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ARTICLE

OUTCOME REASONS AND PROCESS REASONS IN NORMATIVE CONSTITUTIONAL THEORY*

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Constitutional theory is a mess. Disagreements about originalism and living constitutionalism have become intractable. Constitutional theorists make some

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arguments that seem clearly fallacious and advance proposals that are pie in the sky. One of the reasons for the mess is an overreliance by constitutional theorists on "outcome reasons," justifications that rely on the theorist's beliefs about what outcomes are good and what outcomes are bad. This outcome-drive approach is exemplified by the so-called "canonical cases" argument, which evaluates positions in normative constitutional theory on the basis of their counterfactual implications for a handful of prior decisions of the Supreme Court. Among the many problems with "outcome reductionism" (exclusive reliance on outcome reasons) is the reality that none of the fundamental and feasible options for normative constitutional theory can guarantee outcomes that that most citizens would find acceptable, much less optimal. Living constitutionalism produces constitutional outcomes that reflect the moral values and political ideology of Supreme Court Justices, but over the long run there is no guarantee that the Justices will do what any individual believes is required by justice. Decades ago, the Justices established a constitutional right to abortion, but recently they reversed course. Dramatic changes in constitutional law are inevitable given that the Justices are selected by the President and Congress, institutions that will change their political makeup in unpredictable ways over time.

Outcome reductionism is not a sensible method for normative constitutional theory, but there is a better approach. Outcome reasons can be supplemented by process reasons such as legitimacy, the rule of law, and institutional capacities. The way forward for constitutional theory involves a holistic assessment of both outcome reasons and process reasons via the method of reflective equilibrium. The way forward requires a frank acknowledgement of the consequences of deep and persistent disagreement about fundamental questions concerning justice and the common good. And therefore, the way forward will require an acknowledgement that a legitimate constitutional order will require compromise.

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INTRODUCTION

Fundamental questions regarding the constitutional order in the United States are much discussed and disputed. For example, there is a longstanding debate between originalists and living constitutionalists; both are challenged by the opponents of judicial review. Just mapping the landscape of contemporary normative constitutional theory is a daunting task. There are so many theories. The list might start with common law constitutionalism, constitutional pluralism, and the moral readings approach, but then there is contemporary ratification theory and public meaning originalism—not to

mention representation reinforcement theory and the more radical view that Congress should have the final say on all matters constitutional. And that is just the beginning of a much longer list.

How should we think about these choices? Normative constitutional theory aims to provide reasons for making fundamental choices regarding the constitutional order. Such reasons include both outcome reasons and process reasons.[1] Outcome reasons evaluate constitutional options by considering the goodness or badness of the outcomes they produce. Process reasons evaluate constitutional choices differently; considerations of legitimacy, the rule of law, and institutional capacities provide reasons that are not reducible to outcomes.[2] A central claim of this Article is that normative constitutional theory should avoid "outcome reductionism," the theoretical position that maintains that the goodness or badness of selected outcomes provides decisive reasons for choosing an approach to the large questions of constitutional theory. Instead, normative constitutional theory ought to consider a wide range of both outcome reasons and process reasons. These reasons should be evaluated in light of the fact that in the here and now, the United States is characterized by a plurality of views about which outcomes are good or bad; pluralism reflects deeper disagreements about fundamental values reflected in the lack of consensus on matters of religion, morality, and political ideology.

Outcome reductionism creates intractable obstacles to progress in normative constitutional theory. One way to understand this problem is to consider the implications of making the choice in the here and now between the three most important options for the constitutional order in the United States: (1) judicial supremacy, (2) legislative supremacy, and (3) constitutional supremacy (or textualism).[3] These options are prototypes for myriad variations and hybrid theories. Simplifying by focusing on the three options

1 This distinction is discussed below. *See infra* Section II.A. So far as I know, the first deployment of this distinction in constitutional theory is found in the works of Professors Jeremy Waldron and Richard Fallon. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1376-95 (2006) [hereinafter Waldron, *Against Judicial Review*] (critiquing the automatic association of outcome-related reasoning with the case for judicial review); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1710-28 (2008) [hereinafter Fallon, *For Judicial Review*] (defending outcome-based reasoning as a justification for judicial review).

2 *See infra* Section II.A.

