

The Chimerical Concept of Original Public Meaning

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Table of Contents

Introduction.....	3
I. Approaches to Constitutional “Meaning”: Contrasting PMO With A Historian’s Multiple-Meanings Thesis.....	10
A. Public Meaning Originalism	11
B. Foner’s Historical Scholarship and Original Meanings: The Fourteenth Amendment	17
C. A Preliminary Contrast	20
II. Trying to Make Sense of the Idea of Original Public Meaning	21
A. Literal or Semantic Meaning	21
B. Pragmatic (or Contextual) Enrichment	23
1. <i>The Problem of Speaker Identification</i>	24
2. <i>The Problem of Characterizing Reasonable Readers or Listeners</i>	28
C. Reconsidering the Concept of Original Public Meaning	33
D. Linguistic Idiosyncrasy	35
III. Generalizing the Thesis.....	38
IV. Original <i>Legal</i> Meaning.....	42
A. Jurisprudential Foundations of the Search for Original Legal Meaning.....	43
B. The Real but Limited Significance of Semantic and Related Historical Facts.....	45
C. Issues of Judicial Role	49
V. Conclusion	511

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Abstract

Constitutional originalism is a work in progress, the leading current version of which is Public Meaning Originalism (PMO). PMO defines the “original public meaning” of constitutional language as what a reasonable person, fluent in English and knowing the salient, publicly available facts about its drafting, would have taken it to mean at the time of its adoption. This Article demonstrates that constitutional provisions rarely if ever have uniquely correct “original public meanings” in this sense.

The problem with PMO is metaphysical, not epistemological. Although public meaning originalists speak of “evidence” establishing original public meanings, they have no good account of what, exactly, the evidence is supposed to be evidence of. Beyond historical facts about who said and understood and believed different things at particular times, there is no further, diversity-transcending fact of an original public meaning. When members of the Founding generation disagreed — as they frequently did — the idea of a uniquely correct meaning that existed as a matter of linguistic and historical fact is chimerical.

*To illustrate its arguments, this Article draws repeatedly on the findings of historian Eric Foner’s recent book on the Civil War Amendments, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. As Foner’s work helps to make vivid, the difficulty for PMO is not that there are no historical and linguistic facts bearing on constitutional meaning, but that courts must construct legal meanings out of an often diverse welter of facts. As the concluding section of the Article demonstrates, the great challenge for courts, lawyers, and constitutional theorists is to understand and discipline the process by which courts select historical facts to construct original constitutional meanings, not as a matter of fact, but as a matter of law.*

Introduction

Constitutional originalism remains a work in progress, subject to continuing reformulation.¹ Perhaps the leading current version is public meaning originalism (“PMO”).² This form of originalism has many variants, but the core tenet is widely shared: the linguistic meaning of a constitutional provision is what a reasonable person, fluent in English and knowing the salient, publicly available facts about the context of its drafting, would have taken it to mean at the time of its adoption.³

Behind this uniting commitment lie two assumptions. First, PMO assumes that we can discover the original linguistic meaning of constitutional provisions in roughly the same way that

¹ For a brief history of originalism, see Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12 (Grant Huscroft & Bradley W. Miller eds., 2011).

² See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *NW. U. L. REV.* 1243, 1251 (2019) (“Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s.”); Jamal Greene, *The Case for Original Intent*, 80 *GEO. WASH. L. REV.* 1683, 1684 (2012) (“Today, most academic originalists and even some living constitutionalists say that constitutional interpretation should proceed, first and foremost, from the original meaning of the text at issue.”); Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 *U. MIAMI L. REV.* 648, 649 (2016) (asserting that “all modern originalists . . . are original public meaning textualists”). *But cf.* Stephen E. Sachs, *Originalism Without Text*, 127 *YALE L.J.* 156, 158 (2017) (noting that “[a] number of scholars, this author among them, have argued for shifting focus from original meaning to our *original law*”).

Professor Solum distinguishes four varieties of originalism in addition to public meaning originalism: Original Intentions Originalism (“The original meaning of the constitutional text is the meaning that the framers intended to convey.”); Ratifiers’ Understandings Originalism (“The original meaning of the constitutional text is the meaning conveyed to the ratifiers of each provision.”); Original Methods Originalism (“The original meaning of the constitutional text is the meaning produced by application of the original methods of constitutional interpretation and construction to the text.”); and Original Law Originalism (“The law in effect at the time the Constitution was ratified is legally binding unless it was changed by methods authorized by the original law.”). Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 *B.Y.U. L. REV.* 1621, 1627 [hereinafter Solum, *Triangulating Public Meaning*]. For an alternative, critical typology, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 247–67 (2009).

³ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“In their full context, words mean what they conveyed to reasonable people at the time they were written.”); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004) (“[O]riginal [public] meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 105 (2001); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 48 (2006) (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people . . . but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 *U. CHI. L. REV.* 1385, 1440 (2014) (“[T]he true, original public meaning of the language employed . . . [is] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted.”).

we do the meaning of utterances in ordinary conversation.⁴ Public meaning originalists acknowledge that the “model of conversational interpretation”⁵ that we apply to identify the meaning of most oral and written communications may require modest adaptations to address the peculiarities of constitutional interpretation.⁶ Nonetheless, they insist, the interpretive methods that structure conversational interpretation furnish a workable template for identifying constitutional provisions’ original linguistic meanings. Second, PMO posits that the original meaning of constitutional provisions, like those of conversational utterances, exists as a matter of historical and linguistic fact.⁷ The factual status of original public meanings inheres in the conjunction of empirical facts about words’ meanings, political events at the time of constitutional provisions’ adoptions, and the theoretical, meaning-generating premises of the model of conversational interpretation as adapted to constitutional interpretation.

In this Article, I argue that there is no such thing as the original public meaning of constitutional provisions in the sense that public meaning originalists imagine. The two central assumptions that undergird PMO crumble on close examination.

The problem begins with the PMO assumption that we can identify the linguistic meaning of constitutional provisions in roughly the same way that we identify the meanings of conversational utterances — that is, by equating their meanings with what a reasonable person would take them to mean in the context of their utterance. This equation grows dubious when we probe which elements of context a reasonable listener normally takes into account in ascertaining what a remark communicates, asserts, or stipulates. Almost self-evidently, the identity of the speaker matters crucially. Depending on who the speaker was, we would make different assumptions about the “interpretive common ground”⁸ that we share with the speaker

⁴ See, e.g., Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, in 1 PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 403 (2009) [hereinafter Soames, *Interpreting Legal Texts*] (arguing that “[p]rogress can . . . be made . . . by seeing [legal and statutory interpretation] as an instance of the more general question of what determines the contents of ordinary linguistic texts”); Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-24 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244, at 28 (describing the Constitution as a “text” and explaining the central role of semantic theory, framed as “the theory of the meaning of utterances,” in establishing the “linguistic meaning” of constitutional provisions).

⁵ See Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 275 (2019).

⁶ See *infra* note 32 and accompanying text.

⁷ See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 278 (2017) (“[T]he communicative content of the constitutional text is a *fact*.”); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Constitutional Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) (“The communicative content of a text is determined by linguistic facts . . . and by facts about the context in which the text was written. Interpretations are either true or false — although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false.”); Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL’Y ___, ___, (forthcoming 2020) (asserting that “[t]he content” of statutes and other linguistic acts by collective bodies “is, in principle, derivable from the relevant, publicly available, linguistic and non-linguistic facts”).

⁸ My usage follows that of Mark Richard, who defines interpretive common ground as shared assumptions or understandings. See MARK RICHARD, *MEANING AS SPECIES* 3 (2019).

and about the speaker’s likely communicative intentions. If someone tells me, “Let’s meet at our usual spot at the usual time,” information of this kind will contribute to the meaning — or what some philosophers call the assertive or communicative content⁹ — of the utterance. But if we ask who the speaker is in the case of constitutional provisions, typically there is no unitary speaker.¹⁰ Constitutional provisions frequently have multiple authors who may have had different communicative intentions and held different assumptions about how the public would or should understand their words.

Public meaning originalists have diverse strategies for evading this difficulty, mostly by imagining the “reasonable” audience for constitutional provisions as endowed with qualities that make attention to speakers’ communicative intentions unnecessary.¹¹ But none of those strategies succeeds. It is impossible to give even a modestly rich description of the “context” of constitutional provisions’ promulgation without taking account of who the promulgators were and what understandings or responses they aimed to provoke in their audiences, often as evidenced by their own explanations of the purposes or intended effects of constitutional language.

The model of conversational interpretation also fails to fit the case of constitutional interpretation for reasons involving the idea of a “reasonable” reader of constitutional provisions whose judgments determine those provisions’ original meanings. As applied to constitutional interpretation, the idea of a reasonable reader or listener proves perplexing. Among other things, the audiences for constitutional provisions are diverse. Moreover, we know as a matter of historical fact that different, informed, and evidently reasonable people who were alive at the time of constitutional provisions’ promulgation have often disagreed about what those provisions meant.¹²

In cases of disagreement, one approach to ascertaining original public meaning would be to investigate what different people who were alive at the time actually thought and to seek to discover whether there was a majority view. With striking unanimity, however, public meaning originalists disavow that strategy.¹³ Their touchstone is a hypothetical, reasonable person.

⁹ This is the preferred, technical vocabulary of public meaning originalists who draw most explicitly on the conceptual apparatus of the philosophy of language. See *infra* notes 34–36 and accompanying text.

¹⁰ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–15 (1980); Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244, at 40.

¹¹ See *infra* notes 113–126 and accompanying text.

¹² See *infra* Part III (generalizing the thesis beyond the Fourteenth Amendment).

¹³ See, e.g., Solum, *Triangulating Public Meaning*, *supra* note 2, at 1637 (“Original public meaning should be distinguished from what have been called ‘original expected application[s].’”); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people — whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have

Notably, however, most public meaning originalists have had little to say about what a reasonable person would make of disagreement and which aspects of disinterested reason would support a judgment that some original interpreters of constitutional language were right and some were wrong.¹⁴

The unworkability of the model of conversational interpretation as a template for ascertaining the uniquely correct, fact-of-the-matter meanings of constitutional provisions points to the conclusion that such meanings, which are PMO's Holy Grail, simply do not exist, at least in forms capable of resolving any reasonably disputed case. The problem is conceptual or metaphysical, involving what kind of entity PMO imagines the original public meaning of constitutional provisions to be.¹⁵ When we go looking for the original meaning of constitutional provisions — especially when we know that members of the Founding generation disagreed — what exactly are we looking for? We are looking for evidence, originalists maintain,¹⁶ but evidence of what? What, for example, are the truth conditions of a claim that “The original public meaning of the Fourteenth Amendment forbade [or tolerated] race-based segregation in the public schools” or the exclusion of women from the practice of law?

Insofar as originalists equate the original public meaning with what a reasonable person would have concluded, they risk confusing a metaphysical question, involving the existence and nature of original public meanings, with an epistemological question, involving how best to ascertain what the original understanding was. The reasonable decision-maker's decision process is presumably not to ask, “What would a reasonable person think the original meaning was?” Any meaningful inquiry needs to reflect a theory of what *in the world* makes it true that constitutional provisions have particular original public meanings (if they do).

been — but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”).

¹⁴ See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 214 (2008) (“[W]hen [originalist material] speaks in many voices, there is no way to settle the question of whether a view expressed in the Pennsylvania ratifying convention is more or less authoritative than a view expressed in the newspapers of Massachusetts.”).

¹⁵ On the distinction between the metaphysics of meaning and the epistemological issues involved in its ascertainment, see Michael Devitt, *Three Methodological Flaws of Linguistic Pragmatism*, in WHAT IS SAID AND WHAT IS NOT: THE SEMANTICS/PRAGMATICS INTERFACE (C. Penco & F. Domaneschi eds., 2013).

¹⁶ See, e.g., Solum, *Triangulating Public Meaning*, *supra* note 2, at 1658 (suggesting corpus linguistics as a method for discovering the “communicative content of the constitutional text”); see also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 557 (2003) (“[M]odern originalist scholarship often uses the actual understandings expressed by individual framers or ratifiers as evidence of the ‘original meaning.’”); Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 779 (2020) (“This Article provides a concise guide to this practice of finding evidence of the original meaning in these early state constitutions and declarations of rights.”).

A comparison with other contexts in which the law employs “reasonable person” standards confirms this conclusion.¹⁷ The most characteristic function of “reasonable person” standards is to embody reasonableness in a particular domain of thought, action, or disposition.¹⁸ In seeking to resolve disputed questions, the reasonable person pursues the methods of inquiry appropriate to the achievement of true beliefs about the matter in question.¹⁹ The deep, underlying assumption is that true beliefs are possible.

Given this assumption, a reasonable person could not know what methods of inquiry to use in seeking to ascertain constitutional provisions’ original public meaning until she knew what sort of a thing a provision’s original public meaning is. With that question on the table, I take the original public meaning of constitutional provisions, as public meaning originalists use the term, to be a theoretical construct in the same way that “gross domestic product” and “IQ” — to take two quite disparate examples — are theoretical constructs.²⁰ To be more precise, the original public meaning of a constitutional provision is partly a function of the theory by which the original public meaning is defined. Reliance on a “reasonable person” standard could thus furnish meaningful standards of inquiry only if public meaning originalists have a sufficiently specified theory to tell reasonable inquirers what they ought to look for and ultimately how to produce uniquely correct results. On this score, I shall argue, PMO comes up dramatically short.²¹ Without more criteria for identifying the truth conditions for claims about original public meanings in cases of actual historical disagreement, PMO appears to be left with the position that “we know it when we see it.” It seems virtually self-evident, however, that an “it” that exists only insofar as particular practitioners of PMO see it is not the kind of “original public meaning” that they or anyone else should want to make the object of constitutional inquiry.

¹⁷ For illuminating discussions, see, for example, John Gardner, *The Many Faces of the Reasonable Person*, 13 LAW. Q. REV. 563 (2015); John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273 (2001); Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651 (2013); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012); Larry A. DiMatteo, *Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293 (1997); Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1 (2008).

¹⁸ See Jackson, *supra* note 17, at 655 (asserting that “[a] reasonable person is reasonableness rendered incarnate”) (quoting Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 139 (2008)).

¹⁹ See Gardner, *Mysterious Case*, *supra* note 17, at 273 (defining the “reasonable person” as a “justified” person whose actions satisfy the standards of justification appropriate for actions of the relevant kind and whose beliefs are similarly justified); Gardner, *Many Faces*, *supra* note 17, at 568 (“When the law’s question is what the reasonable person would believe, the answer is that (s)he would have reasonable beliefs.”).

²⁰ Cf. Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 78 (2016) [hereinafter Balkin, *Construction*] (terming the original public meaning “a constructed entity”).

²¹ See, e.g., Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 720 (2009) (“Public meaning is, quite explicitly, an artificial construct. The qualifying criteria . . . depend on assumptions about how some chosen hypothetical speaker of the language would apprehend the text at issue. Even in theory there is no ‘right answer.’”).

