledge the chilling challenges that Richard Rothstein's *The Color of Law* or Michelle Alexander's *The New Jim Crow* pose for white complacency with respect to the extent of racial discrimination in our society and the Court's profound and continuing role in preserving and protecting that discrimination. Fallon also ignores the originalists' challenge to the Court's legitimacy. Many originalists—including Justice Antonin Scalia and Robert Bork—sometimes suggest that the failure to follow the original understanding of the constitutional text generates an illegitimate constitutional law.<sup>51</sup> That appears descriptively mistaken as a matter of sociological legitimacy and at best highly problematic as a matter of moral legitimacy. But the originalists don't generally offer an express descriptive

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49. See Robert B. Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, in PRAGMATISM, LAW, AND LANGUAGE 19, 19–20 (Graham Hubbs & Douglas Lind eds., 2014). Fallon occasionally hints at a perspective like this but does not develop it. See FALLON, LAW AND LEGITIMACY, *supra* note 10, at 107.

50. See FALLON, LAW AND LEGITIMACY, *supra* note 10, at 7.

51. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990) (characterizing originalism as the only approach to constitutional interpretation that possesses “democratic legitimacy” and is “consonant with the design of the American Republic”).

or prescriptive account of constitutional legitimacy or the role of the Court in place of that implicit claim. The claim also calls into question the legitimacy of these originalists' own position. Nearly thirty years ago Philip Bobbitt called out Bork's challenge to the legitimacy of the Court. Bobbitt argued that Bork's theoretical commitment to originalist interpretative principles and his corresponding criticism of the Warren and Burger Courts' non-originalist decisions as illegitimate constituted dispositive grounds for denying him a seat on that Court.<sup>52</sup> That's a powerful claim, but one Fallon does not engage when he asserts that Justices must accept the authority of the Constitution and, albeit to a lesser degree, the authority of the Court's own precedent. Fallon ought to have acknowledged that any criticism of the Court's own precedents by members of the Court must be limited to a criticism of the merits of those decisions, not their legitimacy. There is no comparable clarity in Fallon's analysis of the challenges of legitimacy today.

Fallon's exploration of the legitimacy of the Court and the Constitution is, however, refreshingly express. By confronting those issues directly, Fallon avoids some of the confusions that infect much of our contemporary constitutional discourse. By confronting the challenge of legitimacy directly, Fallon articulates a theory that can be assessed and accepted or challenged.

## II

Fallon's first principal goal is to shift the focus of our academic—and our public—constitutional discourse away from the current, longstanding disputes about constitutional interpretative methodology. He offers a brief survey of the principal outstanding theories. After canvassing the principal originalist theories, the pluralist theory of Bobbitt, the pragmatic realism of Posner, and the Critical Legal Studies' challenge of indeterminacy, Fallon argues very briefly that all of those theories are inadequate. His principal objection to the originalist theories is that they cannot accomplish the mission for which they were created and that constitutional adjudication requires more tools than originalists—at least classical originalists—can provide.<sup>53</sup>

Fallon offers some of his harshest criticism of what he terms Cynical Realists.<sup>54</sup> This category lumps together some unidentified law professors and political scientists; he names only Professor Eric Segall and Judge Richard Posner.<sup>55</sup> According to Fallon, these theorists reject any dimension

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52. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 83–108 (1991).

53. See FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 49–51.

54. See *id.* at 169–71.

55. *Id.* at 169, 212 n.43.

of autonomy for law, reducing judicial decision to politics. Certainly the classical Critical Legal Studies theorists reduced the account of constitutional law to power and politics. It's not clear Fallon is fair here to Posner. In his early, utilitarian phase Posner clearly did not reduce law to politics. More importantly, in his more recent analysis of the nature of law, while he is far more critical of theory in general (and moral theory in particular) as a source of legal decision, his pragmatist emphasis upon the exercise of judgment in decision and the doctrinal and factual context of decision is inconsistent with the reductive account Fallon attributes to him. But Fallon is right that the Cynical Realists who deny that the Constitution is law and deny that constitutional rules constrain judges purport to offer a better description of our constitutional practice. Fallon argues that they neither describe the outcomes of judicial controversies better than competing theories but that they must inject the additional complexity of arguing that the Court either deceives itself or seeks to deceive us when it articulates the rationales for its decisions.<sup>56</sup> Fallon does not have much to say about Bobbitt's pluralist theory. I think that gap reflects the extent to which Fallon has not fully thought through how an account of constitutional law that makes practice prior to theory works.

