Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium

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Nearly all of us who participate in constitutional argument in subjective good faith share a second-order methodology of constitutional decision-making—that is, an approach to working out both our first-order theories of constitutional interpretation and our judgments about appropriate results in particular cases. That shared method involves a search for reflective equilibrium between our prior or intuitive methodological assumptions (which sometimes may be vague or indeterminate) and our intuitive judgments concerning the appropriate results in particular cases. If our ex ante methodological theories are underdeterminate, reflection on new cases' facts will lead us to specify our premises more fully. Moreover, in instances of initial conflict between judgments of desirable case-specific outcomes and previously adopted methodological commitments, the Reflective Equilibrium Hypothesis advanced in this Essay holds that adjustment can occur on either end. If we argue about constitutional issues in good faith, normally we will adapt our judgments concerning correct results to methodological premises that we have previously endorsed. But sometimes reflection on new cases will provoke an elaboration, qualification, or rethinking of methodological commitments. After advancing the Reflective Equilibrium Hypothesis as an explanatory theory of the main currents of constitutional argumentation, this Essay offers a brief normative defense.

INTRODUCTION

Nearly all of us who participate in constitutional arguments in good faith share a second-order methodology of constitutional decision-making. We obviously do not share the same first-order methodology. There are famous disagreements among originalists, living constitutionalists, and advocates of moral readings, as well as many others. But beneath the roiling surface of contestation and mutual recrimination, we mostly share a second-order approach to working out our first-order methodological (and, simultaneously, our first-order substantive) positions. This shared method involves a search for reflective equilibrium:[1] just as we

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[1] See John Rawls, *A Theory of Justice* 20–21, 48–53 (Belknap 1971).

evaluate our methodological premises partly in light of the results that they yield, we simultaneously assess our intuitive judgments concerning the appropriate results in particular cases in light of our revisable methodological commitments. We have case-specific intuitions in part because we know that constitutional law is interconnected with substantive morality in a variety of complex ways.[2] Yet most of us also believe that constitutional law has a partial autonomy, grounded in respect for prior controlling authorities and in methodological integrity in determining what prior authorities have established. In instances of initial conflict between judgments of desirable case-specific outcomes and previously adopted methodological stances, the Reflective Equilibrium Hypothesis that I advance in this Essay—which shares important commonalities with a thesis developed by Professor Mitchell Berman[3]—holds that adjustment can occur on either end.[4]

In advancing the Reflective Equilibrium Hypothesis that participants in normative constitutional discourse share a second-order methodology of pursuing reflective equilibrium between methodological principles and judgments involving desirable results in individual cases, my methodology is one of inference to the best, most charitable explanation of familiar processes of argument and decision-making. In so asserting, I use the term "best" in a partly normative sense that encompasses a version of the principle of interpretive charity.[5] For reasons that I explain in Part III, rejection of the Reflective Equilibrium Hypothesis

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2 Professor Larry Alexander argues that the idea of "legal intuitions" makes sense, if at all, only "in cases where the original meaning is unclear." Larry Alexander, *Telepathic Law*, 27 Const Commen 139, 143–45, 149 (2010). As I argue, however, even modestly well-informed observers can have legal intuitions that legal meaning is unclear, as well as intuitions concerning how legal indeterminacies should be resolved.

3 See generally Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* 246 (Cambridge 2011). There are significant differences as well as affinities. Whereas Berman develops his thesis largely as an argument against originalism, I explain why even originalists likely employ a reflective equilibrium methodology in developing the details of their theories. My hypothesis is also more developed than Berman's. See id at 261 (acknowledging that he could not "advance the project very far").

4 The second-order theory that I advance in this Essay is consistent with, but does not depend on, the first-order theory advanced in my previous work. That theory makes a different use of the notion of reflective equilibrium. See generally Richard H. Fallon Jr, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189 (1987).

5 The principle of charity calls for interpretations of another's words or texts that, in situations of possible doubt, "maximize the truth or rationality in the subject's sayings." Simon Blackburn, *The Oxford Dictionary of Philosophy* 59 (Oxford 2d ed 2005).

would leave no strongly plausible alternative to the Cynical Conclusion—as I call it—that much if not most methodological argumentation in constitutional law is a sham.

Many have embraced the Cynical Conclusion as an account of constitutional decision-making by the justices of the Supreme Court. As a frequent participant in constitutional arguments, however, I would say that I almost invariably attempt to argue in good faith and generally perceive my conversational partners as proceeding on the same basis—even though I have no doubt that ideology plays a large role in shaping the sometimes quite divergent conclusions that we reach.[6] If others reason as I do, I would like to believe that we do so not because we are cynical manipulators, but because we experience new cases as prodding us to enrich our understandings of constitutional law and practice. In order to do so, the Reflective Equilibrium Hypothesis maintains, we think simultaneously about appropriate methodology and about normatively attractive results in individual cases.

The Reflective Equilibrium Hypothesis should provoke a revision in widely shared thinking about principled judicial decision-making. The proponents of competing interpretive methodologies typically cast their arguments in partly normative terms. After someone has chosen an interpretive methodology, however, most believe that rule-of-law principles forbid any deviation. My analysis suggests that commitments to interpretive methodologies are and ought to be revisable, but that, in order to be normatively defensible, revisions should be open and principled. We might think of the ideal that I elaborate and defend as one of arguing about the Constitution in good faith across the spans of time and experience.

