

THE CHIMERICAL CONCEPT OF ORIGINAL PUBLIC MEANING

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This Article demonstrates that constitutional provisions rarely if ever have uniquely correct “original public meanings” that are sufficiently determinate to resolve disputed constitutional cases. As public meaning originalism (“PMO”) ascends toward a position of dominance within the Supreme Court, both practitioners and critics should recognize the limited capacity of historical and linguistic facts to settle modern issues.

To understand successful constitutional communication, this Article argues, requires a distinction between “minimal” original public meanings, which either are entailed by language and logic or are otherwise noncontroversial, and the richer and more determinate meanings that originalists often purport to discover. When the Constitution says that each state shall have “two Senators,” “two” means two. By contrast, when members of the Founding generation disagreed about the meaning of a constitutional provision—as they frequently did—the idea of a uniquely correct and determinate more-than-minimal meaning that existed as a matter of linguistic and historical fact is chimerical. Judges can of course reach determinate conclusions, but seldom can those dispute-resolving conclusions be ones of simple historical fact.

Insofar as practitioners of PMO—including Justices of the Supreme Court—purport to discover more-than-minimal original public meanings that provide determinate resolutions to contested cases, skepticism is in order. The problem with claims about more-than-minimal original public meanings is conceptual, not epistemological. Although public meaning originalists speak of “evidence” establishing the historical validity of disputed claims about original public

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meanings, they have no adequate account of what, exactly, the evidence is supposed to be evidence of. Beyond historical facts about who said and believed different things at particular times, there is no further, diversity-transcending fact of an original public meaning that extends beyond minimal and noncontroversial meanings.

After identifying the conceptual limitations of public meaning originalism, this Article examines the resulting challenges for both theorists of PMO and for originalist and nonoriginalist Justices alike. It also draws lessons concerning the nature of and necessary conditions for successful constitutional communication across generations.

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INTRODUCTION

With the confirmation of Justice Amy Coney Barrett as an Associate Justice of the Supreme Court, originalism has moved to center stage once more in constitutional debates in the United States. Justice Barrett self-identifies as an originalist.¹ So does Justice Neil Gorsuch,² whom President Trump nominated and the Senate confirmed to succeed Justice Antonin Scalia. Justice Clarence Thomas has long argued for judicial decision making based on “the original public meaning” of the

¹ See, e.g., Full Transcript: Read Judge Amy Coney Barrett’s Remarks, N.Y. Times (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html> [<https://perma.cc/J48S-S8ZC>] (“I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too.”); Nomination of the Honorable Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 116th Cong. 4 (2020) (opening statement of Amy Coney Barrett) (arguing judges should “interpret[] our Constitution and laws as they are written”); see also *Kanter v. Barr*, 919 F.3d 437, 454–65 (7th Cir. 2019) (Barrett, J., dissenting) (exemplifying, in the Second Amendment context, Justice Barrett’s emphasis on historical analysis).

² See, e.g., Neil Gorsuch, *A Republic, If You Can Keep It* 116–27 (2019) (advancing defense of originalism); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (contending that “[t]he Constitution’s original public meaning supplies the key” to its interpretation).

Constitution.³ Justice Samuel Alito has characterized himself as “a practical originalist.”⁴

With the prospect that originalist Justices might transform our constitutional law now a palpable one, the question “What is originalism?” deserves close re-consideration. Re-consideration is warranted, despite a bulging catalogue of books and articles debating originalism, because originalism—as originalists themselves sometimes emphasize—has always been and remains a “work in progress.”⁵

The leading current version is public meaning originalism (“PMO”).⁶ Justice Scalia was a founding member of the public meaning originalist

³ See, e.g., Rosenkranz Originalism Conference Features Justice Thomas ’74, Yale Law School (Nov. 4, 2019), <https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74> [<https://perma.cc/3SKV-9LBQ>] (quoting Justice Thomas as saying that modern day originalists should “give the words and phrases used by [authors] natural meaning in context” and that doing otherwise “usurps power from the people”); see also Gregory E. Maggs, Which Original Meaning of the Constitution Matters to Justice Thomas?, 4 N.Y.U. J.L. & Liberty 494, 495, 511 (2009) (describing Justice Thomas’ originalism).

⁴ Matthew Walther, Sam Alito: A Civil Man, American Spectator (Apr. 21, 2014, 12:00 AM), <https://spectator.org/sam-alito-a-civil-man> [<https://perma.cc/XD92-CVGH>] (“I think I would consider myself a practical originalist.”); see also Steven G. Calabresi & Todd W. Shaw, The Jurisprudence of Justice Samuel Alito, 87 Geo. Wash. L. Rev. 507, 512 (2019) (observing that a “theme of Justice Alito’s jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia”).

⁵ Scott Soames, Originalism and Legitimacy, 18 Geo. J.L. & Pub. Pol’y 241, 246 (2020) [hereinafter Soames, Originalism and Legitimacy]. For a brief history of originalism, see Lawrence B. Solum, What Is Originalism? The Evolution of Contemporary Originalist Theory, in *The Challenge of Originalism: Theories of Constitutional Interpretation* 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011).

⁶ See Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1251 (2019) (“Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s.”); Jamal Greene, The Case for Original Intent, 80 Geo. Wash. L. Rev. 1683, 1684 (2012) (“Today, most academic originalists and even some living constitutionalists say that constitutional interpretation should proceed, first and foremost, from the original meaning of the text at issue.”); Steven G. Calabresi & Hannah M. Begley, Originalism and Same-Sex Marriage, 70 U. Miami L. Rev. 648, 649 (2016) (asserting that “all modern originalists . . . are original public meaning textualists”). But cf. Stephen E. Sachs, Originalism Without Text, 127 Yale L.J. 156, 158 (2017) (noting that “[a] number of scholars, this author among them, have argued for shifting focus from original meaning to our *original law*”).

Professor Solum distinguishes four varieties of originalism in addition to public meaning originalism: Original Intentions Originalism (“The original meaning of the constitutional text is the meaning that the framers intended to convey.”); Ratifiers’ Understandings Originalism (“The original meaning of the constitutional text is the meaning conveyed to the ratifiers of each provision.”); Original Methods Originalism (“The original meaning of the constitutional

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school,⁷ with which Justices Thomas, Gorsuch, and Barrett also have associated themselves.⁸ Public meaning originalists do not all agree about everything, but they coalesce around a central tenet: the original and unchanging meaning of a constitutional provision is either (1) what a reasonable person who knew the publicly available facts about the context of its drafting would have taken it to mean⁹ or (2) what literate and informed members of the public actually understood it to be,¹⁰ at the time

text is the meaning produced by application of the original methods of constitutional interpretation and construction to the text.”); and Original Law Originalism (“The law in effect at the time the Constitution was ratified is legally binding unless it was changed by methods authorized by the original law.”). Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. Rev. 1621, 1627 [hereinafter Solum, *Triangulating Public Meaning*]. For an alternative, critical typology, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 247–62 (2009).

⁷ See Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in *Original Meaning Jurisprudence: A Sourcebook* 101, 106 (U.S. Dep’t of Just. ed., 1987) (arguing that originalists “ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”); see also Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 Geo. L.J. 1113, 1139 (2003) (characterizing Justice Scalia as “original meaning textualism’s patron saint”).

⁸ See sources cited *supra* notes 1–4.

⁹ See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012) (“In their full context, words mean what they conveyed to reasonable people at the time they were written.”); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92 (2004) (“[O]riginal [public] meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 105 (2001) [hereinafter Barnett, *Commerce Clause*]; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 48 (2006) (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people . . . but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. Chi. L. Rev. 1385, 1440 (2014) (“[T]he true, original public meaning of the language employed . . . [is] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted.”).

¹⁰ See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 60 (1999) (asserting that the process of ratification gave the constitutional “text the meaning that was publicly understood”); Lawrence B. Solum, *Cooley’s Constitutional Limitations and Constitutional Originalism*, 18 Geo. J.L. & Pub. Pol’y 49, 57 (2020) [hereinafter Solum, *Cooley’s Constitutional Limitations*] (“The original meaning of the constitutional text is best understood as the meaning communicated to the public at the time each provision was framed and ratified.”); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 Const. Comment. 451, 453 (2018)

of its promulgation. Although these two formulations diverge as a conceptual matter, the practical difference is usually small. Because there is typically no way of discovering at the individual level what most people understood a provision's meaning to be at the time of its ratification, originalist inquiries tend to focus on what those who knew its language and the publicly available facts about its drafting would reasonably or most reasonably would have understood it to communicate.¹¹

Two primary assumptions link practitioners of PMO as adherents of a single school or approach. First, PMO assumes that members of the Framing generation would have discovered the linguistic meaning of constitutional provisions in roughly the same way that they would have ascertained the meaning of utterances in ordinary conversation.¹² Public meaning originalists acknowledge that the “model of conversational interpretation”¹³ may require modest adaptations to address the peculiarities of constitutional interpretation.¹⁴ Nonetheless, they insist, the interpretive methods that structure conversational interpretation

[hereinafter Solum, Originalist Theory] (“The public meaning of the constitutional text is . . . the content communicated to the public by the text and the publicly available context of constitutional communication.”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127, 1136 (1998) (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”).

¹¹ To take a single illustrative example, Professor Lawrence Solum, who frequently defines original public meanings by reference to “the meaning communicated to the public,” see Solum, *Cooley’s Constitutional Limitations*, *supra* note 10, at 57, criticizes the efforts to discern original meanings by historians who focus primarily on assertions by particular historical figures and do not attend sufficiently to “the communicative content of the text” by closely examining its “semantics or pragmatics.” Solum, *Triangulating Public Meaning*, *supra* note 6, at 1653–54.

¹² See, e.g., Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in 1 *Philosophical Essays: Natural Language: What It Means and How We Use It* 403, 403 (Scott Soames ed., 2009) [hereinafter Soames, *Interpreting Legal Texts*] (arguing that “[p]rogress can . . . be made . . . by seeing [legal and statutory interpretation] as an instance of the more general question of what determines the contents of ordinary linguistic texts”); Lawrence B. Solum, *Semantic Originalism* 28 (*Ill. Pub. L. & Legal Theory Rsch. Paper Series*, Research Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [<https://perma.cc/625M-RML5>] (describing the Constitution as a “text” and explaining the central role of semantic theory, framed as “the theory of the meaning of utterances,” in establishing the “linguistic meaning” of constitutional provisions).

¹³ See Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 *Nw. U. L. Rev.* 269, 275 (2019); cf. Saul Cornell, *President Madison’s Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 *Fordham L. Rev.* 1761 (2021) (referring to “[t]he ‘standard communication model’ favored by many originalists”).

¹⁴ See *infra* notes 52–53 and accompanying text.

furnish a workable template for ascertaining constitutional meanings. I call this the Interpretive Methodology Assumption.

Second, PMO posits that the original meanings of constitutional provisions, like those of conversational utterances, exist as a matter of historical and linguistic fact.¹⁵ The factual status of original public meanings inheres in the conjunction of empirical facts about words' meanings, rules of grammar and syntax, political events leading up to constitutional provisions' adoptions, and the theoretical, meaning-generating premises of the model of conversational interpretation as adapted to constitutional interpretation.¹⁶ I call this the Conceptual Assumption.

This Article argues that original public meanings, in the sense in which originalists use that term, are insufficient to resolve any historically contested or otherwise reasonably disputable issue¹⁷—an important qualification that I shall explain shortly. The two central assumptions that undergird PMO will not withstand analysis. PMO's Interpretive Methodology Assumption is untenable. Without it, the Conceptual Assumption crumbles as well.

PMO's difficulties begin with the Interpretive Methodology Assumption that we can identify linguistic meanings of constitutional provisions that are determinate enough to settle disputed questions by using substantially the same, largely unselfconscious techniques that we employ in interpreting conversational utterances. Given this assumption, PMO equates the meaning of a constitutional provision (or what some

¹⁵ See Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269, 278 (2017) [hereinafter Solum, *Originalist Methodology*] (“[T]he communicative content of the constitutional text is a *fact*.”); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 12 (2015) [hereinafter Solum, *Fixation Thesis*] (“The communicative content of a text is determined by linguistic facts . . . and by facts about the context in which the text was written. Interpretations are either true or false—although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false.”); Soames, *Originalism and Legitimacy*, *supra* note 5, at 248 (asserting that “[t]he contents” of statutes and other linguistic acts by collective bodies “is, in principle, derivable from the relevant, publicly available, linguistic and non-linguistic facts”).

¹⁶ See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 497–98 (2013) [hereinafter Solum, *Communicative Content*] (defining public meaning as “the conventional semantic meaning of the words and phrases as combined by widely shared regularities of syntax and grammar”).

¹⁷ For a different argument to a similar conclusion, see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 714 (2011) (arguing that the most sophisticated versions of “the New Originalism” have responded to criticisms of “the Old Originalism” with adaptations that severely limit their claims to determinacy).

philosophers would call a provision's assertive or communicative content¹⁸) with what either reasonable people or actual people who are assumed to be reasonable would have taken it to mean in the context of its promulgation. But the assimilation of constitutional to conversational interpretation grows problematic when one probes which elements of context a reasonable listener normally takes into account in determining what a remark communicates, asserts, or stipulates. Almost self-evidently, the identity of the speaker matters crucially. Depending on who the speaker was, reasonable people would make different assumptions about the "interpretive common ground"¹⁹ that they share with the speaker and about the speaker's likely communicative intentions. If someone tells me, "Let's meet at our usual spot at the usual time," information of this kind will contribute decisively to the meaning (or communicative content) of her utterance. In the case of constitutional provisions, however, there typically is no unitary speaker.²⁰ Constitutional provisions frequently have multiple or in some cases unknown authors who may have had different communicative intentions and held different assumptions about how the public would understand their words.²¹

Public meaning originalists have diverse strategies for evading this difficulty, mostly by imagining the "reasonable" audience for constitutional provisions as endowed with qualities that make attention to speakers' particularized communicative intentions unnecessary.²² But none of those strategies succeeds. It is impossible to give even a modestly rich description of the "context" of constitutional provisions' promulgation without taking account of who the promulgators were and what understandings or responses they aimed to provoke in their audiences.

The model of conversational interpretation also fails to fit the case of constitutional interpretation for reasons involving the idea of a "reasonable" reader of constitutional provisions whose judgments

¹⁸ This is the preferred, technical vocabulary of the public meaning originalists who draw most explicitly on the conceptual apparatus of the philosophy of language. See *infra* notes 54–56 and accompanying text.

¹⁹ My usage follows that of Professor Mark Richard, who defines interpretive common ground as shared presuppositions. See Mark Richard, *Meanings as Species 3* (2019).

²⁰ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 213–15 (1980); Solum, *supra* note 12, at 40.

²¹ See *infra* Subsection II.A.2.a.

²² See *infra* notes 167–191 and accompanying text.

determine those provisions' original meanings. Among other things, the audiences for constitutional provisions are diverse. In addition, we know as a matter of historical fact that different, informed, and evidently reasonable people who were alive at the time of constitutional provisions' promulgation have often disagreed about what those provisions meant.²³

In cases of disagreement, one approach to ascertaining original public meaning would be to investigate what different people who were alive at the time actually thought and to seek to discover whether there was a majority—or failing that, a plurality—view. Indeed, one might expect PMO adherents who equate public meanings with actual people's historical understandings to pursue that strategy.²⁴ Yet I know of no originalist who has worked out a methodology for calculating how many citizens of the past qualified as sufficiently informed to judge the meanings of particular constitutional provisions competently, for identifying how many had one understanding of a disputed provision in comparison with another, and for resolving disagreements by one or another numerically-based protocol.²⁵ Rather, as I have said, when it comes to the actual practice of PMO, the touchstone for virtually all inquiries is a hypothetical, reasonable person and the conclusions that such a being would have drawn in light of publicly available evidence.²⁶

The unworkability of the model of conversational interpretation as a template for ascertaining the uniquely correct, fact-of-the-matter meanings of constitutional provisions points to an equally shattering conclusion concerning PMO's Conceptual Assumption: original constitutional meanings that are ascertainable as a matter of historical fact, which are PMO's Holy Grail, do not exist in forms capable of resolving any historically or reasonably disputed issue.

²³ See *infra* Subsection III.B.1 (observing disagreement about the meanings of multiple constitutional provisions).

²⁴ See *supra* note 10 and accompanying text (citing examples of such PMO adherents).

²⁵ See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 *Mich. L. Rev.* 165, 214 (2008) (“[W]hen [originalist material] speaks in many voices, there is no way to settle the question of whether a view expressed in the Pennsylvania ratifying convention is more or less authoritative than a view expressed in the newspapers of Massachusetts.”).

²⁶ See, e.g., Lawson & Seidman, *supra* note 9, at 48 (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people—whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”); cf. Solum, *Triangulating Public Meaning*, *supra* note 6, at 1637 (“Original public meaning should be distinguished from what have been called ‘original expected application[s].’”).

I restrict my thesis to reasonably disputed cases because, although identifying the meaning of an utterance in context often requires knowing who the speaker was and what she intended to convey, sometimes there may be no reasonable doubt on any relevant score. For example, when Article I, Section 3, Clause 1 provides that “[t]he Senate of the United States shall be composed of two Senators from each State,”²⁷ its meaning or communicative content is unmistakable. “Two” means two. The term “each State” refers to the States of the United States. It is equally clear that no provision of the Fourteenth Amendment, read in its linguistic and historical context, requires that citizens of the United States eat cornflakes for breakfast. Reaching these conclusions requires no fine-grained knowledge about the relevant provisions’ authors or about possibly divergent linguistic, historical, biographical, or political assumptions among their audiences. In cases such as these, it suffices to assume that the speaker or speakers—whoever they may have been—would have had what I shall call the “minimal” communicative intentions that would be necessary to make a provision intelligible in its linguistic, historical, and institutional context.²⁸ These would include such intentions as to create binding law and to convey, in English, whatever a reasonable listener would *necessarily or noncontroversially* understand the words of the provision either to require, provide, or stipulate or not to require, provide, or stipulate in light of publicly known facts about their drafting.²⁹ In cases of evidently unanimous historical understanding, we could thus say that those provisions had the minimal original meanings and non-meanings on which everyone or nearly everyone living at the time either converged or would have converged. If originalists defined constitutional provisions’ original public meanings as limited to their minimal meanings and non-meanings, then I would offer no conceptual objection to claims that uniquely correct original public meanings could be identified as a matter of historical and linguistic fact.

In practice, however, I know of almost no originalists who accept that original public meanings are limited to minimal meanings as I have

²⁷ U.S. Const. art. I, § 3, cl. 1.

²⁸ This usage echoes Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* 284–85 (2009) (positing that legislators should be assumed to vote for legislation with the “minimal intention” to make law that will be “understood” in accordance with the norms of “their legal culture”).

²⁹ Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 *Colum. L. Rev.* 498, 544 (2011), proposes a test along these lines. For discussion of the details and implications of his proposal, see *infra* notes 207–08 and accompanying text.

defined that term. Although there are exceptions, including Professor Jack Balkin,³⁰ public meaning originalists characteristically advance their theories with more substantial ambitions than clarifying how original public meanings can resolve such non-debates as whether Article I requires that each state should have exactly two Senators or whether the Equal Protection Clause mandates that everyone eat cornflakes. Certainly, this is true of the Justices of the Supreme Court who self-identify as originalists. Rather than defining the original public meaning as limited to minimally necessary (for intelligibility) or historically noncontroversial meaning, mainstream public meaning originalists posit that constitutional provisions' original public meanings consist of minimal meanings *plus* some further content that, they maintain, can also be discovered as a matter of historical and linguistic fact.³¹ To put the point more concretely, they believe that there is a historically and linguistically discoverable original public meaning that is capable of resolving, as a matter of fact, such historically disputed questions as whether the Second Amendment, the preamble to which refers to the importance of “a well regulated Militia,” safeguards a personal right “to keep and bear arms” for purposes of self-defense;³² whether the Free Speech Clause of the First Amendment protects corporate spending to influence political campaigns;³³ and whether the Fourteenth Amendment

³⁰ See, e.g., Jack M. Balkin, *Living Originalism* 21 (2011) (defending “framework originalism”) [hereinafter Balkin, *Living Originalism*]; Jack M. Balkin, *The Construction of Original Public Meaning*, 31 *Const. Comment.* 71, 80 (2016) [hereinafter Balkin, *Construction*].

³¹ See *infra* Section I.A.

³² U.S. Const. amend. II. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (grounding the conclusion that the Second Amendment protects a personal right to possess arms for self-defense in “the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning’” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))); *id.* at 652–79 (Stevens, J., dissenting) (analyzing Second Amendment’s historical context and concluding that any rights that it created were linked to service in a well-regulated militia); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 *Harv. L. Rev.* 246, 246 (2008) (“Well over two hundred years since the Framing, the Court has, for essentially the first time, interpreted a constitutional provision with explicit, careful, and detailed reference to its original public meaning.”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. Rev.* 923, 924 (2009) (contending that *Heller* offered “the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court”).