3 The relationship between various forms of textualism and constitutional supremacy is explored in depth below. *See infra* Section III.D. As used in this Article, the phrase "constitutional supremacy" refers to a system in which the communicative content of the constitutional text itself is the ultimate and final sources of constitutional law. Of course, the phrase could be used to express other ideas, but nothing hangs on the terminology.

helps us to understand the importance of the distinction between outcome reasons and process reasons and to see the dangers of outcome reductionism.

The contemporary constitutional order in the United States is best understood as a system of judicial supremacy:[4] the Supreme Court has final and ultimate authority to determine[5] the content of constitutional law and does not considered itself bound by the constitutional text.[6] In the context of contemporary constitutional discourse in the United States, the phrase "living constitutionalism" could be used to refer to judicial supremacy,[7] but that phrase might also be used to refer to a form of constitutional supremacy.[8] Importantly, that the Supreme Court has ultimate constitutional authority is consistent with the Justices' sometimes choosing to act in ways that are consistent with the constitutional text: "cafeteria constitutionalism" vests the power to decide when to follow, override, modify, nullify, or supplement the constitutional text in the Supreme Court.[9]

There are two important rivals to judicial supremacy. The first is legislative supremacy,[10] which in the United States would give Congress the ultimate authority to determine the shape of the constitutional order. Legislative supremacy would either eliminate judicial review or adopt

4 *See infra* Section IV.A (elaborating on the argument that the constitutional status quo is best characterized as a system of judicial supremacy).

5 I am using the word "determine" here in a stipulated sense. The power to "determine" the content of constitutional law in that sense is the power to make and change constitutional law and not merely the power to resolve constitutional disputes.

6 *See infra* Section IV.A (discussing judicial supremacy). In this paper, I cannot engage the argument that original law originalism provides the best account of the positive law currently in effect. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2408 (2015) ("The best account of our legal practices points toward a certain kind of originalism, an inclusive but non-pluralist one, as the trumping criterion of constitutional law."). If that argument were correct, then it might follow that constitutional supremacy is the status quo. That fact would be fully consistent with the arguments against outcome reductionism and for consideration of process values that are made here.

7 There are no universally accepted definitions of the terms "originalism," "nonoriginalism," "living constitutionalism," or "constitutional supremacy." For discussion of the conceptual possibilities, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1271–76 (2019) [hereinafter Solum, *Conceptual Structure*], which discusses the many forms of living constitutionalism, and Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 534 tbl.1 (2013) [hereinafter Solum, *Constitutional Construction*], which organizes originalism and living constitutionalism and identifies their attributes.

8 *See infra* notes 156-161 and accompanying text. An earlier version of this Article implied that all forms of living constitutionalism are forms of judicial supremacy. I am grateful to Michael Dorf for prompting the clarification.

9 I coined the phrase "cafeteria constitutionalism" to represent an approach to constitutional construction by the Supreme Court in which the Court picks the parts of the constitutional text that it chooses to follow and those that it chooses to override or change.

10 *See infra* Section IV.B (investigating legislative supremacy).

constitutional doctrines (e.g., strong deference doctrines) that are functionally equivalent to a system without meaningful judicial review.[11]

The second rival to judicial supremacy is constitutional supremacy, the view that the constitutional text should bind all constitutional actors.[12] In the context of contemporary normative constitutional theory in the United States, the rival versions of constitutional supremacy include contemporary ratification theory[13] and originalism.[14] To avoid misunderstanding, let me clearly state that by "originalism," I mean to refer to a normative constitutional theory, and not the actual practices of some judges who sometimes call themselves "originalists."[15]

Whereas judicial and legislative supremacy allocate ultimate constitutional authority to an institution (the Supreme Court or Congress), constitutional supremacy allocates that authority to the Constitution itself—

11 Functional equivalence to the abolition of judicial review might be realized by a rule of strong deference, a conclusive presumption of constitutionality, or rational basis review that upholds legislation with any conceivable rational basis. Although these approaches differ in the means by which they achieve congressional supremacy, they may well be functionally equivalent to each other. The courts would render a decision finding that the statute is not unconstitutional in all or almost all cases in which constitutional supremacy would find otherwise. *See* Section IV.B (discussing the difference between pure and functional legislative supremacy).

12 *See infra* Section II.C (describing constitutional supremacy). Some readers may be concerned that "legislative" and "judicial" supremacy are different in kind from "constitutional supremacy," since the latter does not appear to vest decision-making power in anyone capable of making decisions. The first two options are apples (decision-making institutions), and the third option is an orange (a written text). This objection will be discussed below. *See infra* Section IV.D.

