Book Review

Overcoming the Constitution


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INTRODUCTION

Constitutional law is tough to get your hands around. The Constitution itself is short and sweet and can be read in a jiffy. However, if you want to know how the Constitution is interpreted and implemented in modern times you need to know so much more. As taught by most law professors, constitutional law consists of examining the Supreme Court’s constitutional opinions. The constitutional law that emerges from these opinions sometimes bears only the slightest resemblance to the Constitution itself. These opinions often pay a great deal of attention to other factors (such as precedent or value judgments), which the untutored might have thought irrelevant. In its darker moments, the Court seems to regard the Constitution as something that may easily be overcome by reference to these seemingly extraneous considerations, rather than as the supreme law of the land to be interpreted and implemented faithfully.

Implementing the Constitution’ is Professor Richard Fallon’s sophisticated, fair-minded, and engaging attempt to disabuse those who mistakenly believe that the written Constitution is the only legitimate source of our constitutional law. Fallon claims that descriptively and normatively, constitutional law is not just about reading the Constitution, discerning its meaning, and then applying that meaning to concrete situations. Instead, he argues that contemporary constitutional law more accurately consists of “implementing” the Constitution by considering various factors that do not emerge from the Constitution’s text (hence the book’s title). Fallon asserts that when we describe the constitutional law that emanates from the courts, we should not overlook the significance of seemingly “incorrect” precedent, entrenched historical practices, and other adjudicative norms such as the use of value judgments. Furthermore, Fallon notes that judges endeavor to render practical, easily administrable decisions that reflect the reasonable disagreements that exist in society and amongst the government’s branches about the Constitution’s meaning and how it ought to be

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2. Id. at 8.
Fallon also believes, as a normative matter, that contemporary constitutional jurisprudence is legitimate because the people have accepted and embraced a broader concept of the Constitution. People cherish the rights that the courts have teased out of the Constitution even though some of these rights seem to have only the faintest basis in the Constitution. A robust understanding of the freedom of speech, powerful rules against racial and sexual discrimination, and the controversial right to privacy all have arisen from an expansive notion of the proper sources of constitutional law. Such rights would not exist but for the mediation of seemingly extra-constitutional factors such as precedent and value judgments. If these rights were not enforced, there might not be a popular acceptance of our Constitution.

But once we admit that consideration of supposedly extra-constitutional factors is entirely legitimate in constitutional implementation, Fallon insists that we must revisit our narrow conception of the Constitution. When we narrowly describe our Constitution as just the "written Constitution," we misrepresent what one might call the "legitimate Constitution"—the Constitution that legitimately and actually reigns as the supreme law of the land. Instead, claims Fallon, our legitimate Constitution (both normatively and descriptively) encompasses not just the written Constitution familiar to most, but also the "unwritten constitution"—those additional factors mentioned above. I will call Fallon's conception of the legitimate Constitution the "Fallonian Constitution." It is the combination of the written Constitution's meaning and the unwritten constitution's various elements such as precedent, practices, and value judgments, that actually generate the constitutional law accepted by the people. To regard the written Constitution as the sum total of the legitimate Constitution is only slightly better than viewing the written Constitution's seven articles as the sum total of the legitimate Constitution.

After Part I recounts the basic details of Fallon's book, the rest of the Review makes four general points. Part II contends that Fallon must articulate a much more comprehensive account of what constitutes "acceptance" if that concept is to legitimate the unwritten constitution. Otherwise, we have very little reason to

3. Id. at 40.
4. Id at 121-22.
5. Id at 41. For purposes of this review, I will use the phrase "legitimate Constitution" to discuss the Constitution that actually is the supreme law of the land.
6. I follow Fallon's convention of capitalizing the word "constitution" in "written Constitution" but not capitalizing constitution in the "unwritten constitution." See id. at 8. Although Fallon believes that both are legitimate sources of constitutional law, the differences in capitalization perhaps reflect Fallon's recognition that the written Constitution has a firmer claim to legitimacy. See id. at 123.
7. Fallon never names the constitution that results from the unwritten constitution's mediation of the written Constitution. Because I intend to dispute Fallon's assertion that the Fallonian Constitution is the legitimate Constitution, I have decided to differentiate these two concepts by using different labels. If my critique of the Fallonian Constitution is unpersuasive, however, the Fallonian Constitution may well be the legitimate Constitution.
reject the sensible intuition that the legitimate Constitution consists of the written Constitution only. Part III briefly highlights some problems with the Fallonian Constitution. Specifically, it considers whether fidelity to both the written and the unwritten constitutions is possible, whether the Fallonian Constitution is desirable, and whether the Fallonian Constitution counts as a constitution at all (as Fallon describes the latter term). Part IV argues that Fallon’s criticisms of originalism are generally wrong-headed or unfair. Most of Fallon’s critique is better leveled against the written Constitution itself and not originalism as an interpretive methodology. Finally, Part V makes some brief comments meant to clear up common confusion about originalism as an interpretive theory.

I. A SUMMARY OF IMPLEMENTING THE CONSTITUTION

This Part conveys the essence of Professor Fallon’s book and is meant to be entirely descriptive. It begins by briefly reviewing Fallon’s description of what the Supreme Court does in practice. It then summarizes Fallon’s theory about the normative and descriptive correctness of the Fallonian Constitution. Finally, it recounts Fallon’s discussion of alternative constitutional theories.

A. THE DESCRIPTIVE CHAPTERS

Despite Fallon’s assertion that it is difficult to separate normative from positive theories in the realm of constitutional law, I believe that one can roughly classify the chapters of his book along such lines. Chapters Four, Five, and Six describe Supreme Court practices in implementing the Constitution. Chapter Four considers the Court’s role in “extraordinary” cases—cases in which the Court, rather than applying established doctrine, either articulates some new constitutional principle or establishes a new doctrinal framework. The chapter also reviews five types of arguments that the Court typically considers in extraordinary cases, discusses one of those arguments in detail, and reviews certain extraordinary cases: Brown v. Board of Education, Roe v. Wade, and some other cases.

8. Thus the reader should understand that, unless otherwise noted, any statements made in this Part are faithful attempts to describe Professor Fallon’s theories and assertions.
10. Id. at 56.
11. Id. at 45–46 (listing the following five arguments: “(1) arguments about the plain, necessary, or permissible meaning of the constitutional text; (2) historical arguments about the original intent, purpose, or understanding of constitutional language; (3) arguments of structure or theory that identify the purposes in light of which particular provisions of the Constitution would be most attractive or intelligible; (4) arguments about the meaning or relevance of previously decided cases or historically entrenched practices; and (5) value arguments instancing considerations of morality or policy”) (footnote omitted).
12. Fallon discusses the following value arguments: “ultimate ideals of constitutional justice,” “institutional concerns,” “costs to governmental interests,” “judicial manageability and enforceability,” “risks of error in the fog of uncertainty,” and “democratic acceptability in light of reasonable disagreement.” Id. at 45–55.
Wade, the right-to-die cases, and City of Boerne v. Flores. Chapter Five catalogues seven doctrinal tests that the Court employs in individual rights cases, speculates why the Court selects a particular test when deciding extraordinary cases, and then explains the Court's resumption of its historical role in policing the subject matter limits on federal power. Chapter Six addresses the concept of ordinary adjudication—those cases in which the Court applies settled doctrine without reexamining its wisdom. Although the chapter primarily describes how the Court relies upon stare decisis to avoid reexamining entrenched doctrine, Fallon also notes that it is hard to imagine how the Court could function if it had to reconsider the validity of existing doctrine in each case. Despite the strongly felt need to pursue the “first best” implementation of the Constitution—to reformulate doctrine that seems erroneous—there is more often a powerful practical need for a “second best” that allows settled practice to triumph.

Though these three chapters form a good portion of the book, my only comment about them is to agree with Professor Michael Dorf's blurb on the book's dust jacket. Professor Dorf lauds the book as “the best descriptive account of the Supreme Court's role in recent years.” If people wish to have a more solid grasp of what it is that the Court generally does, particularly in individual rights cases, I cannot think of a more accurate sketch than that offered in these three chapters.

Taken together, the book's other five chapters provide a normative justification for the Court's current practices and reasons to reject alternative constitutional theories. In the two sections that follow, I recap both Fallon's constitutional theory and his response to rival theories.

B. THE BASIC NORMATIVE THEORY

Fallon argues that rather than merely interpreting the written Constitution—engaging in a single-minded search for the Constitution's true meaning—the Supreme Court more accurately and more appropriately struggles to “implement” the Constitution. Indeed, to characterize what the Court does (or what it ought to do) in constitutional cases as just interpreting the Constitution is to exclude all the other considerations the Court properly takes into account. In constitutional cases, the Court does far more than interpret the Constitution and enforce it according to its meaning.