³³ See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring) (emphasizing majority opinion’s consistency with original public meaning of the First Amendment); *id.* at 425–33 (Stevens, J., concurring in part and dissenting in part)

bars discrimination on the basis of sex or sexual orientation.³⁴ Historically disputable issues such as these dominate the Supreme Court's docket of constitutional cases.

In cases of this kind, claims that determinate original public meanings existed as a matter of historical and linguistic fact reflect a conceptual or metaphysical mistake.³⁵ Beyond minimal meanings, there is no single historical fact of the matter about what disputed constitutional provisions more determinately meant and, thus, no determinate original public meaning.³⁶ Insofar as originalists equate the original public meaning with what a reasonable person would have concluded, they mistakenly seek to answer an epistemological question, involving how best to ascertain what the original public meaning was, without first resolving a logically prior conceptual or metaphysical question. That question is whether original public meanings that are broader than minimal meanings exist in a form that a reasonable person could identify as a matter of historical or linguistic fact—that is, without making a judgment about which interpretation would be best in some normative sense or without invoking a challengeable theory of what makes the meaning that some ascribed to a constitutional provision, but that others did not, the true original public meaning. Charged with ascertaining the original public meaning of a constitutional provision, a reasonable decision-maker could not sensibly begin with the question, “What would a reasonable person think the

(disputing this analysis); see also Leo E. Strine, Jr. & Nicholas Walter, Originalist or Original: The Difficulties of Reconciling *Citizens United* with Corporate Law History, 91 *Notre Dame L. Rev.* 877, 878 (2016) (providing an overview of the historical dispute between the two opinions).

³⁴ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”); *id.* at 726 (Thomas, J., dissenting) (charging the Court with “los[ing] its way” in “deviating from the original meaning of the [Due Process] Clauses”); cf. Calabresi & Begley, *supra* note 6, at 652–54 (2016) (challenging Justice Thomas’s approach and offering originalist defense of *Obergefell*).

³⁵ On the distinction between the metaphysics of meaning and the epistemological issues involved in its ascertainment, see Michael Devitt, Three Methodological Flaws of Linguistic Pragmatism, in *What Is Said and What Is Not: The Semantics/Pragmatics Interface* 285, 285–86 (Carlo Penco & Filippo Domaneschi eds., 2013).

³⁶ Cf. Thomas B. Colby, The Federal Marriage Amendment and the False Promise of Originalism, 108 *Colum. L. Rev.* 529, 601–02 (2008) (noting the pointlessness of seeking to establish “the standard of proof necessary to establish a ‘fact’ that never existed”).

original meaning was?” Instead, a reasonable decision-maker would need to begin with a theory of what *in the world* makes it true that constitutional provisions have particular original public meanings (if they do) so that the mode of inquiry could be adjudged reasonable or reliable.³⁷

With that challenge on the table, I take the original public meaning of constitutional provisions, as public meaning originalists use the term, to be a theoretical construct in the same way that “gross domestic product” and “IQ”—to take two quite disparate examples—are theoretical constructs.³⁸ To be more precise, the original public meaning of a constitutional provision is partly a function of the theory by which the original public meaning is defined. Reliance on a “reasonable person” standard could thus furnish meaningful standards of inquiry only if public meaning originalists had a sufficiently specified theory to tell reasonable inquirers what they ought to look for and ultimately how to produce correct results. A theory linked instead to what people actually thought or believed would have parallel problems. Since very few people would likely have studied the language of proposed provisions or reflected thoughtfully on their implications for particular issues, such a theory needs an account of which mental states or dispositions mattered. It would also have to specify the conditions under which a contested view should count as the singularly correct original meaning. When confronted with theoretical and conceptual challenges such as these, PMO comes up

³⁷ A comparison with other contexts in which the law employs “reasonable person” standards confirms this conclusion. The most characteristic function of “reasonable person” standards is to embody reasonableness in a particular domain of thought, action, or disposition. See Christopher Jackson, Reasonable Persons, Reasonable Circumstances, 50 San Diego L. Rev. 651, 655 (2013) (quoting Peter Westen, Individualizing the Reasonable Person in Criminal Law, 2 Crim. L. & Phil. 137, 139 (2008)) (asserting that “[a] reasonable person is reasonableness rendered incarnate”). In seeking to resolve disputed questions, the reasonable person pursues the methods of inquiry appropriate to achievement of true beliefs about the matter in question. See John Gardner, The Mysterious Case of the Reasonable Person, 51 U. Toronto L.J. 273, 273 (2001) [hereinafter Gardner, *The Mysterious Case*] (defining the “reasonable person” as a “justified” person whose actions satisfy the standards of justification appropriate for actions of the relevant kind and whose beliefs are similarly justified); John Gardner, Reasonable Person Standard, in *The International Encyclopedia of Ethics* (Hugh LaFollette ed., 2019) (“When the law’s question is what the reasonable person would [believe], the answer is that she would have reasonable [beliefs].”). The deep, underlying assumption is that true beliefs are possible.

³⁸ Cf. Balkin, *Construction*, supra note 30, at 78 (terming the original public meaning “a constructed entity”); Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 Const. Comment. 345, 369 (2020) (“‘Original public meaning’ is a theoretical construction, a mediated account of the past that serves the purposes of law and legal theory.”).

dramatically short.³⁹ Without clear criteria for identifying the truth conditions for claims about original public meanings in cases of actual historical disagreement, PMO appears to insist that “we know it when we see it.” Yet an “it” that exists only insofar as particular practitioners of PMO see it is not the kind of “original public meaning” that they or anyone else should want to make the object of historical inquiry.

To be clear, just as I recognize that constitutional provisions can have minimal original public meanings, I accept—indeed, I shall emphasize—that courts and judges can reach better- or worse-supported conclusions about constitutional provisions’ original *legal* meanings, even in disputed cases. Proper ascription of legal meanings depends on a mixture of facts about ordinary language use, legal norms, and moral norms, not the mistaken premise that disputed provisions had uniquely correct, original *linguistic* meanings that are simultaneously factual, reliably ascertainable, and capable of resolving reasonably disputable issues.⁴⁰

In developing my argument that constitutional provisions lack uniquely correct, original public meanings in the special, stipulated sense that leading originalists postulate, this Article pursues a two-pronged strategy. One branch of my argument advances analytically-based criticisms of PMO. The second juxtaposes the linguistic assumptions that undergird PMO with the picture of linguistic and ultimately constitutional meaning

³⁹ See, e.g., Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703, 720 (2009) (“Public meaning is, quite explicitly, an artificial construct. The qualifying criteria . . . depend on assumptions about how some chosen hypothetical speaker of the language would apprehend the text at issue. Even in theory there is no ‘right answer.’”). According to Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. (forthcoming Dec. 2021) (manuscript at 52) (on file with author) [hereinafter Solum, *Public Meaning Thesis*], “When there is controversy over the public meaning, we aim for the interpretation that best explains all the available evidence.” Although this formulation presupposes the existence of a theory that identifies some “evidence” as relevant and supports inferences about the relationship of evidence to conclusions, Professor Solum never articulates the theory on which he relies.

⁴⁰ In listing moral norms among the factors relevant to legal reasoning, I assume that insofar as authoritative legal materials otherwise fail to provide an answer to a legally disputed question, a judge should adopt the legally eligible answer that would be morally best. See, e.g., Joseph Raz, *Incorporation by Law*, 10 *Legal Theory* 1 (2004).

For a different argument from mine to the shared conclusion that disputed constitutional provisions typically lack uniquely correct and determinate linguistic meanings, see Frederick Mark Gedicks, *The ‘Fixation Thesis’ and Other Falsehoods*, 72 Fla. L. Rev. 219, 223–24 (2020) (arguing that belief in original public meanings represents an ontological mistake because “[t]he meaning of any text from the past is also shaped by the demands of the interpreter” with the result that “in the present[,] textual meaning is mutually constituted by past and present”).

that emerges from work by historians and especially from a recent book on Reconstruction and the Reconstruction Amendments, entitled *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, by the eminent historian Professor Eric Foner.⁴¹ In describing Foner as an eminent historian, I do not vouch for his conclusions. For purposes of thinking about the plausibility of PMO, however, I accept his account of disagreement and uncertainty among those who helped draft the Fourteenth Amendment and who struggled to identify its communicative content.

In contrast with PMO's posit that constitutional provisions have single linguistic meanings, Foner insists that the language of the Fourteenth Amendment had multiple, diverse meanings at the time of its promulgation. "[T]he meaning of key concepts embedded in the Reconstruction amendments such as citizenship, liberty, equality, rights, and the proper location of political authority—ideas that are inherently contested—were themselves in flux,"⁴² he writes. More than one Congressman expressed doubt about what key provisions of the Fourteenth Amendment meant. Others confessed to having changed their minds about what rights the Fourteenth Amendment ought to create in the course of debates. If these claims are true, they should inspire skepticism about any version of PMO that posits the existence of original public meanings that extend beyond minimally necessary and noncontroversial meanings and that can be discerned, without a well-specified theory for how to resolve disagreements about central issues, as a matter of historical and linguistic fact.⁴³

⁴¹ Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, at xxiv (2019).

⁴² *Id.*

⁴³ Crediting Foner's specific factual claims, a public meaning originalist might say that even if Foner has shown that the communicative content of the Fourteenth Amendment was vague or underdeterminate in many relevant respects, this finding does not preclude PMO's claim to be able to identify uniquely correct meanings, going beyond minimally necessary meanings, in some *other* cases of historical disagreement. See Solum, *Public Meaning Thesis*, *supra* note 39 (manuscript at 52) ("[T]he case for Public Meaning Originalism would actually be quite strong if, at the end of the day, it turned out that only [the Privileges or Immunities and Equal Protection Clauses of the Fourteenth Amendment] were so underdeterminate that their original public meaning left almost all of the important contemporary questions in the construction zone."). I reject that originalist response, for reasons given already. Original public meanings in the originalist sense are the artifacts of a model for the generation of linguistic meanings or communicative content that is too poorly specified to generate uniquely correct meanings in any historically debated or reasonably disputable case.

The Article unfolds as follows. Part I lays out the main tenets of PMO, including its Interpretive Methodology and Conceptual Assumptions. Part I also offers a preliminary contrast between PMO's conception of linguistic meaning and the alternative reflected in Professor Foner's recent book, which argues that constitutional provisions can have multiple meanings. According to Foner, "no historian believes that any important document possesses a single intent or meaning."⁴⁴ Part II debunks the notion that constitutional provisions have a single, factually identifiable, original linguistic meaning that extends beyond their necessary or historically noncontroversial meanings. Part III charts the implications of my thesis for public meaning originalists, for nonoriginalist as well as originalist judges and Justices, for constitution-writers and students of written constitutionalism, and for theories of statutory interpretation. Part IV furnishes a brief conclusion.

I. APPROACHES TO CONSTITUTIONAL "MEANING": CONTRASTING PMO
WITH A HISTORIAN'S MULTIPLE-MEANINGS THESIS

This Part outlines the leading claims of PMO. It then briefly summarizes some of the conclusions of Foner's book that, as supported by other historians' analogous findings, should provoke questions about PMO's defining premises.

A. Public Meaning Originalism

Public meaning originalism emerged in the 1980s, partly in response to criticisms of earlier originalist theories that had emphasized the Framers' intent as a touchstone for constitutional analysis.⁴⁵ Justice Antonin Scalia played an important early role in PMO's development.⁴⁶ More recently, scholars have sought to frame PMO in more precise and sophisticated terms than first-generation originalists characteristically employed.

⁴⁴ Foner, *supra* note 41, at xxiv.

⁴⁵ See, e.g., Solum, *supra* note 12, at 18; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 528 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*]; Greene, *supra* note 6, at 1687–88.

⁴⁶ See Scalia, *supra* note 7 (arguing that originalists "ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning"); see also Kesavan & Paulsen, *supra* note 7, at 1139 (characterizing Justice Scalia as "original meaning textualism's patron saint").

The summary of PMO that I offer in this Section emphasizes the Interpretive Methodology and Conceptual Assumptions that leading proponents of the theory now endorse. The discussion relies heavily on the versions developed by law Professor Lawrence Solum and philosopher of language Professor Scott Soames. I focus largely on academic theorists, rather than judicial practitioners of PMO, because of the nature of the argument that I wish to make. The practical importance of PMO depends on whether and if so how it is implemented by judges and Justices including, for example, Justices Thomas, Gorsuch, and Barrett. But when critics of originalism cite the judicial decisions of originalist Justices to develop their critiques, theorists often respond by acknowledging the Justices' methodological shortcomings.⁴⁷ Debate about the merits of PMO should focus on the theoretically best version, they maintain.

My highlighting of positions advanced by Professors Solum and Soames responds to that demand. Professor Solum, who numbers among PMO's most prominent theorists, has held appointments in philosophy departments. Soames, whose interpretive theory falls within the PMO family, is a renowned philosopher of language. In summarizing the tenets of PMO, I omit references to Professor Balkin's idiosyncratic version, which would restrict claims of original meaning almost exclusively to minimally necessary and historically noncontroversial meanings.⁴⁸ According to Balkin, his theory of originalism is consistent with, even though it does not require, the Supreme Court's decision in *Roe v. Wade*.⁴⁹ As Balkin's analysis of *Roe* illustrates, his theory is an outlier that, as he trumpets, would deprive original meanings of almost all resolving power in disputed cases.⁵⁰

⁴⁷ See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. Cin. L. Rev. 7, 13–15 (2006); cf. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1942 (2017) (concluding that, "[t]o the extent [Justice Scalia] was occasionally faint hearted . . . who could blame him for being human?").

⁴⁸ See Balkin, *Living Originalism*, supra note 30, at 31; Balkin, *Construction*, supra note 30, at 80 (advancing a "thin" conception of original public meaning that consists of "the original semantic meaning of the words, . . . taking into account any generally recognized terms of art, and any background context necessary to understand the text," but not the "original expected application" of the text).

⁴⁹ See Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 294 (2007) (noting the availability of an originalist argument in support of abortion rights).

⁵⁰ See Balkin, *Construction*, supra note 30, at 86 ("I view constitutions as frameworks—they are a basic set of rules, standards and principles that are designed to create institutions and channel political action in order to make politics possible. Constitutions are designed to

1. PMO's Interpretive Methodology Assumption

Proponents of PMO maintain that reasonable, objective readers would view constitutional provisions as a species of linguistic utterances, the meanings of which can be identified in much the same way—though possibly with minor adjustments—as the meanings of utterances in ordinary conversation.⁵¹ Soames is explicit on this point:

The content of a legal text is determined in essentially the same way that the contents of other texts or linguistic performances are, save for complications resulting from the fact that the agent of a legislative speech act is often not a single language user but a group . . . and the resulting stipulated contents are required to fit smoothly into a complex set of pre-existing stipulations generated by other actors at other times.⁵²

So far as I am aware, no proponent has suggested a sharply distinctive template.⁵³

put politics in motion and cause people to solve their problems through politics as opposed to through violence and civil war.”)

⁵¹ See Solum, *Communicative Content*, supra note 16, at 485 (“Legal communications are ‘utterances’ in the broad sense of that word, which encompasses both sayings and writings.”); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *Fordham L. Rev.* 597, 598 (2013) [hereinafter Soames, *Deferentialism*] (“applying [the] lesson” learned from successful communication in more familiar speaker-to-listener contexts “to legal interpretation”); Soames, *Originalism and Legitimacy*, supra note 5, at 247 (explaining originalism’s extension of “a well-understood model of linguistic communication among individuals” to “lawmaking”).

⁵² Scott Soames, *Toward a Theory of Legal Interpretation*, 6 *N.Y.U. J.L. & Liberty* 231, 232 (2011).

⁵³ Solum wrestles at length with the differences between conversational and constitutional interpretation in an unpublished paper, *The Public Meaning Thesis*, supra note 39 (manuscript at 12 & n. 45), but emphatically endorses what he calls the “Continuity Thesis,” which holds that constitutional interpretation is sufficiently continuous with conversational interpretation so that concepts developed to elucidate successful conversational interpretation, especially those traceable to Paul Grice, *Studies in the Way of Words* 3–143 (1989), should be adapted rather than abandoned. According to Solum, the principal necessary adjustment of the model of conversational interpretation involves the absence of a unitary speaker in the case of constitutional provisions. See Solum, *Public Meaning Thesis*, supra note 39 (manuscript at 17) In a paper published in 2013, Solum maintained that provisions’ meanings might be based on “the semantic meaning of the text” in conjunction with “the publicly available context of constitutional communication.” Solum, *Communicative Content*, supra note 16, at 500. In the as-yet unpublished *The Public Meaning Thesis*, supra note 39 (manuscript at 36), he postulates that different speakers in the complex chain that begins with a drafter and includes ultimate ratifiers have meshing second-order intentions to adopt either the communicative intentions of the initial drafter or to communicate the public meaning of the text as it would appear to

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Although PMO theorists acknowledge that the term “meaning” can be used in varied ways, they insist that the sense most relevant for constitutional analysis is the “linguistic meaning” or what Soames and Solum label the “assertive content” or “communicative content” of individual constitutional provisions.⁵⁴ Soames explicates the idea of “assertive content” as follows:

In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker’s use of *S* to be intended to convey and commit the speaker to.⁵⁵

Solum, who more commonly speaks of constitutional provisions’ “communicative content,” appears to employ a similar but not identical definition: “The communicative content of a writing is the content the author intended to convey to the reader via the audience’s recognition of the author’s communicative intention.”⁵⁶ Other originalists may not precisely agree with either Soames or Solum. But all appear to share the premise that there is one sense of “meaning” that is uniquely relevant to constitutional interpretation, that depends on the speaker’s communicative intentions, and that is capable of yielding uniquely correct answers to questions involving the original meaning of constitutional provisions.

As thus imagined by PMO, the original public meaning of a constitutional provision is a joint product of what philosophers of language call “semantic content” and “pragmatic” inference or

members of the provision’s intended public audience. For critical discussion of this proposal, see *infra* notes 147–49 and accompanying text.

⁵⁴ See Solum, *Communicative Content*, *supra* note 16, at 484; Soames, *Originalism and Legitimacy*, *supra* note 5, at 264 (defining “assertive content”); Soames, *Deferentialism*, *supra* note 51, at 598–600 (differentiating linguistic meaning from assertive content).

⁵⁵ Soames, *Deferentialism*, *supra* note 51, at 598.

⁵⁶ Solum, *Originalist Methodology*, *supra* note 15, at 277; see also Solum, *Communicative Content*, *supra* note 16, at 488 (“The full communicative content of a legal writing is a product of the semantic content (the meaning of the words and phrases as combined by the rules of syntax and grammar) and the additional content provided by the available context of legal utterance.”). In order to communicate successfully, an author must therefore anticipate what a reasonable reader will take her communicative intent to be in using the words that she uses. See Solum, *Public Meaning Thesis*, *supra* note 39 (manuscript at 14).

enrichment (or, roughly speaking, contextual factors).⁵⁷ According to Solum, the semantic content of a constitutional provision is a function of “the meaning of the words and phrases as combined by the rules of syntax and grammar.”⁵⁸ But the semantic content of constitutional provisions (as of many other utterances) is, in Solum’s word, “sparse”⁵⁹ and requires supplementation (and occasionally qualification) by contextual information and inference.⁶⁰ For example, the semantic content of the word “president” does not tell us whether a particular utterance that uses the term refers to the President of the United States or the president of some other organization. For a reasonable listener or reader, however, context will often resolve any doubt through a process of pragmatic enrichment that depends on a background of intersubjectively shared, but typically unarticulated, assumptions of speakers and listeners.⁶¹

Although constitutional provisions were published to diverse audiences, most of PMO’s proponents define the original public meaning of constitutional provisions in terms of what a hypothetical reasonable person would have understood.⁶² In a recent article, Solum wrote that “[t]he original meaning of the constitutional text is best understood as the meaning communicated to the public at the time each provision was framed and ratified.”⁶³ In other writing, however, Solum has equated the original public meaning not with what was actually grasped by a provision’s original audience but with “the conventional semantic meaning of the words and phrases as combined by widely shared

⁵⁷ See, e.g., Solum, *Communicative Content*, supra note 16, at 488 (“In the philosophy of language and theoretical linguistics, the phrase ‘pragmatic enrichment’ is sometimes used to refer to the contribution that context makes to meaning.”); Andrei Marmor & Scott Soames, Introduction, *in Philosophical Foundations of Language in the Law* 1, 8 (Andrei Marmor & Scott Soames eds., 2011) (noting that the “assertive content” of utterances “is determined by a variety of factors, including the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of the speaker-hearers, and obvious features of the context of utterance”).

⁵⁸ Solum, *Communicative Content*, supra note 16, at 488.

⁵⁹ Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 *Va. L. Rev.* 1111, 1126 (2015) [hereinafter Solum, *Intellectual History*]; Solum, *Originalist Methodology*, supra note 15, at 285.