13 As used here, "contemporary ratification" theory is the view that the meaning of the constitutional text to the public today is binding constitutional actors, including the courts, Congress, executive officials, and state officials. *See infra* Section IV.A.

14 Originalism is best viewed as a family of constitutional theories. *See infra* Section IV.A. The predominant form is public meaning originalism, which provides the example of originalist constitutional supremacy used here. For discussion of public meaning originalism and related methods, see generally Solum, *Conceptual Structure*, *supra* note 7; Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021) [hereinafter Solum, *The Public Meaning Thesis*]; Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 [hereinafter Solum, *Triangulating Public Meaning*]; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*]; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Solum, *Constitutional Construction*, *supra* note 7; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) [hereinafter Solum, *The Interpretation-Construction Distinction*]. In addition to the published and forthcoming articles, works in progress on the subject include Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/57YD-H6BG] [hereinafter Solum, *The Constraint Principle*].

15 I am grateful to Katie Eyer for calling my attention to the need for this clarification. Evaluating the fidelity of judges who call themselves "originalist" to originalism as a constitutional theory is a complex task that is well outside the scope of this Article.

a document and not an institution. Some readers may worry that constitutional supremacy fundamentally differs from judicial and legislative supremacy, creating an apples-and-oranges comparison. That worry and many others are addressed in due course.[16]

Judicial, legislative, and constitutional supremacy are not the only options. Those three can also be combined in various ways. For example, a system that allocates supremacy to Congress over most questions might give the judiciary power over voting rights and the freedom of political speech. Similarly, constitutional supremacy with respect to the basic constitutional structure might be combined with legislative or judicial supremacy regarding individual rights. And there are other possibilities as well, including a system of presidential supremacy and the possibility of direct constitutional democracy (or popular constitutionalism).[17] Nonetheless, judicial, legislative, and constitutional supremacy are especially salient. These three options are *feasible* in the here and now; these options and their variations satisfy reasons criteria for realistic constitutional possibility. And they are *fundamental* in that they provide templates for a variety of more particular constitutional theories.

The preliminary stages of the arguments that follow make the simplifying assumption that relatively pure forms of judicial, legislative, and constitutional supremacy are the only options for structuring out constitutional order. The assumption that we have a choice between three fundamental and feasible options reveals an important problem with

16 If you are worried that there is an apples-and-oranges problem, an extensive discussion is provided below. *See infra* Section IV.D. If you are worried about the indeterminacy of the important constitutional provisions, a further discussion is below. *See infra* Section IV.C.

17 A system of presidential supremacy is conceptually possible but is (hopefully) not a feasible alternative: presidential supremacy would provide Presidents with the power to promulgate what we might call "executive constitutional amendments" or their functional equivalent, but a dictatorship would also be a form of presidential supremacy. A full discussion of the feasibility of "presidential supremacy" would require a lengthy discussion of questions that are simply bracketed here. Importantly, adding presidential supremacy to the list would not fundamentally alter the fact of outcome-uncertainty as discussed in Part I, *infra*. Presidential supremacy would generate outcome uncertainty because different Presidents will have different constitutional preferences: think Abraham Lincoln versus Andrew Johnson or Barack Obama versus Donald Trump.

Another possibility is "majoritarian supremacy," or perhaps "direct popular *sovereignty*." The core idea of this option is that constitutional questions ought to be decided by the majority of citizens, e.g., by the people themselves. The most natural expression of this view would be a system of direct popular votes on constitutional matters, but it is possible that some other institution or individual (Congress, the President, or the Supreme Court) could consult opinion polls and then implement the people's will. As with presidential supremacy, majoritarian supremacy seems infeasible in the short to medium term—although the argument for that conclusion is outside the scope of this Article. Even if majoritarian supremacy is feasible, it would not alter the fact of outcome uncertainty. I am grateful to Professor Tara Leigh Grove for calling this possibility to my attention. For a discussion of "popular constitutionalism," see generally Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005).

exclusive reliance on outcomes as the basis for choosing the way forward for our constitutional order. At a later stage of the argument, that assumption is relaxed, and additional alternatives are considered, but focusing on judicial, legislative, and constitutional supremacy enables us to get quickly to the heart of the matter.