To be clear, I do not deny — indeed, I shall emphasize — that courts and judges can reach better- or worse-supported conclusions about constitutional provisions’ original *legal* meanings that depend on a mixture of facts about ordinary language use, legal norms, and moral norms. But those conclusions do not rest on the premise that those provisions have uniquely correct, original meanings that existed as a matter of historical, linguistic fact and are sufficient to resolve reasonably disputable cases.

I shall say more below about the implications of the restriction of my claim that constitutional provisions lack uniquely correct original linguistic meanings to reasonably disputable cases.²² When everyone’s or nearly everyone’s linguistic intuitions converge on a conclusion about a provision’s meaning, and there is no evidence that the provision’s authors had different intentions or expectations, it seems appropriate — both linguistically and legally — to define the provision’s meaning accordingly. Although I shall also say more about how to distinguish reasonably disputable cases from not plausibly debatable ones, the important point for now is that public meaning originalists have not advanced their theory to clarify non-debates such as whether, for example, the original meaning of the Equal Protection Clause required everyone to eat cornflakes.

In developing my argument that constitutional provisions lack the kind of uniquely correct, original public meanings that leading originalists postulate, this Article pursues a two-pronged strategy. One branch of my argument advances analytically-based criticisms of PMO. The second juxtaposes the linguistic assumptions that undergird PMO with the picture of linguistic and ultimately constitutional meaning that emerges from a recent book on Reconstruction and the Reconstruction Amendments, entitled *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, by the eminent historian Eric Foner.²³ In describing Foner as an eminent historian, I do not vouch for all of his conclusions. For purposes of thinking about the plausibility of PMO, however, I accept his account of disagreement and uncertainty among those who helped draft the Fourteenth Amendment.

In contrast with PMO’s posit that constitutional provisions have single linguistic meanings, Foner insists that the language of the Fourteenth Amendment had multiple, diverse meanings at the time of its promulgation. According to Foner, “no historian believes that any important document has a single intent or meaning.”²⁴ But Foner’s central claims about multiple meanings emerge from a close study of Reconstruction. “[T]he meanings of key concepts embedded in the Reconstruction Amendments such as citizenship, liberty, equality, rights, and the proper location of political authority — ideas that are inherently contested — were themselves in flux”²⁵ at the

²² See *infra* notes 174-197 and accompanying text.

²³ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

²⁴ *Id.* at xiv.

²⁵ *Id.*

time of those Amendments’ drafting and ratification, he writes. More than one Congressman expressed doubt about what key provisions of the Fourteenth Amendment meant. Others confessed to having changed their minds about what rights the Fourteenth Amendment ought to create in the course of debates. If these claims are true, they should raise deep questions about the central premise of PMO that there is a single linguistic fact of the matter, which can be discerned without reliance on normative judgment, about what constitutional provisions originally meant.

I need to be clear about how my conceptual claims relate to my reliance on Foner’s historical findings. Crediting Foner’s specific factual claims, a public meaning originalist might say that, in light of some of the information that Foner adduces, the assertive content of the Fourteenth Amendment was vague or underdeterminate in many relevant respects. If so, this would be an important discovery about the Fourteenth Amendment, but not one that threatens PMO overall. I reject that answer, for reasons that I have given already. Original public meanings in the originalist sense are the artifacts of a model for the generation of linguistic meanings or assertive content that is too poorly specified to generate uniquely correct meanings. The belief that such meanings exist therefore represents a metaphysical mistake.²⁶

When we contemplate such historically contested questions as whether the Fourteenth Amendment’s original public meaning barred states from maintaining segregated public schools or excluding women from the practice of law, the arresting suggestion that I draw from Foner is not that there are or were no relevant facts about language use that bear on the original meaning of the Fourteenth Amendment. It is that there were a multitude of facts, including facts about varying intentions, understandings, and usages among different people. These facts rule out some interpretations, such as an interpretation of the Equal Protection Clause as mandating cornflake-eating. In addition, Foner appeals to a widely shared intuition that facts about the drafting and ratification history of the Fourteenth Amendment may also bear — in ways that need to be worked out — on how courts should have responded in the post-Reconstruction era and how they should respond today to questions about the permissibility of race-segregated public education, the exclusions of women from the practice of law, and more. If we credit Foner’s commitment to the proposition that historical facts should matter to constitutional interpretation, even in cases involving reasonable historical dispute about particular provisions’ meanings, then challenging questions take shape. They involve the role that facts about how people used language and about what they said and believed ought to play *in constitutional law* even if the idea of a uniquely correct original public meaning is chimerical.

²⁶ For an argument to a similar conclusion but based on premises of “philosophical hermeneutics,” see Frederick Mark Gedicks, *The 'Fixation Thesis' and Other Falsehoods*, 72 FLA. L. REV. 219, 224 (2020) (arguing that belief in original public meanings represents an “ontological mistake” because “[t]he meaning of any text from the past is also shaped by the demands of the interpreter” with the result that “in the present-textual meaning is mutually constituted by past and present”).

In addition to debunking PMO, this Article takes up the legal questions that arise when constitutional provisions lack uniquely correct original linguistic meanings. It offers a jurisprudentially-grounded account of the judicial role in the United States that requires courts to justify their decisions by reference to the past actions of legitimate authorities. In order to do so, I argue, courts must sometimes select from among a multitude of linguistic and other facts, some of which point in different directions, and determine which are most legally and morally salient.²⁷

In the process of judicial construction of constitutional meanings, language, law, and moral judgment almost necessarily intersect in complex ways that I shall attempt to explain. In this Article, I cannot hope to provide a full account of how judges or the rest of us ought to construct constitutional meanings, including original meanings, out of a welter of linguistic and other facts that sometimes provide contradictory indications. But I make a start by showing how PMO presents a mistaken picture of the work that inquiries into historical facts about language use can do. Having done so, I also begin to develop a framework for thinking about which historical and linguistic facts ought to matter in the ascription of constitutional meaning, including original constitutional meanings, and why.

The Article unfolds as follows. Part I lays out the main tenets of PMO, including its premise that constitutional provisions have a unitary communicative or assertive content. Part I also offers a preliminary contrast between PMO's conception of linguistic meaning and the alternative, multiple-meanings conception reflected in the work of historian Eric Foner. Part II debunks the notion that constitutional provisions have a single, factually identifiable, original linguistic meaning. Although there are many facts bearing on constitutional provisions' meanings, the notion that they have uniquely correct original public meanings that are capable of resolving reasonably disputed cases is fanciful. Part III briefly explains why my claims about the emptiness of the idea of original public meaning, and the resulting necessity for the construction of legal meanings, though developed largely in reference to the Fourteenth Amendment, apply to other constitutional provisions as well. Part IV takes a constructive turn. It advocates the replacement of PMO's untenable conception of original public linguistic meaning with an alternative conception of constitutional provisions' *legal* meaning, including original legal meaning. But it argues that such meanings must be constructed, not identified as a matter of plain legal fact, based on the historical facts surrounding different provisions' drafting and ratification histories, legal norms, and moral considerations. Part V furnishes a brief conclusion.

I. Approaches to Constitutional “Meaning”: Contrasting PMO with a Historian’s Multiple-Meanings Thesis

²⁷ See Balkin, *Construction*, *supra* note 20, at 93 (“Constitutional construction employs the past as a dialectical tradition of readings and counter-readings that might help us understand how to continue the constitutional enterprise in the present.”).

By way of background to everything that follows, this Part outlines the leading claims of PMO. It then briefly summarizes some of the conclusions of Foner’s book that should provoke questions about PMO’s defining premises.

A. Public Meaning Originalism

Public meaning originalism emerged in the 1980s, partly in response to criticisms of earlier originalist theories that had emphasized the Framers’ intent as a touchstone for constitutional analysis.²⁸ Justice Antonin Scalia played an important early role in PMO’s development.²⁹ More recently, scholars have sought to frame PMO in more precise and sophisticated terms than first-generation originalists characteristically employed.

The summary of PMO that I offer in this Part relies heavily, but not exclusively, on the versions developed by law professor Lawrence Solum and by the philosopher of language Scott Soames. I highlight their contributions in order to ensure that my criticisms of PMO in Part III address philosophically sophisticated positions. Professor Solum, who numbers among PMO’s most prominent theorists, has held appointments in Philosophy departments. Soames, whose interpretive theory falls within the PMO family, is a renowned philosopher of language.

As framed by leading practitioners, PMO embodies a number of interconnected premises:

First, the original public meaning of constitutional provisions is defined in terms of what a hypothetical reasonable person would have understood, not what historical figures thought or said.³⁰ The conceptual distinction between original public meanings and originally expected applications both defines PMO and helps differentiate it from other forms of originalism.³¹

²⁸ See, e.g., Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244, at 18–19; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 528–29 (2013); Greene, *supra* note 2, at 1687–88.

²⁹ See Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986)*, in *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 106 (U.S. Dep’t of Justice ed., 1987) (arguing that originalists “ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”); see also Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1132–33 (2003) (characterizing Justice Scalia as “original meaning textualism’s patron saint”).

³⁰ See *infra* notes 113–126 and accompanying text.

³¹ See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2136, 2335 (2020) (Thomas, J., concurring) (“[T]he Framers’ expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning.”); Solum, *Triangulating Public Meaning*, *supra* note 2, at 1637 (“The meaning of a text is one thing; expectations about how the text will or should be applied to particular cases or issues is another.”); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 *B.Y.U.L. REV.* 1393, 1398 (arguing that “it is the semantic original public meaning of the enacted texts,” rather than expected applications, “that determines original public meaning”); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *TEX. L. REV.* 1, 7 (2011) (distinguishing meaning from expected applications by noting that “sometimes legislators misapply or misunderstand their own rules”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 611–12, 622 (1999) (noting that PMO is not concerned

Second, reasonable, objective readers would view constitutional provisions as a species of linguistic utterances, the meanings of which can be identified in much the same way — though possibly with minor adjustments — as the meanings of other utterances in ordinary conversation.³² Soames is explicit on this point: “The content of a legal text is determined in essentially the same way that the contents of other texts or linguistic performances are, save for complications resulting from the fact that the agent of a legislative speech act is often not a single language user but a group . . . and the resulting stipulated contents are required to fit smoothly into a complex set of pre-existing stipulations generated by other actors at other times.”³³ Other proponents of PMO join Soames in offering proposed modifications of the model of conversational interpretation, but none, so far as I am aware, has suggested a sharply distinctive template.

Third, although the term “meaning” can be used in varied ways in ordinary conversation, the sense most relevant for constitutional analysis is the “linguistic meaning” or what Soames and Solum label even more precisely as the “assertive content” or “communicative content” of individual constitutional provisions.³⁴ Soames explicates the idea of “assertive content” as follows: “In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker’s use of *S* to be intended to convey and commit the speaker to.”³⁵ Solum, who more commonly speaks of constitutional provisions’ “communicative content,” appears to employ a similar but perhaps not identical definition: “The communicative content of a writing is the content the author intended to convey to the reader via the audience’s recognition of the author’s communicative intention.”³⁶ Other originalists may not precisely

with “how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases . . . except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener”).

³² See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 485 (2013) [hereinafter Solum, *Communicative Content*] (“Legal communications are “utterances” in the broad sense of that word, which encompasses both sayings and writings.”); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 598 (2013) [hereinafter Soames, *Deferentialism*]. The contemplated adjustment, if one is needed, involves the absence of a unitary speaker in the case of constitutional provisions. After noting that this difference might appear to undermine the applicability of the model of conversational interpretation as a mechanism for identifying the meaning of constitutional provisions, Solum writes that provisions’ meanings might be based on “the semantic meaning of the text” in conjunction with “the publicly available context of constitutional communication.” Solum, *Communicative Content*, *supra*, at 500.

³³ Scott Soames, *Toward A Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 232 (2011).

³⁴ See Solum, *Communicative Content*, *supra* note 32, at 484; Soames, *Deferentialism*, *supra* note 32, at 598–600 (differentiating linguistic meaning from assertive content).

³⁵ Soames, *Deferentialism*, *supra* note 32, at 598.

³⁶ Solum, *Originalist Methodology*, *supra* note 7, at 277; see also Solum, *Communicative Content*, *supra* note 32, at 488 (2013) (“The full communicative content of a legal writing is a product of the semantic content (the meaning of

agree with either of them. But all appear to share the premise that there is one sense of “meaning” that is uniquely relevant to constitutional interpretation, that is capable of yielding uniquely correct answers to questions involving the original meaning of constitutional provisions, and that is discernible in roughly the same way as the meaning of conversational utterances.

In their equation of constitutional provisions’ linguistic meanings with an exclusive form of “assertive” or “communicative” or similar content, public meaning originalists reject the “multiple meanings” thesis that I have defended in previous writing. Both in law and in life more generally, I have argued, it is familiar for people to equate the “meaning” of conversational remarks and written statements with their “(1) contextual meaning, as framed by the shared presuppositions of speakers and listeners, (2) literal or semantic meaning, (3) moral conceptual meaning, (4) reasonable meaning, . . . (5) intended meaning,” and (6) interpreted or precedential meaning.³⁷ I shall say more about these different senses of meaning below. For now, the relevant point is that the first five are all available to describe the meaning of a constitutional provision at a past point in time, including the time of its original adoption. PMO allows no such catholicity. It recognizes just one relevant sense of meaning, typically one that closely resembles, but is not necessarily identical with, what I call “contextual meaning, as framed by shared presuppositions of speakers and listeners.”

Fourth, the linguistic meaning (or assertive or communicative content) of a constitutional provision is a joint product of what philosophers of language call semantic content and pragmatic inference or enrichment (or, roughly speaking, contextual factors).³⁸ According to Solum, the semantic content of a constitutional provision is a function of “the meaning of the words and phrases as combined by the rules of syntax and grammar.”³⁹ But the semantic content of constitutional provisions (as of many other utterances) is, in Solum’s word, “sparse”⁴⁰ and requires supplementation (and occasionally qualification) by contextual information and

the words and phrases as combined by the rules of syntax and grammar) and the additional content provided by the available context of legal utterance.”).

³⁷ See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 51 (2018).

³⁸ See, e.g., Solum, *Communicative Content*, *supra* note 32, at 488 (“In the philosophy of language and theoretical linguistics, the phrase ‘pragmatic enrichment’ is sometimes used to refer to the contribution that context makes to meaning.”); Andrei Marmor & Scott Soames, *Introduction*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 1, 8 (Andrei Marmor & Scott Soames eds., 2011) (asserting that the communicative content of utterances “is determined by a variety of factors, including the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of the speaker-hearers, and obvious features of the context of utterance”).

³⁹ Solum, *Communicative Content*, *supra* note 32, at 488.

⁴⁰ Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1126 (2015); Solum, *Originalist Methodology*, *supra* note 7, at 285.

inference.⁴¹ For example, the semantic content of the word “president” does not tell us whether a particular utterance that uses the term refers to the president of the United States or the president of some other organization. For a reasonable listener or reader, however, context will often resolve any doubt.