⁶⁰ See Solum, *Communicative Content*, supra note 16, at 488 (“In the philosophy of language and theoretical linguistics, the phrase ‘pragmatic enrichment’ is sometimes used to refer to the contribution that context makes to meaning.”).

⁶¹ See Soames, *Interpreting Legal Texts*, supra note 12, at 403–04; Solum, *Communicative Content*, supra note 16, at 488.

⁶² See *infra* notes 167–74 and accompanying text.

⁶³ Solum, *Cooley’s Constitutional Limitations*, supra note 10, at 57.

regularities of syntax and grammar.”⁶⁴ This formulation makes reasonable understandings or objective meaning its reference point.⁶⁵ Solum also endorses the proposition—which both defines PMO and helps differentiate it from other forms of originalism⁶⁶—that original public meanings cannot be defined by actual historical expectations concerning how constitutional provisions would or ought to be applied.⁶⁷

An example may clarify the conceptual distinction between original meanings and originally expected applications. Imagine that Speaker *S*, who holds a position of authority, directs that “no one who suffers from a contagious disease may attend any public school in the jurisdiction.” Further assume that both Speaker *S* and all members of her audience believe, mistakenly, that psoriasis is a contagious disease. They thus

⁶⁴ Solum, *Communicative Content*, supra note 16, at 497–98 (defining public meaning as “the conventional semantic meaning of the words and phrases as combined by widely shared regularities of syntax and grammar”).

⁶⁵ In his forthcoming article *The Public Meaning Thesis*, supra note 39 (manuscript at 50 n.160), Solum writes:

One idea is that pragmatic enrichments should be assessed from the perspective of “a reasonable member of the ratifying public at the time of enactment.” This idea is consistent with Public Meaning Originalism, so long as we understand that the idea of “a reasonable member of the public” is a heuristic and not an account of the causal mechanism by which communicative content is conveyed.

⁶⁶ See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2136, 2335 (2020) (Thomas, J., concurring) (“[T]he Framers’ expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning.”); Solum, *Triangulating Public Meaning*, supra note 6, at 1637 (“The meaning of a text is one thing; expectations about how the text will or should be applied to particular cases or issues is another.”); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 *BYU L. Rev.* 1393, 1398 (arguing that “it is the semantic original public meaning of the enacted texts,” rather than expected applications that determine original meaning); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *Tex. L. Rev.* 1, 7 (2011) (distinguishing meaning from expected applications by noting that “sometimes legislators misapply or misunderstand their own rules”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 622 (1999) (noting that PMO is not concerned with “how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases . . . except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener”).

In contrast with public meaning originalists, Professor Richard Kay has developed an approach that would fix original constitutional meanings based on overlapping intentions of majorities voting to ratify the Constitution in the various state ratifying conventions, but he identifies his approach as a version of original-intent-based, rather than OPM, originalism. See Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U. L. Rev.* 226, 247–51 (1988).

⁶⁷ See, e.g., Solum, *Triangulating Public Meaning*, supra note 6, at 1637.

expect the directive to exclude anyone with psoriasis.⁶⁸ In this case, it seems intuitively correct that the expected application does not determine the meaning of the directive.⁶⁹ In other cases, however, proponents of PMO maintain that expected applications can provide “evidence” concerning, even though they do not constitute, a constitutional provision’s original public meaning.⁷⁰

I shall return to PMO’s distinction between original meanings and originally expected applications later. For now, the important point is that PMO not only makes but is partly defined by the Interpretive Methodology Assumption that we can identify constitutional meanings in roughly the same way that we ascertain the meanings of conversational utterances.

2. *PMO’s Conceptual Assumption*

PMO is further defined by its Conceptual Assumption that the communicative content of a constitutional provision is a matter of linguistic fact. Solum could not be clearer on this point. “[T]he communicative content of the constitutional text is a *fact*,” he writes,⁷¹ and “[i]nterpretations are either true or false.”⁷² Importantly, many and perhaps most public meaning originalists acknowledge that the meaning of a constitutional provision, when identified as a matter of fact, may be

⁶⁸ This example is adapted from Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *Geo. L.J.* 569, 585 (1998).

⁶⁹ In *Triangulating Public Meaning*, supra note 6, at 1665, Solum gives a complex example involving an “application belief” that the Fourteenth Amendment would not protect women’s equal rights to practice law based on “a false belief that women have intellectual capacities that are similar to those of children and, hence, that women are incapable of practicing law.” For other rejections of the equation of original public meanings with original expectations or application beliefs, see supra note 66 and accompanying text.

⁷⁰ See, e.g., Solum, *Triangulating Public Meaning*, supra note 6, at 1638.

⁷¹ Solum, *Originalist Methodology*, supra note 15, at 278.

⁷² Solum, *Fixation Thesis*, supra note 15, at 12. When originalists assert positions such as these, I do not take them to claim that no judgment is necessary, but that no normative judgment is either necessary or appropriate. For example, to determine whether the Constitution permits a President to pardon him- or herself, a judge might have to use judgment in ascertaining what a reasonable person would take the assertive content of the relevant language of Article II to be in light of its legal background and relationship to other constitutional provisions. Nonetheless, the answer that emerges from application of the model of conversational interpretation (as minimally modified) should not depend on a normative judgment about whether allowing presidents to pardon themselves would be desirable.

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vague or ambiguous.⁷³ Accordingly, the linguistic meaning of a constitutional provision might not always “determine a definite verdict,”⁷⁴ in Soames’s words. Solum sometimes writes of “the fact of constitutional underdetermin[acy].”⁷⁵ In cases of underdeterminacy, Solum and Soames—in common with Professor Randy Barnett and many others⁷⁶—believe that judges have no choice but to exercise normative judgment in rendering determinate what previously was indeterminate.⁷⁷

Partly in recognition of constitutional underdeterminacy, PMO distinguishes the linguistic meaning of a constitutional provision from its legal meaning. At the conclusion of “[c]onstitutional interpretation,” which “is the activity that discerns the communicative content (linguistic meaning) of the constitutional text,”⁷⁸ a further process of “construction” must ensue. “Constitutional construction,” Solum writes, “is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.”⁷⁹ In acknowledgment of that role, Solum labels the “domain of constitutional underdeterminacy” as “the construction zone.”⁸⁰

In light of PMO’s postulate that meanings exist as matters of linguistic fact, frequency and extent of constitutional underdeterminacy would appear to be an empirical question. And one might expect public meaning originalists to display openness to the possibilities that—to take much-mooted examples—the original public meaning of the Fourteenth Amendment failed to resolve the permissibility of states excluding women from the practice of law or operating racially segregated public schools. Yet many (and perhaps most) originalists who have investigated issues such as these appear to believe that they can identify a uniquely

⁷³ See, e.g., Solum, *Originalism and Constitutional Construction*, supra note 45, at 458; Randy E. Barnett, *Interpretation and Construction*, 34 *Harv. J.L. & Pub. Pol’y* 65, 67 (2011) [hereinafter Barnett, *Interpretation and Construction*].

⁷⁴ Soames, *Originalism and Legitimacy*, supra note 5, at 249.

⁷⁵ Solum, *Originalism and Constitutional Construction*, supra note 45, at 536; see also Solum, *Public Meaning Thesis*, supra note 39 (manuscript at 4–5) (noting the need for constitutional “construction” in cases involving linguistically underdeterminate provisions).

⁷⁶ See, e.g., Barnett, *Interpretation and Construction*, supra note 73, at 66, 69–70; see also, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 5–6 (2018) (proposing one originalist model of judicial construction).

⁷⁷ Solum, *Originalism and Constitutional Construction*, supra note 45, at 472–73; Soames, supra note 52, at 243–44.

⁷⁸ Solum, *Originalism and Constitutional Construction*, supra note 45, at 457.

⁷⁹ *Id.*

⁸⁰ *Id.* at 458.

correct original meaning that yields determinate answers.⁸¹ For instance, *Solum* maintains that the original meaning of the Fifth Amendment’s Due Process Clause guaranteed no more than a right to traditional forms of notice of the commencement of legal proceedings⁸² and that the Fourteenth Amendment, contrary to an 1873 decision of the Supreme Court,⁸³ barred states from excluding women from law practice.⁸⁴ Similarly, Soames rejects others’ interpretations of the historical evidence and concludes unequivocally that the Amendment’s assertive content forbade school segregation.⁸⁵ Outside the legal academy, the confidence of originalist (and occasionally nonoriginalist) judges and Justices in arriving at determinate conclusions about the communicative content of constitutional provisions is even more dramatically on display in debates about such matters as the original meaning of the Commerce Clause,⁸⁶ the First Amendment,⁸⁷ the Second Amendment,⁸⁸ and the Due Process and Equal Protection Clauses.⁸⁹

Indeed, some public meaning originalists reject the interpretation/construction distinction altogether.⁹⁰ For them, “interpretation” apparently denominates the activity by which the

⁸¹ See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947, 953, 956 (1995) (finding that original meaning of the Fourteenth Amendment barred school segregation); Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 *Harv. J.L. & Pub. Pol’y* 1017, 1021–22 (2008) (maintaining, contrary to the contentions of others, that originalism authorizes a reading of the “coinage” clause that permits paper money).

⁸² See Maximilian Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 *Va. L. Rev.* (forthcoming 2022) (manuscript at 3–4) (on file with author).

⁸³ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138–39 (1873).

⁸⁴ See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 *ConLawNOW* 235, 253–55 (2018).

⁸⁵ See Soames, *Originalism and Legitimacy*, *supra* note 5, at 275–85.

⁸⁶ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 649 (2012) (Scalia, J., dissenting) (examining “the original meaning of ‘regulate’ at the time of the Constitution’s ratification”); see also *id.* at 599–601, 610 (Ginsburg, J., concurring) (asserting that the Framers understood the commerce power, and the term “regulate,” more broadly).

⁸⁷ Compare, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring), with *id.* at 425–33 (Stevens, J., concurring in part and dissenting in part) (advancing a contrasting view of the original meaning of the Free Speech Clause). See also *supra* note 33 and accompanying text (noting additional contributors to the debate).

⁸⁸ See *supra* note 32.

⁸⁹ See *supra* note 34.

⁹⁰ See, e.g., Scalia & Garner, *supra* note 9, at 15 (“[T]his supposed distinction between interpretation and construction has never reflected the courts’ actual usage.” (emphasis omitted)).

Constitution's original meaning is applied to resolve disputed cases. Nevertheless, even some who hold that view leave space for a distinction between the Constitution's linguistic meaning and its legal meaning. For example, Justice Scalia believed that courts should sometimes decide cases based on precedent rather than a constitutional provision's original meaning. In explaining that stance, he described the principle of stare decisis as an "exception" to his originalist theory rather than an application of it.⁹¹ Other originalists of course adopt more stringent interpretations of what Solum has dubbed their shared "Constraint Principle,"⁹² which holds that the original meaning of constitutional provisions should constrain constitutional actors, centrally including judges.⁹³

For the moment, I put these and other issues that divide public meaning originalists to one side. For present purposes, the crucial points are that PMO posits that original public meanings exist as a matter of historical or linguistic fact and that they are often capable of resolving questions—such as whether the Fourteenth Amendment forbids school segregation and the exclusion of women from law practice—that provoked historical dispute or uncertainty. Furthermore, to repeat, PMO's practitioners characteristically if not invariably reach their conclusions about particular provisions' original meanings without pausing to tally the number of those actual historical people who held alternative views and without furnishing a method for determining how many actual people would have had to converge on an interpretation for it to count as the historically correct one.

⁹¹ Antonin Scalia, Response, *in* *A Matter of Interpretation: Federal Courts and the Law* 129, 140 (Amy Gutmann ed., 1997).

⁹² Solum, *Originalism and Constitutional Construction*, *supra* note 45, at 460.

⁹³ See *id.* at 460–61. Solum, in a recent article, specifies the Constraint Principle as requiring "that the norms of constitutional law should be consistent with and fairly derivable from the public meaning of the constitutional text." Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 *Geo. J.L. & Pub. Pol'y* 287, 292 (2020) [hereinafter Solum, *Themes from Fallon*]. Originalists including Randy Barnett, Gary Lawson, and Michael Stokes Paulsen take similar if not even more uncompromising positions. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257, 269 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol'y* 23, 24 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *Const. Comment.* 289, 291 (2005).

B. Historical Scholarship and Original Meanings

As the Introduction stated, I believe reflection on historical scholarship, such as Professor Foner's, will help to reveal fallacies in PMO's underlying premises, including its Interpretive Methodology Assumption and its Conceptual Assumption that uniquely correct original meanings exist even in historically disputed cases. This Section lays the foundation for subsequent development of that thesis by summarizing some of Foner's conclusions in *The Second Founding*. It then, more briefly, points to important parallels between Foner's findings about the drafting of the Fourteenth Amendment and the conclusions of other leading historians who have highlighted flux, debate, and uncertainty about the meaning of central constitutional terms during the Founding era.

1. The Drafting and Ratification of the Fourteenth Amendment

Foner documents that the members of the Congress that proposed and debated the Fourteenth Amendment disagreed about, and knew they disagreed about, the concepts of equality and equal rights with which they were deeply concerned. "Equal protection" was "a staple of abolitionist discourse"⁹⁴ and, during Reconstruction, "[e]quality was the Radicals' watchword,"⁹⁵ Foner writes. Nevertheless, "[e]quality before the law . . . was a new and elusive concept,"⁹⁶ the meaning of which "was hardly self-explanatory."⁹⁷

According to Foner, the statesmen of the Civil War and Reconstruction eras confronted questions about rights, including rights to equality or the equal protection of the laws, within a legal conceptual scheme quite different from that of lawyers and judges in the present day. Mid-nineteenth-century legal thinkers commonly differentiated rights into categories, and they did not take it for granted that the legally and morally relevant sense of equality required the distribution of all kinds of rights to all groups. Foner summarizes some of the then-common distinctions among categories of rights and their relationship to evolving ideals of equality in terms that twenty-first-century lawyers are likely to find both foreign and occasionally shocking:

⁹⁴ Foner, *supra* note 41, at 11.

⁹⁵ *Id.* at 57.

⁹⁶ *Id.* at 78.

⁹⁷ *Id.*

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Most basic were natural rights, such as the “unalienable” rights enumerated by Thomas Jefferson in the Declaration of Independence. Every person, by virtue of his or her human status, was entitled to life, liberty (even though this principle was flagrantly violated by the existence of slavery), and the pursuit of happiness (often understood as the right to enjoy the fruits of one’s own labor and rise in the social scale). Civil rights, the second category, included legal entitlements essential to pursuing a livelihood and protecting one’s personal security—the right to own property, go to court, sue and be sued, sign contracts, and move about freely. These were fundamental rights of all free persons, but they could be regulated by the state. Married women, for example, could not engage in most economic activities without the consent of their husbands, and many states limited the right of blacks to testify in court in cases involving whites. Then there were political rights. Legally, despite Webster’s dictionary, access to the ballot box was a privilege or “franchise,” not a right. It was everywhere confined to men, and almost everywhere to white men. Finally, there were “social rights,” an amorphous category that included personal and business relationships of many kinds. These lay outside the realm of governmental supervision. Every effort to expand the rights of blacks was attacked by opponents as sure to lead to “social equality,” a phrase that conjured up images of black-white social intimacy and interracial marriage.⁹⁸

Partly because the idea of equality was situated within a discourse that sorted rights into diverse categories, Foner’s narrative reveals that debate about Section 1 of the Fourteenth Amendment—which includes separate Privileges or Immunities and Equal Protection Clauses as well as a Due Process Clause—tended to be holistic, involving what Section 1 would accomplish overall. But if one clause preoccupied the drafters more than others, it was the Privileges or Immunities Clause. With respect to it, “more than one congressman wondered” what “were the ‘privileges or immunities’ of citizens.”⁹⁹

In pursuing answers to that question, Foner draws attention to disparate historical facts. Like a number of other historians, he believes that congressional debates about the 1866 Civil Rights Act formed a crucial

⁹⁸ *Id.* at 6–7.

⁹⁹ *Id.* at 73.

background to debates about the Fourteenth Amendment.¹⁰⁰ The 1866 Civil Rights Act (“CRA”) sought to confer citizenship on all persons born in the U.S. and to guarantee “civil rights,” Foner writes, by giving that “poorly defined concept” a “precise legal meaning.”¹⁰¹ In his account, the debates about the 1866 Civil Rights Act were a species of argument about equality, or at least about the relationship between civil rights and equality,¹⁰² in which the dominant view held that equality in the legally, morally, and constitutionally relevant senses did not require equal distribution of all the kinds of “rights” that lawyers of the day struggled to distinguish.¹⁰³ In the end, moreover, although Foner describes issues of equality as having been “discussed at greater length in connection with the Civil Rights Act” than in connection with the Fourteenth Amendment, he maintains that little precision was achieved.¹⁰⁴

Accordingly, if asked what the language of Section 1 of the Fourteenth Amendment meant or how it ought to be interpreted, many members of Congress would have disagreed with one another, professed uncertainty, or described the language as relevantly indeterminate. Among the reasons for the continuing failure to achieve either clarity or agreement was that “[t]he second founding took place in response to rapidly changing political and social imperatives at a moment when definitions of citizenship, rights, and sovereignty were in flux.”¹⁰⁵ Another reason was that the Fourteenth Amendment was “a political document, meant to serve as a campaign platform for the congressional elections of 1866.”¹⁰⁶ According to some students of the history, members of the Congress that proposed the Fourteenth Amendment deliberately chose language that permitted divergent claims about its meaning and application.¹⁰⁷ The

¹⁰⁰ *Id.* at 62–65.

¹⁰¹ *Id.* at 63.

¹⁰² *Id.* at 63–65.

¹⁰³ *Id.* at 63–66.

¹⁰⁴ *Id.* at 66.

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.* at 89.

¹⁰⁷ See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 51–53 (1988) (noting the possibility that Joint Committee on Reconstruction may have deliberately adopted “a phrasing that was sufficiently broad so that those who favored federal protection of political rights could construe it to provide such protection, and sufficiently innocuous so that those who opposed giving such power to the federal government could be reassured that the amendment did no such thing”); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 61 (1955) (suggesting that “the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by

upshot, Foner concludes, was that the “ambiguity of the language of Section 1 left it uncertain how radical a shift had taken place.”¹⁰⁸

2. *Other Historians, Other Constitutional Provisions*

Although Professor Foner’s work on the Fourteenth Amendment provides an especially vivid case study for my analytical and expositional purposes, the example of the Fourteenth Amendment might seem cherry-picked. Admittedly important for my purposes are that different participants in the drafting process articulated different and shifting understandings of what key terms meant. But well-regarded works by other admired historians maintain that the meanings of central provisions of the original Constitution were similarly framed in a period of intellectual ferment and conceptual flux that made their meanings disputable from the beginning as well.

For example, the Pulitzer Prize-winning historian Professor Jack Rakove has described the circumstances of the drafting of the original Constitution in terms remarkably similar to those that Foner uses to characterize the milieu of the Fourteenth Amendment:¹⁰⁹ “The adopters of the Constitution inhabited a world that was actively concerned with . . . the instability of linguistic meanings, and . . . arguments about the definitions of key words and concepts were themselves central elements of political debate.”¹¹⁰ In Part III, I shall offer a number of specific examples of controversies about the Constitution’s original meaning, often beginning during the ratification debates or in early post-ratification history.¹¹¹ As that catalogue of disputes will attest, disagreements about important points were legion. It is equally noteworthy, of course, that what I have referred to as minimally necessary and noncontroversial meanings of disputed provisions furnished an agreed platform on which debate could occur without descending into cacophony. There was more than enough common ground for disputants

the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances”).

¹⁰⁸ Foner, *supra* note 41, at 91.

¹⁰⁹ See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575, 588 (2011) (“It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in quiet times, but it is quite another to apply that assumption to a period like the late 1780s or the Revolutionary era more generally.”).

¹¹⁰ *Id.* at 593.

¹¹¹ See *infra* Subsection III.B.1.

to understand what they disagreed about and why. Nevertheless, surveying the early history, legal historian Mary Sarah Bilder concludes—in terms that echo Rakove—that “from the moment the Constitution became visible, it was contested The understandings of the Constitution shifted over the summer of 1787 and continued to transform through” the following decade.¹¹²

In another important contribution to the history of constitutional discourse and development, Professor Jonathan Gienapp has recently maintained that early debates focused partly on the nature of the Constitution and the significance of its text.¹¹³ According to him, many members of the Founding generation viewed the written Constitution more as the sketch of an incomplete system than as a document precisely fixing governmental powers and individual rights. “Few have appreciated just how deeply in flux the original Constitution itself was” in 1789, Gienapp writes.¹¹⁴ In Gienapp’s telling, acceptance of the Constitution as a document that had sought to give determinate content to constitutional understandings came later. Many did not view it that way at the time.¹¹⁵

In contrast with the case of the Fourteenth Amendment, the drafting history of the Constitution that emerged from the Philadelphia Convention was unknown to the public in 1787 and its immediate aftermath.¹¹⁶ Nevertheless, accounts of the Constitution as originating in a period of intellectual flux and ferment should occasion reflection on originalist suggestions that there could be a single, determinate original public meaning—capable of being established as a matter of linguistic and historical fact—that extended beyond a necessary and noncontroversial minimum. Accordingly, although the drafting and ratification history of the Fourteenth Amendment was undoubtedly distinctive, reliance on it to illustrate my conceptual argument about the

¹¹² See Mary Sarah Bilder, *Madison’s Hand: Revising the Constitutional Convention* 240 (2015); see also Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 *Const. Comment.* 383, 405 (2014) (“Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.”).