I. A PRACTICE-BASED DESCRIPTION OF THE JUSTICES' ROLE

Most debate about interpretive methodology involves the functions and obligations of ultimate decision-makers and, in particular, of Supreme Court justices. If we view constitutional theories as prescribing the methodological commitments to which the justices should adhere, the choice of a methodology—and the related development of a second-order methodology for choosing a methodology—will necessarily reflect the Court's role in the American constitutional order. I therefore begin with a bare-

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[6] For an illuminating exploration of the antithetical notion of arguing in bad faith, see generally David E. Pozen, *Constitutional Bad Faith*, 129 Harv L Rev 885 (2016).

bones description of the powers that the justices exercise, the constraints to which they are subject, and the legal and moral norms that apply to them. It would obviously be impossible to give a deep description of the justices' role without taking stands on matters of significant substantive and methodological disagreement. I believe, however, that enough common ground exists to permit a shallow description of the justices' central functions that captures important areas of agreement while leaving open—and thus suggesting the possibility of the utility of a first-order interpretive methodology in resolving—remaining disagreements.

A. Core Elements of Legal Reasoning and Argument in Constitutional and Statutory Cases

For purposes of seeking agreement on a thin description of the justices' function in resolving constitutional and statutory cases, three core elements stand out.

First, the justices need to resolve cases within, or as dictated by, the constitutive norms of the American legal system. Despite disagreement about many things, all participants in legal debates engage in the same "practice" in the sense in which philosophers use that term: they join in an activity constituted by shared understandings of what they individually and jointly are doing.[7] For example, all accept the premise that the Supreme Court cannot offer general dictates in the way that Congress can, but can only decide cases and controversies.[8] American legal practice also includes what Professors Henry Hart and Albert Sacks called the principle of institutional settlement, which "expresses the judgment that decisions which are the duly arrived at result of duly established procedures" by institutions recognized as having legitimate authority "ought to be accepted as binding upon the whole society unless and until they are duly changed."[9]

Second, American legal practice is text centered, focused on determining the correct resolution of legal issues in light of the meaning of authoritative texts, including the Constitution. The

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[7] See Richard H. Fallon Jr, *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 NC L Rev 1107, 1118–21 (2008) (discussing the concept of a shared practice and citing sources).

[8] See, for example, Jonathan R. Siegel, *A Theory of Justiciability*, 86 Tex L Rev 73, 76–77 (2007).

[9] Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds).

preoccupation with the meaning of texts does not imply that extralegal norms of language usage invariably determine legal meanings. Nevertheless, participants in legal practice understand themselves as engaged in efforts to identify the meaning of preexisting authorities.[10]

Third, nearly everyone agrees, and everyone ought to agree, that moral and practical judgments play a role in constitutional adjudication.[11] Significantly, moreover, moral or practical judgment functions on two levels. One involves the second-order selection of a theory or methodology, the other the first-order resolution of substantive, case-by-case issues that both settled norms of practice and a justice's methodological theory leave open.

The role of moral reasoning is most obviously evident in the selection of an interpretive methodology—for example, originalism or some version of nonoriginalism. By a methodology, I mean a set of standards—whether articulated or tacit—for resolving legal issues that the constitutive norms of the American legal system leave underdetermined. To count as a theory in this sense, the standards from which a participant seeks guidance need not themselves be wholly determinate, nor need they reflect any single, central organizing principle in the way that originalism and textualism, for example, do. It would also count as a theory for someone to embrace an eclectic approach, pursuant to which the justices should sometimes adhere to the original meaning of constitutional language, but should sometimes permit constitutional doctrine to pursue a common law–like course of evolutionary development.[12]

Despite the capaciousness of my definition, there is an important limit on what can count as an interpretive methodology. If someone were to say, "My methodology is just to follow the law," I—likely in common with most others who engage seriously in constitutional debate—would recognize that claim as being mistaken, misleading, or possibly in bad faith.[13] It is untenable to

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10 See Richard H. Fallon Jr, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U Chi L Rev 1235, 1243–44 (2015).

11 See Fallon, 100 Harv L Rev at 1204–09, 1245–48 (cited in note 4).

12 See Fallon, 82 U Chi L Rev at 1305–07 (cited in note 10).

13 For an argument to the contrary, see Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv J L & Pub Pol 817, 885–87 (2015). This countervailing argument is plausible only if one understands applicable legal principles as counseling the exercise of relatively open-ended judgment in order to resolve indeterminacies. To characterize someone deciding on this basis as "just following the law" would be more misleading than descriptively informative.

maintain as a matter of sociological fact that recognized rules of practice uniquely determine the correctness of a single methodological approach that is adequately determinate to resolve all hard cases. Interpretive theories guide or determine decision-making in cases that are not controlled by clearly settled and unmistakably applicable rules of legal interpretation and that therefore require the exercise of normative judgment. Correspondingly, the embrace of an interpretive methodology reflects an element of normative judgment.[14]

It follows, moreover, that interpretive methodologies require normative defenses. The appropriate terms of defense are, of course, controversial. Nevertheless, any adequate defense must address issues of legitimate judicial authority.