Fifth, PMO postulates a complex relationship between an utterance’s linguistic meaning and both the speaker’s and the listener’s expectations concerning how the utterance’s directions will or ought to be applied to particular cases.⁴² Imagine that Speaker *S*, who holds a position of authority, directs that “no one who suffers from a contagious disease may attend any public school in the jurisdiction.” Further assume that both Speaker *S* and all members of her audience believe, mistakenly, that psoriasis is a contagious disease. They thus expect the directive to be applied to exclude anyone with psoriasis.⁴³ In this case, the expected application does not determine the meaning of the directive.⁴⁴ In some other cases, however, expected applications can provide “evidence” concerning, even though they are not constitutive of, the meaning of an utterance.⁴⁵

Sixth, as stressed in the Introduction, the communicative content of a constitutional provision, as of any other utterance, is a matter of linguistic fact if one uses the term “linguistic fact” to encompass semantic facts as enriched by context.⁴⁶ Solum could not be clearer on this point: “[T]he communicative content of the constitutional text is a *fact*.”⁴⁷

When originalists maintain that interpretations are either true or false⁴⁸ and that the truth conditions consist entirely of linguistic and contextual facts, I do not take them to claim that no judgment is necessary, but that no normative judgment is either necessary or appropriate. For example, to determine whether the Constitution permits a president to pardon him- or herself, a judge might have to use judgment in ascertaining what a reasonable person would take the assertive content of the relevant language of Article II to be in light of its legal background and

⁴¹ See Solum, *Communicative Content*, *supra* note 32, at 488 (“In the philosophy of language and theoretical linguistics, the phrase ‘pragmatic enrichment’ is sometimes used to refer to the contribution that context makes to meaning.”).

⁴² See, e.g., Solum, *Triangulating Public Meaning*, *supra* note 2, at 1637–38.

⁴³ This example is adapted from Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 585 (1998).

⁴⁴ In *Triangulating Public Meaning*, *supra* note 2, at 1621, Solum gives a complex example involving an “application belief” that the Fourteenth Amendment would not protect women’s equal rights to practice law based on “a false belief that women have intellectual capacities that are similar to those of children and, hence, that women are incapable of practicing law.” For other rejections of the equation of original public meanings with original expectations or application beliefs, see *supra* note 31 and accompanying text.

⁴⁵ See, e.g., Solum, *Triangulating Public Meaning*, *supra* note 2, at 1639–41.

⁴⁶ See *supra* note 7 and accompanying text.

⁴⁷ Solum, *Originalist Methodology*, *supra* note 7, at 278.

⁴⁸ See Solum, *The Fixation Thesis*, *supra* note 7, at 12.

relationship to other constitutional provisions. Nonetheless, the answer that emerges from application of the model of conversational interpretation (as minimally modified) should not depend on a normative judgment about whether allowing presidents to pardon themselves would be desirable.

Seventh, many and perhaps most public meaning originalists acknowledge that the meaning of a constitutional provision, when identified as a matter of fact, may be vague or ambiguous.⁴⁹ Accordingly, the linguistic meaning of a constitutional provision might not always “determine a definite verdict,”⁵⁰ in Soames’s words. For example, it is conceptually possible that the original public meaning of the Fourteenth Amendment might have failed to resolve the permissibility of states excluding women from the practice of law or maintaining racially segregated schools. Yet many and perhaps most originalists who have sought to answer questions such as these appear to believe that they can reach determinate answers.⁵¹ For example, Solum maintains that the original public meaning of the Fourteenth Amendment barred states from excluding women from law practice,⁵² and Soames has concluded unequivocally that the Amendment’s assertive content forbade school segregation.⁵³

Eighth, the linguistic meaning of a constitutional provision needs to be distinguished from its legal meaning. According to Solum, at the conclusion of “[c]onstitutional interpretation,” which “is the activity that discerns the communicative content (linguistic meaning) of the constitutional text,”⁵⁴ a further process of “construction” must ensue. “Constitutional construction,” Solum writes, “is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.”⁵⁵

For public meaning originalists who differentiate interpretation from construction, the distinction’s practical significance emerges most sharply when the meaning of constitutional language is vague or ambiguous. In such cases, Solum and Soames — in common with Randy

⁴⁹ See, e.g., Solum, *Originalism and Constitutional Construction*, *supra* note 28, at 458; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67 (2011) [hereinafter Barnett, *Interpretation and Construction*].

⁵⁰ Soames, *supra* note 7.

⁵¹ See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953, 956 (1995) (finding that original meaning of the Fourteenth Amendment barred school segregation); Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017 (2008) (maintaining, contrary to the contentions of others, that originalism authorizes a reading of the “coinage” clause that permits paper money).

⁵² See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 253–55 (2018).

⁵³ See Soames, *supra* note 7.

⁵⁴ Solum, *Originalism and Constitutional Construction*, *supra* note 28, at 457.

⁵⁵ *Id.*

Barnett and many others⁵⁶ — believe that judges have no choice but to exercise normative judgment in rendering determinate what previously was indeterminate. The resulting “domain of constitutional underdeterminacy” defines what Solum labels “the construction zone.”⁵⁷

Other public meaning originalists reject the interpretation/construction distinction.⁵⁸ For them, “interpretation” apparently denominates the activity by which the Constitution’s original meaning is applied to resolve disputed cases. But even some who hold that view leave space for a distinction between the Constitution’s linguistic meaning and its legal meaning. For example, a gap between linguistic meaning and legal meaning would exist if judges have permissibly framed doctrinal tests that are not textually or historically derived in order to structure adjudication under vague or ambiguous provisions. The test under which the Supreme Court holds race-based classifications unconstitutional unless “narrowly tailored” to a “compelling governmental interest”⁵⁹ furnishes a case in point. The Court devised that “strict scrutiny” test during the 1960s and 1970s.⁶⁰ So far as I am aware, no one has tied it directly either to the language or the history of the Fourteenth Amendment. It is also possible for public meaning originalists who deny the interpretation/construction distinction to recognize a gap between a constitutional provision’s linguistic meaning and its legal meaning arising from the doctrine of stare decisis. Some originalists believe that courts should sometimes decide cases based on precedent rather than a constitutional provision’s original meaning. Justice Scalia, who held this view, described the principle of stare decisis as an “exception” to his originalist theory that courts should decide cases based on the Constitution’s original public meaning, not an aspect of that theory.⁶¹

Ninth, all public meaning originalists, including those who recognize a need for judges to clarify the Constitution’s meaning in some cases, embrace what Solum has dubbed “the Constraint Principle.” The Constraint Principle holds that the original meaning of constitutional provisions should constrain constitutional actors, centrally including judges.⁶² The Constraint Principle can be framed in a way that leaves open the degree of constraint that original meanings

⁵⁶ See, e.g., Barnett, *Interpretation and Construction*, *supra* note 49, at 66; see also generally, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

⁵⁷ Solum, *Originalism and Constitutional Construction*, *supra* note 28, at 458.

⁵⁸ See, e.g., SCALIA & GARNER, *supra* note 3, at 15 (“[T]he supposed distinction between interpretation and construction has never reflected the courts’ actual usage.”) (emphases omitted).

⁵⁹ See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

⁶⁰ See RICHARD H. FALLON, JR., *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND PRACTICE OF STRICT JUDICIAL SCRUTINY* 13–19 (2019).

⁶¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 140 (Amy Gutmann ed., 1997).

⁶² Solum, *Originalism and Constitutional Construction*, *supra* note 28, at 460–61.

impose.⁶³ As noted, some originalists, such as Justice Scalia, would allow courts to adhere to *stare decisis* rather than enforce the original public meaning in some cases. But many academic originalists profess fealty to a more stringent interpretation of the Constraint Principle. In a recent article, Solum specifies the Constraint Principle as requiring “that the norms of constitutional law should be consistent with and *fairly derivable from* the public meaning of the constitutional text.”⁶⁴ Originalists including Randy Barnett, Gary Lawson, and Michael Stokes Paulsen take similar if not even more uncompromising positions.⁶⁵

B. Foner’s Historical Scholarship and Original Meanings: The Fourteenth Amendment

As I said in the Introduction, I believe careful reflection on Professor Foner’s historical findings will help to reveal fallacies in PMO’s underlying assumptions. This section lays the foundation for subsequent development of that thesis by summarizing some of conclusions in *The Second Founding*. Among his most striking findings are these:

First, the members of the Congress that proposed and debated the Fourteenth Amendment disagreed about, and knew they disagreed about, the concepts of equality and equal rights with which they were deeply concerned. “Equal protection” was “a staple of abolitionist discourse”⁶⁶ and, during Reconstruction, “[e]quality was the Radicals’ watchword,”⁶⁷ Foner writes. Nevertheless, “[e]quality before the law . . . was a new and elusive concept,”⁶⁸ the meaning of which “was hardly self-explanatory.”⁶⁹

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

⁶³ *Id.* at 458.

⁶⁴ Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL’Y ___, __ (forthcoming 2020).

⁶⁵ See, e.g., Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 269 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

⁶⁶ FONER, *SECOND FOUNDING*, *supra* note 23, at 11.

⁶⁷ *Id.* at 57.

⁶⁸ *Id.* at 78.

⁶⁹ *Id.* at 78.

Most basic were natural rights, such as the “unalienable” rights enumerated by Thomas Jefferson in the Declaration of Independence. Every person, by virtue of his or her human status, was entitled to life, liberty (even though this principle was flagrantly violated by the existence of slavery), and the pursuit of happiness (often understood as the right to enjoy the fruits of one’s own labor and rise in the social scale). Civil rights, the second category, included legal entitlements essential to pursuing a livelihood and protecting one’s personal security — the right to own property, go to court, sue and be sued, sign contracts, and move about freely. These were fundamental rights of all free persons, but they could be regulated by the state. Married women, for example, could not engage in most economic activities without consent of their husbands, and many states limited the right of blacks to testify in court in cases involving whites. Then there were political rights. Legally, despite Webster’s dictionary, access to the ballot box was a privilege or “franchise,” not a right. It was everywhere confined to men, and almost everywhere to white men. Finally, there were “social rights,” an amorphous category that included personal and business relationships of many kinds. These lay outside the realm of governmental supervision. Every effort to expand the rights of blacks was attacked by opponents as sure lead to “social equality,” a phrase that conjured up images of black-white social intimacy and interracial marriage.⁷⁰

Third, because the idea of equality was situated within a discourse about rights that sorted rights into diverse categories, debate about Section 1 of the Fourteenth Amendment — which includes separate Privileges or Immunities and Equal Protection Clauses — tended to be holistic, involving what Section 1 would accomplish overall. But if one clause preoccupied the drafters more than others, it was the Privileges or Immunities Clause. With respect to it, “more than one congressman wondered” what “were the privileges or immunities of citizens.”⁷¹

In pursuing answers to that question, Foner draws attention to disparate historical facts. Like a number of other historians, he believes that congressional debates about the 1866 Civil Rights Act form a crucial background to debates about the Fourteenth Amendment. The 1866 Civil Rights Act (CRA) sought to confer citizenship on all persons born in the U.S. and to guarantee “civil rights,” Foner writes, by giving that “poorly defined concept” a “precise legal meaning.”⁷² In his account, the debates about the 1866 Civil Rights Act were a species of argument about equality, or at least about the relationship between civil rights and equality. Moreover, the dominant view in those debates was that equality in the legally, morally, and constitutionally relevant sense did not require equal distribution of all goods or even of all the kinds of “rights”

⁷⁰ *Id.* at 6–7.

⁷¹ *Id.* at 73.

⁷² *Id.* at 63.

that lawyers of the day struggled to distinguish. In particular, the prevailing view held that legal, moral, and constitutional equality required nondiscrimination in the domain of civil rights but not of social rights. Nevertheless, although Foner describes issues of equality as having been “discussed at greater length in connection with the CRA” than in connection with the Fourteenth Amendment, he maintains that little precision was achieved.⁷³

Accordingly, if asked what the language of Section 1 of the Fourteenth Amendment meant or how it ought to be interpreted, many members of Congress would have disagreed with one another, said they were uncertain, or described the language as relevantly indeterminate. Among the reasons for the continuing failure to achieve either clarity or agreement was that “[t]he second founding took place in response to rapidly changing political and social imperatives at a moment when definitions of citizenship, rights, and sovereignty were in flux.”⁷⁴ Another reason was that the Fourteenth Amendment was “a political document, meant to serve as a campaign platform for the congressional elections of 1866.”⁷⁵ According to some students of the history, members of the Congress that proposed the Fourteenth Amendment deliberately chose language that permitted divergent claims about its meaning and application.⁷⁶ The upshot, Foner concludes, was that the “ambiguity of the language of Section 1 left it uncertain how radical a shift had taken place”⁷⁷

When Foner summarizes leading nineteenth century court decisions interpreting the Fourteenth Amendment in a chapter near the end of his book, he expresses grave disappointment at the truncated interpretations that the Supreme Court reached.⁷⁸ Yet even when most critical, he seldom accuses the Justices of ignoring the original linguistic meanings of the Reconstruction Amendments.⁷⁹ Rather, his complaints involve the Court’s failure to reach morally defensible

⁷³ *Id.* at 66.

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 89.

⁷⁶ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 51–53 (1988) (asserting that Joint Committee on Reconstruction adopted “a phrasing that was sufficiently broad so that those who favored federal protection of political rights could construe it to provide such protection, and sufficiently innocuous so that those who opposed giving such power to the federal government could be reassured that the amendment did no such thing”); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 62 (1955) (suggesting that “the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances”).

⁷⁷ FONER, *SECOND FOUNDING*, *supra* note 23, at 91.

⁷⁸ *E.g.*, *id.* at 131 (“Overall, the late nineteenth-century decisions constitute a sad chapter in the history of race, citizenship, and democracy in the United States.”).

⁷⁹ He comes closest when criticizing the decision in *The Civil Rights Cases*, 109 U.S. 3 (1883), which held that the Fourteenth Amendment gave Congress no power to ban race discrimination by non-governmental entities. See FONER, *SECOND FOUNDING*, *supra* note 23, at 134 (observing that the Court “departed from what most congressmen in 1866 thought they were accomplishing”).

results that the language and history of the Fourteenth Amendment did not foreclose, even if they left room for contestation.

C. A Preliminary Contrast

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

Second, from the perspective of a public meaning originalist, Foner’s account possesses uncertain significance. If Foner’s research helps to establish that the communicative content of the Fourteenth Amendment was vague, originalists can embrace that conclusion. But it is not clear to what extent public meaning originalists would take the debates on which Foner trains his attention, which largely concerned the drafting of the Fourteenth Amendment in Washington, D.C., as decisive evidence of *public* meaning.

In explicating how originalists should seek to ascertain public meaning, Solum has urged a method of “triangulation.” Triangulation calls for simultaneous employment of three methods of historical inquiry: (1) the method of corpus linguistics, which “employs large-scale data sets (corpora) that provide evidence of linguistic practice”; (2) the “method of immersion,” which “requires researchers to immerse themselves in the linguistic and conceptual world of the authors and readers of the constitutional provision being studied”; and (3) the “method of studying the record [of the] framing, ratification, and implementation” of a constitutional provision.⁸⁰ Within that framework, I would think Foner’s work relevant to both the method of immersion and the method of studying the record of a provision’s framing.⁸¹

⁸⁰ Solum, *Triangulating Public Meaning*, *supra* note 2, at 1624–25.