¹¹³ See Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* 4–9 (2018).

¹¹⁴ *Id.* at 5.

¹¹⁵ See *id.* at 9–10.

¹¹⁶ See, e.g., Kesavan & Paulsen, *supra* note 7, at 1115.

nature and scope of “original public meanings” should not prove misleading.¹¹⁷

C. A Preliminary Contrast

In offering a preliminary juxtaposition of PMO with Foner’s findings concerning the drafting history of the Fourteenth Amendment, as briefly supplemented by other historians’ portrayals of the Founding era, I should acknowledge two elements of seeming mismatch. First, public meaning originalists such as Solum and Soames and historians such as Foner pursue different inquiries. Originalists are concerned with the meanings of constitutional provisions following their ratification. Foner, as a historian, focuses more on particular assertions by particular people on particular occasions in an unfolding political narrative that included the ratification by the states of language drafted by Congress. He is not primarily a theorist of what “meaning” is or what “meaning” means for purposes of constitutional interpretation.

Second, it is not clear to what extent public meaning originalists would take the debates on which Foner trains his attention, which largely concerned the drafting of the Fourteenth Amendment in Washington, D.C., as decisive evidence of *public* meaning. Clearly, however, PMO would need to embrace some or all of Foner’s findings (if they are accurate) as historically relevant. In explicating how originalists should seek to ascertain public meaning, Solum has urged a method of “triangulation.” Triangulation calls for simultaneous employment of three methods of historical inquiry: (1) the “method of corpus linguistics,” which “employs large-scale data sets (corpora) that provide evidence of linguistic practice”; (2) the “method of immersion,” which “requires researchers to immerse themselves in the linguistic and conceptual world of the authors and readers of the constitutional provision being studied”; and (3) the “method of studying the record [of the] framing, ratification, and implementation” of a constitutional provision.¹¹⁸ Within that framework, Foner’s work seems clearly relevant to both the method of

¹¹⁷ See also Colby, *supra* note 36, at 535 (observing that “as a natural consequence of the constitution-making process, a constitutional provision addressing a deeply controversial subject can only hope to be enacted when it is drafted with highly ambiguous language so that, rather than possessing a single meaning, it appeals to disparate factions with divergent understandings of its terms”).

¹¹⁸ Solum, *Triangulating Public Meaning*, *supra* note 6, at 1624–25.

immersion and the method of studying the record of a provision's framing, despite its omission of any reliance on corpus linguistics.¹¹⁹

If we assume that Foner's scholarship possesses relevance, the deep challenge that it poses to PMO involves what originalists could intelligibly refer to when they insist that constitutional provisions have a single original meaning, going beyond what I described in the Introduction as minimal or necessary meanings and non-meanings that occasioned little or no controversy. In response to Solum's account of triangulation, we might ask: Triangulation in search of what? Is there such a thing as the single, uniquely correct, original public meaning of a disputed constitutional provision—going beyond its minimal meaning—that the method of triangulation could discover?

This is not merely a topic for discussion in academic journals or seminar rooms. Although this Part has so far trained attention mostly on the writings of originalist theorists in the legal academy, the practical urgency of questions about PMO's defining assumptions intensifies when we contemplate decisions of disputed cases by originalist Supreme Court Justices. When they tell us that the original public meaning of the Constitution settles a controverted case about Congress's power under the Commerce Clause or about rights under the First or Second or Fourteenth Amendment, should we credit their claims about what historical research can, at least in principle, establish? A former law clerk to originalist Justice Clarence Thomas has written that Justice Thomas has no worked-out theory of which kinds of Framing-era facts matter or how much they matter in establishing original public meanings.¹²⁰ According to now-Professor Gregory Maggs, Justice Thomas, at least as of 2009, had "not

¹¹⁹ Solum refers to the drafting history of the Fourteenth Amendment as potentially relevant to its public meaning in his article on triangulation. *Id.* at 1656–57 & n.74. But Solum has also dismissed the work of another estimable historian, Jack Rakove, as largely irrelevant to the project of discerning original public meanings:

Work by the eminent constitutional historian Jack Rakove reflects immersion in the framing period, but Rakove's *Original Meanings* does not focus on the communicative content of the text—indeed, the text is rarely quoted and never (or almost never) parsed for its communicative content. Like most intellectual historians, Rakove's primary concern is with motivations, ideology, and ideas, and not with the semantics or pragmatics of the Constitution.

Id. at 1653–54. If a similar response were directed toward Foner, it might have a patina of plausibility, but no more. Foner specifically writes about the language of the Fourteenth Amendment, the specific concerns and motivations of the language's authors, and about public debates in Congress about which an informed person might know. See *supra* notes 94–104 and accompanying text.

¹²⁰ See Maggs, *supra* note 3, at 495, 511.

shown a notable preference for” a particular “kind[] of original meaning[]” such as “the original intent, original understanding, or original objective meaning,” but instead looked for “general original meaning,” characterized by “agreement among multiple sources of evidence.”¹²¹ Some might admire Justice Thomas’s lack of dogmatism concerning the conceptual nature of original public meanings. But we might also ask how the facts that he adduces in his opinions could be capable of establishing an objectively correct original public meaning that itself existed as a matter of historical fact. That, I take it, is among the central questions that academic theorists of PMO such as Professors Solum and Soames set out to answer. By contrast, I believe that reflection on the historical findings of Professor Foner and other highly esteemed historians should make us skeptical that disputed constitutional provisions could have more than minimal original public meanings—for reasons that the next Part will adduce.

II. THE FALLACIES OF PMO’S INTERPRETIVE METHODOLOGY AND CONCEPTUAL ASSUMPTIONS

This Part challenges PMO’s claim that constitutional provisions have singularly correct original public meanings that extend beyond their minimally necessary and historically noncontroversial meanings. My argument begins with a critical examination of PMO’s Interpretive Methodology Assumption that we can ascertain the meaning of constitutional provisions in substantially the same way that we determine the meaning of utterances in ordinary conversation. I first explain why literal or semantic meaning provides almost no help in resolving any reasonably disputable question under the Fourteenth Amendment. Then, using the Fourteenth Amendment as an example, I argue that the process of “pragmatic” or contextual enrichment of constitutional provisions’ literal meanings cannot work in the way that public meaning originalists imagine. Within conversational interpretation, pragmatic enrichment relies centrally on two factors: the inferable communicative intentions of an identified speaker and the shared assumptions of that speaker and a specific audience. In the case of constitutional interpretation, by contrast, there is no unitary speaker, and the audience is dramatically diverse.

¹²¹ Id. See also Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *Duke L.J.* 239, 300–02 (2009) (observing that Justice Thomas “seems not to contemplate any distinction among original intent, original understanding, and original textual meaning”).

With PMO's Interpretive Methodology Assumption thus exposed as mistaken, the second Section of this Part demonstrates that PMO's Conceptual Assumption exhibits parallel failings. Beyond minimally necessary and noncontroversial meanings, constitutional provisions have no single original public meaning, existing as a matter of historical or linguistic fact, on which all reasonable and informed interpreters therefore ought to converge.

*A. Deficiencies in PMO's Interpretive Methodology Assumption
Arising from Differences Between Conversational and
Constitutional Interpretation*

Remarks by one speaker to another in ordinary conversation commonly have relatively precise meanings that far outstrip their literal meanings. Recall the example of one friend saying to another, "Let's meet at our usual spot at the usual time." As that example suggests, the identification of richly determinate conversational meanings often depends on variables that lack precise analogues in constitutional interpretation. Without them, PMO's Interpretive Methodology Assumption becomes untenable unless and until it is significantly modified.

1. Literal or Semantic Meaning as an Interpretive Building Block

Adherents of PMO emphasize that the words and phrases of constitutional provisions have a literal meaning, existing as a matter of fact, that is as accessible in the constitutional as in the conversational context.¹²² This proposition is indubitably correct. It is important to recognize, however, that original semantic content will seldom furnish help in resolving disputed constitutional questions. Take as an example the Equal Protection Clause, which provides that no state shall deprive any person of "the equal protection of the laws."¹²³ Semantic content may rule out arguments that the Equal Protection Clause requires everyone to eat cornflakes, just as it would defeat arguments that Article I requires that large states should have more than two Senators. But semantic or literal meaning alone will not resolve most of the actual issues concerning which lawyers and judges seek historical guidance, including—to take two historically disputed and important examples—whether the

¹²² See *supra* Subsection I.A.1.

¹²³ U.S. Const. amend. XIV, § 1.

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Fourteenth Amendment prohibits school segregation¹²⁴ or bars states from excluding women from the practice of law.¹²⁵

The modern Supreme Court and nearly all modern constitutional scholars have assumed that these issues require interpretation of the Equal Protection Clause.¹²⁶ If so, literal or semantic meanings will afford little help. Historical facts about language use illuminate why. As Professor Foner establishes, in 1866, when Congress proposed the Equal Protection Clause, the meaning of equality was “in flux.”¹²⁷ To grasp a concept—such as “equal” or “equal protection” or “equal protection of the laws”—is normally to know how to apply it.¹²⁸ If usage was in flux, judgments about the concept’s proper applications were in flux, too.¹²⁹

Of equal importance, the “flux” that Foner depicts in Reconstruction usage—like the parallel “flux” in linguistic understandings that Professors Ravoke and Gienapp have characterized as widespread in the

¹²⁴ Compare Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 26 (2004) (“[T]he original understanding of the Fourteenth Amendment plainly permitted school segregation.”), with McConnell, *supra* note 81, at 956–57 (maintaining that the original public meaning of the Fourteenth Amendment forbade school segregation), and Soames, *Originalism and Legitimacy*, *supra* note 5, at 275–85 (same).

¹²⁵ See Foner, *supra* note 41, at 137–39 (noting debates about women’s rights under the Fourteenth Amendment).

¹²⁶ See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (“[S]egregation is a denial of the equal protection of the laws.”); *United States v. Virginia*, 518 U.S. 515, 530–46 (1996) (holding that a state’s exclusion of women from a unique educational opportunity violated the Equal Protection Clause); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 421–22 (1960) (characterizing *Brown* as turning on whether “a massive intentional disadvantaging” of a group on the basis of race was compatible with the commands of the Equal Protection Clause); Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 432 (1997) (maintaining that “nearly no one today is a true equal protection originalist, because true equal protection originalism would repudiate *Brown v. Board of Education*”).

¹²⁷ Foner, *supra* note 41, at xxiv.

¹²⁸ See Frank Jackson, *From Metaphysics to Ethics: A Defense of Conceptual Analysis* 33 (1998) (arguing “concept” refers to “the possible situations covered by the words we use to ask our questions”); see also David Plunkett, *Which Concepts Should We Use?: Metalinguistic Negotiations and the Methodology of Philosophy*, 58 *Inquiry* 828, 846 (2015) (“[I]ndividual concepts are roughly the equivalent in mental representation to what individual words are in linguistic representation.” (emphasis omitted)).

¹²⁹ For the thesis that there are many such disputes that are best classified as involving “metalinguistic” disputes or negotiations about how we ought to use words, rather than involving empirical claims about semantic meanings, see Plunkett, *supra* note 128, at 837–38; David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 *Philosophers’ Imprint* 1, 2–3 (2013). See also Richard, *supra* note 19, at 3 (arguing that there are multiple possible conceptions of meaning, the most useful of which for many purposes will equate meaning with “interpretive common ground” among competent speakers of a language, and that meaning in this sense is “species-like” and evolving).

Founding era¹³⁰—was partly attributable to the status of equality as an “essentially contested concept.”¹³¹ It has normative as well as descriptive content. As a result, we must expect disagreement about the concept’s proper applications among those who hold relevantly divergent moral views, not only in the era of Reconstruction but more generally.¹³²

Formidable challenges arise in trying to assign *substantive* semantic content to a word that expresses an essentially contestable evaluative concept. John Rawls,¹³³ followed by Ronald Dworkin,¹³⁴ distinguished between concepts and competing “conceptions” of those concepts. With regard to the distinction between concepts and conceptions, “justice” furnished Rawls’s motivating example. He thought that there was enough agreement on the action-guiding implications of judgments concerning justice, and on the kinds of contexts in which discussion of justice normally occurs, so that we could talk of justice without necessarily agreeing on substantive criteria for determining what justice requires.¹³⁵

If we imagine similar patterns of agreement and disagreement about “equal,” “equal protection,” or “the equal protection of the laws,” we would need to expect any purely semantic contribution to the communicative content of the Equal Protection Clause to be very sparse or thin. More concretely, we could not conclude that the literal meaning of the Equal Protection Clause either did or did not forbid states to maintain racially segregated schools or bar women from the practice of law as a matter of purely historical or linguistic fact.

A similar conclusion would emerge if we accepted the conclusion of some originalist scholars that courts should assess the denials to some of the opportunities that states afford to others—such as those of attending a school or procuring a license to practice law—under the Privileges or Immunities Clause rather than the Equal Protection Clause.¹³⁶ Debates

¹³⁰ See *supra* notes 109–15 and accompanying text.

¹³¹ See W.B. Gallie, *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society* 167, 169 (1956) (defining “essentially contested concepts” as “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”).

¹³² In the case of normative and evaluative terms, I assume that disagreement will normally involve the terms’ semantics, not pragmatics. See Plunkett & Sundell, *supra* note 129, at 8.

¹³³ See John Rawls, *A Theory of Justice* 5 (1971).

¹³⁴ See Ronald Dworkin, *Taking Rights Seriously* 133–36 (1977).

¹³⁵ See Rawls, *supra* note 133.

¹³⁶ See, e.g., Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* 223–26, 320–21 (2021) (arguing concluding that the original meaning of the Equal Protection Clause involved a guarantee of nondiscriminatory

about the meaning of contested constitutional terms would then simply migrate from the latter clause to the former.¹³⁷ The Privileges or Immunities Clause clearly presupposes that privileges or immunities of citizenship exist, but semantics alone cannot tell us what “the privileges or immunities of citizens of the United States” were in cases of reasonable substantive disagreement.¹³⁸ A plausible semantic theory must explain how debates about the meaning of equality and the privileges or immunities of citizenship were meaningfully substantive, not settled by regularities in language usage.

In principle, I hasten to add, a public meaning originalist could accept everything that I have said about the underdeterminacy of the Constitution’s purely semantic content in nearly every disputed case. Professor Soames has emphasized that what matters is not what words, phrases, and sentences literally mean but what the Constitution’s framers used them to say.¹³⁹ Solum has described semantic content as “sparse.”¹⁴⁰ If my arguments in this Subsection about the limited contribution that pure semantics can make to constitutional interpretation have seemed to knock at an open door, I have advanced them mostly as a prelude to more controversial claims that will follow immediately.

2. *Difficulties of Pragmatic (or Contextual) Enrichment*

To date, public meaning originalists have provided no workable account of how contextual factors could, as a matter of linguistic fact, sufficiently enrich the semantic content of constitutional provisions to resolve historically disputed or reasonably disputable issues. To know what words or phrases mean in context, we ordinarily draw on biographical information about both the speaker and the listeners and about the assumptions that they share. Professor Soames is explicit on this point in a formulation that I quoted earlier:

enforcement of the laws as written and governmental protection against private lawbreaking and that guarantees against unequal distribution of rights through the content of the written laws came from the Privileges or Immunities Clause).

¹³⁷ See *id.* at 205–26 (discussing and rejecting five rival theories about the meaning of the Privileges or Immunities Clause).

¹³⁸ U.S. Const. amend. XIV, § 1.

¹³⁹ Soames, *Deferentialism*, *supra* note 51, at 597–98.

¹⁴⁰ Solum, *Intellectual History*, *supra* note 59, at 1126; Solum, *Originalist Methodology*, *supra* note 15, at 285.

In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to.¹⁴¹

In the context of constitutional interpretation, however, the normal foundations of pragmatic enrichment do not exist, and public meaning originalists have produced no adequate substitute.

a. The Problem of Speaker Identification

In efforts to pragmatically enrich the semantic content of constitutional provisions, the problem of speaker identification arises ubiquitously. Foner's account of the drafting of the Fourteenth Amendment furnishes a concrete illustration. According to Foner, the first draft of what would become Section 1 of the Fourteenth Amendment was prepared by an outsider, Robert Owen, and passed to the Joint Committee on Reconstruction by the Radical Republican Congressman Thaddeus Stevens.¹⁴² But Moderates, not Radicals, constituted a majority on the Committee. Within it, Foner writes, there occurred "a somewhat disorienting series of further votes, in which language was added and eliminated from Owen's now almost unrecognizable proposal."¹⁴³

After the Committee completed its work, the House and Senate voted separately to recommend the Fourteenth Amendment for ratification by the states.¹⁴⁴ The requisite number of states then approved the Amendment,¹⁴⁵ with the ratifiers arguably taking their place in the parade of potential "speakers" whose communicative intentions reasonable members of the public might have thought relevant to its meaning.

¹⁴¹ Soames, *Deferentialism*, supra note 51, at 598.

¹⁴² Foner, supra note 41, at 68–71, 86–87.

¹⁴³ *Id.* at 70.

¹⁴⁴ *Id.* at 88, 91.

¹⁴⁵ There are serious questions about whether the ratification of the Fourteenth Amendment complied with the requirements of Article V of the Constitution. See, e.g., Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *Nw. U. L. Rev.* 1627, 1629 (2013). It was drafted by a Congress from which representatives of the Southern states were excluded, and those states, which were under military rule, were required to ratify it as a condition of their regaining congressional representation. For a defense of the constitutional lawfulness of the drafting and ratification processes, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 *U. Chi. L. Rev.* 375, 378 (2001).

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If pragmatic enrichment of semantic content by contextual factors normally depends on facts about the speaker and inferences about the speaker's likely communicative intentions, against the background of shared assumptions or interpretive common ground, what should be done in the absence of a unitary speaker?¹⁴⁶ Public meaning originalists have offered various responses. None responds adequately to the challenge that it seeks to meet.

Perhaps the most common strategy is to posit that contextual enrichment can occur without speaker identification. In one version of that strategy, Professor Solum postulates that all of the Constitution's drafters and possibly its ratifiers intended to "convey [the] public meaning" of the text—defined as its semantic content, as enriched by publicly available context—whatever it might be.¹⁴⁷ In this strategy, the speaker or speakers substantially vanish from view. Whoever they were, they meant to convey—and would reasonably be understood as having intended to convey—no more and no less than the public meaning of the provision in question.¹⁴⁸

Although intended as an answer, Solum's account of relevant speakers' intentions begs the central question that arises in every case that is not covered by a provision's minimally necessary or noncontroversial meaning. Contextual or pragmatic enrichment—on which PMO relies to define public meaning—involves inferences by reasonable listeners concerning a speaker's communicative intentions in making a particular utterance on a particular occasion. When we take up the perspective of a reasonable and informed reader, Solum's suggestion that we should assume that the Constitution's authors intended to convey the public meaning of their text proves utterly unhelpful in any reasonably disputed case. It affords no guidance to either a member of the public or an interpreter who is puzzled, substantively, about what a text asserts and

¹⁴⁶ The problem of combining or aggregating the intentions of multiple authors or speakers was initially raised in Brest, *supra* note 20, at 213–14. For a more recent, insightful discussion of "the summing problem," see, for example, Gregory Bassham & Ian Oakley, *New Textualism: The Potholes Ahead*, 28 *Ratio Juris* 127, 138–41 (2015).

¹⁴⁷ Solum, *Themes from Fallon*, *supra* note 93, at 305–06; see also Solum, *Communicative Content*, *supra* note 16, at 500 ("Given that the framers and ratifiers believed that readers engaged in American constitutional practice would know the public context and that they would also know that the framers and ratifiers would believe that they would have such knowledge, the public context satisfies the conditions for common knowledge and can successfully determine clause meaning.").