The notion of legitimate authority is an elusive one, about which I say more later.[15] In the sense familiar among legal philosophers, an authority is a person, institution, or text whose dictates alter the normative situation or obligations of others.[16] In one famous formulation, the dictates of genuine authorities provide content-independent reasons for action that arise from the identity or status of the source of the dictates.[17] We thus might say that the Constitution provides public officials and judges with legal and possibly moral reasons to do as it prescribes, regardless of the officials' judgment concerning the wisdom of the Constitution's prescriptions. For now, suffice it to say that the defense of a methodological theory must show how it respects the legitimate authority of past, duly empowered decision-making institutions as required by the principle of institutional settlement. Moreover, insofar as past decision-makers have left a matter vague or unsettled, proponents of an interpretive theory must further show how their framework would better endow judicial decisions with legitimacy in the normative sense, or with a greater claim to be respected or obeyed, than would rival approaches.[18]

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14 See Fallon, 82 U Chi L Rev at 1298–1300 (cited in note 10); Richard H. Fallon Jr, *How to Choose a Constitutional Theory*, 87 Cal L Rev 535, 540 (1999).

15 See Part II.B.

16 For a discussion of authority, see generally H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 243 (Clarendon 1982). See also Frederick Schauer, *Authority and Authorities*, 94 Va L Rev 1931, 1935–40 (2008).

17 See generally Hart, *Commands and Authoritative Legal Reasons* (cited in note 16). See also Joseph Raz, *The Morality of Freedom* 35–37 (Clarendon 1986).

18 On normative as distinguished from sociological and other possible senses of "legitimacy," see Richard H. Fallon Jr, *Legitimacy and the Constitution*, 118 Harv L Rev 1787, 1794–1802 (2005).

In addition to justifying their choice of a methodology, the justices make, and indeed must make, case-specific moral, practical, and prudential judgments. Although interpretive methodologies aim to guide choice or judgment in disputed cases, there are many instances, as I argue below, in which the leading versions of well-known interpretive theories would not resolve a relevant vagueness or ambiguity.

B. Combining the Elements

Generalizing, we can say that the job of Supreme Court justices or other ultimate interpreters is to determine or establish the meaning of the Constitution and laws of the United States, within the sociologically grounded norms of legal practice, in light of the legally and linguistically eligible meanings of authoritative texts, arguably relevant history, and concerns about morally legitimate lawmaking authority and about morally and practically desirable outcomes. This formulation is obviously—and, as I said at the outset, I believe appropriately—very abstract. Although I mean it to be relatively noncontroversial, I should point out that I place great weight, going forward, on this formulation's recognition of the need for normative judgment on two levels, one involving the choice of methodology, the other involving the desirability of results in particular cases.

II. THE NATURE OF SECOND-ORDER OR METHODOLOGICAL CHOICE

Although my Reflective Equilibrium Hypothesis ultimately needs support from principles of interpretive charity and a reluctance to embrace the Cynical Conclusion that methodological argumentation in constitutional law is at best epiphenomenal, the Reflective Equilibrium Hypothesis draws much of its strength from its capacity to explain other phenomena, two of which I describe in this Part. The first involves the range of issues that a complete interpretive theory would need to address. Almost inevitably, cases spin up issues on which schematic, bare-bones versions of leading theories prove indeterminate. The second phenomenon involves the normative standards—traceable to the conditions of legitimate judicial authority—to which methodologies of constitutional adjudication are appropriately held. To say that interpretive methodologies are appropriately held to normative standards is not, of course, to say that every participant in constitutional practice tries to meet those standards. But if the

relevant standards have moral as well as legal foundations, nonadherence cannot efface them.

A. The Range of Choices That Justices Need to Make

Even a cursory examination will reveal the stunning complexity that interpretive methodologies would need to achieve in order to address all of the issues, and the attendant legitimacy questions, that participants in legal debates inescapably encounter. If ex ante methodological commitments are underdeterminate or otherwise fail to yield adequate answers, then good-faith participants in constitutional debate will need to enrich or revise their theories as they go along.

1. What sense of "meaning" matters most?

Although all agree that legal interpretation aims to ascertain the meaning of constitutional and statutory language, "meaning" can have many meanings. If so, a question arises concerning which sense of meaning is controlling in particular contexts.

Perhaps the paradigmatic sense of legal meaning is "contextual meaning as framed by shared presuppositions of speakers and listeners, including shared presuppositions about application and nonapplication."[19] This, roughly, is what textualists have in mind when they refer to the meaning of legal language "in context,"[20] and it approximates what many originalists contemplate when they refer to the original public meaning.[21] To take a plain example, Article II of the Constitution limits eligibility for the presidency to "natural born Citizen[s]."[22] Insofar as purely semantic or literal meaning is concerned, this language might exclude those whose mothers gave birth by cesarean section, those born abroad, or both. We have no difficulty, however, in concluding that it does not refer to those born by cesarean section, because we impute shared values or concerns (at least to this extent) to those who wrote the provision and to the audience to whom they addressed it.

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19 Fallon, 82 U Chi L Rev at 1244–48, 1259, 1273–74 (cited in note 10).

20 Randy E. Barnett, *Interpretation and Construction*, 34 Harv J L & Pub Pol 65, 66 (2011). See also John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 79–80 (2006).

21 See, for example, Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L Rev 479, 497–500 (2013).

22 US Const Art II, § 1.

As this example suggests, contextual meaning is not necessarily the same as semantic or literal meaning.[23] With that distinction in mind, we can consider the Equal Protection Clause, which provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[24] At the time of the Clause's ratification, almost no one understood it as prohibiting most forms of gender-based discrimination, and no state that mandated race discrimination in public education felt obliged to alter its practices. Nevertheless, we might say that the literal or semantic meaning of the Equal Protection Clause bars some forms of race- or gender-based discrimination: a woman or an African American who is denied a benefit or opportunity solely because of her gender or her race is denied the equal protection of the laws in a literal sense, regardless of what the generation that wrote and ratified the Fourteenth Amendment may have thought.