Fallon argues that none of the dominant theories offers an adequate account of our constitutional law or the Court's constitutional practice.<sup>57</sup> His principal objection is that these accounts begin by putting the theory first, then asks the Justice to apply the theory in the decision of the cases that come before her.<sup>58</sup> While that criticism is apt for many contemporary constitutional theories, it is probably unfair of the most plausible pluralist theories, like those offered by Philip Bobbitt and Dennis Patterson.<sup>59</sup> Those theories emphasize the role of incommensurable arguments and the exercise of situated judgment. They deny that any constitutional theory can provide answers to constitutional controversies. In place of a decision theory that proceeds directly from theoretical foundations, Fallon endorses an iterative account that emphasizes constitutional practice. In this practice, constitutional theory does not have pride of place. It figures in the iterative process, together with our intuitions about the proper outcomes in actual and related hypothetical cases. But Fallon nevertheless believes that constitutional interpretation is logically prior to decision; that assumption is questionable. Moreover, while it's a common assumption, shared with many

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56. *See id.* at 169–71.

57. *Id.* at 136–38.

58. *Id.*

59. BOBBITT, *supra* note 44; DENNIS PATTERSON, *LAW AND TRUTH* (1996).

of the other theorists Fallon discusses, Fallon does not defend it.

Fallon's second central and ultimately more important argument is that we should adopt an iterative methodology drawn from analogy to John Rawls's concept of reflective equilibrium in moral philosophy in our constitutional decision. The pursuit of constitutional reflective equilibrium is the process by which Fallon proposes to situate constitutional decision and to incorporate our moral and constitutional intuitions and competing modes of constitutional argument within sometimes-inconsistent constitutional interpretive theories.<sup>60</sup>

Reflective equilibrium is central to Rawls's moral theory of the nature of justice in the modern, advanced liberal democracies. According to Rawls, to determine the requirements of distributive justice, we should imagine ourselves in the original position. In the original position we are separated from our actual selves by a veil of ignorance. That veil prevents us from knowing who we are and how we have fared in the allocation of natural capabilities and the distribution of social and economic resources. From the original position we are to consider what fairness and justice require in the design of a social and political system with respect to the allocation of social and economic resources. Rawls emphasizes that the requirements that are imposed by the principles of distributive justice are abstract and general. The principles of justice are compatible with various particular political systems. Nevertheless, this process imposes substantial constraints on political systems.

Fallon argues that this approach offers the best description of how our practice of constitutional adjudication goes as well as delivering the best normative prescription for how our constitutional decisional practice should proceed.<sup>61</sup> Originalists may fear that Fallon is answering affirmatively to Justice Scalia's withering rhetorical question whether the Constitution incorporates Rawls's moral theory.<sup>62</sup> This concern is mistaken, at least in its simplest and starkest form. Fallon's incorporation of Rawlsian methods does not commit him to the substantive commitments of Rawls's moral theory. Indeed, on balance Fallon's invocation of Rawls is a little misleading: Fallon's account of constitutional judicial decision is consistent with accounts of practical reasoning more generally. It misleadingly highlights the role of theory in that process. Fallon is really describing a role of practical inference, from premises and underlying grounds to conclusions and

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60. FALLON, LAW AND LEGITIMACY, *supra* note 10, at 142–48.

61. *Id.* at 142–48, 170–71.

62. SCALIA, *supra* note 43, at 45.

implications. (The originalists' fear is not misguided, however, to the extent that Fallon endorses a role for Justices' substantive moral and other normative commitments in constitutional argument and decision that is inconsistent with the dominant, positivist originalist theories. This incorporation is not pursuant to a peculiarly Rawlsian methodology, however.)

It is important to define the relationship of Fallon's constitutional methodology to the philosophical methodology of Rawls. The most important difference between the methods of Rawls and Fallon are three. First, Rawls's methods are methods of moral philosophy. A full metaphilosophical discussion of the implications of classifying Rawls's theory and argument as philosophical is unnecessary here. But both important originalist and legal pragmatist critics of philosophical methods capture some of the implications of that classification when they lament the essentially contested nature of much philosophical argument.<sup>63</sup> Moral philosophy is no exception. Rawls's arguments yield theoretical conclusions, not practical judgments. This difference matters if we take the concept of our existing constitutional practices of constitutional argument and decision as fundamental to our constitutional law. That practice is a pluralist practice of argument, as Fallon acknowledges. The various arguments made are not obviously commensurable.<sup>64</sup> The process of reflective equilibrium and the arguments and conclusions that it generates in the abstract, are relevant in our constitutional law and practice only if and to the extent that they may be articulated within the constraints and conventions of that constitutional practice. Fallon thinks that the process of iterated articulation of constitutional judgment from a position of reflective equilibrium can generate authoritative, binding constitutional judgments. By contrast, for Rawls, reflective equilibrium yields a moral theory that supersedes any of our prior moral thinking to the extent inconsistent with where we end up in reflective equilibrium as a result of our deliberations from the original position.