¹⁴⁸ The textualist/originalist Dean John Manning adopts a similar strategy. See, e.g., John F. Manning, *Without the Pretense of Legislative Intent*, 130 *Harv. L. Rev.* 2397, 2405–12 (2017).

who would normally regard facts about the author's assumptions and specific communicative intentions as pertinent in determining its contextual meaning.¹⁴⁹

The case of the Fourteenth Amendment exemplifies this point. Recall Foner's conclusion that the Fourteenth Amendment was partly a campaign document, drafted to permit members of Congress with different views and preferences to make divergent claims about its meaning during the 1866 campaign.¹⁵⁰ These divergent claims formed part of the historical record. For a citizen attempting to puzzle out the meaning of the semantically vague Fourteenth Amendment, the counsel that it meant whatever a "reasonable" person would think it meant, in context, would epitomize obfuscation unless it signaled that pragmatic enrichment beyond what I have called minimal meaning is simply not possible.¹⁵¹

A second response to the challenge of pragmatically enriching constitutional meanings is to rely on an "objective" notion of speaker intentions. Justice Scalia, who was both an originalist and a textualist,¹⁵² defended an approach along these lines. He recognized, and indeed emphasized, that multi-member bodies such as Congress would rarely have unitary communicative intentions in the psychological sense.¹⁵³ Yet he also acknowledged that contextual enrichment of semantic content required a substitute for such intentions. He purported to find that substitute in "a sort of 'objectified' intent—the intent that a reasonable

¹⁴⁹ See generally Plunkett & Sundell, *supra* note 129, at 16 ("[I]t should be uncontroversial that at least *one* crucial type of data for figuring out what a speaker means by a term T are facts about the speaker's usage of T—patterns of usage that reflect her disposition to apply that term one way or another, more generally.").

¹⁵⁰ See *supra* note 106 and accompanying text.

¹⁵¹ Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 *Harv. L. Rev.* (forthcoming 2022), argues that the prime ambition of originalism is to provide a "standard" for constitutional correctness and that it should not be faulted for failing to furnish a detailed "decision procedure" for finding the correct answer in individual constitutional cases. Sachs, however, writes in defense of a version of originalism that equates original meanings with original legal meanings, not original public meanings. See *id.* (manuscript at 17, 20). I shall address versions of originalism that are concerned with original legal meanings below. My argument here is that PMO fails to furnish even a "standard" in Sachs's sense insofar as it posits the existence of, but gives no account of what constitutes, "original public meanings" that extend beyond the "minimal" meanings on which virtually all competent language users would converge.

¹⁵² See, e.g., Scalia & Garner, *supra* note 9, at 15–16; Antonin Scalia, *Originalism: The Lesser Evil*, 57 *Cin. L. Rev.* 842, 862 (1989).

¹⁵³ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

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person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”¹⁵⁴ For anyone wishing to follow Justice Scalia’s recommended approach, the obvious challenge is to give substantive content to the idea of an objectified intent. Without such content, it will collapse into the same emptiness as the formula of postulating a speaker’s intent to convey a provision’s public meaning, whatever that might be.

One possible response would be to define objective speakers’ intentions as those that an imagined “typical” author (or ratifier) of the words of a constitutional provision, in its linguistic and historical context, could most reasonably be supposed to have.¹⁵⁵ Based on admittedly sketchy data, I take this to have been Justice Scalia’s characteristic approach. And in cases that can be resolved based on minimally necessary or noncontroversial meanings, the positing of objective speakers’ intentions seems unobjectionable. For example, any plausibly imaginable “typical” author of the Constitution would mean references to “the President” to signify the President of the United States, not the president of some other institution, and would intend the First Amendment guarantee of “[t]he freedom of speech” to refer to a previously recognized freedom.¹⁵⁶ If so, the question becomes how much pragmatic enrichment the notion of a typical speaker’s intentions, as reasonably inferable from a linguistic and historical context, might license.

Once we go beyond minimally necessary and noncontroversial meanings, the answer is little if not none. Claims about “typical” and thus purportedly “objective” speakers’ intentions are not grounded in historical fact in the same sense as claims about who said what to whom or who arrived at which conclusions on a particular occasion. The posited

¹⁵⁴ Scalia, *supra* note 91, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); see John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 423 (2005) [hereinafter Manning, Textualism and Legislative Intent] (“[T]extualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process.”); Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 353–57 (2005).

¹⁵⁵ See Seana Valentine Shiffrin, Speech, Death, and Double Effect, 78 N.Y.U. L. Rev. 1135, 1155 (2003) (employing an “objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated”); see also Kay, *supra* note 39, at 708 (“Mainly, we know someone’s intended meaning by examining the typical meaning attached to the words they used.”).

¹⁵⁶ U.S. Const. amend. I (emphasis added).

“typical” communicative intentions are lawyers’ or historians’ constructs, deliberately abstracted from the thought processes of actual human beings.¹⁵⁷ There is nothing per se objectionable about reliance on constructs in this sense. But for a construct such as that of a “typical” speaker to support judgments that could plausibly claim factual status, the criteria for ascribing typical communicative intentions would need to be specified with sufficient precision so that different investigators could be expected to reach the same conclusions. Yet no public meaning originalist of whom I am aware has provided even reasonably determinate guidance.

The problem, I want to emphasize, is not that public meaning originalists who press beyond minimal meanings characteristically fail to adduce evidence in support of their conclusions—for example, that the original public meaning of the Fourteenth Amendment either did or did not forbid school segregation or the exclusion of women from the practice of law. With respect to the former question, Justice Thomas has found that school segregation was forbidden. In support of that conclusion, his concurring opinion in the affirmative action case of *Fisher v. University of Texas*¹⁵⁸ offered the following argument:

The Equal Protection Clause strips States of all authority to use race as a factor in providing education. . . . This principle is neither new nor difficult to understand. In 1868, decades before *Plessy v. Ferguson*, the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark v. Board of Directors*, 24 Iowa 266 [(1868)], a school denied admission to a student because she was black, and “public sentiment [was] opposed to the intermingling of white and colored children in the same schools.” *Id.*, at 269. The Iowa Supreme Court rejected that flimsy justification, holding that “all the youths are equal before the law, and there is no discretion vested in the board . . . or elsewhere, to interfere with or disturb that equality.” *Id.*, at 277.¹⁵⁹

The obvious problem with Justice Thomas’s argument—as with many other specific interpretive conclusions advanced by public meaning originalists—is that he lacks any theory to explain how and why his chosen bits of historical evidence, when compared with evidence that might be adduced on the other side, suffice to establish the supposedly

¹⁵⁷ See Rakove, *supra* note 109, at 584; Kay, *supra* note 39, at 720.

¹⁵⁸ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

¹⁵⁹ *Id.* at 327 (Thomas, J., concurring) (citation omitted).

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fact-of-the-matter original public meaning that he ascribes. In disputed cases, moreover, it is wholly unconvincing to try to back up controversial conclusions with claims about the “objective” communicative intentions of the authors of the Fourteenth Amendment. With regard to historically disputed matters, claims of objective status for either imputed speakers’ intentions or the contested conclusions that they supposedly support are plainly not purely factual.¹⁶⁰ If we ask what are the truth conditions for such claims, originalists have furnished no good answer.

In a third PMO approach to pragmatic enrichment of the utterances of unknown or plural authors, Professor Soames acknowledges the relevance of constitutional provisions’ actual authors and their actual communicative intentions:

To discover *what the law asserts or stipulates* is, in the first instance, to discover what the lawmakers asserted or stipulated in adopting an authoritative text. As with ordinary speech, this is usually *not* a function of the linguistic meaning alone; it is a function of meaning plus the background beliefs and presuppositions of participants.¹⁶¹

Nevertheless, Soames insists, the Framers’ and ratifiers’ relevant intentions merge in their endorsement of a joint statement:

We routinely speak of the goals, beliefs, statements, promises, and commitments of collective bodies, even though the goals, etc., aren’t aggregated sums of individual cognitive attitudes. Collective bodies routinely *investigate whether such-and-such, conclude and assert that so-and-so, and promise to do this and that*. Since they can do these things, legislatures can intend, assert, and stipulate *that such-and-such is to be so-and-so*. The contents of these linguistic acts are what is, in principle, derivable from the relevant, publicly available, linguistic and non-linguistic facts.¹⁶²

This argument never comes to grips with the problem that it aims to solve. Yes, we sometimes speak of collective bodies as exercising agency that does not depend on “aggregated sums of individual cognitive

¹⁶⁰ See, e.g., supra note 146 and accompanying text.

¹⁶¹ Soames, *Deferentialism*, supra note 51, at 597–98; see also Soames, supra note 52, at 241 (“Since what language users *intend* to say, assert, or stipulate is a crucial factor, along with the linguistic meanings of the words they use, in constituting what they *do* say, assert, or stipulate, the intentions of lawmakers are directly relevant to the contents of the laws they enact.”).

¹⁶² Soames, *Originalism and Legitimacy*, supra note 5, at 248.

attitudes.” As work on group agency has demonstrated, sometimes people intend to do things together. In these cases, those acting in coordination may form “we-intentions” rather than just “I-intentions.”¹⁶³ Familiar examples include taking a walk together and cooking dinner together. Rarely, however, will it be the case that any we-intentions that reasonably could be attributed to Congress in proposing a constitutional amendment will include the intention “that a textual provision have some specific meaning.”¹⁶⁴ As the case of the Fourteenth Amendment illustrates, different drafters and ratifiers can and often will have divergent individual intentions.¹⁶⁵

Soames’s references to the work of collective bodies do not prove otherwise. Many references to collective bodies are best understood as aggregative claims about what the members individually said or thought. When we say that “the committee concluded that Jones acted illegally,” we may mean that the committee’s members all concluded that Jones acted illegally. If someone responded by pointing out that one or more members dissented, we would clarify that “a majority of the committee concluded that Jones acted illegally.” At this point it would be clear that we were aggregating the conclusions of individual members. Accordingly, when the publicly available facts establish that different members of a collective body had different goals, intentions, or assumptions—as seems sometimes to have occurred among those who wrote and ratified the Fourteenth Amendment—the fact that “[w]e routinely speak” of groups as having collective attitudes does not help to resolve which collective attitudes or intentions we should ascribe to the framers or authors of the Constitution, taken as a collective.

We could, of course, postulate—as Professor Solum does—that the members of a collective all have meshing individual intentions or even we-intentions to convey the public meaning of any document that the collective adopts.¹⁶⁶ Once again, however, that formula seems inadequate to prescribe how uncertainties and known disagreements among the

¹⁶³ Leading works in developing accounts of group agency and group intention include Michael E. Bratman, *Faces of Intention* (1999) and Christian List & Philip Pettit, *Group Agency* (2011).

¹⁶⁴ Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 *Duke L.J.* 979, 1009 (2017).

¹⁶⁵ See *supra* Subsection I.B.1.

¹⁶⁶ See *supra* note 147 and accompanying text.

historically existing public ought to be resolved as a matter of linguistic fact.

b. The Problem of Characterizing Reasonable Readers or Probing the Actual Thinking of Actual People

Similar, compounding problems arise from public meaning originalists' characteristic reliance on the notion of a reasonable hearer or listener, on whose understandings the communicative content of constitutional provisions depends. Here, too, Foner's study of the drafting of the Fourteenth Amendment illumines some of the difficulties.¹⁶⁷ However one might specify the audience for the Fourteenth Amendment, it was highly diverse. Some members possessed more and some less information about the drafting history and about the legal antecedents of some of its terms. Nor, given the linguistic and moral flux that Foner emphasizes, would all members of the informed public necessarily have drawn the same conclusions about the relevance of prior legal understandings, some of which the Fourteenth Amendment might and others of which it might not be thought to have displaced. In the face of these messy facts, I, like Foner, would conclude that different reasonable listeners would have drawn different reasonable conclusions about the meaning and proper application of the Fourteenth Amendment. The challenge for PMO is to explain how all "reasonable" and informed members of the audience would have made the same interpretive assumptions and arrived at the same conclusions, which then would constitute a provision's uniquely correct original public meaning, the fact of demonstrable historical disagreement notwithstanding.

One possible response would be to treat "reasonableness" as a criterion for normative judgment.¹⁶⁸ For example, one might posit that the most normatively reasonable judgment about the meaning of the Fourteenth Amendment would be that which would allow it to make the most

¹⁶⁷ This discussion draws on Foner's claims as introduced in *supra* Subsection I.B.1.

¹⁶⁸ See Gardner, *The Mysterious Case*, *supra* note 37, at 299 (noting that "the resort to a reasonableness standard is" often a way "to reopen a bit of space for ordinary moral reasoning in a rule that would otherwise be apt to level it away"); see also Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 326–28 (2012) (arguing that it is impossible to construct an analytically rigorous descriptive account of the reasonable person); Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. Pa. L. Rev. 2131, 2150 (2015) ("[W]hat counts as a reasonable person is itself a question with significant normative content.").

normatively desirable contribution to American law.¹⁶⁹ But PMO rejects reliance on normative criteria by insisting that original public meanings exist as matters of historical and linguistic fact.¹⁷⁰

Surprisingly, few prominent public meaning originalists have confronted the challenge of how to identify or construct the hypothetical reasonable interpreter of constitutional language—to be invoked for purposes of resolving disputes that are imagined to be entirely factual—in significant detail.¹⁷¹ Professor Solum has acknowledged the difficulty but has offered no satisfactory solution. In an article entitled *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, he concedes that “different native speakers” of English, when cast in the role of interpreters, “will have different sets of linguistic intuitions, reflecting different histories of exposure to the language,”¹⁷² as they seek to discern what the Constitution’s authors (whoever they were) would have sought to communicate. Under these circumstances, the quest for original meaning ideally requires “a comprehensive recreation of the linguistic world of” relevant periods that would “duplicate” the perspectives of “representative” historical inhabitants, he writes.¹⁷³ Although I applaud this ambition for historical inquiry, it furnishes no solution to the conceptual problem that PMO confronts. Suppose a historian perfectly recreates what Solum acknowledges to be the diverse perspectives of those living at the moment of a constitutional provision’s promulgation and adoption. Solum never explains how a historian’s reconstruction of divergent beliefs and

¹⁶⁹ Cf. Ronald Dworkin, *Law’s Empire* 51–53 (1986) (advancing a theory of “constructive interpretation” that depends on mixed criteria of fit and normative attractiveness); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. Rev. 293, 336, 350 (1997) (observing that “[t]he reasonable person” of contract law, who “must decide if the parties had an intent to create a contract and to give meaning to that intent,” “can be seen as a synthesis of legal and community values”).

¹⁷⁰ See *supra* notes 71–72 and accompanying text.

¹⁷¹ Cf. Lawson & Seidman, *supra* note 9, at 73 (“This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.”); Calabresi & Rickert, *supra* note 66, at 8 n.33 (“The need for courts to construct an objective original public meaning of enacted texts resembles the need for courts in tort cases to ask what a reasonable person might have done in a given situation.”).

¹⁷² Solum, *Triangulating Public Meaning*, *supra* note 6, at 1667.

¹⁷³ *Id.* at 1668.

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perspectives could produce a transcendent, uniquely “reasonable” and therefore correct original public meaning of contested constitutional language.¹⁷⁴

An alternative, as I have acknowledged repeatedly, would of course be to recreate the different views that people of the constitutional past actually held, tally the adherents of each, and apply a specified formula for identifying the position that should count as “the original public meaning.” But Solum takes no steps along this path, which would pose formidable evidentiary difficulties. Among these would be to distinguish between what actual people of the past took constitutional provisions to mean and how they expected those provisions to be applied—a conceptual distinction to which Solum is committed.¹⁷⁵

In seeking to make sense of Solum’s various claims, I can only conclude that he tacks back and forth between alternative understandings of original public meaning and, implicitly, between alternative understandings of the construct of a reasonable interpreter of constitutional language. In one conceptualization, which is extremely minimal in its ambitions, the predominant focus is on the literal or semantic meaning of constitutional language as at most minimally enriched by linguistic and historical context.¹⁷⁶ Operating in this mode, originalists would seek to “translate the provision at issue from the language of the relevant period into contemporary language”;¹⁷⁷ they would not aspire to establish much more than whether and if so how the meanings of relevant words and phrases have changed over time. As examples of “linguistic drift,” Solum cites the phrase “domestic violence” in Article IV and the word “dollar” in the Seventh Amendment.¹⁷⁸ According to Solum, although “domestic violence” today means “violence within the family,” it originally meant “violence within a state,”

¹⁷⁴ See, e.g., Bassham & Oakley, *supra* note 146, at 141 (“[W]hen we are asking what *proposition* an ‘informed, reasonable reader’ would have understood a certain string of words to express, no clear answer may emerge. Equally informed and equally reasonable readers may have understood the words very differently.”).

¹⁷⁵ See Solum, *Triangulating Public Meaning*, *supra* note 6, at 1656.

¹⁷⁶ See Solum, *Communicative Content*, *supra* note 16, at 497–98 (equating public meaning with “the conventional semantic meaning of the words and phrases as combined by widely shared regularities of syntax and grammar”).

¹⁷⁷ Solum, *Triangulating Public Meaning*, *supra* note 6, at 1678.

¹⁷⁸ See *id.* at 1639–40.

and “dollar” in the Seventh Amendment referred to the Spanish silver dollar, not a Federal Reserve Note.¹⁷⁹

Within a minimalist conception of originalist inquiries,¹⁸⁰ the idea of “reasonableness” would also play a very limited role—which one could perhaps describe as grounded in linguistic facts—in the process of pragmatic enrichment that PMO contemplates. If a constitutional term was nearly always used in a particular way, as the method of corpus linguistic analysis might reveal, and if neither the constitutional context nor the “method of immersion” signals the likelihood that actual members of the public would have assigned it a different meaning, then there would be only one linguistically reasonable conclusion about what it meant. To take an example, the conclusion that “domestic violence” originally meant or encompassed “violence within the family” would not be reasonable, even if the literal meaning did not absolutely rule out that conclusion. On this minimal conception of *linguistic* reasonableness, however, invocation of the notion of a reasonable interpreter could not settle any issue that was seriously contestable at the time of a provision’s ratification.

Sometimes, however, Solum, like other public meaning originalists,¹⁸¹ suggests that a reasonable or perhaps a typical or representative interpreter, by taking contextual factors and interpretive common ground into account, would rightly reach much more determinate conclusions and somehow do so without relying on headcounts of actual human beings living at the time of a constitutional provision’s drafting. The following passage exemplifies that intimation:

As I understand the position of the New Originalists (and I count myself as among them), most of the provisions of the Constitution are structural and have clear original meanings: the detailed plan for the national government including the various rules constituting the Congress, presidency, and the judicial branch have discernable original meanings and much of that plan is substantially determinate. Many of

¹⁷⁹ *Id.* at 1640.

¹⁸⁰ Solum also acknowledges that “the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases.” Solum, *Originalism and Constitutional Construction*, *supra* note 45, at 458.

¹⁸¹ See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty 192–208* (2004) (criticizing the *Slaughter-House Cases* for betraying the original meaning of the Fourteenth Amendment).

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the vague provisions (including important individual rights provisions) create construction zones, but this is because the discernable original meaning underdetermines some constitutional questions.

Some originalists may believe that there are a few provisions of the constitution where the original meaning is highly contestable (and perhaps where the available evidence is not fully adequate to resolve the controversies clearly); the Privileges or Immunities Clause of the Fourteenth Amendment might be such a provision. But so far as I know, there is no originalist who believes that this phenomenon is “widespread”¹⁸²

Given manifest historical disagreement and in the absence of further elucidation of the attributes of “reasonableness” that would permit factually-based resolution of such disagreement, I find these claims puzzling. In order for an imagined reasonable and informed reader to transcend the historical disagreements among people at the time of a constitutional amendment’s ratification, I must suppose that Solum and others sometimes imagine their hypothesized construct to be capable of apprehending which of several disputed interpretations is *most* reasonable. For example, Professor Solum may rely on a conception of most-reasonableness when he argues that the linguistic meaning of the Privileges or Immunities Clause forbade states to exclude women from law practice—even though the Supreme Court concluded otherwise in *Bradwell v. Illinois*¹⁸³ by a vote of 8 to 1.¹⁸⁴ In rejecting *Bradwell*, Solum does not appeal to any imagined headcount concerning the meaning that people living in 1866 or 1868 ascribed to the Fourteenth Amendment. Rather, taking the linguistic meaning of relevant language to be both plain and plainly applicable, he views *Bradwell* as based on a “factual” mistake by the Justices in the majority about women’s physical and mental capacities.¹⁸⁵ Although I understand why Solum’s interpretation would

¹⁸² Solum, *Originalism and Constitutional Construction*, supra note 45, at 530 (footnote omitted).

¹⁸³ 83 U.S. (16 Wall.) 130, 139 (1873).

¹⁸⁴ See Foner, supra note 41, at 137; see also Solum, *Triangulating Public Meaning*, supra note 6, at 1665–66 (rejecting “application belief” that the Fourteenth Amendment would not protect women’s equal rights to practice law predicated on “a false belief that women have intellectual capacities that are similar to those of children and, hence, that women are incapable of practicing law”).