Modern constitutional prohibitions against gender and race discrimination could also rest on what I have called the "real conceptual meaning" of the Equal Protection Clause.[25] Some have argued that when the Constitution guarantees moral rights—such as the right to the equal protection of the laws or to the freedom of speech—it incorporates the moral meaning of those terms.[26]

"Intended meaning" is a different sense of meaning.[27] In Eleventh Amendment cases, for example, the Supreme Court has focused less on what the Amendment's language says than on the Framers' supposed intent or purpose of reestablishing a regime of state sovereign immunity.[28]

In other cases, participants in legal debate appeal to a conception of "reasonable meaning" as measured in light of a provision's central, ascribed purposes.[29] Constitutional law exhibits many examples of reliance on reasonable meanings, even if they are not always recognized as such. A paradigm case comes from the interpretation of otherwise-absolute constitutional language, such as that of the First Amendment's guarantees of freedom of

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23 On this distinction, see Fallon, 82 U Chi L Rev at 1245–48 (cited in note 10).

24 US Const Amend XIV, § 1.

25 Fallon, 82 U Chi L Rev at 1239, 1248 (cited in note 10).

26 See, for example, Michael Moore, *Moral Reality*, 1982 Wis L Rev 1061, 1154–56; Michael S. Moore, *Moral Reality Revisited*, 90 Mich L Rev 2424, 2480–83 (1992). See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 7–10 (Harvard 1996).

27 Fallon, 82 U Chi L Rev at 1239, 1249–50 (cited in note 10).

28 See, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 69–70 (1996).

29 See Fallon, 82 U Chi L Rev at 1239, 1250–51 (cited in note 10).

speech and of religion, as contemplating exceptions that are necessary to protect a compelling governmental interest.[30] Why do we assume that otherwise-applicable rights involving speech, religion, and equal protection of the laws must sometimes yield to compelling governmental interests? The answer lies in widely shared, and thus widely imputed, notions of reasonable meaning.

Another sense of meaning manifests itself in justices' reliance on precedent to reach conclusions that otherwise would be linguistically difficult to sustain. In such cases, we can say that whatever a provision's original meaning, it has acquired an interpreted or precedential meaning that can thereafter furnish its legal meaning.[31]

Among these various senses of meaning—on each of which the Supreme Court sometimes relies—a fully comprehensive constitutional theory might determine a uniquely correct solution for every case. But the leading theories, including originalism, more characteristically leave open which sense of meaning their methodology aspires to pick out.[32] There can be multiple candidates to supply a provision's "original" meaning. In addition, nearly all originalists and textualists accept that a provision's interpreted or precedential meaning should sometimes control,[33] often without specifying precisely when or why.

2. What role should precedent play?

Defining the proper role of precedent in constitutional interpretation constitutes a challenge not just for originalists, but also for practitioners of other methodologies. In the history of the Supreme Court, no justices have ever categorically denied the capacity of precedent to authorize or require results contrary to those that they otherwise would have reached in some cases.[34] At the same time, none has held that precedent should always prevail. Under these circumstances, justices whose theories accommodate precedent on a second-best basis must decide when to adhere to stare decisis and when to reject it. I do not know of anyone

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30 See, for example, *Brown v Entertainment Merchants Association*, 564 US 786, 799 (2011); *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 533 (1993).

31 See Fallon, 82 U Chi L Rev at 1239, 1251 (cited in note 10).

32 See id at 1288–97.

33 See, for example, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 413 (Thomson/West 2012); William Baude, *Is Originalism Our Law?*, 115 Colum L Rev 2349, 2358–61 (2015).

34 See Fallon, 86 NC L Rev at 1129–30 (cited in note 7).

who has advanced a plausible, rule-like formula for determining when initially erroneous constitutional precedent should and should not be overruled.

3. Which historical facts matter most?

History matters to constitutional interpretation in myriad and complex ways. The result is an unending set of challenges for originalists and nonoriginalists alike.[35] Originalists agree that Founding-era historical facts should frequently determine judicial decisions, but they disagree about, and sometimes seem to make inconsistent judgments concerning, which historical facts matter most—those bearing on the Framers' intent, the "original understanding" of constitutional language, or the Constitution's original public meaning.[36] Although it is less widely emphasized, nonoriginalists, too, frequently acknowledge the relevance to constitutional adjudication of Founding-era historical facts and occasionally seem to treat such facts as controlling outcomes. To cite just two examples, in *District of Columbia v Heller*,[37] involving the Second Amendment, and in a number of cases involving the Eleventh Amendment,[38] otherwise-nonoriginalist justices argued for their preferred interpretations mostly on originalist historical grounds. As a result, nonoriginalist theories confront the challenge of determining which Founding-era historical facts matter under which circumstances.

Moreover, although appeals to history occur nearly ubiquitously in constitutional law, many involve postoriginalist history. More specifically, they involve actions taken and judgments made by public officials, judges, and the American people in the time since constitutional language was ratified.[39] Somewhat simplistically, we can think of constitutional history as unfolding in a

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35 See generally Richard H. Fallon Jr, *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L Rev 1753 (2015); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L Rev 641 (2013).

36 See Fallon, 90 Notre Dame L Rev at 1762–72 (cited in note 35).

37 554 US 570, 640–62 (2008) (Stevens dissenting, joined by Souter, Ginsburg, and Breyer).

38 See, for example, *Alden v Maine*, 527 US 706, 760–808 (1999) (Souter dissenting, joined by Stevens, Ginsburg, and Breyer); *Central Virginia Community College v Katz*, 546 US 356, 364–69 (2006) (Stevens).