What is the heart of the matter? The answer begins with the observation that there is an approach to normative constitutional theory that elevates outcome reasons and downplays process reasons. For example, we might look to the past and identify canonical cases (think *Brown v. Board of Education*[18]) to argue that any constitutional theory that would not have produced the outcome in the canonical cases is unacceptable; this argument treats the canonical cases as trumps that defeat other considerations. Or we might look to the future and argue that that a constitutional theory can only be accepted if it will guarantee our preferred vision of a good and just society. Again, outcomes (this time, future outcomes) operate to defeat other considerations. The most important claim that I will make in this Article is that both of these forms of outcome reductionism are deeply flawed. Indeed, both rest on assumptions that are obviously fallacious.[19] One of the central claims of this Article is that *outcomes reductionism should be rejected as an approach to normative constitutional theory*.

As applied to the choice among the three fundamental options, the problematic nature of outcome reductionism is revealed by outcome uncertainty. Each of the three ways we can allocate supremacy may produce outcomes that many citizens consider unacceptable. Similarly, none of the three options could have guaranteed the "right" outcome in all of the canonical and anticanonical cases in the past. If we limit our evaluation of judicial, legislative, and constitutional supremacy to outcomes alone and if we require that an option guarantees the right outcomes on the most important issues, the conclusion will be dismal. None of the three fundamental options for the allocation of constitutional lawmaking authority can meet the demand that it must guarantee acceptable outcomes.[20]

Given the fact of pluralism and outcome uncertainty, outcomes reductionism must be rejected for constitutional theory to progress. Making progress requires us to consider both process reasons and outcome reasons holistically; we can do that using the method of reflective equilibrium that aims for a relationship of consistency and mutual support among our beliefs and considered judgments about normative constitutional theory.[21] Given

18 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

19 *See infra* Section II.C.

20 *See infra* Part I.

21 *See infra* Section II.D.

realistic assumptions about our constitutional possibilities, the need for constitutional compromise comes into sharp focus. Understanding the need for compromise leads to another realization: constitutional realism leads inevitably to an acknowledgement that we face tragic choices.

Here is the roadmap.[22] Part I begins by laying out the core argument of the Article: each of the three fundamental options produces outcome uncertainty, and as a consequence, none of the three outcomes can guarantee acceptable outcomes on all of the important constitutional questions. Part II distinguishes between outcome reasons and process reasons. Part III lays out the notions of supremacy, feasibility, and fundamentality that ground the following claim: framing the fundamental problem as a choice among judicial, legislative, and constitutional supremacy illuminates normative constitutional theory. With these clarifications in mind, we turn to the options themselves in Part IV: describing each option, showing why it is feasible and fundamental, and considering some of the forms the three options could take. Finally, Part V argues that there is no way to avoid the problem of outcome uncertainty generated by the three fundamental and feasible options—in other words, there is no way out.

All of this may be disheartening, even to readers who have already accepted the tragic nature of our choice among the three feasible and fundamental options and their variations. Nonetheless, the only way forward in the here and now is to accept the reality that our choices are constrained. The very best that we can do may be a very disappointing compromise, but the heavy heart that accompanies our disappointment should not blind us to constitutional reality.

I. Outcome Uncertainty and the Three Fundamental and Feasible Options

One way to evaluate normative constitutional theories focuses *exclusively* on preferred outcomes. Colloquially, we might ask, "Does this theory get me what I want?" If not, then, "No go." Constitutional preferences are shaped causally by relationships, cultures, political ideologies, and partisan politics—and perhaps reasoned argument as well. If outcomes are what really counts,

22 And here is the anti-roadmap: (1) this Article is not about start-from-scratch constitutional design; it is about the situation of constitutional theory in the here and now; (2) this Article is not an argument for originalism and against living constitutionalism; its aims are ecumenical; (3) this Article does not attempt to adjudicate disputes among the various forms of judicial, legislative, and constitutional supremacy; and (4) this Article does not claim to be comprehensive; the focus is on fundamental and feasible options—discussion of options that are infeasible or that are not fundamental is very limited.

then the question is, "What position in normative constitutional theory best satisfies my constitutional preferences?"

Simplifying (indeed, vastly oversimplifying) a very complex reality, let us stipulate that there are systematic differences between the constitutional preferences of two groups, which we shall call "progressive" and "conservative."[23] We can imagine a less complicated version of the actual world with the following constitutional preference sets:

> *Abortion Rights*: progressives prefer the reinstatement of *Roe v. Wade*;[24] conservatives prefer the status quo created by *Dobbs*.[25]
>
> *Guns*: progressives prefer the reversal of *Heller*,[26] *McDonald*,[27] and *Bruen*;[28] conservatives prefer even stronger protections for the right to bear arms
>
> *Delegation*: progressives prefer a strong administrative state and a weak nondelegation doctrine; conservatives prefer policymaking be centered in Congress and a strong nondelegation doctrine.
>
> *Federalism*: progressives prefer virtually unlimited federal power; conservatives prefer substantial limits on national power.
>
> *Religious Liberty*: progressives prefer very limited or no religious exemptions from general regulations; conservatives prefer robust exemptions.[29]

How would each of the three fundamental options affect these issues? The answer to that question is contingent and uncertain.