Second, Rawls pursues reflective equilibrium from the original position, a place where we imagine ourselves without all of the elements that make us who we are—our entitlements, capabilities, limitations, history, and personal commitments, for example. From the original position we are disembodied spirits imagining our future corporeal selves and seeking fairness and justice. Fallon's process unfolds in the real world and real time

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63. See, e.g., Scalia, *supra* note 43, at 44–45; BORK, *supra* note 51, at 253–55; Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

64. FALLON, LAW AND LEGITIMACY, *supra* note 10, at 125–27.

of constitutional adjudication, with full knowledge of our history and ourselves.

Third, the iterated process that Fallon contemplates is modest and circumscribed; as such, it is very different from the open-ended, no-holds-barred theoretical inquiry of Rawls. In the constitutional context, Fallon believes that reflection on the demands of decision will result in “significant revisions . . . but . . . no troubling disruptions” to our constitutional law and practice.<sup>65</sup> In Rawls’s pursuit of reflective equilibrium, there can be no comparable confidence in the status quo. While the account of justice derived bears a noted resemblance to our advanced liberal western democracies, the role of the state and the commitment to redistribution looks very different from any actual sovereign states.

One of the most powerful criticisms offered against Rawls’s method was that it fails to capture the richness of who we are and what makes us human individuals.<sup>66</sup> Rawls’s description of who we are maximizes the abstraction of our self-descriptions. Critics have argued that we can’t have an adequate account of justice if we excise so much of what we are. Justice, from the perspective of these critics, is not nearly so abstract a concept as Rawls suggests. Justice for us, the argument goes, but take into account more fully who we are—what our desires are, what our capabilities are, and what our history has been. It’s the difference between the ahistorical account of Kant and the historicist account of Hegel.

For Fallon, the process of constitutional reflection begins with a working theory of constitutional interpretation.<sup>67</sup> Fallon believes that a theory of constitutional interpretation must have a logical priority in the process of constitutional adjudication because he believes that the texts of constitutional authorities must be interpreted (in a manner that Fallon defines broadly) so that their meaning may be applied in constitutional decision.<sup>68</sup> To the extent that the meaning is underdetermined or manifestly undesirable, Justices are generally empowered to interpret and apply the Constitution accordingly. Fallon wants to shift the focus of our analysis to the process by which working theories of interpretation are refined and corrected as we

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65. *Id.* at 147.

66. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 79 (1983) (arguing that Rawls’s argument as to what is just in the abstract from behind the veil of ignorance cannot offer a rich enough account to give us answers as to what justice requires in the rich historical context in which we find ourselves in life).

67. FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 126–27.

68. *Id.* at 41–46.

confront constitutional controversies and decide constitutional cases.<sup>69</sup>

Fallon doesn't intend for the process of reflective equilibrium to begin from the original position. But it is less clear what beliefs or other conceptual commitments Justices should or may bring with them to the decision of constitutional cases. They are certainly entitled to bring a methodological stance with respect to interpretation.<sup>70</sup> This stance is, however, subject to testing and refinement against the Justices' (and our) moral intuitions about particular potential actual and hypothetical judicial decisions.<sup>71</sup> The Justices may bring—indeed, on Fallon's account, sometimes must bring—their own normative moral values to their work on the Court.<sup>72</sup> Are there, then, any beliefs or commitments that Justices may not take into account in their decisions?

There would appear to be at least three categories of belief that are out of bounds. First, procedurally, Fallon is at pains to recognize that any account of our constitutional law must preserve the important distinctions between what the law holds and what we think that the law should state and what we would want the law to state.<sup>73</sup> In their decision practice Justices must recognize the limits of their authority within our constitutional republic. Second, substantively, to the extent that a Justice holds a belief that is inconsistent with the Constitution, the substance of the Constitution should prevail. Third, to the extent that a Justice holds a moral belief that she recognizes is not shared within the community, that moral belief should not form the basis for a judicial decision that is otherwise indefensible.

These limits are more complex and difficult to apply than this bare statement may suggest. When is a substantive moral or other normative position inconsistent with the Constitution? How should a Justice determine whether a moral belief is shared (however that would be determined) or idiosyncratic? Before *District of Columbia v. Heller* and *McDonald v. Chicago* were decided, upholding a fundamental right to hold firearms without onerous state or federal regulation, was a broad understanding of a protected right to own or carry firearms inconsistent with the Constitution? Is a belief that the abortion of a human fetus is murder inconsistent with the Constitution? Is a belief that lashing is not a cruel and unusual punishment because not so originally understood at the time of the adoption of the Bill of Rights inconsistent with the Constitution? Is a belief that non-originalist

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69. See *id.* at 126–27.