39 See, for example, *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2560 (2014) (stating that "the longstanding practice of the government can inform our determination of what the law is") (quotation marks and citation omitted). See also Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411, 417–32 (2012).

three-stage sequence. At Time One (T_1), the Constitution was written and ratified and acquired its original meaning or meanings. At Time Two (T_2), also in the past, judges and other officials interpreted or applied the Constitution. Now, in the present day or Time Three (T_3), we need to ask what bearing T_2 judgments and actions ought to have on constitutional adjudication.

This three-stage sequence gives rise to a multitude of issues about the pertinence of various kinds of historical facts under the principle of institutional settlement. Here are a few recurring and schematic examples:

- Following James Madison, nearly all agree that historical practice can sometimes "liquidate" vague constitutional language,[40] but subsidiary questions exist about when and how liquidation can occur and about whether a constitutional meaning, once liquidated, becomes unalterable thereafter.[41]
- Potentially distinct from the concept of liquidation—because it can be broader—is that of a "historical gloss" on constitutional meaning.[42] If the Constitution's meaning can be glossed by history, one would need to work out the details of the nature and limits of historical glossing.
- Appeals to the significance of tradition occur in the opinions of originalist and nonoriginalist justices alike, sometimes apparently as an index of original public meanings, but sometimes also as an independently relevant consideration.[43] In either case, justices who make tradition-based arguments need accounts of how traditions are properly identified and interpreted and of when they control constitutional outcomes.
- A number of recent decisions have pointed to the novelty of statutes' design or purposes as a factor bearing on their

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[40] See Federalist 37 (Madison), in *The Federalist* 231, 236 (Wesleyan 1961) (Jacob E. Cooke, ed); Fallon, 90 Notre Dame L Rev at 1773–75 (cited in note 35).

[41] See Fallon, 90 Notre Dame L Rev at 1774–75 (cited in note 35); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U Chi L Rev 519, 527, 552–53 (2003).

[42] Bradley and Morrison, 126 Harv L Rev at 417–24 (cited in note 39).

[43] See James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and against Originalisms* 5, 44 (Oxford 2015); Fallon, 90 Notre Dame L Rev at 1781–82 (cited in note 35).

constitutionality.[44] Such decisions raise questions about which kinds of novelty function as markers of constitutional dubiety, and why, under which circumstances.

- Insofar as the justices accept that judicial precedents sometimes hold authoritative significance, they must resolve, and thus need methodologies for resolving, such subsidiary questions as how to identify what a precedent originally meant[45] and when subsequent developments have shown a precedent to be unworthy of further adherence.[46]

4. Is there a distinction between meaning and construction or implementation, and if so, what norms govern proper construction or implementation?

Increasingly, both originalist and nonoriginalist legal theorists have distinguished between constitutional meaning, on the one hand, and constitutional construction or implementation, on the other hand.[47] The distinction reflects the premise that the meaning or communicative content of constitutional or statutory provisions—as of utterances in a variety of nonlegal settings—may frequently be vague, ambiguous, or otherwise indeterminate. If so, judges and justices must give legal language a determinacy that it otherwise lacks. And the justices' function in doing so, on this view, differs from the initial task of discovering a provision's meaning. Examples of constitutional construction or implementation might include the strict judicial scrutiny formulation,[48] the "actual malice" test of *New York Times Co v Sullivan*,[49] and the due process balancing formula of *Mathews v Eldridge*.[50] Whatever difficulties may arise in attempting to draw lines between interpretation and implementation, designing tests such as these requires the justices to play a different role from that of identifying

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44 See, for example, *Virginia Office for Protection and Advocacy v Stewart*, 563 US 247, 260 (2011) ("Lack of historical precedent can indicate a constitutional infirmity.").

45 See Fallon, 90 Notre Dame L Rev at 1789–91 (cited in note 35).

46 See id at 1788–89.

47 See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 120–31 (Princeton rev ed 2014) (providing an originalist perspective); Richard H. Fallon Jr, *Implementing the Constitution* 37–44 (Harvard 2001) (providing a nonoriginalist perspective); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 1–19 (Harvard 1999).

48 For a discussion of the historical origins of the strict scrutiny formula, see Richard H. Fallon Jr, *Strict Judicial Scrutiny*, 54 UCLA L Rev 1267, 1273–85 (2007).

49 376 US 254, 279–83 (1964).

50 424 US 319, 332–35 (1976).

what constitutional language or the past practices of Congress and the president have established. So far, however, academic constitutional theory has had little to say about how the justices should perform the function of constitutional construction or implementation.

5. The practical limits of ex ante constitutional theorizing.

The central point of my unfolding account of the diversity and complexity of the issues that arise in constitutional adjudication should now be incontrovertible: the justices routinely confront a flow of issues that far outstrips the resolving power of any generic version of the most familiarly debated constitutional theories.

B. Issues of Legitimate Authority

When gaps in previously articulated interpretive methodologies manifest themselves, the participants in constitutional debate could decide contested cases by simply choosing whatever result seems normatively most attractive on the facts before them. But empirical theories that portray participants in constitutional argument as simply asserting their normative preferences whenever their preformulated methodological theories run out would depict them as eliding, in a substantial set of cases, the concerns that motivate the embrace of methodological commitments in the first place. As noted above, those concerns involve issues of legitimate judicial authority.