17. FALLON, supra note 1, at 77–79.
18. Id. at 81–95.
19. Id. at 97–101.
20. Id. at 102–03.
21. See id. at 102.
22. Id. at 102 (discussing “second best” strategy).
23. Id. at 5, 41.
On the other hand, “implementing” the Constitution more accurately connotes what the Court actually does. Implementing the Constitution encompasses collaboration and compromise amongst the Justices; Justices properly may subordinate or temper their views about the best reading of the Constitution to secure a majority opinion or to project a unified front.\textsuperscript{24} “Implementation” also suggests accommodation of the views of the other branches of government; for example, the Court occasionally will defer to the considered judgment of other branches because the Constitution is meant to be implemented by the other branches no less than the Court.\textsuperscript{25}

According to Fallon, implementation also intimates that what the Supreme Court does is highly practical. When formulating constitutional rules, formulas, and tests, the Court devises and implements pragmatic strategies for enforcing constitutional values.\textsuperscript{26} This “distinctively lawyers’ work” includes allocating responsibility between courts and other institutions of government.\textsuperscript{27} For instance, tests often reflect the Court’s judgment about an appropriate standard of judicial review of legislative or executive action. Appropriate standards of judicial review sometimes require doctrinal tests that fail to fully enforce underlying constitutional norms. At other times, the Court will adopt prophylactic rules that ensure overenforcement of ultimate constitutional values.\textsuperscript{28} Likewise, because implementation involves discerning what will work in practice, the Justices must consider the insights of psychology, sociology, history, and economics when implementing the Constitution.\textsuperscript{29}

Though implementation is grounded in practical realities, the Justices occasionally may implement “the best ‘moral reading’ of constitutional guarantees.”\textsuperscript{30} Fallon contends that \textit{Brown v. Board of Education}\textsuperscript{31} stands as the best example of the Court playing this role.\textsuperscript{32} Yet, the Justices need not always apply the moral reading of the Constitution (as they understand the best moral reading).\textsuperscript{33} In addition to sometimes compromising with other Justices\textsuperscript{34} and with the other governmental branches,\textsuperscript{35} the Justices must consider the democratic acceptability of implementing the best moral reading of a constitutional provision.\textsuperscript{36}

Fallon posits the existence of an “unwritten constitution” to explain why the Supreme Court may appropriately implement the Constitution in a manner not

\begin{itemize}
\item 24. \textit{Id.} at 37.
\item 25. \textit{Id.} at 37-38.
\item 26. \textit{Id.} at 5.
\item 27. \textit{Id.} at 5, 110.
\item 28. \textit{Id.} at 7; \textit{see also id.} at 111 n.2 (citing Joseph D. Grano, \textit{Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,} 80 Nw. U. L. Rev. 100 (1985)).
\item 29. \textit{Id.} at 8.
\item 30. \textit{Id.}
\item 31. 343 U.S. 483 (1954).
\item 32. \textit{FALLON, supra} note 1, at 8.
\item 33. \textit{Id.}
\item 34. \textit{Id.} at 34.
\item 35. \textit{Id.} at 35.
\item 36. \textit{Id.} at 51-52.
\end{itemize}
always consonant with the written Constitution's meaning (however understood). He believes the unwritten constitution consists of those additional factors typically relied upon in Supreme Court constitutional decisionmaking: precedent, settled practices, and other adjudicative norms. According to Fallon, the unwritten constitution’s factors do not preempt or supplant the written Constitution so much as supplement or mediate it.37 For instance, judicial precedent and entrenched practices enjoy at least limited constitutional authority because both may dictate results in constitutional cases different from the results that would be reached under the best interpretation of the written Constitution.38 Likewise, the Supreme Court properly may be “required to make practical, predictive, and sometimes tactical judgments” about the types of doctrinal rules to apply.39 Yet, in no case may the Supreme Court appropriately rely upon the unwritten constitution to trump or displace a provision of the written Constitution.40

Fallon appreciates that merely positing an unwritten constitution hardly legitimates the use of an unwritten constitution to decide cases.41 He rejects numerous possible reasons why the written Constitution and the unwritten constitution are legitimate sources of fundamental law.42 For instance, originalism cannot explain much of the modern constitutional cases that even originalists seem reluctant to discard.43 Nor can consent justify the Court’s practices because most people never explicitly or implicitly consented to the Court’s implementation.44 Fallon ultimately bases the legitimacy of the unwritten constitution on the same grounds that he believes legitimate the written Constitution. The Supreme Court’s practices of implementation—its mediation of the written Constitution by using the unwritten constitution—are legitimate because the people of the United States widely accept the resulting Fallonian Constitution.45 In other words, because the people accept the Fallonian Constitution they also accept “at least some elements” of the unwritten constitution as law.46

According to Fallon, even those who do not accept the Fallonian Constitution have a moral obligation to adhere to it. A “reasonably just” legal system deserves support “unless there is very good prospect of its swift and relatively non-violent replacement by more just institutions.”47 Because the Fallonian Constitution establishes the rule of law, protects individual rights, and safe-

37. Id. at 111.
38. Id. at 113–14.
39. Id. at 11; see also id. at 7 (using Miranda v. Arizona as an example of the judicial branch making such judgments).
40. Id. at 111.
41. Id. at 119.
42. Id. at 119–21.
43. Id. at 119.
44. Id. at 120–21.
45. Id. at 122.
46. Id.
47. Id. at 122.
guards political democracy, \textsuperscript{48} it is “reasonably just.”\textsuperscript{49} Therefore, we all have a moral duty to adhere to the Fallonian Constitution—both the written and unwritten constitutions.

Fallon anticipates and addresses several problems with his assertions. First, he admits that popular acceptance of the unwritten constitution is not as strong or as widespread as that of the written Constitution.\textsuperscript{50} Judges and lawyers may embrace the unwritten constitution and its norms more completely, while other citizens may only “passively acquiesc[e].”\textsuperscript{51} Notwithstanding these differences in acceptance levels, Fallon argues that the Supreme Court’s persistent use of the unwritten constitution would be impossible unless there were broad public acceptance, “at least in a minimal sense.”\textsuperscript{52} Second, Fallon acknowledges that there is uncertainty about which norms comprise the unwritten constitution.\textsuperscript{53} There is also a related problem of different individuals positing different unwritten constitutional norms. Yet, Fallon asserts that these “disagreements are not fatal to the idea of an unwritten constitution.”\textsuperscript{54} People also disagree about which norms are explicit or implicit in the written Constitution, though few doubt its legitimacy.\textsuperscript{55} Finally, he appreciates that the Supreme Court eschews open reliance on the unwritten constitution. He concedes that it is “an embarrassment to my central thesis that the Justices themselves might feel constrained to defend their work as interpretation, not implementation, and as directly licensed and mandated by the written Constitution.”\textsuperscript{56} But Fallon claims that this difference between what the Court says and does is a problem for every constitutional theory.\textsuperscript{57} Moreover, any claim that judicial decisionmaking should reflect only the Constitution’s meaning conflicts “with other, more central and entrenched elements of constitutional practice and must be rejected as error on that ground.”\textsuperscript{58}

Fallon ultimately argues that it is impossible to participate in conventional constitutional discourse without assuming the existence of the unwritten constitution.\textsuperscript{59} Without the Fallonian Constitution’s unwritten component, we cannot make sense of practice or persuade others to accept our views about how to resolve constitutional disputes.

\section*{C. OTHER CONSTITUTIONAL THEORIES CONSIDERED AND REJECTED}

Besides constructing a theory meant to defend the Supreme Court’s existing
jurisprudential practices, Fallon also assesses alternative constitutional theories. Indeed, he begins his book with chapters on originalism and Ronald Dworkin’s theory that the Supreme Court ought to act as a “forum-of-principle.” He discusses both theories because each has “achieved special prominence” and because he borrows from each. At the end of his book, he briefly addresses constitutional populism and an extreme version of pragmatism.

Chapter One takes on originalism, claiming that the method is flawed. According to Fallon, originalists claim that “for the Constitution to serve as law that binds,” the Constitution’s “meaning must be fixed” by the original understanding of the Constitution’s text. This means that “the Justices should not impose their own views of what would be desirable.” Rather, the Court should limit itself to identifying the Constitution’s original meaning and applying it. Nothing else matters.

Fallon begins this chapter with a candid concession. Most law students and, indeed, most people, “almost reflexively” believe that the appropriate role of the Supreme Court is to apply the Constitution’s original understanding. Yet, these instincts are wrong. According to Fallon, originalism suffers from four flaws that preclude it from being a viable constitutional theory: (1) originalism fails to describe the actual practices of the Supreme Court, (2) it particularly fails to account for the use of precedent, (3) it entrenches the chasm between the Founders’ world and our own, and (4) it yields unattractive results.

Fallon’s most forceful criticism of originalism is that it fails to describe the legitimate Constitution. By fixating on the original understandings of a document that is mostly two centuries old, originalists have failed to consider the possibility that they are construing a document that no longer is understood to be the sole element of the legitimate Constitution. As noted earlier, Fallon argues that the people accept the Fallonian Constitution. Indeed, contrary to the strong medicine that originalism prescribes, the Supreme Court openly considers factors other than original understanding. Precedent, historical practices,

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60. See id. at 13–25.
61. See id. at 26–36.
62. Id. at 3.
63. See, e.g., id. at 24, 134.
64. Id. at 127–32.
65. Id. at 132–33.
66. Fallon defines originalism as a theory holding that courts should decide constitutional cases based on the “original understanding’ of those who wrote and ratified [the] relevant language.” Id. at 13.
67. Id. at 3.
68. Id.
69. Id.
70. Id. at 13.
71. Id. at 13, 16.
72. Id. at 14–17.
73. Id. at 13–14.
74. Id. at 22.
75. Id. at 18–19.
value judgments, sociology, psychology, practicality, and public reaction regularly shape Supreme Court decisionmaking.