¹⁸⁵ Solum, *Triangulating Public Meaning*, supra note 6, at 1666.

have been a plausible one,¹⁸⁶ others could have seen, and some apparently did see, the drafting context of the Fourteenth Amendment—which specifically linked states’ representation in Congress to nondiscrimination against “male” citizens with regard to voting¹⁸⁷—as signaling an implicit tolerance for some sex-based disparities.¹⁸⁸ In light of that disagreement, the question becomes how disputes such as those between Solum and the *Bradwell* majority could be resolved as a matter of historical or linguistic fact. So far, neither Solum nor any other adherent of PMO has proffered an adequate answer.¹⁸⁹

Professor Soames’s analysis marks no advance beyond Professor Solum’s. “[W]hen ‘speaker’ and ‘audience’ are collective,” he writes, “the default interpretation of the asserted content of the communication is what one would expect a reasonable and rational individual who understood the words and knew all of the relevant and publicly available facts of the context of use would take it to be.”¹⁹⁰ This formula may work well enough in cases that everyone agrees about. To repeat a now-familiar example, when the Constitution says that the states will all have two Senators,¹⁹¹ everyone agrees that “two” means two. But the unsolved problem, once again, is that “reasonable and rational individual[s]” often disagree about matters of constitutional interpretation. Sometimes they may do so because they disagree about which publicly available facts are more and less relevant. Reasonable people may also disagree because they hold divergent views about the relevant conception of essentially contestable concepts or other concepts that may be in flux at a particular time.

To sum up: PMO assumes the possibility of pragmatic enrichment of constitutional provisions’ semantic content as mediated through the hypothetical construct of a “reasonable” interpreter. But to do meaningful analytical work, that construct would need to be imbued with substantive content. History teaches that seemingly reasonable human beings often disagree about what constitutional provisions mean, in context. Maybe there is a theoretically sound conception of reasonableness capable of

¹⁸⁶ Chief Justice Chase, who dissented in *Bradwell*, may have shared it. See Foner, *supra* note 41, at 137.

¹⁸⁷ U.S. Const. amend. XIV, § 2.

¹⁸⁸ See Foner, *supra* note 41, at 80–83, 136–39.

¹⁸⁹ Cf. Balkin, *Construction*, *supra* note 30, at 92 (“[I]n any age or era—as in our own—reasonable people often differ about many things, especially where politics is involved.”).

¹⁹⁰ Soames, *Originalism and Legitimacy*, *supra* note 5, at 262.

¹⁹¹ U.S. Const. art. I, § 3.

transcending and resolving familiar disagreements. PMO implicitly claims to have one. But the leading public meaning originalists have not so far elaborated that conception. In its absence, the contention that disputed constitutional provisions have uniquely correct original linguistic meanings that go beyond their semantic content and noncontroversial implications, and that exist for discovery as a matter of historical and linguistic fact, is unsustainable.

The same conclusion holds if one turns one's eyes from the legal academy to the courts, including the Supreme Court, and to the decisions that originalist judges and Justices pronounce in the name of the Constitution. For example, when Justice Thomas in *Fisher* cited a single 1868 decision of the Iowa Supreme Court, based on the Iowa constitution, and claimed that it demonstrated the original public meaning of the Fourteenth Amendment¹⁹²—in the face of claims by some historians that most Americans living at the time thought otherwise¹⁹³—I have no idea what he imagined the truth conditions for his claim to be. I do not doubt that Justice Thomas believed his assertion to be correct, but I am at a loss to imagine what in the world he thought made it true.

B. Reconsidering the Concept of Original Public Meaning: The Collapse of PMO's Conceptual Assumption

PMO's Conceptual Assumption is as vulnerable as its Interpretive Methodological Assumption. The more one pushes for clarity concerning the idea that constitutional provisions have uniquely correct original public meanings that extend beyond minimal and noncontroversial meanings, the more elusive it becomes. According to Professor Solum, the facts that historians unearth about the drafting history of constitutional provisions and about who said what to whom about their meaning are "evidential" of original public meaning but do not constitute it.¹⁹⁴ Professor Gary Lawson maintains that rigorous originalists need to

¹⁹² See supra note 159 and accompanying text.

¹⁹³ See, e.g., Klarman, supra note 124, at 25–26, 146.

¹⁹⁴ Solum, *Triangulating Public Meaning*, supra note 6, at 1656; see also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 557 (2003) ("[M]odern originalist scholarship often uses the actual understandings expressed by individual framers or ratifiers as evidence of the 'original meaning.'"); Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. Rev. 779, 779 (2020) ("This Article provides a concise guide to this practice of finding evidence of the original meaning in these early state constitutions and declarations of rights.").

identify a “standard of proof”¹⁹⁵ to apply in judging which answer to a disputed question involving a provision’s original public meaning is the “*best*” one, even if it “does not command a high degree of confidence.”¹⁹⁶ But what does it mean to say that historical facts are “evidential” or that a “standard of proof” should be applied in this context? These formulations imply that a constitutional provision’s more-than-minimal original public meaning is a fact of some kind, beyond those that historians such as Foner discover, that can itself be proved. But what sort of a fact is it, and how would other asserted facts help to prove or constitute it?

It may help to rule out some possibilities. The fact of a constitutional provision’s original public meaning that goes beyond its necessary or historically noncontroversial meaning is not an empirical fact in the same sense as facts about the natural world. It is not a psychological fact, involving any particular person’s mental life—though it may be related in some unspecified way either to what reasonable people would have thought or to what some fraction of actual people actively understood. It is not a logical or a moral fact. As presented by public meaning originalists, the original public meaning of a constitutional provision appears to be a theory-generated conclusion about the implications of actual historical facts in pragmatically enriching the semantic content of particular constitutional provisions in ways that reasonable people should have grasped or that some number of actual people specifically understood.

As Section A of this Part argued at length, however, proponents of PMO have failed to spell out theories adequate to justify the conclusions that they routinely pronounce. In rejecting demands for greater clarity about the nature of the facts that they seek to establish or the theories that would support their purportedly factual judgments, proponents of PMO insist that the fact of a disputed constitutional provision’s communicative content is no more mysterious than the fact that conversational utterances have communicative content that goes beyond their literal meanings.¹⁹⁷ If I ask my wife if she wants to go to the movies and she tells me “I have work to do,” there is no reasonable question that she has told me “no.” As I have emphasized, however, there are crucial differences between the

¹⁹⁵ Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 *Harv. J.L. & Pub. Pol’y* 411, 418 (1995).

¹⁹⁶ *Id.* at 421.

¹⁹⁷ For a discussion, see *supra* Subsection I.A.2.

conversational context and that involving disputed constitutional meanings. Behind claims about the pragmatically enriched meanings of conversational utterances lies the tacit theory embodied in what I have called the model of conversational interpretation. That theory, which depends on facts about identifiable speakers and their audiences and the interpretive common ground that they are reasonably imagined to share, does not fit the case of disputed constitutional provisions insofar as claims of meaning extend beyond minimally necessary or historically noncontroversial meaning. Another theory is needed.

In the absence of a fleshed-out theory specifying the criteria that constitutional interpreters should employ in pragmatically enriching constitutional provisions' semantic content, moreover, the idea of historical facts being "evidential" of original public meanings is uninformative if not empty. A comparison with some other situations in which facts are evidence of further facts may illustrate the difficulty. In some contexts, facts can be evidential in a probabilistic sense. Suppose we wanted to know whether George Washington made a secret visit to Philadelphia during December of 1776. Various known facts would be evidential of whether he did or did not. In that case, however, the further fact that we are trying to prove (or disprove) would be well-specified, its truth conditions obvious. Other facts would make it more or less likely in a probabilistic sense that Washington visited Philadelphia on a particular date.

Now suppose we want to know what the original public meaning of one or another provision of the Fourteenth Amendment was in order to determine whether it prohibited segregation in the public schools or discrimination against women in the award of licenses to practice law. Historians can discover facts about things that people said and apparently believed during the congressional debates surrounding the Fourteenth Amendment and the subsequent ratification process. Corpus linguistics analysis can identify statistical regularities in word usage. But these facts could not be evidential of the further fact of original public meaning in the same, probabilistic way as facts making it more or less likely that George Washington visited Philadelphia. In the case of Washington and Philadelphia, we know the truth conditions for the claim that he was there. We can, accordingly, judge how likely it was that those truth conditions were satisfied. In the case of a claim about the original meaning of the Fourteenth Amendment, by contrast—for example, that it forbade (or allowed) school segregation or discrimination against women with regard

to law licenses—originalists have still not specified what circumstances would have had to exist in the world in 1866 or 1868 to make the claim either true or false.

In pressing questions about truth conditions, my point, I emphasize, is not to suggest that there can be no pragmatic enrichment whatsoever of language that is written by unknown speakers and is directed at diverse audiences or of compromise language that is written to paper over some disagreements. What I have called “minimal original meanings and non-meanings on which everyone or nearly everyone living at the time either converged or would have converged”¹⁹⁸ undoubtedly existed and in some respects went beyond the bare semantic content of the Fourteenth Amendment, as of other constitutional provisions. For example, when Section 1 says that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws,”¹⁹⁹ it appears to have been noncontroversial that the word “State” referred to the states of the United States, not to foreign nation states, and that it included state subdivisions such as cities and towns. To a rough approximation, the truth conditions for claims of minimal and noncontroversial meanings would centrally include its being the case that nearly every resident of the United States who was linguistically competent, properly informed, and reasonably unbiased either agreed or would have had no good factual reason to disagree about those meanings’ existence and content. But when adherents of PMO insist that the content of original public meanings that existed as a matter of fact can be and often are broader than minimal and noncontroversial meanings, and encompass reasonably disputable propositions, we should insist that the proponents of such claims tell us much more than they have told us so far about what they think makes their claims true as a matter of fact.²⁰⁰

¹⁹⁸ See *supra* Introduction.

¹⁹⁹ U.S. Const. amend. IV, § 1.

²⁰⁰ In a discussion of my criticism of PMO in *The Public Meaning Thesis*, *supra* note 39, Professor Solum labors at length to refute the proposition that “successful pragmatic enrichment and contextual disambiguation are impossible (or very rare)” in the constitutional context because “the public lacked needed information about the drafters of individual constitutional provisions.” *Id.* (manuscript at 45). Although I agree with much of his discussion of this point, I have not argued that successful pragmatic enrichment is impossible or necessarily even “very rare” in the case of the Constitution, only that proponents of PMO have failed to establish how claims that determinate constitutional meanings exist as matters of linguistic fact could extend beyond minimally necessary and noncontroversial meanings and non-meanings. In *The Public Meaning Thesis*, the central examples on which Professor Solum relies to show that pragmatic enrichment can occur even when listeners have only

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Another historical comparison—toward which I have gestured repeatedly—may shed new light at this point. Historians can ask, and then appeal to factual evidence in attempting to answer, a question such as: What percentage of the people living in the thirteen colonies that rebelled against Britain during the American Revolution supported the rebellion? Precise answers to the question would be impossible; the evidence will not permit a determinate answer. But we know what in principle we are looking for—something along the lines of what each of three million or so people thought about a specific issue.

We could imagine asking and trying to answer a similar question about what percentage of Americans alive in 1866 or 1868 thought that the Fourteenth Amendment barred school segregation or discrimination against women seeking law licenses. As I have emphasized however, most adherents of PMO appear to reject this approach.²⁰¹ Part of the reason may involve the difficulty of formulating the precise question about the meaning of a constitutional provision that person-by-person excavations of historical thinking might help to answer. In a partly analogous context, it is notorious that the answers that pollsters get

minimal biographical information about a speaker or drafter involve inferences by imagined audiences that he expects all of his readers to concur in. Such examples elide the difficulty of specifying truth conditions for *disputed* claims about constitutional provisions' pragmatically enriched meanings.

With respect to the contextually enriched meanings of disputed provisions, Solum's fullest statement in *Public Meaning Originalism* is as follows:

As a matter of interpretation, the actual communicative content of the constitutional text is what it is—as a matter of fact. Some contextual enrichments are publicly accessible even though they may not have been “obvious” in the sense that recognizing them might require thought and reflection. Other contextual enrichments may exist, even though they were controversial—because controversy can be generated by motivated reasoning or bad faith argumentation driven by ideology or interest. Finally, many pragmatic enrichments are not based on the particular language of the specific constitutional provision, but instead arise the interaction between the purpose of the provision and background assumptions or between one provision and overall constitutional structure.

Solum, *Public Meaning Thesis*, *supra* note 39 (manuscript at 51).

By beginning this passage with an assertion that the communicative content of a constitutional provision is both a “a matter of fact” and “a matter of interpretation,” Solum appears to acknowledge that the “fact” of an original public meaning, going beyond minimally necessary and noncontroversial meaning, depends on a theory that permits the judging of proposed interpretations as correct or incorrect, but he never articulates what in the world makes it true that one interpretation is correct and another incorrect in reasonably disputed cases (not involving motivated reasoning or the like).

²⁰¹ See *supra* notes 25–26 and accompanying text.

frequently depend on how they frame their questions.²⁰² Another part of the explanation, however, involves PMO's conceptual distinction between original linguistic meanings and originally anticipated applications of constitutional language.²⁰³ According to public meaning originalists, whether, for example, most Americans living in 1866 or 1868 expected that the Equal Protection or Privileges or Immunities Clause would bar school segregation or discrimination against women seeking to become lawyers is not the same as whether the original meaning prohibited those practices.²⁰⁴ As explained above, public meaning originalists maintain that original public meaning (or assertive or communicative content) is one thing, expected applications another. To fail to appreciate the distinction is to make an elementary philosophical mistake.²⁰⁵

In my view, however, another philosophical mistake may infect debates about constitutional provisions' original public meanings. It is the philosophical mistake of assuming that constitutional provisions have singular original public meanings that are broader than their minimally necessary and historically noncontroversial meanings and non-meanings, that existed as a matter of historical fact, and that are capable of resolving both historically documented and contemporary constitutional disputes. In light of deficiencies in even the most sophisticated originalist theories that have emerged to date, the Conceptual Assumption that constitutional provisions have original public meanings of that kind and scope is chimerical.

III. CHARTING IMPLICATIONS AND RESETTING AGENDAS

If constitutional provisions lack original public meanings that extend beyond their minimally necessary and noncontroversial meanings, important implications follow and significant challenges arise, not only for public meaning originalists but also for others who view original

²⁰² See, e.g., Josh Pasek & Jon A. Krosnick, Optimizing Survey Questionnaire Design in Political Science: Insights From Psychology, *in* *The Oxford Handbook of American Elections and Political Behavior* 32, 35–36, 38–39 (Jan E. Leighley ed., 2010).

²⁰³ See *supra* notes 66–67 and accompanying text.

²⁰⁴ See, e.g., Solum, *supra* note 84, at 253–55; Calabresi & Matthews, *supra* note 66, at 1398 (arguing that “it is the semantic original public meaning of the enacted texts,” rather than expected applications, that determines original public meaning).

²⁰⁵ Cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750–54 (2020) (distinguishing original linguistic meaning from expected applications in the context of statutory interpretation).

public meanings as relevant to constitutional interpretation.²⁰⁶ This Part first examines the challenges that recognition of the narrow scope of original public meanings pose for public meaning originalists. A second Section then weighs ramifications for judges and Justices, including nonoriginalists as well as originalists. A third Section considers broader jurisprudential implications. It reflects on the nature of and conditions for successful constitutional communication despite the non-applicability of the model of conversational interpretation and briefly sketches the ramifications of my argument about original constitutional meanings for debates about statutory interpretation.

A. Challenges for Public Meaning Originalists

Acceptance that original public meanings do not extend beyond minimally necessary and noncontroversial meanings would require public meaning originalists to revise their claims about the relationship of historical research to determinate outcomes in disputed cases. Originalists should recognize that most constitutional issues requiring decision by the Supreme Court arise in the “construction zone” and should make the elaboration of theories of constitutional construction an urgent priority.

1. Revising, and Limiting, the Claimed Scope of Original Public Meanings

If public meaning originalists want to adhere to the premise that original public meanings can be discovered as a matter of historical and linguistic fact, they need to acknowledge that their defining claim encompasses only minimally necessary and noncontroversial meanings. At least one originalist besides Professor Balkin has taken this position. In an insightful effort to plumb the meaning of the Ninth Amendment, Professor Ryan Williams distinguishes between purely semantic or what he calls “primary” meaning and contextually enriched or “secondary” meaning.²⁰⁷ In moving from the former to the latter, he argues, interpreters should follow two rules:

First, interpreters should question whether . . . putatively implied content [that pragmatic enrichment adds to semantic meaning] arises as

²⁰⁶ The classic source on modalities of constitutional argument is Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).

²⁰⁷ Williams, *supra* note 29, at 532–33.

a matter of logical necessity due to a noncancellable, semantically encoded formulation

Second, if the implied content is not semantically encoded in the text, interpreters should inquire whether a reasonable member of the ratifying public at the time of enactment would have recognized the implied content as following obviously and noncontroversially from the choice of the particular language used in the provision and the relevant background context.²⁰⁸

In a version of a not-yet-published paper that he posted online, Professor Solum once described Williams's position as "very close" to his own.²⁰⁹ But he has now recanted that statement and insisted that "where there is controversy over the public meaning" of a provision, adherents of PMO should "aim for the interpretation that best explains all the available evidence"²¹⁰ although still without explaining the nature of the "fact" that the "evidence" is supposed to establish.

As discussed above, I read Solum's published work as equivocating between narrower and broader accounts of the contextually enriched original public meanings that he characterizes as linguistic facts.²¹¹ For present purposes, suffice it to note that embrace of Williams's strictures would dramatically circumscribe the range of issues to which the original public meanings of constitutional provisions could provide definitive resolutions. With regard to the Fourteenth Amendment, for example, Professor Foner's findings suggest that the minimally necessary and historically noncontroversial content of the Equal Protection and Privileges or Immunities Clauses could not resolve any of the disputed interpretive questions that arose in the near aftermath of Reconstruction, including those about the permissibility of state-enforced segregation with regard to social rights, discrimination in public education, and exclusions of women from the practice of law.²¹² If not, the repercussions for originalist scholarship would be large. To cite just one example, it seems unlikely that historical research could produce linguistically determinate answers to the questions about the original meaning of the

²⁰⁸ *Id.* at 544.

²⁰⁹ Solum, Public Meaning Thesis, *supra* note 39 (manuscript at 51) (acknowledging that "in a prior version of this paper, I stated that my position was 'very close' to Williams").

²¹⁰ *Id.*

²¹¹ See *supra* notes 174–88 and accompanying text.

²¹² See Foner, *supra* note 41, at 145–74 (discussing Fourteenth Amendment cases coming before the Supreme Court during Reconstruction and its aftermath).

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Privileges or Immunities Clause on which prominent originalist scholars Professor Randy Barnett and Professor Kurt Lash have recently produced dueling, book-length disquisitions that arrive at competing conclusions.²¹³

Even on a stringently narrow account of the original public meanings that could be established as a matter of historical or linguistic fact, PMO might perform significant work in fixing the boundaries of linguistically permissible ascriptions of constitutional meaning. But it is uncertain, at best, how many historically identified boundaries would have important impacts on legal debates.

Issues involving abortion rights may be illustrative. Numerous originalists think it virtually self-evident that the Supreme Court's decision in *Roe v. Wade*²¹⁴ contravenes the original public meaning of the Fourteenth Amendment.²¹⁵ Even concerning *Roe*, however, Professor Balkin holds a contrary view.²¹⁶ Balkin does not maintain that most people in 1868 understood the Fourteenth Amendment as creating abortion rights. Instead, emphasizing the PMO premise that expected applications do not determine public *meanings*,²¹⁷ Balkin argues that the Fourteenth Amendment's guarantee of equal citizenship is plausibly understood to include a prohibition against caste-enforcing legislation and that it did not linguistically necessarily or noncontroversially preclude the

²¹³ See generally Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 *Notre Dame L. Rev.* 499, 507 (2019) (critiquing Lash's "enumerated-rights-only" theory of the Privileges or Immunities Clause on originalist grounds); Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 *Notre Dame L. Rev.* 591, 593 (2019) (drawing on a "substantial body of preratification evidence" to advance contrary arguments, and contending that "[a]ll postratification evidence is necessarily weak as a source of original understanding"); Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 *Notre Dame L. Rev.* 679, 679 (2019) (offering a sur-reply to Lash and, in recognition of the historically complex dueling claims, "forgiv[ing] readers for having difficulty adjudicating this dispute").

²¹⁴ 410 U.S. 113 (1973).

²¹⁵ See, e.g., Antonin Scalia, *Session Three: Religion, Politics and the Death Penalty*, *Pew Rsch. Ctr.* (Jan. 25, 2002), <https://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/> [<https://perma.cc/FK5N-WZV2>] (quoting Justice Scalia as saying: "[M]y difficulty with *Roe v. Wade* is a legal rather than a moral one. I do not believe—and no one believed for 200 years—that the Constitution contains a right to abortion.").

²¹⁶ See Balkin, *supra* note 49, at 292 (maintaining that conventional critiques of *Roe* as unmoored from constitutional text are wrong).