⁸¹ Solum refers to the drafting history of the Fourteenth Amendment as potentially relevant to its public meaning in his article on triangulation. *Id.* at 1656–57 & n.74. But Solum has also dismissed the work of another estimable historian, Jack Rakove, as largely irrelevant to the project of discerning original public meanings:

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

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

In my view, the real challenge that Foner’s work poses to PMO involves what exactly originalists could intelligibly refer to when they insist that constitutional provisions have a single original meaning that existed as a matter of fact. In response to Solum’s account of triangulation, we might ask: Triangulation in search of what? Is there such a thing as the single, uniquely correct, original public meaning of a disputed constitutional provision that the method of triangulation could help to discover, and, if so, what exactly are its constitutive properties?

II. Trying to Make Sense of the Idea of Original Public Meaning

This Part explores the public meaning originalist premises that such a thing as the singular original public meaning of constitutional provisions exists and that it can be identified as a matter of historical and linguistic fact. My argument unfolds over four sections. First, I explain why literal meaning — which furnishes the starting point for determinations of a provision’s assertive or communicative content within the model of conversational interpretation — provides almost no help in resolving any reasonably disputable question under the Fourteenth Amendment.

Second, using the Fourteenth Amendment as an example, I argue that the process of “pragmatic” or contextual enrichment of constitutional provisions’ literal meanings cannot work in the way that public meaning originalists imagine. Within conversational interpretation, pragmatic enrichment ordinarily relies on the overtly inferable communicative intentions of an identified speaker and the shared assumptions of that speaker and a specific audience. In the case of constitutional interpretation, by contrast, there is no unitary speaker.

Third, I explicate and defend the ultimate conclusion to which my analysis points: constitutional provisions have no single original public meaning, existing as a matter of historical or linguistic fact, on which all reasonable and informed interpreters ought to converge. Fourth, I reflect briefly on what might appear to be a puzzle: if there is no single linguistic fact of the matter about what the Fourteenth Amendment affirmatively meant at the time of its ratification in 1868, then how can it be a linguistic fact that the original meaning of the Fourteenth Amendment did not — as I have acknowledged that it did not — require that everyone eat cornflakes?

A. Literal or Semantic Meaning

Original public meaning originalists emphasize that the words and phrases of constitutional provisions have a literal meaning, existing as a matter of fact. Although I do not disagree, original semantic meaning furnishes almost no help in resolving disputed constitutional questions. Let us take as an example the Equal Protection Clause, which provides that no state shall deprive any person of “the equal protection of the laws.”⁸² Semantic content may play an important role in ruling out arguments that the Equal Protection Clause requires everyone to eat

⁸² U.S. CONST. amend. XIV, § 1.

cornflakes, but semantic or literal meaning alone will not resolve most of the actual issues concerning which lawyers and judges seek historical guidance, including whether the Fourteenth Amendment prohibits school segregation or bars states from excluding women from the practice of law.

Historical facts about language use illuminate why. As Foner establishes, in 1866, when Congress proposed the Equal Protection Clause, the meaning of equality was “in flux.”⁸³ To grasp a concept — such as “equal” or “equal protection” or “equal protection of the laws” — is normally to know how to apply it.⁸⁴ If usage was in flux, judgments about the concept’s proper applications were in flux, too.⁸⁵

Of equal importance, the “flux” that Foner depicts in Reconstruction usage was partly attributable to the status of equality as what W.B. Gallie termed an “essentially contestable concept.”⁸⁶ It has normative as well as descriptive content. As a result of this intermixture, we must expect disagreement about the concept’s proper applications among those who hold divergent moral views, not only in the era of Reconstruction, but more generally.⁸⁷

A variety of problems arises in trying to assign *substantive* semantic content to a word that expresses an essentially contestable evaluative concept. John Rawls,⁸⁸ followed by Ronald Dworkin,⁸⁹ famously distinguished between concepts and competing “conceptions” of those concepts. With regard to the distinction between concepts and conceptions, justice furnished Rawls’s central example. He thought that there was enough agreement on the action-guiding implications of judgments concerning justice and injustice, and on the kinds of contexts in which discussion of justice normally occurs, so that we could talk of justice without necessarily

⁸³ FONER, *SECOND FOUNDING*, *supra* note 23, at xiv.

⁸⁴ See FRANK JACKSON, *FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS* 33 (1998) (arguing “concept” refers to “the possible situations covered by the *words* we use to ask our questions”); see also David Plunkett, *Which Concepts Should We Use? Metalinguistic Negotiations and the Methodology of Philosophy*, 58 *INQUIRY* 828, 846 (2015) (“[I]ndividual concepts are roughly the equivalent in mental representation to what individual words are in linguistic representation.”).

⁸⁵ For the thesis that there are many such disputes that are best classified as involving “metalinguistic” disputes or negotiations about how we ought to use words, rather than involving empirical claims about semantic meanings, see Plunkett, *supra* note 84, at 837–38; David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 *PHILOSOPHERS’ IMPRINT* 1, 2–3 (2013). See also RICHARD, *supra* note 3, at 3 (arguing that there are multiple possible conceptions of meaning, the most useful of which for many purposes will equate meaning with “interpretive common ground” among competent speakers of a language, and that meaning in this sense is “species-like” and evolving).

⁸⁶ See W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 167 (1956).

⁸⁷ In the case of normative and evaluative terms, I assume that disagreement will normally involve the terms’ semantics, not pragmatics. See Plunkett & Sundell, *supra* note 85, at 8.

⁸⁸ See JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971).

⁸⁹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977).

agreeing on some of the most important substantive criteria for determining what justice requires.⁹⁰

If we imagine similar patterns of agreement and disagreement about “equal,” “equal protection,” or “equal protection of the laws,” we would need to expect any purely semantic contribution to the assertive or communicative content of the Fourteenth Amendment’s Equal Protection and Privileges or Immunities Clauses to be very sparse or thin. For example, we could not conclude that the literal meaning of the Fourteenth Amendment either did or did not forbid states to maintain racially segregated schools or bar women from the practice of law. This conclusion would hold under the Equal Protection Clause for reasons involving flux and disagreement about the nature and requirements of the concept of equality. It would emerge equally clearly with regard to the semantic content of the Privileges or Immunities Clause. That clause clearly presupposes that privileges or immunities of citizenship exist, but semantics alone cannot tell us what “the privileges or immunities of citizens of the United States” were in cases of reasonable substantive disagreement. A plausible semantic theory must explain how debates about the meaning of equality and the privileges or immunities of citizenship were meaningfully substantive, not settled by regularities in the usage of language.

In principle, I hasten to add, a public meaning originalist could accept everything that I have said about the underdeterminacy of the Constitution’s semantic content in nearly every disputed case. Professor Soames has emphasized that what matters is not what words, phrases, and sentences literally mean but what the Constitution’s framers used them to say.⁹¹ Solum has described semantic content as “sparse.”⁹² If my arguments in this section about the limited contribution that pure semantics can make to constitutional interpretation have seemed to knock at an open door, I have advanced them mostly as a prelude to more controversial claims.

B. Pragmatic (or Contextual) Enrichment

I now want to make a more radical claim about public meaning originalism: public meaning originalists have no workable account of how contextual factors could, as a matter of linguistic fact, sufficiently enrich the semantic content of disputed provisions to resolve reasonably disputable cases. To know what words or phrases mean in context, we ordinarily draw on biographical information about both the speaker and the listeners and about the assumptions that they share. Professor Soames is explicit on this point in a formulation that I quoted earlier: “In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would

⁹⁰ See RAWLS, *supra* note 88, at 5.

⁹¹ Soames, *Deferentialism*, *supra* note 32, at 597–98.

⁹² Solum, *Intellectual History as Constitutional Theory*, *supra* note 40, at 1126; Solum, *Originalist Methodology*, *supra* note 7, at 285.

rationally take the speaker's use of *S* to be intended to convey and commit the speaker to."⁹³ In the context of constitutional interpretation, however, the normal foundations of pragmatic enrichment do not exist, and public meaning originalists have produced no adequate substitute.

1. The problem of speaker identification

In efforts to pragmatically enrich the semantic content of constitutional provisions, the problem of speaker identification arises ubiquitously. Foner's account of the drafting of the Fourteenth Amendment furnishes a concrete illustration. According to Foner, the first draft of what would become Section One of the Fourteenth Amendment was prepared by an outsider, Robert Owen, and passed to the Joint Committee on Reconstruction by the Radical Republican Congressman Thaddeus Stevens.⁹⁴ But Moderates, not Radicals, constituted a majority on the Committee. Within it, Foner writes, there then occurred "a somewhat disorienting series of further votes in which language was added and eliminated from Owen's now almost unrecognizable proposal."⁹⁵

After the Committee completed its work, the House and Senate voted separately to recommend the Fourteenth Amendment for ratification by the states. Ratification then occurred at the state level, with the ratifiers arguably taking their place in the parade of potential "speakers" whose communicative intentions reasonable members of the public might have thought relevant to the Fourteenth Amendment's meaning. The ratifiers' adoption of the proposed Amendment's language gave it the status of law that courts and others thereafter had to interpret.

If pragmatic enrichment of semantic content by contextual factors normally depends on facts about the speaker and inferences about the speaker's likely communicative intentions, against the background of shared assumptions or interpretive common ground, what should be done in the absence of a unitary speaker?⁹⁶ Public meaning originalists have offered a variety of responses. None responds adequately to the challenge that it seeks to meet.

Perhaps the most common strategy is to posit that contextual enrichment can occur without speaker identification at all. In one version of that strategy, Professor Solum postulates that all of the Constitution's drafters and possibly its ratifiers intended to "convey [the] public meaning" of the text — defined as its semantic content, as enriched by publicly available context —

⁹³ Soames, *Deferentialism*, *supra* note 32, at 598.

⁹⁴ FONER, *SECOND FOUNDING*, *supra* note 23, at 69–71.

⁹⁵ FONER, *SECOND FOUNDING*, *supra* note 23, at 70.

⁹⁶ The problem of combining or aggregating the intentions of multiple authors or speakers was initially raised in Brest, *supra* note 10, at 213–14. For a more recent, insightful discussion of "the summing problem," see, for example, Gregory Bassham & Ian Oakley, *New Textualism: The Potholes Ahead*, 28 *RATIO JURIS* 127, 138–41 (2015).

whatever it might be.⁹⁷ In this strategy, the speaker or speakers substantially vanish from view. Whoever they were, they meant to convey — and would reasonably be understood as having intended to convey — no more and no less than the public meaning of the constitutional provision in question.⁹⁸

Although clever, Solum’s account of relevant speakers’ intentions begs the central question in issue. Contextual or pragmatic enrichment — on which PMO relies to define public meaning — involves inferences by reasonable listeners concerning a speaker’s communicative intentions in making a particular utterance on a particular occasion. When we take up the perspective of a reasonable and informed reader, Solum’s suggestion that we should assume that the Constitution’s authors intended to convey the public meaning of their text proves utterly unhelpful in any reasonably disputable case. It affords no guidance to either a member of the public or an interpreter who is puzzled, substantively, about what a text asserts and who would normally regard facts about the author’s assumptions and communicative intentions as pertinent in determining its contextual meaning.⁹⁹

The case of the Fourteenth Amendment exemplifies this point. Recall Foner’s conclusion that the Fourteenth Amendment was partly a campaign document, drafted to permit members of Congress with different views and preferences to make divergent claims about its meaning during the 1866 campaign.¹⁰⁰ These divergent claims were part of the historical record. For a citizen attempting to puzzle out the meaning of the semantically vague Fourteenth Amendment to be told that it meant whatever a “reasonable” person would think it meant, in context, would epitomize obfuscation. It provides no help whatsoever to someone who wants to know specifically how and why contextual factors could pragmatically enrich the semantic content of the Fourteenth Amendment — which is radically sparse and underdeterminate — in particular ways.

A second response to the challenge of pragmatically enriching constitutional meanings in the absence of a clearly identified speaker is to rely on an “objective” notion of speaker intentions. Justice Scalia, who was both an originalist and a textualist, defended an approach along these lines. He recognized, and indeed emphasized, that multi-member bodies such as Congress would rarely if ever have unitary communicative intentions in the psychological sense.¹⁰¹ Yet he also acknowledged that contextual enrichment of semantic content required a substitute for such

⁹⁷ Solum, *supra* note 64; *see also* Solum, *Communicative Content*, *supra* note 32, at 500.

⁹⁸ The textualist/originalist Dean John Manning adopts a similar strategy. *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2405–12 (2017).

⁹⁹ *See generally* David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 PHILOSOPHERS’ IMPRINT 1, 16 (2013) (“[I]t should be uncontroversial that at least one crucial type of data for figuring out what a speaker means by a term *T* are facts about the speaker’s usage of *T* — patterns of usage that reflect her disposition to apply that term one way or another, more generally.”).

¹⁰⁰ *See supra* note 75 and accompanying text.

¹⁰¹ *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

intentions. He purported to find that substitute in “a sort of ‘objectified’ intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”¹⁰² Within this framework, the obvious challenge is to give substantive content to the idea of an objectified intent. Without such content, it will collapse into the same emptiness as the formula of postulating a speakers’ intent to convey a provision’s public meaning, whatever that might be.

One possible response would be to define objective speakers’ intentions as those that an imagined “typical” author (or ratifier) of the words of a constitutional provision, in its linguistic and historical context, could most reasonably be supposed to have.¹⁰³ Based on admittedly sketchy data, I take this to have been Justice Scalia’s characteristic approach. And in some cases, it seems helpful. With regard to linguistic context, for example, it seems plausible to assume that a “typical” author of the Constitution would intend references to “the President” to signify the president of the United States, not the president of some other institution, and that the First Amendment guarantee of “[t]he freedom of speech” refers to a previously recognized freedom. If so, the question becomes how much pragmatic enrichment the notion of a typical speaker’s intentions, as reasonably inferable from a linguistic and historical context, might license.

With regard to this question, Foner’s account of the flux and debate that surrounded the drafting and ratification of the Fourteenth Amendment counsels caution. As historical disagreements and drafting compromises evidenced, “typical,” “objective” speakers’ intentions are not identifiable as matters of historical fact in the same sense as conclusions about who said what to whom or who arrived at which conclusions on a particular occasion. The posited “typical” communicative intentions are lawyers’ or historians’ constructs, deliberately abstracted from the thought processes of actual human beings.¹⁰⁴ There is nothing per se objectionable about reliance on constructs in this sense. But for a construct such as that of a “typical” speaker to support judgments that could plausibly claim *objective* status, the criteria for ascribing typical communicative intentions would need to be specified with sufficient precision so that different

¹⁰² See, e.g., SCALIA, *supra* note 61, at 17 (“We look for a sort of ‘objectified’ intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423 (2005) [hereinafter Manning, *Textualism and Legislative Intent*] (“[T]extualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process.”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005).

¹⁰³ See Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003) (employing an “objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated”); see also Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 (2009) (“Mainly, we know someone’s intended meaning by examining the typical meaning attached to the words they used.”).

¹⁰⁴ See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584 (2011); Kay, *supra* note 103, at 720.

investigators could be expected to reach the same conclusions.¹⁰⁵ Yet no public meaning originalist of whom I am aware has provided even reasonably determinate guidance.