Insofar as law and official action are concerned, questions involving morally legitimate authority apply most cogently to legal systems as a whole.[51] If the American legal system is legitimate, then officials may have good reasons to adhere to its dictates, even when they believe those dictates misguided.[52] Nevertheless, there is a derivative sense in which we can ask about the legitimate authority of courts to decide cases in particular ways.

Whenever and however courts decide cases, they hold themselves out as legitimate normative authorities in a double sense. First, pursuant to the principle of institutional settlement,[53] they claim authority to make binding decisions concerning what past

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[51] See Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 Rev Const Stud 101, 105–07 (2003).

[52] For a discussion of the Constitution's legitimacy, see Fallon, 118 Harv L Rev at 1802–13 (cited in note 18).

[53] See text accompanying note 9.

normative authorities (such as those who wrote and ratified the Constitution) have established. Second, the Supreme Court claims legitimate authority to resolve prior legal indeterminacy and, for all practical purposes, to establish law for the future.[54]

Because the Supreme Court must both determine and enforce the dictates of past authorities and, in cases of relevant indeterminacy, establish law for the future, constitutional debate and interpretation are, inevitably, simultaneously backward-looking and forward-looking.[55] On the one hand, the justices must respect the principle of institutional settlement. On the other hand, authorities such as the Constitution are not self-interpreting. They may be vague or ambiguous in relevant ways, and in some cases they may conflict with one another.[56] Especially in cases of doubt, the justices, looking to the future, must shape their decisions in light of the ultimate foundation of all claims of normative authority—whether those of the Founding generation, the legislature, or the courts—in the capacity of those who assert authority to decide the issues in question either wisely, procedurally fairly, or both.[57]

In principle, it may be imaginable that the backward- and forward-looking aspects of issues of legitimate authority, as they present themselves in constitutional disputes, could be held separate. One might say that judges appropriately exercise forward-looking normative judgment, on terms that then would require moral justification, only when the law as established by past authorities is genuinely indeterminate. It is highly doubtful, however, that most human beings could maintain this rigid distinction as a psychological matter when they must decide how past authorities should be interpreted under circumstances in which some possible interpretations would have attractive and others baleful consequences. As illustrated by the range of choices that justices need to make in adjudicating cases, it also seems plain that issues of arguable indeterminacy present themselves with considerable frequency in constitutional debate.

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54 See, for example, *Cooper v Aaron*, 358 US 1, 18 (1958); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 854–69 (1992).

55 See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in Larry Alexander, ed, *Constitutionalism: Philosophical Foundations* 152, 176–80 (Cambridge 1998).

56 See Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* 105–07 (Oxford 2013).

57 Roughly speaking, the two classic grounds for claims of legitimate authority involve substantive wisdom or insight, on the one hand, or fairness in procedures or in the allocation of power—as is asserted, for example, in attempts to ground legitimacy in democracy or the will of the people—on the other hand. See, for example, id at 29–31.

In any event, every question of constitutional interpretation subsumes the question: How ought a decision-making authority decide such that its decision will possess normative legitimacy and, thus, deserve respect and adherence? An interpretive theory or methodology must observe a number of constraints in order to possess legitimacy-conferring capacity. For example, it must employ a reasonably reliable method for ascertaining relevant facts and must appeal only to reasonable (even if not universally accepted) normative premises. A further consideration involves reasonable consistency or good faith in the application of a decision-maker's interpretive premises from one case to the next. A failure of procedural regularity in the application of interpretive premises, or an acknowledgment that reliance on such premises is wholly opportunistic, would deeply compromise any ultimate decision-maker's claim to be exercising legitimate authority—especially in determining what past authorities have established—as distinguished from raw political power.[58]

C. The Inescapability of Theoretical Commitments

Although I have emphasized the virtual impossibility of developing an ex ante constitutional theory adequate to resolve the full flood of questions that future cases will bring to the fore, methodological commitments are unavoidable. To participate in constitutional disputes, one must make arguments. And those arguments frequently raise, and reciprocally must respond to, questions about legitimate judicial authority to which methodological claims and premises offer answers. To see the force of this fundamental but intuitively obvious point, consider the case of Justice Stephen Breyer, who often has expressed wariness of unyielding doctrinal and methodological commitments.[59] Although disavowing the embrace of any overarching and determinate theory, Breyer inevitably makes methodological commitments through the positions that he adopts in the decision of cases. In *National Labor Relations Board v Noel Canning*,[60] for example, he acknowledged that a clear original meaning—if there were one—would authoritatively determine the scope of presidential power under

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58 See generally Fallon, 87 Cal L Rev 535 (cited in note 14).

59 See, for example, *Van Orden v Perry*, 545 US 677, 700 (2005) (Breyer concurring in the judgment) ("While the Court's prior tests provide useful guideposts . . . no exact formula can dictate a resolution to [ ] fact-intensive cases [under the Establishment Clause].").

60 134 S Ct 2550 (2014).

the Recess Appointments Clause in the absence of an on point judicial precedent.[61] One would expect him to honor that commitment, and indeed to generalize from it, in subsequent cases.

III. AN INFERENCE TO THE REFLECTIVE EQUILIBRIUM HYPOTHESIS AS A SHARED SECOND-ORDER METHODOLOGY OF CONSTITUTIONAL ARGUMENT AND DECISION

Against the background of Parts I and II, I can now elaborate and defend the Reflective Equilibrium Hypothesis that good-faith participants in constitutional debate share a second-order decision-making methodology. As stated in the Introduction, the Reflective Equilibrium Hypothesis asserts that those of us who care about legal and normative legitimacy in both its backward- and forward-looking aspects, and who embrace methodological premises in the course of arguing about particular cases, attempt to refine our interpretive theories on an ongoing basis as new cases present fresh challenges. More specifically, the Reflective Equilibrium Hypothesis postulates that we employ a reflective equilibrium methodology in which we consider the defensibility of our methodological commitments and our provisional judgments concerning the normative desirability of particular outcomes in light of one another.