²¹⁷ See *supra* notes 66–69 and accompanying text.

conclusion that abortion restrictions deprive women of equal citizenship.²¹⁸

Once determinate original public meanings and non-meanings are understood to be limited to linguistically minimal meanings, I do not know whether Balkin is also correct about *Roe*'s not contravening the Fourteenth Amendment's original public meaning, even though *Roe*'s result is one that few if any of those alive during the 1860s appear specifically to have anticipated. I raise the example of *Roe* only to illustrate uncertainty about the frequency or infrequency with which originalist scholarship aimed at identifying linguistic boundaries would prove decisive. In light of PMO's distinction between original meanings and originally anticipated applications, the grounds for uncertainty extend even in the debates in which originalists have widely assumed that original meanings most clearly point to uniquely correct answers.

2. Developing Theories of Constitutional Construction

Even when the original public meaning of constitutional language is relevantly underdeterminate with respect to a disputed question, public meaning originalists need not fall silent. As Part I recognized, many public meaning originalists acknowledge that linguistic indeterminacy sometimes exists and produces a need for constitutional "construction" to render determinate what linguistic meaning alone leaves uncertain.²¹⁹ So far, however, few originalists have attempted to elaborate a full theory of how courts should resolve issues in the "construction zone." Professor Solum has maintained that "[c]onstitutional doctrines . . . must be consistent with the 'translation set' . . . [consisting] of the set of doctrines that themselves directly translate the communicative content of the text"²²⁰ But he has not said much more.

In a new book, Professors Randy Barnett and Evan Bernick argue that decisions about constitutional construction should accord with the "spirit" as well as with the assertive content of constitutional language.²²¹

²¹⁸ See Balkin, *supra* note 49, at 292, 311–36 (elaborating these arguments); see also *id.* at 321–22 ("The original meaning of the Fourteenth Amendment . . . therefore presents no bar to the conclusion that sex discrimination violates the Constitution. The text of section 1 does not exclude women from its protections, and the underlying principle of equal citizenship applies to men and women equally.").

²¹⁹ See *supra* notes 78–80 and accompanying text.

²²⁰ See Solum, *Originalist Methodology*, *supra* note 15, at 293.

²²¹ See Barnett & Bernick, *supra* note 136, at 8–9.

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According to the authors, “[t]he spirit of the text is its original function(s), purpose(s), object(s), end(s), aim(s), or goal(s).”²²² To grasp the spirit of a constitutional provision, judges, they write, “must investigate not only the immediate context of communication but antecedent legal, political, and social history that might shed light on what kinds of normative goods the text was designed to capture” and then “formulate rules for decision-making that . . . are well adapted to that setting.”²²³ This prescription is vague. In applying it to the Fourteenth Amendment, Professors Barnett and Bernick illustrate a number of the kinds of judgment that its application requires, many of them highly contestable. Nevertheless, I am frankly unsure how much more determinacy one could reasonably demand. Without purporting to settle that question, I would expect other public meaning originalists who recognized the limited resolving power of original public meanings to attach a high priority to the elaboration of fuller theories of constitutional construction.

Because constitutional construction by the courts is a legal activity, I hazard the further speculation that many public meaning originalists—once having grasped that linguistic meaning alone could seldom settle disputed issues—may feel drawn to forms of originalism that look to original or Founding-era law to ascribe original *legal* meanings to linguistically vague provisions. In an article championing “original-law originalism,”²²⁴ Professors William Baude and Stephen Sachs maintain that the “‘law of interpretation’ determines what a particular instrument ‘means’ in our legal system.”²²⁵ From their perspective, it is no embarrassment that members of the Founding generation disagreed about what a constitutional provision meant. “[T]oday’s lawyers are fully capable of rendering an opinion on which side of a Founding-Era dispute had the better [legal] claim,” they write.²²⁶ The distinctive tenet of the original-law originalism Professors Baude and Sachs is that the relevant interpretive law for modern-day lawyers and judges to apply in

²²² *Id.* at 227.

²²³ *Id.* at 228.

²²⁴ The phrase comes from Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 817, 874–75 (2015) (advancing a theory of originalism that calls for adherence to “the Founders’ law, as lawfully changed” since the Founding).

²²⁵ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1082–83 (2017).

²²⁶ William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *Law & Hist. Rev.* 809, 818–19 (2019).

determining original constitutional meanings is “original law.”²²⁷ Baude and Sachs further suggest that original interpretive law typically will prove determinate enough to spare judges from normative choices in identifying original constitutional meanings.²²⁸ If so, original-law originalism might furnish most of a theory of constitutional construction.

Although studies by other legal scholars make me skeptical that the Founding-era law of interpretation was as largely undisputed and substantially determinate as Professors Baude and Sachs believe,²²⁹ I leave critical analysis of original-law originalism for another day. Here, my purpose is solely to anticipate the agenda for public meaning originalists who accept my conclusion that original public meanings that existed as a matter of historical fact cannot resolve historically disputed constitutional issues. For that cohort, I would not be surprised to see original-law originalism displace PMO as the dominant version of originalist theory. In practical effect, that change would substitute original legal meanings, as identified by original interpretive methods, for original public meanings, imagined to exist as a matter of linguistic and historical fact, as the touchstone for originalist theory.

It bears noting, however, that for practicing originalists, such as Justices of the Supreme Court, embrace of original-law originalism would carry a daunting implication. Originalist analysis would need to operate

²²⁷ See Sachs, *supra* note 6, at 158. A close cousin of original-law originalism is the theory of original-methods originalism advanced by Professors John McGinnis and Michael Rappaport, which advocates interpreting the Constitution in accordance with the interpretive rules and methods that lawyers would have applied at the time of constitutional provisions’ adoption. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 118 (2013). The authors believe that a variety of interpretive techniques that are either dictated by or consistent with the original law of interpretation would result in the size of the “construction zone” being relatively small. See John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 *Notre Dame L. Rev.* 919 (2021).

²²⁸ See Baude & Sachs, *supra* note 225, at 1083 (“[C]ontrary to the skeptics, extracting legal content from a written instrument needn’t involve much direct normative judgment. In fact, it usually doesn’t.”).

²²⁹ See, e.g., Gienapp, *supra* note 113, at 116–23 (describing chaotic uncertainty about appropriate interpretive rules for the Constitution based on deeper uncertainty about what kind of document the Constitution was); Farah Peterson, *Expounding the Constitution*, 130 *Yale L.J.* 2, 2–3 (2020) (maintaining that litigants in early constitutional cases in the Supreme Court disputed whether the Constitution should be interpreted according to restrictive rules applicable to private legislation or the more flexible and pragmatic rules applicable to public legislation); Balkin, *Construction*, *supra* note 30, at 98; Larry Kramer, *Two (More) Problems with Originalism*, 31 *Harv. J.L. & Pub. Pol’y* 907, 912–13 (2008); Nelson, *supra* note 194, at 555–56, 561, 571–73.

on at least two tracks and possibly three. One would continue to encompass historical fact-finding of the kind that historians such as Foner practice and PMO currently contemplates. Another would involve the identification of “original” interpretive norms—which might vary from the Founding era to Reconstruction, for example—to gauge the legal significance of complex and sometimes messy historical facts. Depending on what research revealed about original interpretive norms, a further process of constitutional construction might also be needed.

B. Implications for Judges and Justices

The strictures that should apply to scholars in claiming that original public meanings can settle current issues should apply a fortiori to judges and Justices. Judges bear obligations of candor and good faith in advancing justifications for their decisions.²³⁰

1. Acknowledging What Original History Cannot Establish Authoritatively

The requisite changes in judicial practice extend to nonoriginalist as well as originalist Justices. Even nonoriginalist Justices commonly deploy originalist arguments when satisfied that history supports their conclusions. In light of evidence adduced by historians and by dueling judicial opinions, examples of recent cases in which Justices of the Supreme Court have over-claimed in asserting the capacity of historical materials to establish determinative linguistic meanings of constitutional provisions include, but are by no means limited to, these:

- In *Seila Law v. Consumer Financial Protection Bureau*,²³¹ a majority of the Justices echoed earlier decisions in suggesting that Article II’s Appointments Clause impliedly established a presidential prerogative to remove a high government official. Claims that the President’s power to “appoint” officers of the United States under Article I, Section 2, Clause 2 encompasses a power also to remove

²³⁰ See Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* 130–32 (2018) (asserting the importance of argument in good faith to the legal and moral legitimacy of judicial decision making).

²³¹ 140 S. Ct. 2183 (2020).

them depends on a linguistically unnecessary inference and provoked disagreement among the Founding generation.²³²

- In *National Federation of Independent Business v. Sebelius*,²³³ the Justices divided over whether the Commerce and Necessary and Proper Clauses authorize Congress to mandate purchases of health insurance, but all intimated that historical materials supplied a clear answer.²³⁴ That conclusion appears doubtful. The scope of Congress’s commerce power occasioned debates beginning in early constitutional history and extending beyond.²³⁵ Perhaps even more historically notorious are debates about the scope of Congress’s

²³² See, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1815–45 (2006) (making a “sustained case” for a presidential removal power); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 3, 6 (2020) (countering claims of some originalists that the Appointments Clause requires a presidential power to remove high federal officials by showing that the First Congress, with the approval of President George Washington and Treasury Secretary Alexander Hamilton, created a Sinking Fund Commission some of whose members enjoyed protection from presidential removal). Compare *Seila Law*, 140 S. Ct. at 2198–201 (affirming “the President’s general removal power” and noting only “two exceptions to the President’s unrestricted removal power” as articulated in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) and *Morrison v. Olson*, 487 U.S. 654 (1988)), with *id.* at 2226–31 (Kagan, J., concurring in part and dissenting in part) (emphasizing that the Constitution says “nothing at all” about the President’s removal power, and accusing the majority of “extrapolat[ing] an unrestricted removal power from such general constitutional language” which is “more than the text will bear” (alteration in original) (internal quotations omitted)). For examples of Founding-era disagreement over executive removal authority, see, e.g., *The Federalist No. 77*, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting “[t]he consent of [the Senate] would be necessary to displace as well as to appoint” officers of the United States). Compare also *Seila Law*, 140 S. Ct. at 2205, with *id.* at 2229 n.4 (Kagan, J., concurring in part and dissenting in part) (disagreeing about the importance of *Federalist No. 77*).

²³³ 567 U.S. 519 (2012).

²³⁴ Compare *id.* at 550–51 & n.4 (suggesting “the language of the Constitution” and the Framing’s historical context together distinguished action from inaction), with *id.* at 610 (Ginsburg, J., concurring in part and dissenting in part) (contesting this history). But cf. David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 Sup. Ct. Rev. 1, 8–9 (arguing Necessary and Proper Clause obviated need for such historical analysis).

²³⁵ See Alison L. LaCroix, *The Shadow Powers of Article I*, 123 Yale L.J. 2044, 2058–60 (2014) (discussing the scope of the Necessary and Proper Clause and whether it can be considered an enumerated power). Compare, e.g., Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 16–18 (2010) (articulating the view that the Framers used the term “commerce” at the Constitutional Convention broadly to include things like navigation, and calling a narrower conception “anachronistic”), with Barnett, *Commerce Clause*, *supra* note 9, at 104 (arguing that at the Constitutional Convention “the term ‘commerce’ was consistently used in the narrow sense and that *there is no surviving example of it being used . . . in any broader sense*”).

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power under Article I, Section 8, Clause 18 to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”²³⁶ James Madison and Alexander Hamilton famously divided over that issue.²³⁷

- In *Citizens United v. Federal Election Commission*,²³⁸ concurring and dissenting opinions clashed over whether the First Amendment forbade congressional regulation of corporate expenditures on campaign advertising.²³⁹ Historians have long debated how members of the Framing generation understood the First Amendment bar to Congress’s “abridging the freedom of speech.”²⁴⁰ Some have maintained that the Founders predominantly understood the Free Speech Clause as having a narrowly truncated reach (by modern standards) that would not have embraced sexually explicit books or pictures, blasphemy, commercial advertising, and much more.²⁴¹ More recently, revisionist historians have maintained that the Founding generation widely viewed the Free Speech Clause as broad in scope but weak in its protective effect, readily tolerating restrictions that served the public interest.²⁴²

²³⁶ U.S. Const. art. I, § 8, cl. 18.

²³⁷ See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 588–603; John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. Chi. L. Rev. 1101, 1125–26 (2011); see also Gienapp, *supra* note 113, at 90–92 (discussing disagreements between Anti-Federalists and Federalists during ratification debates).

²³⁸ 558 U.S. 310 (2010).

²³⁹ Compare *id.* at 385–93 (Scalia, J., concurring) (defending “the conformity of [the majority] opinion with the original meaning of the First Amendment”), with *id.* at 425–33 (Stevens, J., concurring in part and dissenting in part) (disputing this analysis).

²⁴⁰ U.S. Const. amend. I; see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 Ind. L.J. 1, 9–22 (2011); see also Thomas F. Carroll, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 Mich. L. Rev. 615, 627–37 (1920) (discussing early interpretations of the First Amendment and Congress’s ability to regulate the press).

²⁴¹ See Leonard W. Levy, *Emergence of a Free Press*, at xii–xv (1985); see also David A. Strauss, *The Living Constitution* 61 (2010) (suggesting “the First Amendment was *not* understood to outlaw prosecutions for seditious libel”).

²⁴² See generally, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246 (2017) (arguing that speech and press freedoms in the Founding era were expansive in scope but weak in legal effect); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2169–71 (2015) (arguing that early American courts employed a “broad but shallow” approach to the First Amendment under which speech that was not categorically excluded from constitutional protection could be penalized if it posed a “threat to the public order”).

- In *District of Columbia v. Heller*,²⁴³ all nine participating Justices signed opinions purporting to establish that the original meaning of the Second Amendment either did or did not encompass a right of citizens to possess guns for private purposes unrelated to service in “a well-regulated militia.”²⁴⁴ Legal historians disagree about predominant Founding-era understandings.²⁴⁵
- In *Fisher v. University of Texas*,²⁴⁶ Justice Thomas maintained that the original public meaning of “[t]he Equal Protection Clause strips States of all authority to use race as a factor in providing education.”²⁴⁷ Others who have examined the surrounding history think it just as clear that most Americans living in 1868 who were familiar with the language and drafting history of the Fourteenth Amendment did not understand it as barring school segregation.²⁴⁸

Once again, I do not deny that some cases would come within the minimally necessary or uncontroversial original public meanings of constitutional provisions. As I have said repeatedly, when Article I provides that each state will have two Senators, “two” means two. Professor Solum has asserted more sweepingly that “most of the [structural] provisions of the Constitution . . . have discernable original meanings” and that “much of” the Constitution’s structural language “is substantially determinate.”²⁴⁹ But work by constitutional historians leaves me skeptical about this claim. Beyond the disagreements about Article I powers in *NFIB v. Sebelius* and Article II powers in *Seila Law* to which I just referred, here are some further examples of historical debates about the meanings of structural constitutional provisions that cast doubt on claims about those provisions’ necessary or noncontroversial meanings:

- Article I, Section 8, Clause 1 provides that “[t]he Congress shall have power to lay and collect taxes . . . to pay the debts and provide

²⁴³ 554 U.S. 570 (2008).

²⁴⁴ See *id.* at 605 (analyzing purported original public meaning of Second Amendment); *id.* at 652–79 (Stevens, J., dissenting) (challenging this analysis).

²⁴⁵ Compare Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. Rev.* 1343 (2009) (arguing that while *Heller* reached the correct originalist result, its reasoning was incomplete), with Adam Winkler, *Scrutinizing the Second Amendment*, 105 *Mich. L. Rev.* 683, 686, 688 (2007) (arguing that a “reasonableness” standard is consistent with the original understanding of the Second Amendment).

²⁴⁶ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

²⁴⁷ *Id.* at 327–28 (Thomas, J., concurring).

²⁴⁸ See, e.g., Klarman, *supra* note 124, at 25–26, 146.

²⁴⁹ Solum, *Originalism and Constitutional Construction*, *supra* note 45, at 530.

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for the common defense and general welfare of the United States.”²⁵⁰ Members of the Founding generation debated whether this provision conferred a general power to tax and spend for the general welfare or was limited to paying debts incurred in the exercise of other, specifically listed congressional powers.²⁵¹

- Under Article II, there are longstanding disputes about whether Section 1, Clause 1’s conferral on the President of “the executive power” conveys powers in addition to those that the Article specifically lists²⁵² and about the meaning and implications of the “commander in chief” power of Article I, Section 2, Clause 1.²⁵³
- Disputes abound about the original meaning of Article III, including about the meaning of “the judicial power” under Section 1,

²⁵⁰ U.S. Const. art. I, § 8, cl. 1.

²⁵¹ Compare Alexander Hamilton, Report on Manufacturers (1791), *reprinted in* History of the United States: Political, Industrial, Social 506–07 (Charles Manfred Thompson ed., 1917) (arguing that Congress’s “power to raise money is plenary and indefinite”; that “[t]he terms ‘general welfare’ were doubtlessly intended to signify more than was expressed or imported in” the preceding list of congressional powers; and that as a result “[i]t is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general Welfare, and for which, under that description, an appropriation of money is requisite and proper”), with The Federalist No. 41 (James Madison) 262–63 (Clinton Rossiter ed., 1961) (arguing for a narrow construction of the clause, and describing Hamilton’s approach as a “misconstruction” that only “might have had some color” in a counterfactual where “no other enumeration or definition of the powers of the Congress been found in the Constitution”); see also, e.g., *United States v. Butler*, 297 U.S. 1, 64 (1936) (noting disagreement but concluding that “[t]he true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare”); 1 Joseph Story, Commentaries on the Constitution of the United States § 922, at 672–73 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1833); Herman J. Herbert, Jr., Comment, The General Welfare Clauses in the Constitution of the United States, 7 *Fordham L. Rev.* 390, 396–403 (1938).

²⁵² See generally Julian Davis Mortenson, Article II Vests the Executive Power, not the Royal Prerogative, 119 *Colum. L. Rev.* 1169 (2019) (arguing for a narrow reading of the executive vesting clause); see also Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 *U. Ill. L. Rev.* 701 (arguing the original public meaning of the executive vesting clause was merely the power to execute the law); cf. Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 *Harv. L. Rev.* 1153, 1175–79 (1992) (arguing that the executive vesting clause incorporates a broad understanding of executive power).

²⁵³ See David Luban, On the Commander in Chief Power, 81 *S. Cal. L. Rev.* 477, 483–84 (2008) (“The Commander in Chief Clause is a sphinx, and specifying its powers and the theory generating them is its riddle.”); see generally Richard A. Epstein, Executive Power, the Commander in Chief, and the Militia Clause, 34 *Hofstra L. Rev.* 317 (2005) (evaluating various views of the commander in chief power); Jesse H. Choper, Michael C. Dorf, Richard H. Fallon, Jr. & Frederick Schauer, Constitutional Law 213–17 (13th ed. 2019) (noting and summarizing debate over the scope of executive war powers).

Clause 1;²⁵⁴ about the nature and limits of the “cases” or “controversies” over which the federal courts may exercise jurisdiction under Section 2;²⁵⁵ and about the implications of the provision in Section 2, Clause 1 that “[t]he judicial power of the United States shall extend to all cases” arising under the Constitution, laws and treaties of the United States.²⁵⁶

Although these provisions all contain minimal cores of noncontroversial meaning, the Justices of the Supreme Court need to come to grips with the reality that nearly all of the constitutional cases on their docket arise within “the construction zone” or require judicial “implementation” of less-than-determinate constitutional norms.²⁵⁷

2. Linguistic Underdeterminacy and Constitutional Theory

As I have recognized and indeed emphasized, to say that a constitutional provision lacks a more-than-minimal original public meaning does not imply that courts and judges cannot assign it a

²⁵⁴ See, e.g., Gienapp, *supra* note 113, at 92–95 (noting Anti-Federalists’ on Article III’s provision for judicial power as dangerously “imprecise”). Among the specific disputes that persisted after ratification involved whether the judicial power encompassed a power to develop a federal common law of crimes. See, e.g., Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler’s the Federal Courts and the Federal System* 638–42 (7th ed. 2015).

²⁵⁵ Compare, e.g., *United States v. Windsor*, 570 U.S. 744, 786 (2013) (Scalia, J., dissenting) (describing the adverse-party requirement as “not a ‘prudential’ requirement that we have invented, but an essential element of an Article III case or controversy”), with James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *Yale L.J.* 1346, 1355–56 (2015) (arguing that Article III’s embrace of both adversarial hearings and *ex parte* hearings derives from Roman and civil law). See James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III’s Domestic Relations Exception*, 92 *Notre Dame L. Rev.* 117, 118–19 (2016) (arguing that the bar to Article III jurisdiction over “domestic relations” derives from the distinction between “cases” and “controversies” and the consensual relations that overrides much of domestic relations law); James E. Pfander & Daniel Birk, *Adverse Interests and Article III: A Reply*, 111 *Nw. U. L. Rev.* 1067, 1068–71 (2017) (rejecting an argument that even if “cases and controversies” do not require “adverse parties,” they require “adverse interests”).