70. *Id.* at 144.

71. *Id.*

72. *Id.* at 128.

73. See *id.* at 10–11, 121–23.

precedent of the Court is not authoritative law inconsistent with an acknowledgment of the limits of the Court's authority? None of these cases are easily classified within Fallon's framework, even if our intuitions about them are clear. They are hard even with Fallon's account of the constraints that should figure in constitutional adjudication. Articulating the ways in which Justices' own moral commitments may figure in decision while preserving the moral legitimacy of decision is a project that Fallon has foreshadowed rather than completed.

Readers may also wonder whether Fallon's position is vulnerable to the criticisms that have been made of Dworkin's account of Justice Hercules.<sup>74</sup> Focusing upon Dworkin's claim that law required the comprehensive articulation of a theory grounded on, and derived from, fundamental moral and political theory, Cass Sunstein famously characterized Justice Hercules as an oddball.<sup>75</sup> Sunstein emphasized the inability of such a Justice, committed to constructing a comprehensive and complete decisional theory, to decide cases together with other members of an appellate court.<sup>76</sup> When we look at Fallon's reflective equilibrium methodology, we may wonder whether any Justice adopting it would face a similar criticism. Fallon's methodology is ambitious, requiring both sophisticated historical research and sophisticated philosophical argument, even if it doesn't require the formulation of a single, unified theory that Dworkin's law as integrity demands.<sup>77</sup> Critics may wonder whether the process of seeking reflective equilibrium belongs to philosophers in their arm chairs, not judges charged with deciding hard cases in the hurly burly pressures of our deeply divided pluralistic constitutional republic. Fallon goes further than most in the academy in recognizing the untheoretical nature of much our practice of constitutional adjudication, but he does not reject a foundational role for theory and an obligation on the part of a Justice to formulate and apply such a theory.

Fallon thinks he has disarmed critics who might argue that the process of reflective equilibrium would be impracticable or result in absolute, uncompromisable judgments in constitutional controversies. His requirement that Justices proceed in good faith appears to be an important part of his argument for the collegiality and integrity of judicial decision-

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74. See RONALD DWORKIN, *LAW'S EMPIRE* 379–92 (1986).

75. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 49 (1996).

76. *Id.* at 48–50.

77. Compare DWORKIN, *supra* note 74, at 264–65 (acknowledging but dismissing the objection to his account of adjudication based on the practical impossibility of human judges adopting and following the ambitious methodology of law as integrity) with FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 149 (history), 48–49 (theoretical analysis of language).

making.<sup>78</sup> But Fallon does not explain the requirement of good faith in much depth. Good faith imposes a duty of consistency, in the absence of a change in view. But the constraint does more in Fallon's theory. It requires the introduction of an implicit distinction between the arguments that may be made to the Court and the arguments made by the Court. In the case of the arguments made to the Court much, perhaps all, of any requirement of good faith would appear to be properly subordinated to requirements of effective argument—an advocate can surely make arguments to the Court that she does not herself endorse. Moreover, as Fallon acknowledges, the *desideratum* of good faith, in the face of prudential considerations that may support more artificial approaches, like that pursued by the Court in the period between its decision in *Brown* and its decision in *Loving*, is controversial. The constraint of good faith warrants a fuller development if Fallon is to be persuasive in his claim that it can play the important role he ascribes to it.

Fallon believes that the process of reflection is practicable, at least in a limited, practical way because it is a description of how much of our judicial constitutional decision-making actually proceeds.<sup>79</sup> He argues that by articulating the process more formally we may improve our judicial decision-making, without needing to change it in any fundamental way. With respect to Sunstein's objection to Dworkin, Fallon argues that by requiring that his Justices proceed reasonably, taking into account the perspectives and values of the other Justices he can insure that his theory is consonant with the need for multimember panels to achieve consensus, even if members of the panel begin from different normative points of departure and apply different decisional methods.<sup>80</sup> But can Fallon so easily pair his notion of reflective equilibrium with a commitment to collegiality and reasonableness on the part of his Justices?

Fallon may argue that while his reflective equilibrium generates substantive constitutional outcomes and doctrine, the requirement of reasonableness addresses the epistemic dimension of the adjudication process. The requirement of reasonableness limits the confidence that Justices should take in the conclusions that the process of pursuing reflective equilibrium generates, and the doctrine and decisions that arise from it. If this is the way to understand Fallon's theory, it is very different from the concept of reflective equilibrium that Rawls defends, at least in *A Theory of*

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78. FALLON, LAW AND LEGITIMACY, *supra* note 10, at 130–32.