The problem is not that originalists fail to adduce evidence in support of their conclusions — for example, that the original public meaning of the Fourteenth Amendment either did or did not forbid school segregation or the exclusion of women from the practice of law. It is that PMO lacks an account of how and why particular historical evidence suffices to establish the “objective” intentions of unknown or non-existent speakers in the face of historical evidence that some people at the time reached different conclusions about what the Fourteenth Amendment required. If we ask what are the truth conditions for such claims, originalists have so far furnished no good answer.

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

To discover what the law asserts or stipulates is, in the first instance, to discover what the lawmakers asserted or stipulated in adopting an authoritative text. As with ordinary speech, this is usually not a function of the linguistic meaning alone; it is a function of meaning plus the background beliefs and presuppositions of participants.¹⁰⁶

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

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

¹⁰⁵ I do not question that originalists might develop a minimalist conception of objective intentions as those necessary to make the adoption of constitutional language intelligible in its linguistic, historical, and institutional context. Cf. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 284-85 (2009) (postulating that legislators should be assumed to act with the “minimal intention” to make law that will be “understood” in accordance with the norms of “their legal culture”). But so minimal a concept of objective intentions would support only minimal pragmatic enrichment of constitutional provisions’ semantic content.

¹⁰⁶ Soames, *Deferentialism*, *supra* note 32, at 597–98; *see also* Soames, *Toward A Theory of Legal Interpretation*, *supra* note 33, at 241 (“Since what language users intend to say, assert, or stipulate is a crucial factor, along with the linguistic meanings of the words they use, in constituting what they do say, assert, or stipulate, the intentions of lawmakers are directly relevant to the contents of the laws they enact.”).

is, in principle, derivable from the relevant, publicly available, linguistic and non-linguistic facts.¹⁰⁷

This argument never comes to grips with the problem that it purports to solve. It is true that we sometimes speak of collective bodies as exercising agency that does not depend on “aggregated sums of individual cognitive attitudes.” As work on group agency has demonstrated, sometimes people intend to do things together. In these cases, those acting in coordination may form “we-intentions” rather than just “I-intentions.”¹⁰⁸ Familiar examples are taking a walk together and cooking dinner together. Rarely, however, will it be the case that any we-intentions that reasonably could be attributed to Congress in proposing a constitutional amendment will include the intention “that a textual provision have some specific meaning.”¹⁰⁹ As the case of the Fourteenth Amendment illustrates, different drafters and ratifiers can and often will have divergent individual intentions.

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

2. The problem of characterizing reasonable readers or listeners

Similar, compounding problems arise from PMO’s reliance on the notion of a reasonable hearer or listener, on whose interpretive understandings the contextual meaning of constitutional provisions depends. Foner’s study of the drafting and ratification of the Fourteenth Amendment again illumines some of the difficulties. However one might specify the audience for the Fourteenth Amendment, it was highly diverse. Some members possessed more and some less information about the drafting history and about the legal antecedents of some terms. Nor, given the linguistic and moral flux that Foner emphasizes, would all members of the informed public

¹⁰⁷ Soames, *supra* note 7.

¹⁰⁸ Leading works in developing accounts of group agency and group intention include MICHAEL E. BRATMAN, *FACES OF INTENTION* (1999) and CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY* (2011).

¹⁰⁹ Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 *DUKE L.J.* 979, 1009 (2017).

necessarily have drawn the same conclusions about the relevance of prior legal understandings. In the face of these messy facts, I, like Foner, would simply conclude that different reasonable listeners would have drawn different reasonable conclusions about the meaning and proper application of the Fourteenth Amendment. The challenge for PMO is to explain how all “reasonable” and informed members of the audience would have made the same interpretive assumptions and arrived at the same conclusions, which then would constitute a provision’s uniquely correct original public meaning.

One possible response would be to treat “reasonableness” in the relevant sense as a criterion for normative judgment.¹¹⁰ For example, one might posit that the most normatively reasonable judgment about the meaning of the Fourteenth Amendment would be that which made the most normatively desirable contribution to the overall body of American law.¹¹¹ But public meaning originalism rejects reliance on normative criteria by insisting that original public meanings exist as matters of historical and linguistic fact.¹¹²

Surprisingly, few prominent public meaning originalists have confronted the challenge of how to identify or construct the hypothetical reasonable interpreter of constitutional language — to be invoked for purposes of resolving disputes that are imagined to be entirely factual — in significant detail.¹¹³ Professor Solum acknowledges the difficulty but offers no satisfactory solution. In an article entitled *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, he concedes that “different native speakers [of English], when cast in the role of interpreters, “will have different sets of linguistic intuitions, reflecting different histories of exposure to the language,”¹¹⁴ as they seek to discern what the Constitution’s authors (whoever they were) would have sought to communicate to them, in context. Under these circumstances, the quest for original meaning ideally requires “a comprehensive recreation of the

¹¹⁰ See Gardner, *Mysterious Case*, *supra* note 17, at 299 (noting that “the resort to a reasonableness standard is” often a way “to reopen a bit of space for ordinary moral reasoning in a rule that would otherwise be apt to level it away”); see also Miller & Perry, *supra* note 17, at 326–28 (arguing that it is impossible to construct an analytically rigorous descriptive account of the reasonable person); Benjamin Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2150 (2015) (“[W]hat counts as a reasonable person is itself a question with significant normative content.”).

¹¹¹ Cf. RONALD DWORKIN, *LAW’S EMPIRE* 51–53 (1986) (advancing a theory of “constructive interpretation” that depends on mixed criteria of “fit” and normative attractiveness); DiMatteo, *supra* note 17, at 335 (observing that “the reasonable person” of contract law, who “must decide if the parties had an intent to create a contract and to give meaning to that intent,” “can be seen as a synthesis of legal and community values”).

¹¹² See *supra* notes 29–47 and accompanying text.

¹¹³ Cf. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 73 (2006) (“This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.”); Steven Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 8 n.33 (2011) (“The need for courts to construct an objective original public meaning of enacted texts resembles the need for courts in tort cases to ask what a reasonable person might have done in a given situation.”).

¹¹⁴ Solum, *Triangulating Public Meaning*, *supra* note 2, at 1667.

linguistic world of” relevant periods that would “duplicate” the perspectives of “representative” historical inhabitants,¹¹⁵ he writes. Although I applaud this ambition for historical inquiry, it furnishes no solution to the conceptual problem that PMO confronts. Suppose a historian perfectly recreates what Solum acknowledges to be the perspectives of those living at the moment of a constitutional provision’s promulgation and adoption. Solum never explains how a historian’s reconstruction of divergent historical beliefs and perspectives could produce a transcendent, uniquely “reasonable” and therefore correct original public meaning (or communicative content) of contested constitutional language.¹¹⁶

In seeking to make sense of Solum’s claims, the best I can do is to conclude that he tacks back and forth between two alternative understandings of original public meaning and, implicitly, between two alternative understandings of the reasonable interpreter of constitutional language. On one, which is extremely minimal in its ambitions, the aim of inquiries into the original meaning is merely, as he puts it, to “translate the provision at issue from the language of the relevant period into contemporary language.”¹¹⁷ In this minimalist exercise, historians would aspire to establish little more than whether and if so how the meanings of relevant words and phrases have changed over time. As examples of “linguistic drift,” Solum cites the phrase “domestic violence” in Article IV and the word “dollar” in the Seventh Amendment. According to Solum, although “domestic violence” today means “violence within the family,” it originally meant “violence within a state,” and “dollar” in the Seventh Amendment likely referred to the Spanish silver dollar, not a Federal Reserve Note.¹¹⁸ If so, the original public meaning of Article IV and the Seventh Amendment would reflect these historically revealed predominant usages, but translation would not, by itself, resolve any disputed issues not settled by the provisions’ semantic content.

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

¹¹⁵ *Id.* at 1668.

¹¹⁶ See, e.g., Bassham & Oakley, *supra* note 96, at 141 (“[W]hen we are asking what proposition an ‘informed, reasonable reader’ would have understood a certain string of words to express, no clear answer may emerge. Equally informed and equally reasonable readers may have understood the words very differently.”).

¹¹⁷ Solum, *Triangulating Public Meaning*, *supra* note 2, at 1678.

¹¹⁸ See *id.* at 1670.

the notion of a reasonable interpreter could not settle any issue that was seriously contestable at the time of a provision's ratification.

Sometimes, however, Solum and other public meaning originalists suggest that a reasonable interpreter, by taking contextual factors and interpretive common ground into account, would rightly reach much more determinate conclusions.¹¹⁹ The following passage exemplifies that position:

As I understand the position of the New Originalists (and I count myself as among them), most of the provisions of the Constitution are structural and have clear original meanings: the detailed plan for the national government including the various rules constituting the Congress, presidency, and the judicial branch have discernable original meanings and much of that plan is substantially determinate. Many of the vague provisions (including important individual rights provisions) create construction zones, but this is because the discernable original meaning underdetermines some constitutional questions.

Some originalists may believe that there are a few provisions of the constitution where the original meaning is highly contestable (and perhaps where the available evidence is not fully adequate to resolve the controversies clearly); the Privileges or Immunities Clause of the Fourteenth Amendment might be such a provision. But so far as I know, there is no originalist who believes that this phenomenon is “widespread”¹²⁰

Given manifest historical disagreement and in the absence of further elucidation of the attributes of “reasonableness” that would permit factually-based resolution of such disagreement, I find these claims puzzling. In order for an imagined reasonable and informed reader to transcend the historical disagreements among people at the time of a constitutional amendment's ratification, I must suppose that Solum and others sometimes imagine their hypothesized construct to be capable of apprehending which of several disputed interpretations is *most* reasonable. For example, Professor Solum may rely on a conception of most-reasonableness when he argues that the linguistic meaning of the Privileges or Immunities Clause, as properly interpreted, forbade states to exclude women from law practice — even though the Supreme Court concluded otherwise in *Bradwell v. Illinois*¹²¹ by a vote of 8 to 1.¹²² Although Solum

¹¹⁹ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 192–208 (2004) (criticizing the *Slaughter-House Cases* for betraying the original meaning of the Fourteenth Amendment).

¹²⁰ Solum, *Originalism and Constitutional Construction*, *supra* note 28, at 530.

¹²¹ 83 U.S. (16 Wall.) 130 (1873).

¹²² See Solum, *Surprising Originalism*, *supra* note 52, at 253–54; see also Solum, *Triangulating Public Meaning*, *supra* note 2, at 1666 (rejecting “application belief that the Fourteenth Amendment would not protect women’s equal rights to practice law because predicated on “a false belief that women have intellectual capacities that are similar to those of children and, hence, that women are incapable of practicing law”).

views *Bradwell* as based on a “factual” mistake about women’s capacities, others could have seen the drafting context of the Fourteenth Amendment – which specifically linked states’ representation in Congress to nondiscrimination against “male citizens” with regard to voting¹²³ — as signaling an implicit tolerance for some sex-based disparities. Whichever view is more reasonable, my point is that if public meaning originalists think that contextual factors can pragmatically enrich the “sparse” semantic content of the Privileges or Immunities Clause in a way that all reasonable people should agree on, they owe a fuller account of the conception of reasonableness on which they rely. Among other things, they need to specify how a reasonable person would reach conclusions about the communicative content of a provision that apparently had multiple authors with divergent communicative intentions.¹²⁴

In response to this demand, proponents of PMO might object that they bear no burden of specification. Competent speakers of English, they might insist, know how to draw the inferences through which contextual factors contribute to the communicative content of both oral and written utterances without need for further instruction. But that response fails with regard to constitutional provisions that have either unknown or multiple authors and that, partly as a result, have provoked interpretive controversy. In disputed cases of that kind, tacit knowledge of how contextual factors contribute to the communicative content of conversational utterances and written communications about matters of fact furnishes little help. The existence of historical disputes about constitutional meaning corroborate this conclusion. Absent a fuller account of what the constituent elements of uniquely correct “original public meanings” would be, assurances that a reasonable person would know how to discover them without specific instruction are at best misleading and likely false.

Professor Soames provides no further clarity. “[W]hen ‘speaker’ and ‘audience’ are collective,” he writes, “the default interpretation of the asserted content of the communication is what one would expect a reasonable and rational individual who understood the words and knew all of the relevant and publicly available facts of the context of use would take it to be.”¹²⁵ This formula may work well enough in cases that everyone agrees about. When the Constitution says “four years,”¹²⁶ everyone agrees that it means four years. But the unsolved problem, once again, is that “reasonable and rational individual[s]” often disagree about matters of constitutional interpretation. Sometimes they may do so because they disagree about which publicly available facts are more and less relevant. Reasonable people may also disagree because they hold divergent views about the relevant conception of essentially contestable concepts or other

¹²³ U.S. CONST. amend. XIV, § 2.

¹²⁴ See Balkin, *Construction*, *supra* note 20, at 92 (“In any age or era — as in our own — reasonable people often differ about many things, especially where politics is involved.”).

¹²⁵ Soames, *supra* note 7.

¹²⁶ U.S. CONST. art. II, § 1 (providing for a presidential term of four years).

concepts that may be in flux at a particular time. Foner furnishes abundant evidence on this score.

To sum up: PMO assumes the possibility of pragmatic enrichment of constitutional provisions' semantic content as mediated through the hypothetical construct of a "reasonable" interpreter. But to do real analytical work, that construct would need to be imbued with substantive content. History teaches that seemingly reasonable human beings often disagree about what constitutional provisions mean, in context. Maybe there is a theoretically sound conception of reasonableness capable of transcending and resolving familiar disagreements. PMO implicitly claims to have one. But the leading public meaning originalists have not so far elaborated that conception. In its absence, the contention that disputed constitutional provisions have uniquely correct original linguistic meanings, discernible as a matter of historical and linguistic fact, is unsustainable.

C. Reconsidering the Concept of Original Public Meaning

The more one pushes for clarity concerning the idea of constitutional provisions having uniquely correct original public meanings that could be discovered as a matter of historical and linguistic fact, the more elusive it becomes. According to Professor Solum, the facts that historians unearth about the contents of dictionaries and about who said what to whom are "evidential" of original public meaning but do not constitute it.¹²⁷ But what does "evidential" mean in this context? It implies that a constitutional provision's original public meaning (or assertive or communicative content) is a further fact, beyond those that historians such as Foner discover, that can itself be proved. But what sort of a fact is it?

At the outset, it may help to rule out some possibilities. The fact of a constitutional provision's original public meaning is not an empirical fact in the same sense as facts about the natural world. It is not a psychological fact, involving any particular person's mental life. It is not a logical or a moral fact. As presented by public meaning originalists, the original public meaning of a constitutional provision appears to be a theory-generated conclusion about the implications of actual historical facts in pragmatically enriching the semantic content of particular constitutional provisions.