For the most part, new cases may not present occasions for substantial rethinking. Among other things, I assume that most of us have a relatively strong presumption in favor of adhering to the methodological premises that we have endorsed in the past. Sometimes, however, previously embraced premises may fail to resolve some of the potential issues that I sketched in Part II. If so, we need to refine our interpretive approaches or make new commitments. And sometimes new cases may provoke a rethinking of previously accepted methodological premises. These claims, I should emphasize, hold as much for originalists as for non-originalists, for no off-the-rack originalist theory of which I am aware comes remotely close to resolving all of the questions that Part II identified. For example, it is easy to imagine an originalist refining her theory on a case-by-case basis to specify: the circumstances, if any, under which the literal or semantic meaning of a constitutional provision should count as its relevant original meaning, despite evidence of a different or narrower original contextual meaning; when, if ever, precedential or interpreted meaning, or

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[61] Id at 2564–65 (Breyer).

evidence of a historical tradition, should prevail over contrary evidence of original contextual meaning; when original meaning is sufficiently vague or indeterminate for historical liquidations or glosses to possess controlling authority; and whether, when, and, if so, how courts should go about constitutional construction or implementation in cases involving vague original meaning.

Descriptively, the Reflective Equilibrium Hypothesis makes sense of a variety of crucial data points that emerged in Parts I and II, including all of the following:

- Interpreters' normative values exert a significant influence on their constitutional judgments. To insist otherwise is to deny reality. The Reflective Equilibrium Hypothesis responds to this phenomenon by postulating that justices' normative values influence not only their choice of interpretive theory, but also their case-by-case specifications or revisions of their theories.

- For those who engage in constitutional argument, the embrace of theoretical or methodological premises occurs, like it or not. Participants in constitutional argument necessarily take positions about which arguments are good and which are bad. In doing so, they presuppose the validity or invalidity of theories or methodologies. The Reflective Equilibrium Hypothesis provides a charitable explanation of how asserted premises accrue over time and relate to one another.

- Constitutional practice routinely generates issues that leading constitutional theories fail to resolve and, what is more, that no human theory designer could plausibly have anticipated. As a result, the emergence of unforeseen categories of cases can almost self-evidently put strain on and provoke reconsideration of previously articulated methodological premises. The Reflective Equilibrium Hypothesis is, in many ways, grounded in this empirical observation.

- For reasons involving the legitimacy of judicial authority, constitutional decision-making appropriately has a forward-looking aspect, concerned with the establishment of just rules for the future, as well as a more widely recognized backward-looking aspect, rooted in an obligation to respect the legitimate authority of past decision-makers to lay down rules binding on the future. Both of

> these kinds of legitimacy-based concerns bear on assessments of appropriate outcomes in many contestable cases and also on evolving judgments with respect to soundly defensible interpretive methodologies. The Reflective Equilibrium Hypothesis accommodates the resulting normative demands by recognizing the importance of legitimacy at both the first- and second-order stages of judicial methodology.

Besides possessing impressive descriptive capacity, the Reflective Equilibrium Hypothesis offers a charitable explanation of the phenomena that support it. To begin with, the Reflective Equilibrium Hypothesis depicts participants in constitutional argument as adopting an approach that I believe to be eminently sensible. I see no reason to think that advance settlement of all methodological questions would always be better than case-by-case decision-making. Normative legitimacy claims are too complex and tangled for all of the issues that have arisen in the past and will arise in the future to permit sensible resolution on a once-and-for-all basis.

The Reflective Equilibrium Hypothesis also allows the possibility that those of us who engage in constitutional debate in what we experience subjectively as good faith genuinely do so. And it invites us to view our co-debaters as proceeding in similar good faith, even when they embrace methodological positions that initially surprise us in support of conclusions that they obviously find ideologically congenial.

In my view, the Reflective Equilibrium Hypothesis draws further strength from comparisons with two rival accounts of the role of methodological premises or theories in constitutional argument. The first imagines that most participants come to constitutional debates with fixed, reasonably determinate methodological positions and adhere to them no matter what. But this position is untenable in both its empirical and its normative dimensions. No one has a comprehensively determinate methodological theory. And once we acknowledge our incapacity to identify all relevant methodological and legitimacy-based challenges in advance, we should reimagine some of our commitments as open to rethinking when new issues reveal deficiencies in our prior reasoning.

Second, we should consider the Cynical Conclusion that methodological debate is entirely strategic and that substantive political preferences concerning outcomes in individual cases always dominate articulated methodological premises. Many have

advanced versions of the Cynical Conclusion to characterize the behavior of Supreme Court justices.[62] Perhaps the justices are a breed apart. But I think we may gain perspective—on both the justices and ourselves—if we provisionally lump together all who engage seriously in constitutional argumentation. If true, the Cynical Conclusion would unmask most or all of us as regularly arguing in bad faith. It would also unmask us as indifferent to the backward-looking aspect of legitimate judicial authority.

Insofar as we care about legitimate judicial authority—and I think many of us do—it would be disappointing to conclude that our arguments are more self-serving and sophistic than sincere. I think, moreover, that our outrage when others betray their methodological commitments reflects a deep-rooted belief that constitutional argument can, should, and frequently does proceed in good faith.