The use of precedent is particularly embarrassing for originalists because many originalists purport to make a pragmatic exception for precedent while rejecting other aspects of current practice. But if precedent may trump the original understanding on pragmatist grounds, why cannot other established adjudicative norms trump the original understanding as well? Moreover, to supplement originalism with the doctrine of precedent is to lose its most attractive feature: its identification of a single, overarching and binding principle.76

Fallon’s last two criticisms are related. He complains that the written Constitution is a relic of another era, the product of the hopes and fears of ancient generations.77 Necessarily, the Framers failed to anticipate many of the problems and opportunities facing modern society and government. To apply originalism to this anachronistic Constitution would handcuff us to out-of-date rules.78 Relatedly, because originalist readings tie us to outdated understandings, a consistently originalist jurisprudence would generate an unappealing constitutional law. Many aspects of our constitutional law such as desegregation, the right of privacy, and an expansive approach to the freedom of speech would be banished under purely originalist readings of the Constitution. Why, Fallon asks, should we adhere to originalism when it yields such unattractive results?79

Although Fallon also rejects Professor Ronald Dworkin’s characterization of the Supreme Court as the ultimate “forum of principle,”80 his discussion of Professor Dworkin’s theory is full of praise.81 According to Professor Dworkin, the Court must identify the Constitution’s meaning through a “highly moralized, philosophic inquiry.”82 For a constitutional principle to be true, it must be “philosophically the best explanation of the written Constitution and of the surrounding practice and judicial precedent.”83 Where originalists require the Justices to act as historians, Dworkin seeks political philosophers.84

Fallon concludes that Dworkin’s constitution of principle is too narrow and impractical. Fallon agrees that “we should equate the constitutional meaning with the norms, values, or principles that the Constitution embodies” and that

76. Cf. id. at 13–17.
77. See id. at 14 & n.6 (citing Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 410 (1995); Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1211 (1993)).
78. Id. at 13–14.
79. Id. at 19–24.
80. Id. at 26 (quoting and citing RONALD DWORFIN, A MATTER OF PRINCIPLE 69–71 (1985)).
81. See, e.g., id. at 4 (“Much of Dworkin’s account is remarkably helpful and insightful.”).
82. Id. at 4 (citing RONALD DWORFIN, FREEDOM’S LAW 2, 7–12 (1996)).
83. See id. at 27 (citing RONALD DWORFIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 50–54 (1996); RONALD DWORFIN, LAW’S EMPIRE 225 (1986)).
84. FALLON, supra note 1, at 4.
the “norms should be construed ... capacious.” Yet, Fallon claims, to single-mindedly focus on the search for meaning derived from principles obscures the Court's vital practical functions. As mentioned earlier, Justices must craft doctrines and tests that not only reflect constitutional meaning but also reflect the need to compromise among themselves, to be respectful of the inevitable disagreements in society, the need to gauge the reaction of the other branches, to create “clear, workable law,” and to anticipate popular reaction.

In sum, although the Supreme Court is a forum of principle, “it is not only a forum of principle.” It must make a variety of “practical, even tactical calculations” to implement the Constitution.

Fallon discusses constitutional populism and methodological pragmatism in his penultimate chapter. He rejects constitutional populism’s call to abolish judicial review because he believes that a “modestly robust judicial review has ... done more good than harm” and that this pattern will likely continue. His disagreement with methodological pragmatism only extends to its most extreme form, in which judges are counseled to do whatever they feel is best. Fallon agrees that judges should leaven philosophy (of whatever sort) with a measure of practicality. Yet, to urge judges to do whatever they wish would “offend both rule-of-law and democratic values” and “devalue the notion of a constitutional ‘right.’” For Fallon, this extreme form of pragmatism takes pragmatism too far.

II. Whose Constitution Should We Implement: Yours, Mine, or the Founders?

I have always assumed that the exclusive, legitimate source of federal constitutional law was the Constitution—that document found at the National

85. Id.
86. See id.
87. Id. at 5.
88. Fallon notes that “[t]he Justices ... do not enjoy an unlimited charter to do what is right by their moral lights; in assigning meaning to open-ended constitutional language, the Court must achieve results that are the least democratically acceptable over time, even if they are not immediately approved by popular majorities.” Id. at 5.
89. Id. at 36.
90. Id.
91. Fallon defines constitutional populism as the movement that wishes to see judicial review either play a smaller role or be abolished. Id. at 127.
92. Fallon defines methodological pragmatism as the “bracing” proposition that the Supreme Court should do “whatever would be best for the future” without regard to maintaining consistency with past decisions. Id. at 132.
93. Id. at 128 & n.7 (citing Mark Tushnet, Taking the Constitution Away from the Courts (1999)).
94. Id.
95. Id. at 132 n.24 (quoting and citing Richard A. Posner, Pragmatic Adjudication, 18 Cardozo L. Rev. 1, 4 (1996)).
96. Id. at 133.
97. Id.
Archives and typically reproduced at the beginning of constitutional law casebooks. I have also presumed that other putative sources of constitutional law that could not somehow be traced back to this Constitution were not appropriate fonts of constitutional law. Finally, I have always supposed that people generally consider this familiar document the legitimate Constitution (rather than some document in my drawer) because of who originally enacted it (the Founders), how it was ratified (by a super-majority), and subsequently how it was amended. I owe Fallon a debt of gratitude for making me question each of these assumptions.

Although benefiting from Fallon’s book, I find myself in no better position to prove (or disprove) these assumptions. Nor am I better able to discern what makes some document or concept a “constitution.” I understand how Fallon might identify a legitimate constitution, but I am not sure that I would subscribe to his identification process (public acceptance) as a means of recognizing a legitimate constitution. Fallon must explicate this theory of acceptance more fully if he wishes to persuade others to embrace it. Moreover, even assuming that his theory properly identifies a legitimate Constitution, there are practical problems with attempting to discern acceptance in the shadow of arguably misleading Supreme Court practices. Finally, even if we assume that the people accept some set of rules as the legitimate Constitution, it is far from clear that they accept the Fallonian Constitution.

A. WHAT CONSTITUTES CONSTITUTIONAL ACCEPTANCE?

Recall that Fallon asserts that the legitimate Constitution consists of its (familiar) written component and its (less familiar) unwritten component. According to Fallon, the Fallonian Constitution is the legitimate Constitution for three reasons: it is widely accepted, it is reasonably just, and there is a moral obligation to support existing systems that are reasonably just. Hence, two groups help identify the content of the legitimate Constitution—the first of which I will call “accepters” and the second “reluctant adherents.”

If a theory of constitutional acceptance is to be useful in circumstances of contested claims of acceptance, the theory must identify what constitutes acceptance at the individual and societal levels. Presumably, individual acceptance does not require the embrace of every provision found in a putative constitution. Such an exacting standard likely would preclude acceptance in most circumstances and hence something less strict seems appropriate. At the same time, something more than indifference is required, lest the legitimate Constitution be whatever the government can “get away with.” Equating indifference with

98. That is no fault of Fallon’s. Though he purports to reveal what our Constitution is today, he does not pretend to review or discuss other methods that might be used to discern the legitimate Constitution. His book is not about the various methods by which one could identify the fundamental constitutional law.

99. FALLON, supra note 1, at 122.
acceptance ensures that the legitimate Constitution will be entirely protean, for the government will be able to amend the Constitution quite a bit before the people will rise in revolution.

An acceptance threshold for society seems equally crucial. Would a forty-percent acceptance rate be enough? Might we require a majority (or even a supermajority) of accepters before we will prevail upon the scruples of the reluctant adherents? What ought we do if more than one constitution exceeds the agreed upon societal acceptance threshold?

The definition of individual acceptance and the setting of a societal acceptance threshold are hardly minor matters. They are absolutely necessary elements of any theory of constitutional acceptance in an era when people contest the contents of the legitimate Constitution. Unfortunately, Fallon supplies neither a definition of individual acceptance nor an acceptance threshold. Indeed, he fails to discuss such elements even though he acknowledges that there are conflicting claims about the content of the Constitution.\(^\text{100}\) Perhaps it is asking too much to require a more complete theory of constitutional acceptance. Yet, because one of Fallon's principal claims is that many people fundamentally misconceive the contents of the legitimate Constitution, he ought to have discussed in greater detail how we should identify as a means of discerning the contents of the legitimate Constitution.

Although Professor Fallon does not grapple with these questions, the written Constitution at least attempts to supply an acceptance threshold. The Constitution became law when nine popularly elected state conventions ratified it. Once ratified, the written Constitution presumes that all modifications of it will go through one of two procedures specified in Article V, both of which require variants of a supermajority. Compared to Professor Fallon's theory of acceptance, Articles V & VII seem positively prolix in comparison.

### B. THE CONTENTS OF THE LEGITIMATE CONSTITUTION

Assuming that we had some standards by which to gauge individual and societal acceptance, we would still have to discern the contents of the legitimate constitution? Fallon assumes that we accept the Fallonian Constitution, under which certain longstanding judicial practices (such as the use of precedent and value judgments) mediate the written Constitution. Others may say that the people do not care much about the judicial practices underlying cases. If the people accept anything it is the results of cases—the right to privacy, the right to expressive freedom, the right to be free from governmental discrimination. Furthermore, one might argue that people would reject the Fallonian Constitution precisely because that Constitution vests so much discretion in the Supreme Court that these rights, created by the judiciary, could be withdrawn by the

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100. *Id.* at 123 (admitting that there is "widespread disagreement" about elements of the unwritten Constitution).
A third faction may assert that the people accept what the Supreme Court purports to do but may not actually do in practice—namely, discerning and applying the Constitution's meaning in particular cases. Obviously, one could posit other constitutions and imagine proponents insisting that their favored constitution was popularly accepted.