Proponents of PMO purport to see no mystery here. According to them, the further fact of a disputed constitutional provision's communicative content is no more mysterious than the fact that conversational utterances have communicative content that goes beyond their literal meanings. As I have emphasized, however, there are crucial differences. Behind claims about the pragmatically enriched meanings of conversational utterances lies the tacit theory embodied in what I have called the model of conversational interpretation. That theory, which depends on

¹²⁷ Solum, *Triangulating Public Meaning*, *supra* note 2, at 1656; *see also* Nelson, *supra* note 16, at 557 ("[M]odern originalist scholarship often uses the actual understandings expressed by individual framers or ratifiers as evidence of the 'original meaning.'"); Maggs, *supra* note 16 (offering a guide of evidence of original meaning).

facts about identifiable speakers and their audiences and the interpretive common ground that they are reasonably imagined to share, does not fit the case of disputed constitutional provisions. Another theory is needed. And as the previous section showed, public meaning originalists have not yet articulated a theory adequate to justify their conclusions under circumstances that feature multiple and diverse speakers, equally heterogeneous readers or listeners, and resulting uncertainties about what could plausibly be described as interpretive common ground in a fact-based sense.

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

Now suppose we want to know what the original public meaning of one or another provision of the Fourteenth Amendment was and whether, in particular, it prohibited segregation in the public schools or discrimination against women in the award of licenses to practice law. We know lots of facts about things that people said and apparently believed during the congressional debates surrounding the Fourteenth Amendment and the subsequent ratification process. But these facts could not be evidential of the further fact of original public meaning in the same, probabilistic way as facts making it more or less likely that George Washington visited Philadelphia.

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

We could imagine asking and trying to answer a similar question about what percentage of Americans alive in 1866 or 1868 thought that the Fourteenth Amendment barred school segregation or discrimination against women seeking law licenses. If so, at some point we would need to face the question of how to aggregate what would undoubtedly be split results into a unitary original public meaning — perhaps a majoritarian or, if necessary, a plurality-based conception of original public meaning as cashed out in empirical terms (for example, if some people might have said they did not know).

As we entertain this thought experiment, however, we should recall that public meaning originalists have never, so far as I am aware, sought to conceptualize the original public meaning of a constitutional provision in terms of the answers that most people or a plurality of people would have given to an imagined pollster.¹²⁸ Part of the reason may involve uncertainty about how exactly to specify the question that a historically nonexistent pollster ought to have asked. It is notorious that the answers that pollsters get frequently depend on how they formulate their questions.¹²⁹

Another part of the reason, however, involves public meaning originalists' conceptual distinction between original linguistic meanings and originally anticipated applications of constitutional language.¹³⁰ According to public meaning originalists, whether, for example, most Americans living in 1866 or 1868 expected that the Equal Protection or Privileges or Immunities Clause would bar school segregation or discrimination against women is not the same as whether the original meaning precluded school segregation or discrimination against women.¹³¹ As I sought to explain above, public meaning originalists maintain that meaning (or assertive or communicative content) is one thing, expected applications another. To fail to appreciate the distinction is to make an elementary philosophical mistake.¹³²

In my view, however, another philosophical mistake may infect debates about constitutional provisions' original public meanings. It is the philosophical mistake of assuming that constitutional provisions have singular original public meanings that consist in some further fact, the identification of which requires no special interpretive theory and which ought to be discernible to all, of which all of the more basic facts that historians such as Foner unearth are merely evidential. The idea that constitutional provisions have original public meanings in that sense — which is the central, defining tenet of PMO — is chimerical.

D. Linguistic Idiosyncrasy

¹²⁸ Other varieties of originalists sometimes have taken this or a similar approach. Richard Kay has developed an approach that would fix original constitutional meanings based on overlapping intentions of majorities voting to ratify the Constitution in the various state ratifying conventions, but he identifies his approach as a version of original-intent-based, rather than OPM, originalism. See Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 247–51 (1988).

¹²⁹ See, e.g., Josh Pasek & Jon A. Krosnick, *Optimizing Questionnaire Survey Questionnaire Design in Political Science: Insights From Psychology*, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR 32, 35–36, 38–39 (Jan E. Leighley ed., 2010).

¹³⁰ See *supra* note 31 and accompanying text.

¹³¹ See, e.g., Solum, *Surprising Originalism*, *supra* note 52, at 253–55; Calabresi & Matthews, *supra* note 31, at 1398 (arguing that “it is the semantic original public meaning of the enacted texts,” rather than expected applications, that determines original public meaning).

¹³² Cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750–54 (2020) (distinguishing original linguistic meaning from expected applications in the context of statutory interpretation).

In debunking the idea that constitutional provisions have singular original public meanings in the sense that originalists imagine, I may seem to have carried linguistic-meaning-skepticism too far. It may be hard to specify exactly what original public meanings are or which bits of evidence contribute to them in which ways, someone might object, but surely constitutional provisions must have uniquely correct, fact-based, original public meanings. How else could we say — as I have acknowledged — that the original meaning of the Equal Protection Clause did not require everyone to eat cornflakes for breakfast?

One possible answer would be simply that the Equal Protection Clause had no original public meaning. There was no such thing. Because no such thing as the original public meaning existed, it could not require the eating of cornflakes.¹³³

Another, less pervasively skeptical answer would start with a slightly different question than the one — about whether constitutional provisions must not have at least minimally determinate original public meanings — that I just posed. Although the notion that constitutional provisions have uniquely correct “original public meanings” is mysterious and ultimately chimerical, I have not disputed that we can talk meaningfully about constitutional provisions’ meanings, including their original meanings, without embracing the conceptual assumptions on which the chimera of “original public meaning” depends. To do so, we need to be clear, distinguishing all of the various senses of meaning that we sometimes invoke, and to acknowledge the limits of what empirical evidence can establish. When we do so, particular claims about original meaning may prove unsupportable, regardless of the conception of original meaning that one employs.

In considering whether the original meaning of the Equal Protection Clause required cornflake-eating, we might begin (though we could not end) with the Clause’s semantic content. At bottom, semantic content depends on regularities in usage, based on widely shared understandings about what words do, do not, and cannot mean. Even with regard to regularities of usage of the kind that dictionaries purport to record, there can be flux, uncertainty, and what Solum calls semantic shift.¹³⁴ But based on all of the historical evidence of which I am aware, someone who took the position that the semantic content of the Equal Protection Clause mandated the eating of cornflakes would have been an extreme outlier in 1868. There may be cases in which a word or phrase is so vague that it would be hard to mark the point at which a claim of semantic meaning became an “outlier.” But it suffices for current purposes that this is not one of them. It is not my aim here (or anywhere) to mark the precise limits of what semantic inquiry can establish.

Because the word “meaning” has many senses, semantic analysis could not, by itself, establish decisively that the original meaning of the Equal Protection Clause did not require cornflake-eating. To reach that conclusion, we would need to consider whether someone using

¹³³ See Fallon, *supra* note 5, at 313–17 (advancing an “error theory” to explain claims that statutes have uniquely correct contextual meanings).

¹³⁴ See, e.g., Solum, *Triangulating Public Meaning*, *supra* note 2, at 1639.

the term “meaning” in any other sense circa 1868 could plausibly have thought otherwise. Once again, however, all of the historical evidence of which I am aware suggests that the answer would be no. If there were any who took the view that the Fourteenth Amendment required the consumption of cornflakes, they would have been outliers or even extreme outliers once again.

Leaving no stone unturned, we might ask whether “the real conceptual meaning” of the Equal Protection Clause — if it were understood as having incorporated a moral ideal — required cornflake-eating. The question then would be a moral one, not dependent on the accidents or possibly the mistakes of prevalent thinking in the early aftermath of the Civil War. But I know of no plausible theory of equality as a moral or political ideal that implicates cornflakes in any way.

Based on this analysis, we can confidently conclude, I believe as a matter of historical fact, that anyone who took the position in 1866 or 1868 that the Equal Protection Clause mandated the eating of cornflakes would have been an outlier, unsupported in her views by any plausible theory or supporting evidence. Insofar as purely linguistic (rather than legal) meaning is concerned, I am not sure what more we could reasonably want to assert by saying that “the original meaning of the Equal Protection Clause did not mandate cornflake-eating.”

I should perhaps highlight once more, however, that my claims here are about the original meaning of the Equal Protection Clause, in the various senses in which we might plausibly use that term,¹³⁵ and not about the original *public* meaning as specially defined (although I have argued inadequately so) by public meaning originalists. Talk about the original public meaning in that sense remains a snare and a delusion even insofar as the status of cornflake-eating under the Equal Protection Clause is concerned.

By contrast with my analysis of the Fourteenth Amendment’s non-prescription of cornflake-eating, if the question were whether the original meaning of the Fourteenth Amendment forbade racial segregation in the public schools or categorical exclusion of women from the practice of law, knowable historical facts establish that otherwise reasonable people disagreed.¹³⁶ Undaunted by the fact of disagreement, public meaning originalists insist that there is some other further fact, involving the Fourteenth Amendment’s uniquely correct original public meaning. But until they give an account of what that further fact might be, I am skeptical that there is any such further fact of the kind that PMO postulates. Accordingly, when originalists announce claims about determinate original public meanings in cases of historical dispute among otherwise informed, linguistically competent, and reasonable people, I do not understand how those claims could be demonstrably either true or false as a matter of historical and linguistic fact.

¹³⁵ See *supra* note 120 and accompanying text.

¹³⁶ See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 25–26, 146 (2004) (“[T]he original understanding of the Fourteenth Amendment plainly permitted school segregation”); FONER, *SECOND FOUNDING*, *supra* note 23, at 137–39 (noting debates about women’s rights under the Fourteenth Amendment).

III. Generalizing the Thesis

So far in this Article, I have sought to develop a general thesis about the chimerical character of purported original linguistic meanings of constitutional language, and the resulting need for judicial constructions of legal meanings, by focusing on an admittedly cherry-picked example. I have drawn nearly all of my historical evidence from the drafting history of the Fourteenth Amendment as recounted by Eric Foner. Nevertheless, my argument has proceeded largely on conceptual turf, challenging the intelligibility of the idea that constitutional provisions whose meanings and applications are reasonably disputed could have a single original meaning as a matter of linguistic fact. The case of the Fourteenth Amendment makes an especially vivid example because different participants in the drafting process articulated different and shifting understandings of what key terms meant. But the facts of constitutional history strongly suggest that the meanings of other constitutional provisions were similarly framed in periods of intellectual ferment and conceptual flux that made their meanings disputable from the beginning.

The Pulitzer Prize-winning historian Jack Rakove has described the circumstances of the drafting of the original Constitution in terms similar to those that Foner uses to characterize the milieu of the Fourteenth Amendment:¹³⁷ “The adopters of the Constitution inhabited a world that was actively concerned with . . . the instability of linguistic meanings, and . . . arguments about the definitions of key words and concepts were themselves central elements of political debate.”¹³⁸ Post-ratification debates about the meaning of central provisions of the original Constitution largely corroborate accounts that emphasize flux, shifting meanings, and controversy. According to Professor Mary Sarah Bilder, “from the moment the Constitution became visible, it was contested. . . . The understandings of the Constitution shifted over the summer of 1787 and continued to transform through” the following decade.¹³⁹

Professor Jonathan Gienapp has recently maintained that early constitutional debates focused partly on the nature of the Constitution and the significance of its text.¹⁴⁰ According to him, many members of the Founding generation viewed the written Constitution more as the sketch of an incomplete system than as a document precisely fixing governmental powers and individual rights. “Few have appreciated just how deeply in flux the original Constitution was” in 1789,

¹³⁷ See Rakove, *supra* note 104, at 588 (“It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in quiet times, but it is quite another to apply that assumption to a period like the late 1780s or the Revolutionary era more generally.”).

¹³⁸ *Id.* at 593.

¹³⁹ See MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 240 (2015); see also Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 *CONST. COMMENT.* 383, 405 (2014) (“Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.”).

¹⁴⁰ See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018).

Gienapp writes.¹⁴¹ In Gienapp’s telling, acceptance of the Constitution as a document that had sought to give determinate content to constitutional understandings came later. Many did not understand it that way at the time.¹⁴²

Although I do not purport to confirm the findings of particular historians, accounts of the Constitution as originating in a period of intellectual flux and ferment resonate with a well-known record of early debates about constitutional meanings. And those debates, in turn, suggest that the thesis that I developed in Part II applies generally: where actual historical actors used and understood relevant language in ways that evidenced disagreement, the idea that constitutional provisions had single original public meanings identifiable solely as a matter of linguistic fact is typically fanciful.

Here are just a relatively few illustrative examples of historical disputes about constitutional meaning to which my conceptual arguments would therefore appear to apply:

Article I, § 8, cl. 1 provides that “[t]he Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States.”¹⁴³ Members of the Founding generation debated whether this provision conferred a general power to tax and spend for the general welfare or was limited to paying debts incurred in the exercise of other, specifically listed congressional powers.¹⁴⁴

Article I, § 8, cl. 3 authorizes Congress to “regulate commerce . . . among the several states.”¹⁴⁵ The scope of this power also occasioned debates beginning in early constitutional history and extending beyond.¹⁴⁶ Among the controverted questions was whether and if so to

¹⁴¹ *Id.* at 5.

¹⁴² *See id.* at 9-10

¹⁴³ U.S. CONST. art. I, § 8, cl. 1.

¹⁴⁴ Compare ALEXANDER HAMILTON, REPORT ON MANUFACTURERS (1791), reprinted in HISTORY OF THE UNITED STATES: POLITICAL, INDUSTRIAL, SOCIAL 506–07 (Charles Manfred Thompson ed., 1917) (arguing that Congress’s “power to raise money is plenary, and indefinite”; that “[t]he terms ‘general welfare’ were doubtlessly intended to signify more than was expressed or imported in” the preceding list of congressional powers; and that as a result “[i]t is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper”), with THE FEDERALIST No. 43 (James Madison) (arguing for a “narrow” construction of the clause, and describing Hamilton’s approach as a “misconstruction” that only “might have had some color” in a counterfactual where “no other enumeration or definition of the powers of the Congress been found in the Constitution.”); *see also*, e.g., United States v. Butler, 297 U.S. 1, 64 (1936) (noting disagreement but concluding that “[t]he true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare.”); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed.), § 922; Herman J. Herbert, Jr., *The General Welfare Clauses in the Constitution of the United States*, 7 FORDHAM L. REV. 390, 396–403 (1938).

¹⁴⁵ U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁶ Compare, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 16–18 (2010) (articulating the view that the Framers used the term “commerce” at the Constitutional Convention broadly to include things like navigation, and calling a narrower conception “anachronistic,” *id.* at 16), with Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001) (arguing that at the Constitutional Convention “the term

what extent the Commerce Clause impliedly barred state regulation of matters that fell within Congress’s lawmaking authority.¹⁴⁷

Perhaps even more historically notorious are debates about the scope of Congress’s power under Article I, § 8, cl. 18 to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”¹⁴⁸ James Madison and Alexander Hamilton famously divided over this issue.¹⁴⁹

Under Article II, there are longstanding disputes about whether §1, clause 1’s conferral on the President of “the executive power” conveys powers in addition to those that the Article specifically lists;¹⁵⁰ about the meaning and implications of the “commander in chief” power of Article I, § 2, cl. 1;¹⁵¹ and about whether the power to “appoint” officers of the United States under Article I, § 2, cl. 2 implies a power also to remove such officers.¹⁵²

‘commerce’ was consistently used in the narrower sense and that *there is no surviving evidence of it being used . . . in any broader sense*”) (emphasis in original); see also Alison LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2058–60 (2014).