Having introduced two possible rivals to the Reflective Equilibrium Hypothesis,[63] I should briefly consider what might appear to be an additional candidate to explain the role of methodological argumentation in constitutional debate. What I call the Fainthearted Commitments Hypothesis holds that methodological arguments and prior methodological commitments matter in constitutional cases, but only when the practical stakes remain relatively low.[64] When the stakes grow large, and when a methodological theory would dictate results that a purported adherent deems substantively objectionable, nearly everyone, this hypothesis continues, will ignore or wriggle sophistically out of her commitments. Some might cite *Bush v Gore*[65] as evidence for the Fainthearted Commitments Hypothesis. Whether or not one agrees with that example, others will spring to nearly everyone's mind.

The Fainthearted Commitments Hypothesis seems to me both correct and important insofar as it maintains that many of us will adhere to our previously articulated methodological principles only up to a threshold, beyond which the strains of commitment become unbearable. But if we assume that most of us will

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62 See, for example, Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 Harv L Rev 31, 34, 39–41 (2005) (arguing that the Supreme Court is a "political organ" when deciding constitutional cases).

63 There are undoubtedly more.

64 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 862–64 (1989) (defending originalism but acknowledging that his commitment to originalism might prove "faint-hearted").

65 531 US 98 (2000) (per curiam).

normally adhere to our commitments, but recognize exceptions for extraordinary cases, we can also imagine that the process for determining the threshold above which commitments cease to hold involves a reflective equilibrium methodology. The Supreme Court's iconic decision in *Brown v Board of Education of Topeka*[66] furnishes a possible example. Some of the justices appear to have thought the invalidation of school segregation inconsistent with their normal methodological premises.[67] If so, their decisions to join the unanimous *Brown* majority might have reflected a conclusion—reached via a process of back and forth thinking aimed at achieving reflective equilibrium—that some of the methodological strictures that govern normal cases cease to bind in cases exhibiting sufficiently urgent moral stakes. Insofar as reasoning about exceptions to normally governing methodological commitments proceeds on a basis such as this, the Reflective Equilibrium Hypothesis could subsume the Fainthearted Commitments Hypothesis.

But an admitted difficulty attends this conclusion. Although I think it plausible that the best prescriptive constitutional theory might include methodological principles that apply only up to a consequentially specified threshold, the prospect of bad faith may again rear its head unless those who make only fainthearted commitments so acknowledge. Speaking normatively, I would endorse a principle of public disclosure in cases in which participants in constitutional argument believe that exceptional circumstances justify deviation from principles that they continue to endorse. I must acknowledge, however, that such a discipline may not be widely observed in practice.

In some cases of apparent inconsistency, a more innocent explanation may of course exist: in the course of case-by-case, casuistical argument, we may embrace methodological premises in some cases that we would reject in others without noticing the variations in our positions. If so, the test of our bona fides would come if the inconsistency caught our attention. In that case, if we really argue in the good faith that many of us think we do, we would need to make an adjustment somewhere in our overall

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66 347 US 483 (1954).

67 See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 295–308 (Oxford 2004) (discussing the evolving thinking of Justices Felix Frankfurter and Robert H. Jackson, who initially thought school segregation morally wrong but probably constitutionally permissible, but who ultimately joined the *Brown* majority in invalidating school segregation).

scheme of substantive and methodological beliefs. The Reflective Equilibrium Hypothesis posits that most of us who experience ourselves as arguing in good faith would do so.

I hasten to add that I do not claim to have proved the Reflective Equilibrium Hypothesis as an empirical matter—only to have shown that it offers an interpretation of the ideal of constitutional argumentation in good faith that is reasonably consistent with the observable facts of constitutional argument in many if not most of the contexts known to me. If the hypothesis fits constitutional argument in some contexts better than others, or if the evidence persuades some that the justices of the Supreme Court are indeed a breed apart—not honoring the obligations of argumentation in good faith to which many of us try to hold ourselves and our interlocutors—then so be it.

When speaking in a normative voice, I am less equivocal: I wholeheartedly endorse the second-order methodological approach that the Reflective Equilibrium Hypothesis models. In a nutshell, that approach couples good sense concerning the extent to which ex ante methodological commitments should control substantive outcomes in hard constitutional cases—especially those with large practical consequences—with a realistic understanding of what good faith in constitutional argument minimally requires. No matter how much else we may disagree about, we should agree that constitutional argument, which is transparently sensitive to substantive ideological judgment but also depends intrinsically on methodological premises, should proceed in good faith.

CONCLUSION

The Reflective Equilibrium Hypothesis—which holds that good-faith participants in constitutional debates test their methodological commitments against provisional judgments concerning the appropriate results in particular cases, and vice versa, through a back and forth search for reflective equilibrium—offers simultaneous responses to a number of puzzles and challenges. Emerging as an inference to the most normatively attractive explanation of a number of phenomena within our constitutional practice, the Reflective Equilibrium Hypothesis is at least a plausible alternative to the Cynical Conclusion that methodological argumentation is entirely strategic and manipulative. The Reflective Equilibrium Hypothesis also illuminates the simultaneously

backward- and forward-looking aspects of legitimate judicial authority, and it calls attention to the nearly pervasive indeterminacy of both actual and realistically imaginable first-order theories of constitutional interpretation. Perhaps most important, the Reflective Equilibrium Hypothesis offers a coherent and attractive reconstruction of the nature of constitutional decision-making in a practice in which methodological arguments and arguments about the normative desirability of particular outcomes often blend seamlessly.