In the absence of empirical data on societal acceptance, it is unclear why Fallon confidently declares that people accept the actual judicial practices of the Supreme Court, rather than what the Supreme Court purports to do (interpret and apply the written Constitution), or the actual results of the Supreme Court's case law. Common sense suggests that people accepting the Fallonian Constitution is the most implausible of the three claims. Few people read any Supreme Court opinions and even fewer can discern the actual basis of the Supreme Court's opinions.

On the other hand, the assertion that the people accept what the Supreme Court generally claims to be doing may have a leg up. After all, there must be some significant reason why the Court finds it necessary to assert that it applies the written Constitution's meaning when it often does nothing of the sort. The most plausible reason for the Court to profess one methodology, but apply another, is to cloak the Court's actual practices. And the most plausible reason to obscure the Court's actual practices is the fear that if people understood what actually goes on, that knowledge would jeopardize the Court's legitimacy and status. Arguably, people believe that the Court's authority comes solely from the written Constitution. They may expect that when the Court decides a constitutional case, the Court is actually interpreting the Constitution rather than making philosophical judgments and predictions about the future. Recognizing that its authority comes from the (mistaken) popular belief that the Court applies the written Constitution, the Court steadfastly claims that its decisions flow from the document rather than the personal views of the Justices. If the Justices, despite their life tenure and guaranteed salaries, feel the need to shade the truth about how they decide cases, they must be deeply concerned about the outcry that would result if the public knew the truth.

Nor should we ignore the possibility that a contemporary originalist, who subscribed to a theory of constitutional acceptance, may argue that the written Constitution is the legitimate Constitution because the people accept it. She may cite a generalized reverence for the wisdom of the Founders and a popular aversion to judicial lawmaking. She may emphasize Fallon's candid confession that most people "reflexively" subscribe to the view that the Constitution is whatever the Founders understood it to be. If the written Constitution "is widely perceived as having a claim to legitimacy that the unwritten constitution

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101. See infra Part VI.
102. As Fallon notes, the Court acts as if each of its decisions were dictated by the Constitution's meaning. See FALLON, supra note 1, at 124.
103. See id. at 13.
does not,"\textsuperscript{104} that is probably because people equate the meaning of the written Constitution with the original meaning ascribed to it by the Founders.

To his credit, Fallon acknowledges that it is "an embarrassment to [his] central thesis that the Justices themselves might feel constrained to defend their work as an interpretation" of the written Constitution.\textsuperscript{105} Yet it seems more than an embarrassment. We may have a massive, constitutionally determinative ruse that prevents meaningful acceptance.\textsuperscript{106} In that case, we simply cannot say what the legitimate Constitution is—at least if we adopt an acceptance framework for deciding what the legitimate Constitution is. Assuming that we accept something, what is it that we accept? Is it what the Supreme Court purports to do (apply the Constitution's meaning); what it actually does (mediate the written Constitution with the unwritten constitution); or the particular results of cases? Fallon offers no good reason for concluding that his particular conclusion is right.\textsuperscript{107}

Finally, we should not categorically rule out the possibility that there is no legitimate Constitution. Because there are so many constitutions competing to be the one legitimate Constitution, no single constitution might surpass the requisite societal acceptance threshold.\textsuperscript{108} Indeed, many people, when faced with the array of choices, may choose to be rationally indifferent and adopt the view that so long as the government does not go "too far," there is no reason to reach any judgments about the contents of the legitimate Constitution.\textsuperscript{109} As a result, many may ignore abstract discussions of constitutional legitimacy.

Defining acceptance at the individual and societal level is not easy. Neither is applying these tests to discern actual acceptance. These undertakings become even more difficult when there is an element of deception in the air. Though none of these thorny issues demonstrates that Fallon's theory of acceptance is

\textsuperscript{104} Id. at 123.
\textsuperscript{105} Id. at 124.
\textsuperscript{106} For example, what if one accepted the election results as proclaimed by the registrar because one assumed that the registrar tallied all the votes cast. In truth, it turns out that the registrar did not count any votes and instead used some other method of anointing the winner. Would one accept the chosen legislators? It is possible that one might accept such legislators simply because they roughly share one's own views about sound public policy. But one also might conclude that it does not matter whether one likes the resulting composition of the legislature or not. Society approved a particular mechanism for selecting legislators, and the selection process actually used did not conform to that mechanism. Hence, there ought to be a real count.
\textsuperscript{107} Recall that Fallon admits the people "reflexively" subscribe to an originalist methodology. See FALLON, supra note 1, at 13.
\textsuperscript{108} See Larry Alexander, Originalism, or Who is Fred, 19 HARV. J.L. & PUB. POL'Y 321, 326 n.17 (1995) (observing that we probably have a constitutional crisis because we probably do not agree on whose Constitution is authoritative). If Professor Alexander is correct, we may agree to muddle along, each faction content with making claims about what the Constitution is, happy with whatever political or judicial victories that vindicate their Constitution, eager to criticize departures, and dreaming of eventually securing some decisive victory for their preferred Constitution.
\textsuperscript{109} If people were generally rationally indifferent, one might conclude that the legitimate Constitution is the constitution that resulted from the last time there was a constitution that passed the acceptance threshold.
wrong, they do suggest that it is rather incomplete and that many would contest any more precise explication. This incompleteness and contestability matter because Fallon's central claim is that society accepts the unwritten constitution as part of the legitimate Constitution. If we cannot define acceptance and if multiple factions can make seemingly credible claims of acceptability for their preferred constitutions, it becomes impossible to gauge whether we agree with Fallon's claim that the legitimate Constitution is the Fallonian Constitution. Ultimately, Fallon has not given us sufficient reason to reject the natural assumption that the legitimate Constitution consists solely of the written Constitution.

III. PROBLEMS WITH THE FALLONIAN CONSTITUTION

To his credit, Fallon discusses the Fallonian Constitution's potential shortcomings. This Part considers some of these problems afflicting the Fallonian Constitution, including the fatuousness of the written Constitution; the problem of federal and state officials implementing the Fallonian Constitution when they have taken an oath to the written Constitution; the claim that the Fallonian Constitution leads to good results; and whether the Fallonian Constitution is a constitution at all (as Fallon defines the term).

A. FIDELITY TO THE WRITTEN CONSTITUTION

Fallon anticipates and rejects three possible "fidelity"-based objections to the unwritten constitution. The first objection is that one cannot simultaneously accept the written and unwritten constitutions because the written Constitution claims to be the "exclusive" source of constitutional law. The second objection is that when someone claims to subscribe to the Fallonian Constitution, the assertion is fatuous because we do not know the contestable elements of the Fallonian Constitution. The last objection is that "the influence of the unwritten constitution is so great as to make a mockery of the written Constitution."

Fallon has two primary responses to these objections. Regarding the first, Fallon asserts that one can subscribe to both the written and unwritten constitutions because such a person implicitly rejects the written Constitution's claim that it is the exclusive source of constitutional law. Fallon's more general answer is to deny that the unwritten constitution makes a mockery of the written Constitution because the written Constitution provides a "vital focal point," "structures conversation," and "fortifies" those who enforce constitutional values against popular objection. Moreover, "[i]t is also fair to say that the historically understood or linguistically natural meanings of the written Constitu-

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110. Fallon, supra note 1, at 125.
111. Id.
112. Id.
113. Id.
114. Id.
tion always prevail in the absence of what are experienced as particularly good reasons why they should not."115

Both of Fallon’s responses are unconvincing. Even if one could sensibly claim to accept a document as law without really accepting one of its most fundamental elements,116 not everyone can append a qualification to their acceptance of the written Constitution and still claim fidelity to the written Constitution, as Fallon suggests.117 In particular, those who have sworn allegiance to the written Constitution do not have the luxury of retroactively amending their oath of allegiance with exceptions and provisos. If this counted as fidelity to the written Constitution, there would be nothing to prevent any federal or state official from prospectively amending their oath to allow them to act on their personal preferences about what is good or just. Government officials who use something like the unwritten constitution to supplement or mediate the written Constitution simply are not exhibiting fidelity to the written Constitution. Consequently, such officials are not being faithful to their oath any more than they would be if they decided to supplement the written Constitution with the philosophy of Karl Marx or the wisdom of Adam Smith.