79. *Id.* at 147–48.

80. *Id.* at 151–53.

*Justice*.<sup>81</sup> For Rawls, the pursuit of a reflective equilibrium is a theoretical, philosophical inquiry. There are no epistemic limits on the conclusions generated in reflective equilibrium. Fallon's reconciliation of his more situated, historical, and practical account of constitutional practical reasoning that makes a place for reasonableness and collegiality in our constitutional practice is not implausible.

When we understand how Fallon wants his process of historically situated reasoning to reflective equilibrium to work, we are left wondering what Rawls has to do with it. The iterated articulation of a constitutional reflective equilibrium is a far more practical exercise than Rawls's theoretical exercise from the original position. On Fallon's account, we begin with a great deal of knowledge about and commitment to our constitutional law and practice and to our socially instantiated moral intuitions and expectations. We can see this if we compare Fallon's account with Gilbert Harman's account of how we change our views as a matter of practical reason.<sup>82</sup> Fallon's description of the process of reasoning to a constitutional reflective equilibrium is not inconsistent with Harman's account of how we change our beliefs and actions as a matter of practical reason. Briefly, on Harman's account, we reason by inference to the best explanation, adding and culling beliefs and inferential commitments until we arrive at the most persuasive, most coherent overall relevant view. Fallon also dispenses with the most salient features of Rawls's method (principally, the original position and the veil of ignorance) in his proposed constitutional decision and theory-building process. The process of reflective equilibrium is the means by which Fallon limits the power of the competing theories of constitutional interpretation. But if we don't begin by according the competing theories of constitutional interpretation a logical priority in our practice of constitutional adjudication, then we don't need to emphasize the complicated process of iterated reasoning to a reflective equilibrium. This is the most important way in which Fallon betrays his unarticulated commitment to the priority of theory. I think Fallon's invocation of Rawls's concept of reflective equilibrium—admittedly only as analogy—may be best understood as reflecting his misplaced commitments to a pride of place for theoretical and conceptual reasoning in our constitutional practice.

Fallon's Rawlsian tack is not easily reconciled with Rawls's own later

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81. JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971).

82. GILBERT HARMAN, *CHANGE IN VIEW: PRINCIPLES OF REASONING* 1 (1986). Harman's account of belief change is embedded in a representational account of language, but I believe that his account of practical reasoning could be recast in a non-representational, inferentialist form.

political philosophy.<sup>83</sup> Rawls's later work appears to retreat from the systematic claim of *A Theory of Justice* that philosophy could derive the formulation of the political institutions that would create a just society that could and should be accepted by all.<sup>84</sup> Instead, Rawls later appears to argue that a just society requires pluralism and continuing tolerance for dissent, because a shared understanding of moral doctrine can only be maintained by oppression.<sup>85</sup> (Note how consistent the commitment of the later Rawls to continuing argument and dissent and the absence of an agreed upon comprehensive canon is with a modal, pluralist account of constitutional law. This parallel does not seem to have been highlighted by the constitutional pluralists.)

If this reading is right, then the later Rawls poses a substantial challenge for Fallon's claim that our goal should be a constitutional decision process that decides cases on the basis of constitutional reflection that aims at a reasonably comprehensive account of the proper understanding and application of the Constitution. Constitutional adjudication yields authoritative, binding legal decisions. If the Rawls of *Political Liberalism* is right, the resulting law is either incomplete or sustainable only with force, not reason. For Fallon, constitutional adjudication is fundamentally a matter of using constitutional interpretative theory to find the right constitutional meaning, not to choose among essentially contested or otherwise inconsistent resolutions of constitutional controversies on the basis of structured, canonical forms of constitutional argument. While Fallon makes a place for dissent and disagreement, it does not take the pride of place that features in more fundamentally pluralist accounts. His focus falls on argument and disagreement as a means for developing the underlying constitutional theory in modest and incremental ways, not as a fundamental or constitutive feature of our constitutional law and practice. For Fallon, with reflective equilibrium comes consistent, reasoned constitutional decision and constitutional theory. Despite invoking Rawls's theory at multiple levels, Fallon does not adequately address the challenge posed by the later Rawls.<sup>86</sup>

Doctrinal coherence is also important for an inferentialist account of constitutional decision. Constitutional opinions, like the text of the

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83. JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996).

84. *Id.* at 37.

85. See Burton Dreben, *On Rawls and Political Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 316, 317–18 (Samuel Freeman ed., 2003).