¹⁴⁷ See *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824) (deciding on statutory, rather constitutional grounds, the question of concurrent state and federal regulation powers); *Cooley v. Board of Wardens*, 53 U.S. 299 (1851); Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398 (2004); see also Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of The Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1884–86 (2011); Richard Primus, *The Gibbons Fallacy*, 19 U. OF PA. J. OF CONST. L. 567, 610–14 (2017).

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 18.

¹⁴⁹ See, e.g., J. Randy Beck, *The New Jurisprudence of The Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 588–603; John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1125–26 (2011); see also GIENAPP, SECOND CREATION, *supra* note 140, at 90–92 (discussing disagreements between Anti-Federalists and Federalists during ratification debates).

¹⁵⁰ See generally Julian Davis Mortenson, *Article II Vests The Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019) (arguing for a narrow reading of the executive vesting clause); see also Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (arguing the original public meaning of the executive vesting clause was merely the power to execute the law); cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–79 (1992) (arguing that the executive vesting clause incorporates a broad understanding of executive power).

¹⁵¹ See David Luban, *On the Commander-In-Chief Power*, 81 S. CAL. L. REV. 477 (2008); see also Richard Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005); CHOPER ET AL., CONSTITUTIONAL LAW 213–17 (13th ed. 2019).

¹⁵² Compare *Seila Law v. CFPB*, 140 S. Ct. 2183, 2198–2201 (2020) (majority opinion) (affirming “the President’s general removal power,” *id.* at 2198, and noting only “two exceptions to the President’s unrestricted removal power,” *id.*, as articulated in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) and *Morrison v. Olson*, 487 U.S. 654 (1988)), with *id.* at 2226–31 (Kagan, J., dissenting) (emphasizing that the Constitution says “nothing at all” about the President’s removal power, *id.* at 2226, and accusing the majority of “extrapolating an unrestricted removal power from such general constitutional language” which is “more than the text will bear,” *id.* at 2228 (internal quotations omitted)); see also, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA L. REV. 1779, 1815–1844 (2006) (making a “sustained case” for a presidential removal power, *id.* at 1815); cf. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1215 (2014) (arguing that the broad power to appoint subordinates and the obligation to take care that laws are faithfully executed implies the broad power to remove).

Disputes abound about the original meaning of Article III, including about the meaning of “the judicial power” under § 1, cl. 1;¹⁵³ about the nature and limits of the “cases” or “controversies” over which the federal courts may exercise jurisdiction under § 2;¹⁵⁴ and about the implications of the provision in § 2, cl. 1 that “[t]he judicial power of the United States shall extend to all cases” arising under the Constitution, laws and treaties of the United States.¹⁵⁵

Constitutional amendments have spawned a host of similar debates, beginning with the Bill of Rights as ratified in 1791. Historians have long debated how members of the Framing generation understood the First Amendment bar to Congress’s “abridging the freedom of speech.”¹⁵⁶ Some have maintained that the Founders predominantly understood the Free Speech Clause as having a narrowly truncated reach (by modern standards) that would not have encompassed sexually explicit books or pictures, blasphemy, commercial advertising, and much more.¹⁵⁷ More recently, revisionist historians have told a different story. According to them, the Founding generation widely viewed the Free Speech Clause as being broad in scope but weak in its protective effect, readily tolerating governmentally imposed restrictions that served the public interest.¹⁵⁸

¹⁵³ See, e.g., GIENAPP, *SECOND CREATION*, *supra* note 140, at 92–94 (noting Anti-Federalists’ on Article III’s provision for judicial power as dangerously “imprecise”). Among the specific disputes that persisted after ratification involved whether the judicial power encompassed a power to develop a federal common law of crimes. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 638–42 (7th ed. 2015).

¹⁵⁴ Compare, e.g., *United States v. Windsor*, 570 U.S. 744, 786 (2013) (Scalia, J., dissenting) (describing the adverse-party requirement as “not a ‘prudential’ requirement that we have invented, but an essential element of an Article III case or controversy”), with James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346 (arguing that Article III’s embrace of both adversarial hearings and *ex parte* hearings derives from Roman and civil law); see also James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III’s Domestic Relations Clause*, 92 *NOTRE DAME L. REV.* 117 (2016) (arguing that the bar to Article III jurisdiction over “domestic relations” derives from the distinction between “cases” and “controversies” and the consensual relations that undercuts much of domestic relations law); James E. Pfander & Daniel Birk, *Adverse Interests and Article III: A Reply*, 111 *NW. U. L. REV.* 1067 (2017) (rejecting an argument that even if “cases and controversies” do not require “adverse parties,” they require “adverse interests”).

¹⁵⁵ Compare Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. REV.* 205 (1985) (arguing that Congress must confer federal jurisdiction, in either original or appellate form, over all cases arising under the Constitution), with Daniel Meltzer, *History and Structure of Article III*, 138 *U. PA. L. REV.* 1569 (1990) (arguing that Amar’s thesis is unproved and that Congress has more discretion about whether to provide for either lower federal court or Supreme Court appellate jurisdiction).

¹⁵⁶ U.S. CONST. amend. I. See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 *IND. L.J.* 1, 9–22 (2011); see also Thomas F. Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act*, 18 *MICH. L. REV.* 615, 627–37 (1920).

¹⁵⁷ See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xii–xv (1985); see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 61 (2010).

¹⁵⁸ See generally, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246 (2017); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 *HARV. L. REV.* 2167 (2015).

The Supreme Court divided 5 to 4 about the original meaning of the Second Amendment right to “keep and bear arms” in *District of Columbia v. Heller*.¹⁵⁹ Legal historians have similarly disagreed about the Second Amendment’s original meaning.¹⁶⁰

Under the Fourth Amendment, disputes about the reach of the prohibition against “unreasonable searches and seizures” have often had a historical dimension.¹⁶¹ The Fifth Amendment’s double jeopardy, self-incrimination, and Due Process Clauses have all engendered disputes about historical meanings and antecedents.¹⁶²

I could go on and on, but to no good end. My point should now be clear. Too often in too many contexts, originalists have received the equivalent of a free pass concerning what, as a conceptual matter, the imagined “original public meaning” of a constitutional provision is or refers to. In cases involving manifest historical disagreement, which are myriad, the idea that there is or was a uniquely correct original public meaning is almost always poorly specified and unhelpful. The Fourteenth Amendment is more typical in this respect than it is unique.

IV. Original Legal Meaning

This Part takes up the challenge of considering how historical facts, including about language use, do and should matter to constitutional law. It is a familiar function of law and legal reasoning to ascribe clear, determinate meanings to constitutional language, based in part on historical and linguistic facts. The immediately pressing question is not whether judges should identify or establish constitutional meanings, including original constitutional meanings, but how they should do so. In responding to that question, this Part begins with a jurisprudential examination of American legal practice and of judicial authority within it. It then explores the characteristic, and sometimes surprisingly limited, role of semantic facts in constitutional adjudication, despite nearly universal recognition of the Constitution’s Framers and ratifiers as legitimate authorities, capable of establishing binding legal norms for the future. Under existing practice-based norms, I argue, courts seek to construct the original meanings of constitutional

¹⁵⁹ 554 U.S. 570 (2008).

¹⁶⁰ Compare Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009) (arguing that while *Heller* reached the correct originalist result, its reasoning was incomplete) with Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007) (arguing that a “reasonableness” standard is consistent with the original understanding of the Second Amendment).

¹⁶¹ See, e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–411 (1996) (tracing the origin of the Fourth Amendment to disputes over the “writs of assistance” in colonial America); see also Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (2013) (arguing that a “trespass test” did not exist in Fourth Amendment cases prior to *Katz*).

¹⁶² See, e.g., Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1726–55 (2012) (examining the history of the Fifth Amendment’s “due process” clause and its expected application as a restraint on legislatures); Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 51–54 (2011) (arguing that the Double Jeopardy Clause was anticipated to prohibit multiple punishments for the same crime).

provisions, rather than discover their content as a matter of linguistic or legal fact, in all reasonably contestable cases.¹⁶³

A. Jurisprudential Foundations of the Search for Original Legal Meaning

In theorizing about American constitutional law and the functions and obligations of courts within it, I assume — but will not pause to argue for — the validity of a practice-based jurisprudential theory of the kind developed by Professor H.L.A. Hart.¹⁶⁴ According to Hartian theory, the foundations of law lie in acceptance. For example, the Constitution is law in the United States, not because it says it is, but because relevant constituencies accept it as law.

To explicate the patterns of acceptance that constitute a legal system’s foundations, Hart offered the idea of a fundamental rule or rules of recognition that differentiate law from non-law. According to Hart, the rule of recognition is “a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.”¹⁶⁵

As applied to U.S. practice, Hart’s description of recognition practices as involving a “rule” or “rules” is misleading. As a sympathetic critic has written, “[t]here is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule . . . and it may be less distracting to think of the ultimate source of recognition . . . as a *practice*.”¹⁶⁶ Within American legal practice, all or nearly all judges and relevant others agree that the Constitution is law, that Supreme Court decisions bind lower court judges in subsequent cases, and that the Equal Protection Clause does not mandate eating cornflakes. There is similarly broad convergence of judgment about many other issues. Equally plainly, however, some matters are deeply disputable.

Emphasizing disagreement among insiders to legal practice, Professor Ronald Dworkin argued that there are no “rules” in the sense that Hart imagined.¹⁶⁷ Law, he argued, is an “interpretive practice,” in which each practitioner must engage in “constructive interpretation” of legal practice itself in order to identify the norms to which she ought to adhere.¹⁶⁸ According to

¹⁶³ For earlier arguments to similar effects, see, for example, Balkin, *Construction*, *supra* note 20, at 78–79; Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641 (2013) [hereinafter Balkin, *The New Originalism*].

¹⁶⁴ See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

¹⁶⁵ *Id.* at 256; see also *id.* at 116 (“[R]ules of recognition specifying the criteria of legal validity and [the legal system’s] rules of change must be effectively accepted as common public standards of official behaviour by its officials.”).

¹⁶⁶ Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 150 (Sanford Levinson ed., 1995).

¹⁶⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 39–45 (1977) (arguing that Hart’s account of the rule of recognition as the “master rule” of a legal system is untenable).

¹⁶⁸ See DWORKIN, *LAW’S EMPIRE*, *supra* note 111, at 3–4, 13 (noting that legal practice generally is inherently argumentative).

Dworkin, constructive interpretation requires interpreters to apply mixed criteria of “fit” and normative attractiveness and to cast legal practice in the best moral light that the criterion of “fit” will allow.¹⁶⁹

Although Dworkin was profoundly insightful in insisting that participants in constitutional debates must resolve many questions about applicable norms for themselves, his claim that answers must invariably emerge through “interpretation” — which he characterized as the exclusive mechanism for reasoning reliably in morals and the humanities as well as law¹⁷⁰ — mystifies more than it clarifies. Given disagreement about how judges ought to resolve methodological as well as substantive issues, participants in constitutional practice must determine what judges can and ought to do under the circumstances of particular cases. But that question, difficult and controversial as it is, can be approached most straightforwardly as one about relevant reasons for action and belief. Participants in constitutional practice who wish to sustain our constitutional regime as an ongoing system of social cooperation need to weigh possible reasons for decision that centrally include those arising from the expectations, attitudes, and values of others. Through assimilation into constitutional practice, participants internalize tacit understandings about what — in light of the understandings of other participants — is legally requisite and forbidden, permissible and impermissible in different contexts.

Charitably interpreted, Hart’s reference to “rules” of recognition employed the term in a sense associated with the philosopher Ludwig Wittgenstein.¹⁷¹ For Wittgenstein, the term “rule” marked the existence of a shared and often tacit understanding among some group concerning how to “go on” in ways that others will view as appropriate.¹⁷² Even when particular legal outcomes are disputed, there will often be agreement that some substantive conclusions or methodological approaches lie beyond the pale. So recognizing, Professor Jules Coleman has described the rule of recognition in some societies, including the United States, as a conventional “framework for bargaining” in disputable cases.¹⁷³

By way of a gloss on the idea that the rule of recognition can function as a framework for bargaining, I would add two points. First, bargaining should proceed in the currency of reasons, not mere assertions of power or preference. Anyone taking a substantive or methodological position should be prepared to offer explanations of why others should concur. Second, constitutional argument occurs pursuant to an implied warrant of good faith.¹⁷⁴ Anyone who

¹⁶⁹ See *id.* at 51–53.

¹⁷⁰ See RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 127–33 (2011).

¹⁷¹ See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 80–81 (2001) (invoking the Wittgensteinian notion of rule to explicate jurisprudential issues).

¹⁷² See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶¶ 151–53, 179–83 (G.E.M. Anscombe trans., 1953).

¹⁷³ COLEMAN, *supra* note 171, at 100.

¹⁷⁴ See FALLON, *supra* note 37, at 130–32.

relies on methodological premises to support a controversial conclusion in one case impliedly pledges to adhere to those premises in subsequent cases.

B. The Real but Limited Significance of Semantic and Related Historical Facts

When we try to make sense of the requisite, permissible, and optimal roles of constitutional provisions' drafting and ratification histories within American constitutional practice, it seems intuitively clear that both semantic facts and other historical facts involving the drafting and ratification process have to matter, sometimes decisively. But the anchoring intuition requires qualification.

A now-familiar example highlights the importance of semantic facts: on no plausible interpretation does the Equal Protection Clause mandate the eating of cornflakes. As further analysis reveals, however, semantic content does not always control constitutional analysis. For example, although the First Amendment begins by prescribing that “Congress shall make no law,”¹⁷⁵ courts interpret it as applying to the executive and judicial branches.¹⁷⁶ In what many believe to be a similar deviation from original semantic meaning, the Supreme Court has held since 1954 that the Due Process Clause of the Fifth Amendment, which was ratified in 1791, subjects the federal government to the same equal protection norms that the Fourteenth Amendment explicitly imposes on the states,¹⁷⁷ even though the Fourteenth Amendment refers only to the states and virtually no one, at the time of the Fifth Amendment's ratification, understood the Due Process Clause as barring race-based discrimination.

Overall, semantic content provides a presumptive mooring in identifying constitutional meaning, but one that is sensitive to other factors of recognized legitimacy in constitutional argument.¹⁷⁸ Based on ascriptions of purpose to the Framers and ratifiers that sometimes outstrip the literal language of constitutional provisions, constitutional interpreters sometimes rely on senses of meaning that deviate from literal meaning and even from contextual meaning as defined by widely expected applications and non-applications.¹⁷⁹

¹⁷⁵ See U.S. CONST. amend. I.

¹⁷⁶ See generally David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 30–34 (2015) [hereinafter Strauss, *Foreword*] (observing that despite its text the First Amendment “uncontroversially” applies against all three branches of the federal government, *id.* at 30); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1244–47 (2015) (“American constitutional practice . . . has always viewed the First Amendment as relevant to the conduct of the entire federal government, not just Congress.” *Id.* at 1244.).