Fallon’s second response is problematic as well. After having spent many pages describing the influence and necessity of his unwritten constitution (and implicitly revealing the relative weaknesses of the written Constitution), he reverses course and maintains that the written Constitution still matters under the Fallonian Constitution.118 Fallon takes great pains to say that the unwritten constitution does not supplant the written one, but rather supplements and mediates it.119 Maybe he envisions some lines that one could not cross in implementing the Fallonian Constitution. It is doubtful, however, that any provision of the written Constitution could not be overcome through the application of the unwritten constitution’s factors. Under any theory of interpretation, constitutional provisions can be understood expansively or narrowly. If the Justices can add to this interpretive latitude the flexibility to over or under enforce the written Constitution’s meaning through value judgments or other considerations, what is left to limit their discretion? At the extreme, implementing the written Constitution as modified by the unwritten constitution allows the implementer to transcend the confines of the written Constitution.120 If Fallon

115. Id. at 125.
116. It seems problematic for someone who claims to accept the written Constitution to deny simultaneously that it is the exclusive source of constitutional law. It is problematic because one of the Constitution’s most important features is its implicit claim to be the only legitimate source of constitutional law. If one could claim to accept the written Constitution in this matter, one likewise could “accept” the written Constitution save for its amendments.
117. FALLO, supra note 1, at 125.
118. Id.
119. Id.
120. It would have been useful had Fallon provided an example of some provision of the Constitution that could not be “implemented” away. Then we could better test his claim against the powerful intuition that the unwritten constitution allows us to overcome the written Constitution.
believes that a precedent-authorizing constitution would necessarily fail to
"provide a solid foundation for any conclusion," that criticism surely applies
to the Fallonian Constitution, in which not only does precedent serve this role,
but so do value judgments and other factors too numerous to list.

To be sure, constitutional fidelity is not the only virtue. Think of all the
colonials who swore allegiance to the Crown only to declare their independence
later. The claim is not that the Fallonian Constitution is wrong because his
unwritten constitution overwhelms the written Constitution and therefore makes
fidelity to the written Constitution impossible. Fidelity to the written Constitu-
tion matters here because Fallon clearly believes that such fidelity is a crucial
aspect of what the people accept as the legitimate Constitution. However, given
his description of the unwritten constitution and the resulting judicial liberation,
the widespread acceptance of the written Constitution hardly seems to matter. If
the meaning of the written Constitution prevails on occasion over the use of
value judgments, the invocations of practicality, and other factors, it would
seem a fluke.122

B. THE NORMATIVE DESIRABILITY OF THE FALLONIAN CONSTITUTION

In part by proposing that the legitimate Constitution is the Fallonian Constitu-
tion, Fallon hopes to legitimate all those Supreme Court decisions that seem
contrary to, lack a firm grounding in, or go beyond the written Constitution. The
claim is that without the use of value judgments and other factors from the
unwritten constitution, many treasured cases (such as *Miranda v. Arizona*,
*New York Times v. Sullivan*, and *Brown v. Board of Education*) would have
been impossible.

Many would dispute the claim that, on balance, we have benefited from the
use of value judgments in constitutional adjudication. For many people, *Roe v.
Wade* itself negates any benefits accruing from the other Supreme Court
cases. After all, from the pro-life perspective, the state has constitutionalized
the right to take the life of another person. Some people on the left dislike the use of
value judgment as well. Personal distaste for racial discrimination arguably
underlay *Bolling v. Sharpe*. But now that systematic federal discrimination
against racial minorities is mostly a relic of the past, those on the left may wish

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121. *Fallon, supra* note 1, at 115.
122. This criticism is valid whether one views the written Constitution's meaning as fixed by the
original understanding of the Founders or whether one tries to uncover the modern meaning of the
Constitution (that is, as if it were written yesterday). In either case, the written Constitution’s meaning
may be overwhelmed.
127. 347 U.S. 497 (1954). Those who desire federal affirmative action programs that discriminate on
the basis of race may not like the conclusion in *Bolling* that the federal government is bound by the
same equal protection constraints as are the states.
that the federal government could make racial distinctions to permit more aggressive affirmative action. Others on the left question the protections afforded pornography under the guise of protecting the freedom of speech protections that exist principally because of the use of value judgments.  

Even if most agreed that the unwritten constitution has generated salutary results, the Fallonian Constitution hardly guarantees good consequences. The very same Fallonian Constitution that grants judges "enormous room to exercise judgment" and that "authorizes substantial creativity" to do good things also authorizes the courts to do bad things. One can easily imagine controversial and unwelcome decisions that might emanate from a court laboring under a Fallonian Constitution. The same unwritten constitution that enables the Court to overenforce the First Amendment and underenforce the Second Amendment also could be used to underenforce the former and overenforce the latter. Likewise, the Court might use the unwritten constitution to underenforce the protections for the accused and overenforce the property rights aspects of the Constitution, like the Takings and Contracts Clauses. Though many would welcome such developments, others would no doubt cry foul.

Moreover, consistent with the Fallonian Constitution, every creative opinion that Fallon celebrates could be overturned. The Fallonian Constitution does not purport to constitutionalize the right to privacy, broad freedom of speech, or expansion of the rights of the accused. Instead, the Fallonian Constitution constitutionalizes particular judicial practices and norms, ironically providing each of these substantive rights that Fallon and others cherish with no firm basis. To be sure, no constitution can prevent a subsequent interpreter from a too liberal or too stingy reading. Yet the Fallonian Constitution does not try to constrain the natural impulse of the implementer to trim here and add there. Instead, it legitimizes these tendencies, further encouraging the interpreter's own biases.

If the Fallonian Constitution has led to results that Fallon welcomes, these results have little to do with the faint-to-nonexistent restraints of the Fallonian Constitution itself. Instead, these results are largely a matter of sheer luck. Those who believe in a constitution that maximizes judicial discretion and minimizes constraints are like gamblers on a winning streak who fallaciously believe their system allows them to "beat the house." They may be winning now, but the law of averages suggests that their luck will eventually change.

C. THE CONSTITUTIONAL STATUS OF THE FALLONIAN CONSTITUTION

In his chapter on the legitimacy of the unwritten constitution, Fallon helpfully

128. See generally CATHERINE MCKINNON, ONLY WORDS (1993).
129. FALLON, supra note 1, at 132.
130. Id. at 133.
131. These examples purposefully construct a parade of horribles that frightens those who tend to celebrate the Court's opinions. Others may contemplate such results and see the wisdom of the Fallonian Constitution.
lays out the “standard elements” of any constitution. First, a constitution establishes supreme law that trumps other laws. Second, a constitution “defines the powers of the most central institutions.” Third, a constitution connotes stability in comparison with other legal norms. Although he spends some time showing how the unwritten constitution fits into the first two elements, he does not spend much time discussing the third.

Fallon’s own discussion of the elements of a constitution suggests a problem with his theory. In particular, it is hard to see how the Fallonian Constitution yields a stable constitution. Constitutional stability is often achieved by requiring a supermajority to amend the written Constitution, thus making it more difficult to change. Absent such amendments, the Constitution is not supposed to change. On one level, the Fallonian Constitution stays constant: one must always supplement the written Constitution with the unwritten constitution. But at a more meaningful level, the Fallonian Constitution grants such broad latitude to judges that the case law cannot be expected to be stable.

Is the Fallonian Constitution a constitution at all (as Fallon defines the term) if one day affirmative action is constitutional and the next day it is not? Or if one day there is a right to secure an abortion and the next day there is not? Remember that such changes would not be the result of some extraordinary process, but would flow from the Fallonian Constitution’s grant of enormous discretion to judges. Indeed, no constitutional theory can ever prevent such flip-flops. The Fallonian Constitution is singular only in its celebration and legitimization of that instability. Under a Fallonian Constitution, such mercurial changes may be upsetting, even “wrong” on some level, but they would hardly be unconstitutional. This suggests that the only thing the Fallonian Constitution constitutionalizes is the maximization of judicial discretion.

IV. FALLON’S MISDIRECTED CRITIQUE OF ORIGINALISM

Recall Fallon’s four criticisms of originalism. First, Fallon claims that originalism does not describe the legitimate Constitution. Second, it cannot account for the use of precedent in adjudication. Third, it does not reflect the current world. Fourth, it does not lead to desirable results. In my view, each criticism is unfair or wrong. At there core, these criticisms each reflect a dislike of the written Constitution bequeathed to us by the Framers. I think that Fallon finds such a constitution to be anachronistic, unappealing, and unacceptable. But this view of the written Constitution has little to say about originalism itself.

132. FALLON, supra note 1, at 111–26.
133. Id. at 113.
134. Id. (footnote omitted).
135. Id.
136. The doctrine of precedent, because it does not purport to prevent reconsideration of judicial doctrine, hardly acts as a real constraint on such backtracking.
137. See supra text accompanying notes 71–74.
A. ORIGINALISM’S FAILURE TO DESCRIBE ACTUAL PRACTICES

As Fallon notes, originalists do not pretend to describe what the Supreme Court actually does.\textsuperscript{138} Yet, he believes that one of originalism’s failings is its inability to describe.\textsuperscript{139} How can it be a failure of originalism that it does not do what its adherents do not claim that it does? We do not describe moral theories as defective because they fail to describe how people actually live their lives. Nor do we describe cars as defective because they cannot fly. Theories of interpretation are no different. They generally ought to be judged by what they purport to do and not what others would have them do.

Perhaps Fallon means to suggest that if a constitutional theory cannot describe current practices, it simply cannot be a valid normative constitutional theory.\textsuperscript{140} In other words, any valid normative constitutional theory must necessarily describe current practice as well as desired practice. But why should we straightjacket normative theories in this counterintuitive manner? A normative theory often seeks to enshrine an ideal that will never be realized in practice. Consider, for example, an abstract theory of justice that has no chance of ever being implemented in a wholesale manner: John Rawls’s arguments about the supposed desirability of rules we would generate from behind the veil of ignorance.\textsuperscript{141} Other times, a normative theory is meant to criticize existing practices. In this case, originalists often use the Framers’ original understanding of the written Constitution as a basis for criticizing Supreme Court doctrine.