86. To the extent we read Cass Sunstein's judicial minimalism and defense of incompletely theorized decisions as relying fundamentally on the later Rawls, Fallon's focus on the earlier Rawls is also reflected in his relative non-engagement with Sunstein's constitutional theory. See Sunstein, *supra* note 75, at 46–48, 199 nn.13–14 (citing *Political Liberalism*).

Constitution itself, both do things and say things.<sup>87</sup> When opinions say things in their holdings and in their reasoning, they make discursive commitments that are part of our constitutional law (This dimension of the way Justices say things accounts for much of the reason why the celebrated (infamous?) analogy with umpires is so manifestly inadequate to explain what Justices do.<sup>88</sup>)

As suggested above, Fallon gets it backwards. We ought to begin with our constitutional practice—and the importance of discursive inferential commitments in the opinion writing part of that practice. From that practice we can understand the need for doctrinal and inferential coherence with respect to the Court’s holdings and in the doctrine articulated in the Court’s opinions, because the discursive commitments of those authoritative constitutional texts inform and ultimately constitute much of our constitutional law.

But, contrary to Fallon’s account, we can insist on consistency and coherence as an important requirement for our discursive commitments without a commitment to the priority of constitutional interpretative theory. An inferentialist account accomplishes this directly. According to an inferentialist account, the meaning of statements and assertions arises not simply from their use, but also from the discursive commitments that follow from them. Most simply, when the Court asserts, for example, “[s]eparate educational facilities are inherently unequal,”<sup>89</sup> that assertion carries a number of important inferential commitments but also leaves open other important questions. The assertion, at least as a matter of linguistic if not semantic meaning,<sup>90</sup> holds racial segregation unconstitutional in schools. It does not appear to admit of exceptions. The assertion does not explain whether it speaks to schools that are in fact separate or separate by law, but

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87. See André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111 (2016).

88. See Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 *passim* (2012) (exploring the metaphor Chief Justice John Roberts offered in his confirmation hearings but arguing, most importantly, that the role and contribution of the judge to adjudication in the law is more complex and more important than the role of the umpire in playing sports games). It also accounts for why Sunstein’s argument for incompletely theorized opinions is overstated, if not mistaken. Sometimes constitutional cases are best resolved by the Court, despite the important inherent limitations on the Court, by a more comprehensive or sweeping opinion to announce the decision. When and why that may be the case is not a question that Fallon engages directly, but unlike Sunstein, he does not reject the possibility that certain constitutional cases may require a decision on the basis of an argument with broad application or implications.

89. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

90. While the pragmatics of the text—context and role in the decision of the constitutional case—make it clear that it speaks as a matter of federal constitutional law, even though it does not expressly assert its conclusion as a matter of federal constitutional law.

on its face it does not appear to distinguish the two. It does not expressly foreclose all forms of racial discrimination or even all forms of racial segregation. It does not determine what remedies may exist for racial segregation in schools. It appears inconsistent on its face with *Plessy*,<sup>91</sup> and the opinion elsewhere makes this inconsistency express—but does not expressly overrule that case.<sup>92</sup> Attention to these inferential dimensions of the assertion gives the linguistic content, its meaning and force, to the text. They also impose some consistency and coherence on constitutional doctrine and law. If a holding or an argument is inconsistent with the constitutional text or with other authoritative assertions of constitutional law, we can call that flaw out. If an opinion fails to offer a canonical, authoritative argument for the decision made, we can call that out, too—again without the need to construct a theoretical superstructure.<sup>93</sup> We don't first need a theory of constitutional meaning and interpretation before making such judgments or deciding cases.

It may appear that an inferentialist account, with its emphasis on the discursive commitments that flow from the assertions made in constitutional authorities—the text of the Constitution and of constitutional precedents—is itself inconsistent with a modal account of constitutional argument and decision. The modal, pluralist account asserts that there are multiple, sometimes inconsistent forms of argument that we invoke and rely upon to decide constitutional cases. This conflict is not best understood as a conflict about meaning so much as a conflict about what the Constitution says and should be understood to do. The modal conflict—and central prudential and doctrinal arguments, while sometimes couched in terms of the meaning of the relevant authoritative texts—are better understood in terms of what we should do, how we should hold in a constitutional case. The conflicts inherent in a pluralist theory are not inconsistent with an inferentialist account of the meaning of our constitutional texts.

Although Fallon long ago endorsed something that he himself termed a pluralist theory,<sup>94</sup> it's not clear that he remains a pluralist today. Moreover, his defense of his reflective methodology appears vulnerable to important criticisms from pluralist theory. Constitutional pluralism asserts plurality,

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91. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

92. *Brown*, 347 U.S. at 494–95.

93. BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* (1975) (arguing that the consistent failure of Justice Douglas to articulate any grounds as the basis on which he struck down federal taxes contested before the Court was illegitimate).

94. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

variously asserting the existence of multiple, independent theories of interpretation and construction, readings of the Constitution that inform constitutional adjudication, and modes of constitutional argument. Pluralism, most fundamentally, recognizes the limits of constitutional theory and the corresponding priority of our faculty of constitutional judgment in our constitutional practice. The *locus classicus* for this claim—albeit in an often-misunderstood and admittedly opaque expression—is Philip Bobbitt’s *Constitutional Fate*.<sup>95</sup> Subtitled *Theory of the Constitution*, the book has sometimes been misunderstood to articulate six dueling theories of the Constitution, although Bobbitt introduced these forms *archetypes*, but he later came to refer to them as *modalities*.<sup>96</sup> Bobbitt acknowledged that some of his readers had mistakenly thought that he was describing multiple theories, not a single theory of the Constitution.<sup>97</sup> The confusion likely arose because Bobbitt’s theory made constitutional practice central and constitutive of our constitutional law; that theory doesn’t look much like other constitutional theories. Central to Bobbitt’s account is that there is no algorithm or decision methodology that can resolve conflicts among competing modalities of argument. (While many constitutional theorists implicitly discount the role of constitutional judgment, few (perhaps none) expressly assert that an algorithm could determine the proper resolution of constitutional cases.) For Bobbitt, the resolution of the conflict was a matter of conscience.<sup>98</sup> Secular readers found that account problematic.<sup>99</sup> But one can imagine a secularized account of judgment, even an account that is consistent with moral relativism.<sup>100</sup>

Pluralism, with the logical priority that it assigns to our practice of constitutional argument and decision, is inconsistent with Fallon’s reflective account that begins with a theoretical approach to constitutional interpretation.<sup>101</sup> Choosing between Fallon’s emphasis on the contribution and role of theory in constitutional adjudication and the social practice

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95. BOBBITT, *supra* note 44.

96. *Id.* at 7; BOBBITT, *supra* note 52, at 11–22.

97. BOBBITT, *supra* note 52, at xi.

98. *Id.* at xvii, 184–86.

99. PATTERSON, *supra* note 59, at 142–46, 149–50.

100. Harman’s account of practical judgment would appear to be such an example.

101. It may appear that Bobbitt’s notion of the style of a particular Justice, reflected in his preference for one or more particular modes of argument, is analogous to Fallon’s claim that a Justice begins the decision of a constitutional case with a working theory of constitutional interpretation. I think the parallel is misleading because the modes of arguments are not theories of the Constitution, still less theories of interpretation. Moreover, while not foundational (because they are merely types or classes of argument) and because they are not confirmed or reinforced by intuitions about the best resolution of constitutional controversies.

account of pluralism requires us to make a judgment about the nature of constitutional judgment. Constitutional judgment requires wisdom as well as mastery of constitutional methods and doctrine. The lingering question is whether Fallon offers a compelling account of the role and relative importance of each.

Finally, it is helpful to examine Fallon's account against the constitutional jurisprudence of another, more conservative member of Rawls's posse, Fallon's colleague Charles Fried. There are important parallels between the two descriptions of our constitutional law and the normative perspectives each holds. For example, both Fried and Fallon believe that reasoning about constitutional doctrine is important in constitutional adjudication.<sup>102</sup> For Fallon, doctrinal and precedential reasoning explicates the meaning of the constitutional text; for Fried, precedent shapes and determines constitutional doctrine and decision. But the differences between the two accounts are also significant and these differences highlight some central elements of Fallon's argument. Leaving aside the differences in the substantive constitutional law each would endorse, Fried's emphasis on the granularity of constitutional doctrine and on the importance of judgment<sup>103</sup> reflects his view that downplays the role of theories of constitutional interpretation in our constitutional law and constitutional adjudication. For Fried, constitutional law and the resolution of constitutional controversy requires very careful attention to the facts of the case and the relevant constitutional doctrine with respect to which the case arises. It is in that particularized context that situated constitutional judgment may be best made.<sup>104</sup> Theories of meaning and interpretation, which sometimes impair the exercise of good constitutional judgment, do not play for Fried the central role that Fallon's theory accords them.

### III

Fallon's new book makes an important contribution to our thinking about the Constitution and the Court. The arguments *Law and Legitimacy* makes expressly, as well as the unstated assumptions that underlie these

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102. FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 98–99; *see* CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 241–42 (2004).

103. *See* Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025 *passim* (2011) (emphasizing the often underestimated importance of judgment in constitutional cases in lieu of emphasizing the importance of interpretive theory). Even the title of Fried's earlier book—*Saying What the Law Is*—emphasizes the performative, character of our constitutional law and practice, at least if we understand the Court to make the law so by saying.