²⁵⁶ Compare Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 272 (1985) (arguing that Congress must confer federal jurisdiction, in either original or appellate form, over all cases arising under the Constitution), with Daniel J. Meltzer, *The History and Structure of Article III*, 138 *U. Pa. L. Rev.* 1569, 1624–30 (1990) (arguing that Amar’s thesis is unproven and that Congress has more discretion about whether to provide for either lower federal court or Supreme Court appellate jurisdiction).

²⁵⁷ See generally Richard H. Fallon, Jr., *Implementing the Constitution* (2001) (identifying implementation as a task partly distinct from interpretation).

determinate *legal* meaning. Across diverse areas of law, judges frequently attribute determinate legal content to linguistically indeterminate language.²⁵⁸ At the same time, notorious debates among the Justices about constitutional interpretive methodology make it implausible to maintain, as some do,²⁵⁹ that a widely accepted “rule of recognition,” grounded in the Justices’ historical practices, establishes uniquely correct legal answers that do not depend on normative judgment in most of the cases that come before the Supreme Court.²⁶⁰ The Justices’ interpretive theories can matter crucially. Justices who recognized the extent of the Constitution’s linguistic underdeterminacy would therefore experience added pressures on their theories of constitutional interpretation, construction, or implementation.

As I have argued previously, it seems unlikely that any of the Justices—or any of the rest of us—has a fully worked out interpretive theory adequate to resolve every question that might arise in constitutional cases.²⁶¹ To develop such a theory is obviously beyond the scope of this Article. Nevertheless, it may be useful for me to advance two anchoring premises that any plausible theory would need to respect.

First, to be defensible, an interpretive theory must acknowledge the status of the Constitution’s Framers and ratifiers as legitimate authorities, capable of altering the legal and moral obligations of succeeding generations of Americans.²⁶² The legal and moral legitimacy of the Framers and ratifiers in establishing the Constitution as law is perhaps the deepest implicit assumption of American constitutional practice. It follows, moreover, that the Framers’ and ratifiers’ minimal communicative intentions play a necessary role in endowing the

²⁵⁸ See, e.g., Baude & Sachs, *supra* note 225, at 1094–96 (discussing legal rules for achieving determinacy in the interpretation of contracts, deeds, and wills).

²⁵⁹ See *id.* at 1083, 1125 (“[C]ontrary to the skeptics, extracting legal content from a written instrument needn’t involve much direct normative judgment. In fact, it usually doesn’t.”).

²⁶⁰ See Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 *Harv. L. Rev. F.* 105, 114–19 (2017) (explaining that the absence of consensus either about interpretive methodologies or the criteria for their validation falsifies claims for the determinacy of the law of interpretation under premises that Baude and Sachs purport to accept).

²⁶¹ See Fallon, *supra* note 230, at 147–48.

²⁶² On the obligation-altering implications of legitimate authority, see H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 243–47 (1982); Frederick Schauer, *Authority and Authorities*, 94 *Va. L. Rev.* 1931, 1939 (2008).

Constitution with legal meaning.²⁶³ There is no other mechanism by which their legitimate authority might be recognized.

Second, judges and Justices charged with interpreting a Constitution that is linguistically underdeterminate in significant respects are themselves legitimate authorities, charged with resolving relevant indeterminacies and creating binding law for the future.²⁶⁴ In doing so, judges and especially Justices need to look simultaneously backward and forward. They must look backward to maintain fidelity with the authoritative determinations of past legitimate authorities, centrally including the Constitution's Framers and ratifiers. But the Justices must also look forward to ensure that their own pronouncements satisfy the requirements of constitutional justice in ways that will deserve future respect and obedience.²⁶⁵

In other writing, I have defended an approach to constitutional interpretation in which judges and others take account of a variety of factors, including the Constitution's text, evidence of Founding-era intentions, meanings, and understandings, supportable inferences from the Constitution's overall structure, judicial precedent, and moral, policy, and prudential considerations.²⁶⁶ Within this multi-factored approach, I have further argued, Justices should consider and sometimes re-consider the persuasiveness of arguments and evidence within those various categories of argument in light of the persuasiveness of arguments and evidence within others.²⁶⁷

Once it is recognized that the historical facts surrounding the ratification of many constitutional provisions can determine only minimal linguistic meanings, a central challenge for the Justices—as for academic originalists—should be to re-think the role of various kinds of historical facts in constitutional decision making. Even if historical facts fail to establish uniquely correct original public meanings that extend beyond minimally necessary and noncontroversial meanings, it does not follow that historical facts about a provision's drafting and ratification should fall entirely from view.

²⁶³ See Raz, *supra* note 28, at 284 (linking legislative intentions to law's authority as well as its intelligibility).

²⁶⁴ See Fallon, *supra* note 230, at 79–82.

²⁶⁵ See *id.* at 81–82.

²⁶⁶ See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 *Harv. L. Rev.* 1189, 1237–51 (1987).

²⁶⁷ See *id.* at 1252–68.

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The potential for different kinds of facts to influence constitutional decision making in different kinds of cases becomes especially significant if, as I have argued—consistently with the claims of historians such as Professor Foner—constitutional provisions are capable of bearing multiple kinds of meanings. As noted above, these include “(1) contextual meaning, as framed by the shared presuppositions of speakers and listeners, (2) literal or semantic meaning, (3) moral conceptual meaning, (4) reasonable meaning, . . . (5) intended meaning,” and (6) interpreted or precedential meaning.²⁶⁸ The Supreme Court has sometimes resolved cases on the basis of all of these different and sometimes conflicting senses of meaning.²⁶⁹

If more than one of these diverse senses of meaning are plausibly relevant to a particular case, then the historical facts that would support an ascription of meaning in any one of these senses may also be relevant. For example, although the point is not free from doubt, it appears that most Americans living in 1868 did not expect either the Equal Protection Clause or the Privileges or Immunities Clause to mandate an end to school segregation, at least immediately.²⁷⁰ If this historical judgment is correct, then it is *relevant*—and I claim no more—to whether judges and Justices should have held school segregation unconstitutional in the near aftermath of the Fourteenth Amendment’s ratification. By contrast, as a number of leading constitutional cases reflect, the legal and moral pertinence of historical facts may shift over time. In particular, expectations and reliance interests that might have mattered greatly in one historical context can diminish in importance as time passes.²⁷¹ Correspondingly, it may become more legally and morally appropriate for judges and Justices to base ascriptions of constitutional meaning on the best moral understanding of the language that the drafters and ratifiers of a constitutional amendment deliberately chose or knowingly adopted. The

²⁶⁸ See Fallon, *supra* note 230, at 51.

²⁶⁹ See *id.* at 51–65.

²⁷⁰ See Klarman, *supra* note 124, at 25–26, 146 (“[T]he original understanding of the Fourteenth Amendment plainly permitted school segregation.”); Bickel, *supra* note 107, at 58–59 (acknowledging “[t]he obvious conclusion” that the Fourteenth Amendment was not intended to apply to school segregation).

²⁷¹ See David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 57 (2015) (“The key point is one that Jefferson recognized: original understandings are binding for a time but then lose their force.”); *id.* at 58 (“[A] decision that would be lawless in the immediate wake of a constitutional amendment might be acceptable—in fact is, in our system, routinely accepted—after time has passed.”); Primus, *supra* note 25, at 170.

Supreme Court may have turned from a sense of constitutional meaning that emphasizes the shared presuppositions of speakers and ratifiers to one focused on moral or conceptual meaning when Chief Justice Earl Warren wrote in *Brown v. Board of Education*²⁷² that historical “sources cast some light,”²⁷³ but “not enough to resolve the problem” at hand,²⁷⁴ and that the Court must gauge whether segregated education was consistent with equality in light of pertinent present measures.²⁷⁵

Looking broadly at more issues and cases, Professors Jack Balkin and Michael Dorf have both written thoughtfully about diverse ways in which the views of those who participated in the drafting and ratification of constitutional provisions might matter to constitutional law even if historical facts do not establish uniquely correct and determinate original meanings.²⁷⁶ For example, a Justice addressing a linguistically unresolved question may find it pertinent that a particular Framer or ratifier offered an interpretation that seems especially cogent, far-sighted, or inspiring. Justices of the Supreme Court have often drawn on the historical record in this way when citing the writings of James Madison and Thomas Jefferson to support interpretations of the First Amendment’s Establishment and Free Exercise Clauses.²⁷⁷

Many and perhaps most originalists may respond reflexively that it is disturbing to allow judges and Justices to choose among alternative possible legal or linguistic meanings that could variously be supported by diverse kinds of historical evidence. Constitutional adjudication, some will insist, should track the fixed star of relevant provisions’ original public meaning, defined as occupying the status of linguistic and historical fact. Anyone who is moved by this plea should re-read Part II

²⁷² 347 U.S. 483 (1954).

²⁷³ *Id.* at 489.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 492–93.

²⁷⁶ See Balkin, *Construction*, *supra* note 30, at 73; Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *Geo. L.J.* 1765, 1766–67 (1996).

²⁷⁷ A prominent example involves Thomas Jefferson’s image of “a wall of separation between Church and State.” Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* 16 *The Writings of Thomas Jefferson* 281, 282 (A. Lipscomb ed., 1904). Jefferson’s metaphor has become a fixture of American First Amendment law. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)); see also *Developments in the Law: Religion and the State*, 100 *Harv. L. Rev.* 1606, 1635–37 (1987) (exploring history and impact of this metaphor).

of this Article. Beyond minimally necessary and noncontroversial meanings, which will furnish determinate answers to few cases that reach the Supreme Court, PMO's fixed star is a mirage. When this hard fact is acknowledged, the Justices of the Supreme Court need to double down on the development of legal or constitutional theories adequate to guide judicial decision in the face of the Constitution's limited linguistic determinacy.²⁷⁸

C. Broader Jurisprudential Implications

My attacks on PMO's Interpretive Methodology and Conceptual Assumptions also have implications for a variety of jurisprudential issues, including the nature and limits of inter-generational constitutional communication and the interpretation of statutes that are enacted by diverse, multi-member bodies. Although I cannot do much more here than introduce these topics, a few words about each may further illustrate the significance of my arguments about the fallacies of PMO's Interpretive Methodology and Conceptual Assumptions.

1. Intergenerational Constitutional Communication

If my arguments about the limited scope of the Constitution's original linguistic meanings are correct, they should provoke reconsideration of the nature and limits of successful constitutional communication, including across generations. The inapplicability of the model of conversational interpretation to constitutional interpretation suggests that the conveyance of reasonably determinate communicative content is far more difficult in the constitutional than the conversational context. The framers and adopters of written constitutions seek to use natural languages to establish binding norms for the future. Absent the wealth of psychologically shared interpretive common ground that often characterizes conversational interactions, constitutional framers can rely on only minimal pragmatic or contextual enrichment of proposed provisions' literal meanings. As I have acknowledged repeatedly, literal

²⁷⁸ As I have argued elsewhere, I believe that participants in constitutional practice do best to develop their theories on a partially rolling basis as they reflect on the attractiveness of provisional interpretive principles in light of the outcomes that those principles would yield in particular cases and seek a "reflective equilibrium" between their interpretive principles and their substantive judgments about contested issues. See Fallon, *supra* note 230, at 142–54 (defending a second-order Reflective Equilibrium Theory of constitutional interpretation).

meanings sometimes require no enrichment. “[T]wo” means two. But if those who write constitutions want to exert reasonably determinate control over interpretive developments across a broad domain, especially precise drafting—sometimes approximating what John Marshall called “the prolixity of a legal code”²⁷⁹—is likely to be necessary.

Even with regard to terms that lack numerical precision, I do not mean to disparage the significance of minimally necessary and noncontroversial meanings and non-meanings. As history illustrates, nearly without exception, the effect of constitutional provisions that employ general terms—including the provisions that confer congressional, presidential, and judicial powers, protect freedom of speech and religion, and guarantee rights to due process and the equal protection of the laws—is to channel future debate and development.²⁸⁰ Even if the channeling does not determine specific outcomes, it typically winnows the eligible choices.²⁸¹

²⁷⁹ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

²⁸⁰ See, e.g., Balkin, *Living Originalism*, *supra* note 30, at 21–35 (articulating a theory of “framework originalism” under which constitutional language provides a framework for debate and decision while leaving many outcomes underdetermined); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 4 (2009) (describing how shifts in public opinion and expectations have shaped interpretation of the Constitution by the Supreme Court); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 911 (1996) (“On the conventionalist account, the Constitution is a focal point . . . our culture has given it a salience that makes it the natural choice when cooperation is valuable.”).

²⁸¹ There are arguable exceptions. For example, although the First Amendment begins by prescribing that “Congress shall make no law,” U.S. Const. amend. I, courts interpret it as applying to the executive and judicial branches. See Strauss, *supra* note 271, at 30 (observing that despite its text the First Amendment “uncontroversially” applies against all three branches of the federal government); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *Duke L.J.* 1213, 1244–47 (2015) (“American constitutional practice . . . has always viewed the First Amendment as relevant to the conduct of the entire federal government, not just Congress.”). In what many believe to be a similar deviation from original semantic meaning, the Supreme Court has held since 1954 that the Due Process Clause of the Fifth Amendment subjects the federal government to the same equal protection norms that the Fourteenth Amendment explicitly imposes on the states. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); *Adarand Constructors v. Peña*, 515 U.S. 200, 217 (1995). The Court has adopted this interpretation even though the Fourteenth Amendment refers only to the states and virtually no one, at the time of the Fifth Amendment’s ratification, understood the Due Process Clause as barring race-based discrimination. Overall, semantic content provides a presumptive mooring in identifying constitutional meaning, but one that is sensitive to other factors of recognized legitimacy in constitutional argument. See Bradley & Siegel, *supra*, at 1244–47; Strauss, *supra* note 271, at 4 (“Clear text does not always govern, as the anomalies show; there are times when established principles are simply inconsistent with the text.”).

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If my generalizations about the effects of constitutional language are correct, they pose a normative question concerning whether the limits of successful constitutional communication—or the failure of the Framers of the Constitution of the United States to achieve greater determinacy—should occasion regret or disapproval. For the most part, the answer should be no. Especially in light of the limits of human foresight, to leave responsibility for the elaboration of vague constitutional language to future generations can surely be a responsible choice. In the case of the Fourteenth Amendment, Professor Foner suggests that congressional drafters may have had tactical reasons for proposing vague language.²⁸² In other instances, relative uncertainty of aim may make reliance on vague formulae a sound strategy even in the absence of specific disagreements among the drafters that require papering over.

According to Professor David Strauss, the characteristic genius of our Constitution's Framers was to be specific where specificity was appropriate—for example, in establishing the terms of office for elected officials and prescribing the precise number of Senators to which each state is entitled—while leaving room for experience-guided development in other areas.²⁸³ Although it is possible to disagree about which among the Framers' decisions deserve praise and which merit censure or revision, I concur with Strauss that some provisions are more and others less determinate and that decisions to leave some matters in the less determinate category have often proved sage.

To be sure, vagueness and flexibility put a lot of power in the hands of judges and especially the Justices of the Supreme Court. This assignment brings undeniable risks. But it also opens paths to public influence on the development of constitutional law²⁸⁴ that contribute to our system's democratic legitimacy. Albeit imperfectly, the Constitution's provisions for the nomination and confirmation of Justices make it unlikely that the Court will deviate too far from the evolving moral sensibilities of the

²⁸² See Foner, *supra* note 41, at 89.

²⁸³ See Strauss, *supra* note 241, at 111–14.

²⁸⁴ There is a vast literature on the mechanisms by which shifting public opinion affects appointments to and decision making by the Supreme Court. Influential contributions include Bruce A. Ackerman, *We the People*, Volume I: Foundations (1991); Friedman, *supra* note 280; Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596 (2003); and Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027 (2004).

mainstream public.²⁸⁵ There might be better mechanisms for equitably distributing opportunities for democratic influence on legal evolution over time. It might also be better if the Constitution were easier to amend. But I leave consideration of specific reform proposals for another day. My principal present submission is relatively modest: recognition of the limited scope of original public meanings as a purely fact-based linguistic matter ought to provoke broader thought about the nature and mechanisms of intergenerational constitutional communication and distribution of power.

2. *Statutory Interpretation Debates*

Many of my claims about the ill-fit of the model of conversational interpretation to constitutional interpretation also apply to statutory interpretation. There, too, minimally necessary and noncontroversial meanings may occupy the status of linguistic facts, but settlement of most interpretive disputes requires legal, rather than merely linguistic, analysis.

If correct, my arguments in Part II thus suggest that some versions of textualism—like the versions of PMO that I have criticized in this essay—claim more than they can deliver once the disparities between conversational interpretation and statutory interpretation are accounted for. Having written elsewhere about the normative challenges of statutory interpretation,²⁸⁶ I shall not repeat my proposals. Here, I would insist only that, given further-reaching linguistic underdeterminacy than many wish to acknowledge, judges must somehow assume a responsibility for facilitating workable government under law that accords with sometimes vague but nevertheless meaningful legislative policy choices. Under these circumstances, familiar talk about the proper role of courts as “faithful agents” of the legislature²⁸⁷ should not obscure the reality that legislatures are not speakers in the sense that the model of conversational interpretation posits. In the absence of more determinate direction than statutes frequently afford, truly faithful agency on the part of the courts may require the exercise of sound judicial judgment.

²⁸⁵ See generally Robert A. Dahl, *Democracy and Its Critics* 190 (1989) (“[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.”); Robert G. McCloskey, *The American Supreme Court* 224 (1960) (“[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand.”).

²⁸⁶ See Fallon, *supra* note 13.

²⁸⁷ See, e.g., John F. Manning, *The New Purposivism*, 2011 *Sup. Ct. Rev.* 113, 120.

CONCLUSION

Contested constitutional provisions rarely if ever have single original public meanings, ascertainable as a matter of historical and linguistic fact, that are capable of resolving reasonably disputable issues such as those in virtually all constitutional cases that come before the Supreme Court. Public meaning originalists who maintain otherwise, including Supreme Court Justices, characteristically do so in reliance on untenable Interpretive Methodology and Conceptual Assumptions.

PMO assumes that we understand the meaning of constitutional provisions in roughly the same way that we grasp the meaning of utterances in ordinary conversation. But there are conspicuous disparities between the conversational and the constitutional contexts. In ordinary conversation, gleaned the meaning of an utterance requires drawing inferences about what the speaker—who is typically a known person—intends to convey in light of a psychologically shared set of background assumptions. In the case of constitutional provisions drafted by multiple or unknown speakers for dissemination to diverse audiences, the interpretive common ground that is shared as a matter of psychological fact is typically far less extensive.

Constitutional communication occurs despite this handicap. All reasonable listeners living at the time of a constitutional provision's promulgation would have understood it as reflecting the minimal communicative intentions that would be necessary to make it intelligible in its historical context. In some cases, further elements of communicative content may have been noncontroversial. But when members of the Founding generation disagreed about the meaning of a constitutional provision, the idea of a uniquely correct meaning that existed as a matter of fact and is determinate enough to resolve disputed matters is typically unsupportable.

Prominent public meaning originalists often contend otherwise. They insist that historical research can settle questions about which we know that members of the framing generations disagreed, including issues involving the scope of congressional power under Article I, presidential power under Article II, judicial power under Article III, and the meaning of the individual-rights guarantees of the First, Second, and Fourteenth Amendments. After decades of discussion and debate, however, public meaning originalists still have provided no clear account of how an imagined reasonable person could resolve, supposedly as a matter of

historical and linguistic fact, disputes and uncertainties among members of the Founding generation about what constitutional provisions meant.

In both academic debates and constitutional litigation, PMO has too often received a free pass on the conceptual question of whether constitutional provisions actually have original public meanings, existing as a matter of fact, that extend beyond minimal and noncontroversial meanings and non-meanings. Those seeking to win constitutional cases in the Supreme Court assemble whatever historical evidence aligns with their position. Nonoriginalists most frequently argue that the original public meaning of constitutional provisions—assuming that such an entity exists—should not always control the outcome of modern cases. As the Supreme Court passes increasingly into the control of self-identified originalist Justices, however, it is past time for a conceptual reckoning. Claims that PMO can provide uniquely, factually correct answers to disputed constitutional issues are mostly chimerical. When members of the Founding generation disagreed, the best explanation will typically not be that some misunderstood the clear linguistic meaning of words or phrases, or that the beliefs of some were factually unreasonable, but that a disputed constitutional provision was relevantly vague or underdeterminate.

The difficulty for PMO is not that there are no historical and linguistic facts bearing on constitutional meaning, but that courts must construct legal meanings out of an often diverse welter of facts. If originalist Justices tell us that they have found uniquely correct factual meanings that provide determinate resolutions to constitutional disputes, we should view their claims with skepticism. The only original public meanings that existed as a matter of purely historical and linguistic fact are minimally necessary and noncontroversial meanings. When we absorb this truth, the great challenge—for originalists and nonoriginalists alike—is to understand and discipline the process by which courts appeal to historical facts to construct constitutional meanings as a matter of law.