Given that normative theories are not ordinarily thought of as descriptive and given that they are often meant to supply a basis for criticizing existing practices, Fallon’s need to conjoin the normative and the descriptive is mystifying.\textsuperscript{142}

If we are to require that any valid theory of constitutional interpretation describe current practices, there may be instances when we will be unable to discern what constitutional theory is valid. Sometimes the Court may appear to adopt some mode of interpretation, but instead applies some other mode entirely.\textsuperscript{143} For instance, suppose the people accept the Fallonian Constitution! Start with the written Constitution and allow mediation by precedent, practice, and

\textsuperscript{138} FALLON, supra note 1, at 24.
\textsuperscript{139} Indeed, he oddly speaks of originalism’s “descriptive pretensions” being embarrassed by entrenched, nonoriginalist precedent. Id. at 16. Originalism has no such pretensions, so its proponents should not be embarrassed by its supposed failure.
\textsuperscript{140} This may be what he means when he claims (a bit cryptically) that it is difficult to separate the normative from the positive in constitutional theory. Id. at 2.
\textsuperscript{141} JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).
\textsuperscript{142} Indeed, it is telling that when Fallon discusses constitutional populism, he does not just say that constitutional populism must be wrong because it cannot describe actual practices. Instead, he defends the reasonable justice of the Court’s jurisprudence as a reason for continuing judicial review. See FALLON, supra note 1, at 128. If he believes that any valid theory of interpretation must describe practices, however, it would have been sufficient to point out that constitutional populism must be wrong because it does not describe the actual practice of judicial review. But, of course, constitutional populism is correct or false as a normative matter independent of what the Court does.
\textsuperscript{143} For an example of this argument, see supra section II.B.
and other adjudicative norms. And suppose that the Supreme Court, sensing this acceptance, makes all the right noises about fealty to the Fallonian Constitution. In making their actual decisions, however, the Supreme Court applies some other methodology. Finally, assume the people are taken in by the Supreme Court’s misdirection. In this scenario, one would have good reason for concluding that the Fallonian Constitution is the legitimate Constitution, but one would be wrong, at least if any valid constitutional theory must describe actual practices. Unless we can see through the Supreme Court’s ruse and discern the actual basis for its decisionmaking, we will have no idea which is the valid constitutional theory because we will not know which one accurately describes what it is that the Supreme Court is doing.

More generally, if we allow only one entity to decide what the Constitution is and another to implement it, we necessarily create the conditions for a disconnect between positive and normative. For normative reasons, Fallon concludes that the people selected the Constitution through a process of acceptance. But as a matter of positive description, the Supreme Court may often act at a variance with the Constitution accepted by the people. The only way to collapse the normative and the positive is to put implementation in the hands of the Constitution-maker. Then there may be a perfect consonance between the normative and the positive. That would require that either the people implement the Constitution themselves or that the people designate the Supreme Court as the Constitution-maker.

Although most self-described originalists may not claim that their preferred Constitution actually describes current practices, originalism is capable of accurate description under two conditions. First, one must correctly identify the legitimate Constitution. Second, the Supreme Court must follow the legitimate Constitution without the use of any ruses that obscure departures from the legitimate Constitution. If both conditions are met, originalism describes the legitimate Constitution. For instance, if the legitimate Constitution is the Fallonian Constitution and an originalist correctly identifies it as such, then the originalist will apply the original understanding of the Fallonian Constitution to conclude that the written Constitution may be mediated or supplemented by the adjudicative factors that Fallon mentions.

Simply put, Fallon has confused the theory of originalism with the views of most current originalists about what the Constitution is. Most originalists happen to believe that the written Constitution as originally understood by the Founders is the legitimate Constitution. But originalism is a mode of interpretation and cannot tell us what is or is not the legitimate Constitution. That judgment must be made independent of originalism. If modern originalists are wrong about what constitutes the legitimate Constitution, that is where the problem lies, for they will reach conclusions that are almost certain to be wrong descriptively. For example, if an originalist wrongly believed that the Articles of Confederation comprised the legitimate Constitution, this originalist will not be able to describe actual practices. But his failure to describe stems from his
failure to understand the content of the legitimate Constitution. It is not a failing of originalism as a theory of interpretation.

B. ORIGINALISM’S PROBLEM WITH PRECEDENT

Another supposed embarrassment for originalism is that its adherents often have a decidedly mixed attitude towards precedent that is inconsistent with the original understanding. Originalists proclaim that the judiciary ought to follow the original understanding of the Constitution and are quick to criticize much of the Supreme Court’s jurisprudence for its nonoriginalist elements. Yet, originalists typically are not willing to declare that the Supreme Court always should reject contrary precedent as erroneous. In this way, originalists seem to abandon their principle of original understanding because they do not wholly abjure reliance on precedent.

For those originalists who regard the acceptance of erroneous precedent as the price that the principled must pay for the sake of practicality, I believe that Fallon’s critique has hit the bull’s eye. Either the original understanding is the proper and exclusive source for our constitutional law, or it is not. And if some originalists are open to precedent when that latter doctrine has no basis in our original Constitution, then these originalists can hardly criticize the courts for departures from the original understanding when the courts bring other considerations to bear in constitutional interpretation. The pragmatic originalist must be able to explain why other pragmatic exceptions cannot be carved out of the Constitution as originally understood. Yet not every originalist who admits that precedent may sometimes trump the original understanding faces the stark choice of either abandoning precedent or abandoning the claim that originalist readings of the Constitution are the only proper source of constitutional law.

Some originalists may believe that Article III’s vesting of the “judicial Power” in the federal courts enables courts to use precedent to allow supposedly erroneous doctrine to trump the original understanding of a particular provision. Put another way, the original understanding of Article III may authorize courts to choose erroneous precedent over the original understanding of a particular constitutional provision. Originalists who believe that stare decisis arises out of the Constitution cannot be charged with making pragmatic, unprincipled exceptions to the doctrine of original understanding.¹⁴⁴

Fallon recognizes that the written Constitution itself may authorize the citation of precedent to overcome the original understanding of a constitutional provision.¹⁴⁵ But he claims that this argument either proves too much or too little. It supposedly proves too much because “if the Constitution made itself

¹⁴⁴. Borrowing from Fallon, a pragmatic originalist who does not believe that the Constitution’s original understanding authorizes the use of precedent also permits acceptance of the written Constitution as modified by precedent (and only precedent). For such an originalist, the legitimate Constitution authorizes courts to ignore a provision’s original understanding when faced with contrary precedent.

¹⁴⁵. Fallon, supra note 1, at 115.
wholly subject to judicial revision, it could not provide a solid foundation for any conclusion.” It proves too little because if the Constitution allows a precedent to trump originalist meanings, other aspects of the unwritten constitution also should overcome the original understandings.

I share Fallon’s view that allowing courts to entrench mistaken interpretations (however defined) by invoking stare decisis enables the courts effectively to amend the Constitution. It would be far better for a constitution to bar judicial recourse to the doctrine of stare decisis entirely. At the same time, it is easy to envision why people may construct a constitution that authorized the doctrine of stare decisis. The framers of such a constitution might simply value stability more than getting the constitution’s meaning exactly “right.” In any event, when Fallon argues that any constitution that authorized stare decisis would fail to yield a solid foundation, it is a classic case of the pot calling the kettle black. After all, Fallon clearly believes that the system of precedent is an element of the legitimate Constitution; hence, his Fallonian Constitution also prevents a “solid foundation for any conclusion.”

As for Fallon’s other claim—that a constitution authorizing the use of precedent must authorize consideration of other extra-constitutional factors—it leaps to an unwarranted conclusion. Fallon wants to argue that if precedent is accepted by originalists, that demonstrates the “necessity and the existence of an unwritten constitution” more generally. But if originalists construe the Constitution as authorizing the use of precedent as a means for overcoming the original understanding of a particular provision, it is the written Constitution that authorizes precedent, not resort to considerations external to the document. In other words, originalists who claim that the original understanding of Article III authorizes the use of precedent are making a claim about the written Constitution. In this case, their dogged attachment to the written Constitution and their claim that the Constitution authorizes the use of precedent yields no opening for Fallonians who want to legitimate the other elements of the unwritten constitution. In particular, such originalists have not unwittingly opened the Pandora’s box that is the unwritten constitution because, according to the originalists’ argument, the written Constitution authorizes stare decisis and does not necessarily authorize the other elements of the Fallonian Constitution. Such originalists may be wrong as a matter of original understanding, but in that case they would either have to abandon stare decisis, face Fallon’s appropriate criticisms, or change their views about the contents of the legitimate Constitution.

Fallon properly calls to task those originalists who, though they do not

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146. Id.
147. Id.
148. In the name of stability, such framers may even require stare decisis—that is, preclude courts from deciding whether to follow precedent.
149. FALLON, supra note 1, at 115.
150. Id.
understand precedent as arising out of the legitimate Constitution (that is, the written Constitution), nevertheless recognize the validity of precedent as a means of overcoming the original understanding. If such originalists can make a practical, prudential exception for particular precedent, why not for nonoriginalist interpretive methods more generally? Yet Fallon reaches hasty conclusions when he seems to deny that any written constitution could authorize the use of precedent or when he argues that any such authorization would somehow prove the necessity of an unwritten constitution. That some originalists may grudgingly accept the doctrine of precedent, even if they believe it unauthorized by the legitimate Constitution, says nothing about the validity of originalism as a theory of interpretation. It shows only that some originalists sometimes lack the courage of their convictions, something that is true of proponents of every political or legal theory known to mankind.