¹⁷⁷ See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

¹⁷⁸ Bradley & Siegel, *supra* note 176, at 1244–47; Strauss, *Foreword*, *supra* note 176, at 4 (“Clear text does not always govern, as the anomalies show; there are times when established principles are simply inconsistent with the text.”).

¹⁷⁹ See FALLON, *supra* note 37, at 51–57.

The role of constitutional provisions' drafting and ratification histories in constitutional adjudication is important but hugely complex. Appeals to original intentions, meanings, and understandings constitute an almost universally recognized "modality" of constitutional argument, engaged in by originalists and living constitutionalists alike.¹⁸⁰ Nonoriginalists differ from some originalists in recognizing that post-ratification decisionmakers, including judges and especially Supreme Court majorities, can also exercise legitimate authority in deciding constitutional cases and thereby establishing interpretive precedents.¹⁸¹ With only rare exceptions, however, nonoriginalists do not deny that the Framers and ratifiers were and remain legitimate authorities.

The importance of Framing-era history to identifications of constitutional meaning might seem to follow directly from recognition of the Constitution's Framers and ratifiers as legitimate authorities, capable of changing legal and sometimes moral obligations.¹⁸² In one sense, it does. As Part II stressed, however, the Framers and ratifiers were "a 'they,' not an 'it.'"¹⁸³ In many cases, certainly including that of the Fourteenth Amendment, different Framers and different members of the original public audience for constitutional provisions had different thoughts, intentions, expectations, and understandings. Perhaps as a result, participants in constitutional practice frequently appeal to diverse senses of constitutional meaning, including, as noted above, (1) contextual meaning, as framed by the shared presuppositions of speakers and listeners, (2) literal or semantic meaning, (3) moral conceptual meaning, (4) reasonable meaning, and (5) intended meaning — which they support by citing different kinds of historical facts involving the Framers and ratifiers.¹⁸⁴

The most frequent appeals to facts about constitutional provisions' drafting and ratification history appear aimed at establishing contextual meaning as framed by the shared presuppositions of speakers and listeners. To a rough approximation, the goal is to identify what most reasonable and reasonably informed members of the ratifying generation would have understood a constitutional provision to mean, apply to, or not apply to. For the most part, however, there is little precision in the exercise, especially in cases of manifest disagreement among the Framing and ratifying generation. For example, a former law clerk to originalist Justice Clarence Thomas has written that Thomas has no worked-out theory of which kinds of Framing-era facts matter or

¹⁸⁰ The classic source on modalities of constitutional argument is PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). Among Bobbitt's modalities is "historical argument[s]," which "depend on a determination of the original understanding of the constitutional provision to be construed." *Id.* at 26.

¹⁸¹ See *id.* (listing modalities in addition to historical argument); FALLON, *supra* note 37, at 72–82.

¹⁸² On the obligation-altering implications of legitimate authority, see H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 243–47 (1982); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1939 (2008).

¹⁸³ See Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

¹⁸⁴ See *supra* note 37 and accompanying text.

how much they matter in establishing original constitutional meanings.¹⁸⁵ Rarely if ever do interpreters seek to cash out their claims of original legal meaning in terms of how many actual people held which views. Nor, if the touchstone is what a “reasonable” person would have thought, do most participants in modern debates explain how and why it would have been “unreasonable” to come to different conclusions from those that they reach. Instead, they simply cite evidence and announce conclusions.

Moreover, as my catalogue of multiple senses of constitutional meaning reflects, participants in constitutional practice sometimes frame their historical arguments in different terms in different cases. Sometimes lawyers, judges, and Supreme Court Justices cite historical evidence aimed at establishing *intended* meanings that a provision’s language would not obviously have revealed. For example, in *Plaut v. Spendthrift Farm, Inc.*,¹⁸⁶ Justice Scalia’s opinion for the Court maintained that Article III of the Constitution, which vests the federal courts with the “judicial power,” precludes Congress from nullifying final judicial judgments. As historical support for that conclusion, Justice Scalia noted that the Framers had “lived among the ruins of a system of intermingled legislative and judicial powers” and inferred that, in light of that experience, they intended to insulate judicial rulings from legislative revision.¹⁸⁷

Sometimes, too, the Court identifies constitutional meaning — apparently including original meaning — with *reasonable meaning*. A famous example comes from Justice Holmes’s classic opinion in *Schenck v. United States*¹⁸⁸: “The most stringent protection of free speech [that could plausibly be attributed to the First Amendment] would not protect a man in falsely shouting fire in a theatre and causing a panic.”¹⁸⁹ Holmes did not think it necessary to cite any historical evidence in support of his assertion. He thought it self-evident that no other conclusion would be reasonable.

To take just one more example, the Court also sometimes relies on the *real conceptual* or moral meanings of morally laden constitutional language.¹⁹⁰ It has done so, for example, in holding that the Equal Protection Clause forbids forms of discrimination that most of the Amendment’s Framers and ratifiers exhibited no specific intentions to prohibit. Sometimes implicitly and sometimes explicitly, the Court ascribes to the Framers and ratifiers a purpose or intent to safeguard liberty or realize equality as a morally, rather than historically, defined

¹⁸⁵ See Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 495, 511 (2009) (concluding that Justice Thomas “has not shown a preference for” a “particular kind[] of original meaning” such as “the original intent, original understanding, or original objective meaning,” but instead looks for “general original meaning,” characterized by “agreement among multiple sources of evidence”).

¹⁸⁶ 514 U.S. 211 (1995).

¹⁸⁷ See *id.* at 219.

¹⁸⁸ 249 U.S. 47 (1919).

¹⁸⁹ See *id.* at 52.

¹⁹⁰ See FALLON, *supra* note 37, at 55.

concept. Justice Kennedy’s opinion spoke explicitly on this point in *Lawrence v. Texas*,¹⁹¹ which cited equal protection as well as substantive due process grounds for invalidating a state statute that barred private acts of sodomy between consenting adults:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁹²

The resulting situation could easily be characterized as cacophonous: insiders to constitutional practice, including the Justices of the Supreme Court, rely on diverse senses of constitutional “meaning,” supported by different kinds of historical evidence. To compound matters, I doubt that many of the most sophisticated participants in constitutional practice, including the Justices, could furnish an articulate account of how constitutional history properly contributes to their judgments in cases involving provisions whose terms were disputable or in flux at the time of their drafting and ratification. Nevertheless, the important common thread, which I noted above, involves an implicit recognition of the Framers and ratifiers as legitimate authorities.¹⁹³ In one way or another, all of the diverse senses of original meaning implicitly acknowledge the status of the Framers and ratifiers as legitimate authorities and seek to link ascriptions of original meaning to their intentions, goals, or purposes.¹⁹⁴ Yet relevant, practice-based norms do not conclusively determine which sense of original meaning should control, nor which facts possess greatest relevance.

Under these circumstances, I think it impossible to maintain that central participants in constitutional practice ascertain original meanings by applying clear legal norms to the historical facts that those or other norms mark as significant. It would be more accurate to say that judges and Justices construct original meanings, frequently and perhaps typically by imputing intentions and purposes to various provisions’ Framers and ratifiers.¹⁹⁵ As is implicit in what I have said

¹⁹¹ 539 U.S. 558 (2003).

¹⁹² *Id.* at 578–79.

¹⁹³ See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–52, 2365–86 (2015); cf. Greene, *supra* note 2, at 1703 (propounding an authority-based conception of originalism under which “[w]e care about Madison’s, Hamilton’s, Jefferson’s, and Washington’s views both as to the intended rules and as to the expected application of those rules because adjudication according to their intentions and expectations better comports with a particular set of normative claims about the judicial role.”).

¹⁹⁴ See Greene, *supra* note 2, at 1691 (noting that “[t]he Supreme Court has cited the Constitutional Convention in at least 164 cases, and it has referenced *The Federalist* in 236 opinions from 1965 to 2005 alone”).

¹⁹⁵ Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374, 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (postulating that statutes

already, however, those imputations cannot sensibly, or at least charitably, be viewed as asserting claims of psychological fact. In debates about statutory interpretation, it is notorious that ascriptions of purpose do not seek to capture the precise psychological states of anyone.¹⁹⁶ Legislatures are not the kinds of entities that are capable of having collective communicative intentions of the kind that the model of conversational interpretation presupposes. If constitutional interpreters purport to assign original meanings based on historical claims about the collective psychological intentions or purposes of the Constitution's Framers and ratifiers, their arguments will betray similar confusion.

There is a more charitable interpretation. When participants in constitutional argument ascribe intentions or purposes to the Constitution's Framers and ratifiers and thus to the texts that they produced, those intentions or purposes are legal constructs, proffered to explain how reasonable people might reasonably have adopted the language that the Framers and ratifiers adopted in the historical context in which they did so. Another point, which is brought out by the diversity of recognized senses of original legal meaning, is equally important: the selection of one or another sense of meaning — based on the ascribed purposes that would trace that sense of meaning to the authoritative actions of a provision's Framers and ratifiers — requires normative judgment.¹⁹⁷ In selecting historical facts for emphasis, constitutional interpreters aim to arrive at judgments about provisions' original meanings that merit acceptance as legally authoritative at the time of their decision and for the future.

C. Issues of Judicial Role

The proposition that constitutional interpreters choose among possible senses of original meaning, and do so in part by selecting which facts about constitutional provisions' drafting and ratification to emphasize, might seem discreditable until one takes account of the nature of the judicial role within our constitutional practice. As discussed in section A of this Part, judges are bound by law, insofar as it applies, but practice-based interpretive norms are vague or contestable in many relevant respects. Under these circumstances, judges — whose interpretations determine how the coercive force of the law will be deployed to harm or benefit other human beings — should almost self-evidently do what is morally best within the space that the law allows. But what is morally best for a judge to do depends on complex issues of role morality.¹⁹⁸ The question for a judge deciding a contested constitutional case is not what rules an ideal polity would adopt, but what judges should use their powers to mandate in interpreting

should be interpreted based on the premise that the legislature consists of reasonable people seeking to promote reasonable goals in reasonable ways).

¹⁹⁶ See, e.g., Manning, *supra* note 98, at 2405–12 (endorsing this position and cataloguing myriad luminaries in the theory of statutory interpretation who have concurred).

¹⁹⁷ See FALLON, *supra* note 37, at 127–28.

¹⁹⁸ See LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* (2019) (emphasizing the Supreme Court's obligations of fidelity to judicial role as well as to the constitutional text).

constitutional provisions against the backdrop of practice and history. In thinking about the proper role of judges within our constitutional order, four principles stand out.

First, judges exercising moral judgment in interpreting the Constitution should base their decisions exclusively on reasons that reasonable citizens should acknowledge as enjoying the status of reasons.¹⁹⁹ They should not rely on religious, partisan, or idiosyncratic values that others could reasonably view as insupportable.

Second, judges interpreting the Constitution need to consider not only substantive moral ideals, but also fairness in the allocation of political power.²⁰⁰ To take a clear example, courts would have no business interpreting vague constitutional language as mandating the embrace of socialism or libertarianism, even if an ideal polity would do so through democratic means. If so momentous a change in legal rules and social organization were to occur, democratically accountable decisionmakers should drive the shift.

Third, continuity and predictability are important presumptive goods in constitutional law. They are not the only goods, but there should be a strong presumption against scrapping rules, practices, and institutions that have worked tolerably well.

Fourth, even in cases in which the semantic content of a constitutional provision would readily accommodate an otherwise normatively desirable result, judges need to take account of the reasonable expectations of others,²⁰¹ including their reliance on claims made at the time of a constitutional provision's promulgation and ratification about what the provision would and would not achieve. To take account of others' expectations is not necessarily to accede to them. Nevertheless, others' expectations should enter the judicial calculus.

An example may bring out relevant subtleties. Although the point is not wholly free from doubt, it appears that most Americans living in 1868 did not expect the Equal Protection Clause to mandate an end to school segregation, at least immediately.²⁰² If this historical judgment is correct, then it is *relevant* — and I mean for the moment to say no more — to whether judges and Justices should have held school segregation unconstitutional in the near aftermath of the Fourteenth Amendment's ratification. At the same time, it would be a deep *legal* mistake — paralleling the linguistic mistake that Part II exposed — to conclude that a singularly correct original legal meaning of the Fourteenth Amendment accepted school segregation as constitutionally permissible. Rather, there was a plethora of legally as well as morally relevant facts, including facts about promises and expectations, some of them conflicting, from which the

¹⁹⁹ See FALLON, *supra* note 37, at 128.

²⁰⁰ See *id.* at 129.

²⁰¹ See *id.* at 149–50.

²⁰² See KLARMAN, *supra* note 136, at 25–26, 146 (“[T]he original understanding of the Fourteenth Amendment plainly permitted school segregation.”); Bickel, *supra* note 76, at 58–59 (acknowledging “[t]he obvious conclusion” that the Fourteenth Amendment was not intended to apply to school segregation, *id.* at 58).

Fourteenth Amendment's original legal meaning would have had to be constructed.²⁰³ As a number of leading constitutional cases reflect, moreover, the legal and moral pertinence of relevant facts may shift over time. In particular, expectations and reliance interests that might have mattered greatly in one historical context can diminish in importance as time passes.²⁰⁴ Correspondingly, it may become more legally and morally appropriate for judges and Justices to base ascriptions of constitutional meaning on the best moral understanding of the morally laden language that the drafters and ratifiers of a constitutional amendment deliberately chose or knowingly adopted.

Originalists will of course object that it is disturbing to allow judges to make judgments of this kind and enforce them in the name of the Constitution. Constitutional adjudication, they insist, should track the fixed star of relevant provisions' original public meaning.²⁰⁵ Anyone who is moved by this plea should re-read Part II of this Article. PMO's fixed star is in fact a mirage.

V. Conclusion

Contested constitutional provisions rarely if ever have a single original public meaning in the sense that public meaning originalists imagine. The problem is metaphysical, not epistemological. After decades of discussion and debate, public meaning originalists have still provided no clear account of what they mean by constitutional provisions' "original public meanings." When members of the Founding generation disagreed, the idea of a uniquely correct meaning that existed as a matter of linguistic and historical fact is typically chimerical.

The difficulty for PMO is not that there are no historical and linguistic facts bearing on constitutional meaning, but that courts must construct legal meanings out of an often diverse welter of facts. The great challenge is to understand and discipline the process by which courts appeal to historical facts to construct constitutional meanings, not as a matter of fact, but as a matter of law.

²⁰³ See *Brown v. Bd. of Ed.*, 347 U.S. 483, 489 (1954) ("This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."); Bickel, *supra* note 76, at 62 (suggesting that "the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances").

²⁰⁴ See Strauss, *Foreword*, *supra* note 176, at 57 ("The key point is one that Jefferson recognized: original understandings are binding for a time but then lose their force."); *id.* at 58 ("[A] decision that would be lawless in the immediate wake of a constitutional amendment might be acceptable — in fact is, in our system, routinely accepted — after time has passed.").

²⁰⁵ See, e.g., Solum, *The Fixation Thesis*, *supra* note 7, at 6–7 ("The Fixation Thesis claims the original meaning . . . of the constitutional text is fixed at the time each provision is framed and ratified."); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 412 (2013) ("The New Originalism stands for the proposition that the meaning of a written constitution should remain the same until it's properly changed.").