104. *Id.* at 1043–44 (highlighting the power of Justice Scalia's non-originalist opinions and decisions).

arguments and the focus of the book more generally, would move our constitutional thinking forward if others master its lessons. Fallon's book is more likely, however, to elicit criticism both for what it says and what it doesn't bother to say. Legal pragmatists may feel slighted by Fallon's brief engagement with their claims, for example, as well as by being termed *Cynical Realists*. Most of them don't self-identify either as cynical or as realists. The committed interpretivists on both sides of the originalism debate will likely forcefully reject Fallon's argument that Justices may properly look to their own moral commitments in deciding certain constitutional cases. To the extent that the originalists are tempted by Fallon's account their project of delegitimizing the constitutional jurisprudence of the Warren and Burger Courts will be called into question.

To the extent that the constitutional academy does not respond critically, it will likely attempt to assimilate *Law and Legitimacy* into the canon of our current practice of normal constitutional theory. That response will be, at least in important respects, misleading. Thus, for example, we may anticipate that New Originalists like Solum will emphasize Fallon's openness to originalist methodologies. They will emphasize the centrality of the constitutional text to Fallon's account of constitutional interpretation and decision. Although Fallon endorses much of Soames's theory (including employing without objection Soames's barbarism of *precisification*),<sup>105</sup> Soames must surely reject Fallon's methodological claims about ordinary language and our knowledge thereof. Leaving aside the modest substantive disagreements, while Soames is interested in natural language, methodologically he is no ordinary language philosopher. He is committed to a canonical analytical metaphilosophical account of his project.<sup>106</sup> For analytic philosophers of language, ordinary language users are not authoritative informants about the nature of linguistic meaning or other, related philosophical questions. Soames should reject Fallon's methodological claim to participate in the analysis of constitutional meaning, because the nature of meaning, ambiguity, truth, and knowledge are matters as to which philosophers have special expertise and knowledge. Fallon, as a legal scholar, does not have this professional expertise or knowledge. Originalists are more likely to focus critically on Fallon's willingness to incorporate underlying normative values into constitutional judgments. Originalist critics like Sunstein will emphasize the role of consensus and collegiality in appellate constitutional adjudication and Fallon's call for greater deference to Congress, overlooking Fallon's tacit denial of a central

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105. FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 67.

106. SOAMES, *supra* note 20, at 1–10 (beginning his theoretical analysis with Frege).

role for incompletely theorized opinions.<sup>107</sup> They may also emphasize Fallon's suggestion that the Court should be more deferential to the Congress. They will likely emphasize Fallon's reliance on the earlier rather than the later, Rawls. Because of the measured style and the balance of Fallon's argument, it is possible, indeed, perhaps likely, that other scholars will selectively find in Fallon's arguments what is most in harmony with their own positions. Some may find the same tendency in this review. This may result in underestimating the originality and importance of Fallon's contribution.

Implicit in this review's narrative is the claim that we should recognize how far Fallon departs from the traditional traces of our contemporary constitutional theory. He is not just providing new answers; he is redirecting us to new or lost questions about the nature of the Constitution, the role of the Court, and the nature of the legitimacy of the Republic. By focusing on the foundations for the moral legitimacy of the Court and the Constitution, Fallon would shift our constitutional discourse away from the sterile debate over constitutional interpretation and originalism and other theoretical issues. That would be a signal achievement in its own right.<sup>108</sup> By casting the discussion of legitimacy in the fundamental new terms that look expressly to our moral and political theory and our constitutional practice—rather than in the narrower, traditional terms of the countermajoritarian dilemma and the role of, and limits on, judicial discretion—Fallon tacitly challenges the dominant positivism that has informed both most originalism and the competing constitutional theories of originalism's critics. But in so doing, he needs to acknowledge the challenges that originalists and their critics have historically posed to reliance on underlying normative values in our constitutional adjudication.

Within the realm of the possible, Fallon's new book accomplishes a lot. How important it will prove to have been in reshaping our constitutional theory and practice, to echo Zhou Enlai, it's simply too soon to say. If *Law and Legitimacy* should have that impact, it will be more a matter of changing what we do than of changing what we merely say.

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107. Fallon mentions Sunstein's concept and argument only in passing. FALLON, *LAW AND LEGITIMACY*, *supra* note 10, at 208, n.65. While Fallon argues for greater judicial deference to the legislature, he does not endorse the systematic judicial minimalism that Sunstein calls for.

108. For a more cautious view that it will take more than merely compelling or even dispositive, rational argument to reach that result, see André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL OF RTS. J. 101 (2017).