C. ORIGINALISM ENTRENCHES THE ANACHRONISTIC VALUES OF DEAD WHITE MALE SLAVEOWNERS

As a means of criticizing originalism, Fallon highlights the enormous gap between the Framers' world and our own.151 Regarding the founding, he cites, among other differences, the privileged status of white males, the agrarian nature of the society, and the weakness of the United States.152 Moreover, he asserts, the original Founders never contemplated modern political phenomena such as Social Security or welfare.153 Nor did they foresee the Federal Reserve Board or federal environmental regulation.154 Regarding the Civil War amendments, he notes that at the time, women could not vote and there was no system of public education.155 Undoubtedly, he could have gone on at much greater length, for his list only scratches at the surface of the differences between our age and the great "foundings" of the past.

For some reason, Fallon believes that this gap reveals a "fundamental" problem with originalism.156 Perhaps if originalism prefers the various founding generations, it risks entrenching outdated preferences. If we could use modern meanings and nonoriginalist interpretive methods, however, we could mitigate the antiquated aspects of the written Constitution; hence, the advantage of the unwritten constitution and the need to avoid purely originalist readings that may limit our flexibility to deal with the modern era.

Though Fallon's criticisms are familiar, they are woefully misdirected. Originalism is only a mode of interpretation and does not inevitably yield anachronistic results. Fallon's real beef is with the written Constitution. The written Constitution is the product of the original founding and the subsequent found-

151. Id. at 14.
152. Id. at 13.
153. Id.
154. Id. at 22.
155. Id. at 13.
156. Id. at 13.
ings. It is the product of individuals from bygone eras, individuals whom many deem flawed and even evil by modern standards. No one ought to be surprised that the written Constitution reflects other eras better than it reflects our own. Though the written Constitution was meant to endure for the ages, none of the Founders were fortune tellers.

The related claim that originalism entrenches out-of-date preferences is also misdirected. Originalism does not purport to entrench anything because it is just a means of understanding what someone else meant to convey. Entrenchment comes, if at all, from prior decisions to accept someone as a lawmaker and to accept that lawmaker’s words as law. In other words, criticisms of the entrenchment of the values extant over two centuries ago are better directed at contemporary originalists who clearly prefer the written Constitution to the Fallonian Constitution.

Indeed, it is telling that few object to originalism as a mode of interpretation when nothing from the past is purportedly being entrenched. For instance, no one objects to applying originalist methodology to the Articles of Confederation even though doing so would yield legal rules that, if applied, would be even more out of step with current society. Few would say that originalism is a poor or improper theory of interpretation because originalist readings of the Articles would lead to a narrow understanding of congressional power under the Articles. In fact, people expect historians and others who attempt to make the past come alive to use an originalist methodology. We generally do not want our historians to sugarcoat history in the guise of making history the best that it can be. When we want historians to fiddle with history, interpretation and capturing the past are at most secondary, and some other ideological or personal motivation is primary.

Yet if there was some chance that the Articles of Confederation were understood by many as the one and true Constitution, there undoubtedly would be many who would attempt to “enhance” the Articles by departing from their original understanding and criticizing originalism as outdated. Theories of translation, interpretation, and other nonoriginalist modes of interpretation would be drafted into service. As a result, criticisms of originalist interpretations of the Articles would reveal far more about the critic’s view of the Articles than they would reveal about the validity of originalism as a theory of interpretation.

Originalism does not yield the gap “between doctrine and the Constitution” that bothers Fallon. 157 Fallon’s problem is with the originalists’ preferred Constitution. Most current originalists believe that the legitimate Constitution should consist of the original meaning of the written Constitution. Yet if originalists concluded that the Fallonian Constitution was the legitimate Constitution, there would be no problem with out-of-date meanings because originalism as applied to a Fallonian Constitution would yield much flexibility, certainly enough to legitimate Social Security and the Federal Reserve. Then it would be clear that

157. Id. at 114.
the credit (or blame) for such results would rest squarely with the Fallonian Constitution and not with originalism.\textsuperscript{158}

D. ORIGINALISM DOES NOT YIELD GOOD RESULTS

Though prominent originalists claim that only originalism can safeguard the rule of law, protect political democracy from overreaching judges, and defend individual rights,\textsuperscript{159} Fallon claims this “normative defense of originalism cannot withstand close scrutiny.”\textsuperscript{160} Because “common law decisionmaking is almost universally seen as compatible with rule of law”\textsuperscript{161} and because nonoriginalist theories often look similar to common law decisionmaking, originalism is not the only means for securing the rule of law. Moreover, democracy may be better protected by nonoriginalist decisions like the Supreme Court’s one-person, one-vote decisions and its First Amendment case law. Finally, many of the rights held sacred by people would not exist (or be as sweeping) but for departures from the Constitution’s original meaning, such as the right to school desegregation and the more general right to be free from various types of governmental discrimination.

The various shortcomings Fallon articulates (and the many others one could cite) do not stem from originalism, but with the Founders’ Constitution.\textsuperscript{162} Fallon has conflated originalism’s interpretive method (of using the original understandings of the lawgiver) with the normative preferences of most current originalists (of treating the original founders and the subsequent founders as the lawgivers). Because originalism is only a methodology, it cannot be the captive of any ideology or set of preferences, even the Founders’ preferences.

It is easy to see why Fallon might have been led astray. After all, originalists often make normative claims as if originalism was the reason why their supposed good might obtain. Rather than crediting the Founders’ Constitution, they sometimes seem to want to credit originalism. Thus, originalism is said to ensure the rule of law, promote democracy, and safeguard human rights. Though originalism has much to commend it, it does not deserve the credit or censure

\textsuperscript{158} Do originalists choose their methodology as a matter of logic (“This is the only way of making sense of our decision to live by someone else’s rules.”) or because of the results generated? What would rule-of-law originalists do if the Fallonian Constitution (or some other constitution that they dislike) clearly was the legitimate Constitution? One would hope that originalists, whatever their personal feelings about the original meaning of the Fallonian Constitution, would continue to subscribe to the theory of original meanings. After all, originalists should be wedded to originalism as a mode of interpretation regardless of the contents of the legitimate Constitution. Though they may personally reject the Fallonian Constitution (or other candidates for the legitimate Constitution), that should not lead them to misconstrue its meaning. But perhaps the temptation to “mediate” or “supplement” the Fallonian Constitution through creative interpretive techniques would just be too strong.


\textsuperscript{160} Fallon, supra note 1, at 20.

\textsuperscript{161} Id.

\textsuperscript{162} See supra section IV.C.
for the good or bad that results from its application to a particular law. It is that particular law as understood by the lawmaker that merits our approbation or disapprobation.

To see why this is so, imagine again that nearly all agreed that the legitimate Constitution was the Fallonian Constitution. Suppose a mossback claimed that we ought not apply originalism to the flexible Fallonian Constitution on the grounds that if we applied some other interpretive methodology, we may be able to recapture the beneficial democracy, stability, or the rule of law values associated with the Founders’ Constitution. In that case, the refusal to follow originalism would yield the benefits supposedly currently available to us under originalism. If the same interpretive methodology can yield good and bad results (from whatever ideological perspective) depending upon the particular document being interpreted, it is the underlying document doing all the work and not the methodology.

Any theory of “interpretation” that promises to yield attractive outcomes or to mitigate the bad consequences of a document is not a theory of interpretation at all. Instead, it is a theory that quarrels with the choice of document and its author(s) by essentially positing another document (and author) more to the “interpreter’s” liking. It may be that applying originalism to the Founders’ Constitution yields sub-optimal, even terrible, results. But then the problem would lie with the Founders’ Constitution and our acceptance of it.

E. CONFUSION ABOUT ORIGINALISM

Fallon recognizes that much of the current debate about interpretive methodology is actually a debate about which Constitution ought to command our allegiance. Does the Founders’ Constitution hold sway or does the Fallonian Constitution deserve and enjoy our allegiance? That is why it is disappointing that Fallon criticizes originalism rather than the Founders’ Constitution itself.

Under the right circumstances, I believe that Fallon and other modern critics of originalism would embrace originalism. Suppose Fallon was able to convince us to adopt, unambiguously, the Fallonian Constitution. In such circumstances, Fallon and other supporters of the Fallonian Constitution would probably adopt an originalist methodology to interpret the Fallonian Constitution. If someone attempted to convince the people that they could retain their commitment to the Fallonian Constitution (and its lawmakers) and yet adopt a different interpretive methodology that would yield better results, such a person would be rebuffed by the following argument: to adopt a nonoriginalist methodology nullifies our first-order preference that the Fallonian Constitution remain in place. If we now regard the Fallonian Constitution as deficient, it would be far better to simply abandon it rather than to confuse matters by selecting some nonoriginalist methodology that has the effect of obfuscating what we would be doing. Fallon makes a decent case that the original Constitution is out of date and inadequate. He has not made this case against originalism.
V. THE INSTRUMENTAL CASE FOR NEUTRAL, VALUE-FREE ORIGINALISM

Originalism is often identified with "conservative" principles such as the rule of law, the need to limit judicial discretion, and the need for stability. Prominent conservatives speak of originalism as necessary to secure these values. It is no surprise then that originalism is typically viewed as a mode of interpretation favored by those on the political right. In this Part, I argue that originalism is neither a politically conservative nor a politically liberal mode of interpretation; nor does it necessarily ensure the rule of law, limit judicial discretion, or promote stability. It is just a mode of interpretation. The underlying document and its authors are responsible for whatever results from the application of originalist methodology.\footnote{163}

A. THE BASIC ORIGINALIST FRAMEWORK

As defined by one of its foremost proponents, originalism consists of discerning how a law "would have been understood at the time" it was enacted and thereby uncovering its "public understanding," as "manifested in the words used" in the text and contemporaneous secondary materials.\footnote{164} Originalism does not require that lawmakers express anything about the provisions to be interpreted. Rather, the quest is to determine the meaning of the provisions at the time of their enactment even if no one uttered a peep about the relevant text.

Like any theory, originalism has various strains, with some people wed to the public meaning (sometimes called "original meaning"), and others embracing what certain lawmakers have said about a provision even when it conflicts with the best understanding of the public meaning (sometimes called "original intention"). In most situations, each originalist strain is likely to lead to the same or similar conclusions about a law's meaning.

What makes originalism so intuitively attractive? Most people probably comprehend that originalism is the only mode of interpretation that is consistent with our willingness to submit to a lawmaker. Once we identify the lawmaker, we ought to construe the lawmaker's laws as the lawmaker would have understood them. Alternative modes of interpretation negate the initial decision to accept the lawmaker's laws as authoritative. Lawmakers, after all, do not just enact words. They codify meanings as well. Any other view of lawmaking and interpretation would mean that we allow the lawmaker to "pick the marks on the page" but reserve the authority to determine what the lawmaker's marks mean.\footnote{165} When this is true, the nominal "interpreter" is the actual lawmaker.

Suppose we accept that some legislature can enact laws to govern our conduct. That legislature enacts a law related to environmental protection. If we later construe this law to advance some moral vision or economic consideration


\footnote{164. ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990).}

\footnote{165. See Alexander, \textit{supra} note 109, at 324.}
independent of the legislature’s original understanding of the law, we act contrary to our initial decision to accept that legislature as a lawgiver. The legislature is not a lawmaker if the interpreters feel free to supplement the law with extraneous factors. Hence, if we favor environmental protection and adopt an overly protective reading of the law, we have not respected the legislature’s choice. Likewise, if we loathe environmental protection and adopt cramped readings of the statute, we reject the legislature as a legitimate lawmaker.

Originalism does not require the acceptance of any particular law or constitution. Originalism is just a methodology necessary to a decision to adhere to the laws of a particular lawmaker. Without originalism, the idea of a lawmaker external to the interpreter is chimerical.\footnote{Of course, it is possible that the best original meaning of some law is that it was meant to convey to the interpreter discretion as to its meaning and application. In that case, original meanings would authorize the use of nonoriginalist meanings.}

\section*{B. THE VALUES SERVED BY ORIGINALISM}

Originalism serves the rule of law, but only in the narrowest sense. Originalism enables us to honor another person’s limitations of our freedom. Without originalism, we cannot have law that is separate from the interpreter’s whims, desires, and fears.

Originalism serves no other values. This may seem implausible given that prominent originalists often claim that originalism secures individual rights or stability or broader notions of the rule of law. But many originalists have been blinded by their devotion to the Founders’ Constitution. That application of originalism to the Founders’ Constitution arguably yields certain meanings does not mean that originalism is responsible for those meanings. Instead, all the work is being done by the text and its authors. The Founders’ Constitution deserves the credit or blame for its treatment of individual rights, stability, and the rule of law.

To see why this is so, imagine that our Constitution was shorn of the Bill of Rights, the ninth and tenth sections of Article I, and all its other individual rights provisions. Originalism, as applied to this hypothetical constitution, would hardly protect individual rights. Likewise, if this constitution permitted amendments when a majority of both chambers of Congress enacted “constitutional” legislation, there would be a great deal of instability under an originalist methodology. Finally, if this constitution simply provided that Fred’s word was to be applied as law, originalism would suggest that we must follow Fred’s word, even though this would be the arbitrary rule of man and not the rule of law.\footnote{See generally Alexander, supra note 109.} In this situation, originalism would require whatever Fred wants because of our first-order commitment to the “Fred-centric” constitution.

Apart from the instrumental value of ensuring that the recognition of an external lawmaker is not an empty gesture, originalism is a valueless construct.
Originalism can serve as many values as there are values—secularism, libertarianism, communitarianism, and many others. Originalism can even serve the much-vaunted value of having an evolving constitution. If our designated constitution-maker enacts a constitution that allows for its contents or prescriptions to vary with the times, originalism helps us discern that instruction and helps us adhere to the constitution-maker's constitution. Even if we, upon reflection, would have desired rigidity, originalism brings us back to our commitments (or, alternatively, suggests that we ought to reconsider them). While originalism cannot force us to honor our commitment to the external lawmaker, it makes it possible for that commitment to be meaningful.

C. THE UNEASY RELATIONSHIP BETWEEN ORIGINALISM AND CONSERVATISM

If it is correct that originalism serves no other value—other than the instrumental one of enabling us to honor our first-order commitment to some lawmaker, whether that lawmaker is a Communist or a Classical Liberal—one may wonder why originalism is so strongly identified with conservatives. The answer has to do with our constitutional and political history more than with originalism.

Surprise, surprise—political conservatives tend to like the Founders' Constitution. It protects property rights and the freedom of contract. It protects the accused from overly aggressive government prosecution. It limits the power of the federal government. Given the conservative-libertarian, negative-rights nature of the Constitution, it is small wonder that conservatives prize it. As Fallon points out, conservatives generally want to claim that the Founders' Constitution is the entire Constitution. And applying originalism to the Founders' Constitution lays the framework for ensuring that the Founders' generally conservative ideals trump those of modernity.

Conservatives recognize that they have certain advantages in disputes about what the Constitution provides, and they try to exploit those advantages. Because almost everyone agrees that the written Constitution forms some part of our legitimate Constitution (if not the entire part) and because most people revere the wisdom of the Founders, people are naturally disposed to treating the Founders as the lawmakers for originalist purposes; hence, the "reflexive" feeling that the Founders' understandings ought to prevail over whatever meaning we would assign to the written Constitution. People generally do not recognize themselves as Constitution-makers, except perhaps in the exceptional case of passing amendments. Most of the Constitution was enacted a long time ago and, to most people, it is the Founders' meanings that matter.

Progressives likewise understand that they enjoy certain advantages. Many of the Supreme Court's departures from the original understanding of the Constitution are quite popular. Indeed, progressives can point to many Supreme Court cases and doctrines inconsistent with the Founders' meanings. Perhaps duped by the Supreme Court, many people believe that they somehow can maintain fidelity to the Founders' Constitution and still enjoy the Supreme Court's departures from it. Pressing their advantage requires progressives either to deny
the desirability of our written Constitution or to disparage originalism. Because the first is difficult as a practical matter, progressives have chosen to trash originalism.

Fallon tries to escape this trap. Rather than attempting to shoehorn the Supreme Court's case law into an ill-fitting Founders' Constitution, Fallon more plausibly argues that we have a Constitution broader than the familiar written Constitution. Whether he is right or not is hard to say. But having avoided falling into the trap of the Founders' Constitution, it is not clear why Fallon feels the need to criticize originalism. Indeed, if we had a constitution that unambiguously favored progressives, many progressives would come to their senses and recognize the utility of originalism in safeguarding the lawmaker's progressive constitution. And political conservatives might reluctantly conclude that perhaps they were wrong to embrace an anachronistic, dead-hand theory of interpretation. This is not to say that both sides are insincere, only that everybody is susceptible to the temptation to play lawmaker in the guise of interpretation.

**CONCLUSION**

Fallon's book challenges comfortable presumptions. Though I do not agree with most of his claims, particularly his assertion that the unwritten constitution is part of our legitimate Constitution, he does a fine job of trying to negate the textual and historical advantages enjoyed by conservatives. He also skillfully presses the progressive advantages stemming from the Supreme Court's actual cases. Rather than treating these cases merely as textual embarrassments, he attempts to legitimate them by reference to an unwritten constitution.

But Fallon's criticisms of originalism are disappointing. Like many of its proponents, Fallon identifies originalism too closely with the Founders' Constitution and thus fails to separate interpretive methodology from its results. As a theory, originalism has nothing to do with entrenching the preferences of dead, white, slaveholding males. Nor does it necessarily have anything to do with eras in which problems and opportunities were far different from our own. It is just a mode of interpretation that can serve any ideology or none at all.

Paradoxically, Fallon's attack on originalism ultimately could undermine the very Constitution that he attempts to vindicate. In a world where the Fallonian Constitution is accepted as the legitimate constitution, to the extent that people accept Fallon's criticisms of originalism, he supplies the means for undermining the very Constitution he champions. Those opposed to the Fallonian Constitution can always cite Fallon's book for reasons why, despite the original understanding of the Fallonian Constitution, it really is inappropriate to consider precedent, or why it is wholly improper to make value judgments. Perhaps it is altogether fitting that Fallon's book supplies the means for undermining the Fallonian Constitution.