For judicial supremacy, the key variable is the composition of the Supreme Court, which changes over time in response to Justices leaving the court and being replaced by presidential nomination and Senate confirmation. These

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23 The labels "conservative" and "progressive" are simplifications. The actual composition of political ideologies is multidimensional and may be scalar rather than binary. Thus, conservatives differ from libertarians, and progressives differ from liberals. And there are radicals of the left and right, populists, anarchists, communists, and on and on. The thought experiment is designed to illuminate the problems posed by choice among the three fundamental alternatives; in the real world, these problems would be more complex.

24 Roe v. Wade, 410 U.S. 113, 164-65 (1973) (holding that there exists a constitutional right to abortion).

25 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*).

26 District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (holding that the Second Amendment protects at right to possess "handguns held and used for self-defense in the home")

27 McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) ("[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

28 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022) (holding that the Second Amendment protects a "right to carry a handgun for self-defense outside the home").

29 It is worth noting that the ideological valence of religious liberty may have changed over time. The simplified statement in the text is intended to roughly capture the current state of progressive and conservative preferences. I am grateful to Michael Dorf for this point.

changes are ultimately driven by the political ideology[30] and jurisprudential preferences[31] of the Senate majority and the President. Similarly, for legislative supremacy, the key variable is the composition of Congress and the Presidency.

For constitutional supremacy, the resolution of constitutional questions (including the five preference sets listed above) depends on the Constitution itself.[32] The constitutional text changes only in response to constitutional amendment, and it is the meaning (or communicative content) that determines the legal content of constitutional doctrine. That meaning depends on the specific version of constitutional supremacy that constitutional actors employ. For the purposes of this Article, two versions are considered, contemporary ratification theory and originalism.

One way in which these two versions of constitutional supremacy differ is their attitude towards the fixation of constitutional meaning. Contemporary public meaning can change in response to linguistic drift and shifts in public opinion.[33] The original meaning is stable in theory, but that meaning is not fully known and may sometimes be surprising.[34] As a

30 As used here, "political ideology" refers to the politically salient beliefs and preferences of the officials who participate in judicial selection.

31 As used here, "jurisprudential preferences" refers to the legally salient beliefs and preferences of officials and judges. Broadly speaking, such preferences can be thought of as ranging from formalist (originalism, textualism) to realist (living constitutionalism, purposivism).

32 Again, for those who are worried about constitutional indeterminacy, see *infra* Section IV.C.

33 Linguistic drift (or semantic shift) occurs when words and phrases procure new meanings due to changes in patterns of usage. *See* SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING vii (2008) (explaining that words undergo changes in meaning over time); Solum, *The Fixation Thesis*, *supra* note 14, at 17 (explaining linguistic drift). One way in which semantic drift can occur involves judicial interpretation of a constitutional provision. A judicial interpretation can change the technical legal meaning of words, and that new meaning may diffuse to the public. Something like this may have occurred in the case of the Fifth Amendment Due Process of Law Clause. *See* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 453 (2022) ("[T]he whole corpus of due process of law doctrine is inconsistent with the original meaning of the Fifth Amendment Due Process of Law Clause . . . . [which] suggests that 'due process of law' has undergone linguistic drift—its meaning has changed since the First Congress proposed it for ratification."). In a system in which the Supreme Court consistently applied contemporary ratification theory, the production of linguistic drift would change constitutional doctrine. Social movements might campaign for new usages of constitutional language, and if successful, such campaigns could have the same effects as constitutional amendments. Problems would arise if there was no consensus within the linguistic community about the new meaning, creating semantic ambiguity. These and other questions raised by contemporary ratification theory are outside the scope of this Article.

34 Some provisions of the Constitution are relatively precise and have an original public meaning that is easy to ascertain. These provisions include the basic structural provisions that set up the office of the presidency and the two houses of Congress. U.S. CONST. art. II, § 1; *id.* art. I, §§ 2–3. Other provisions have meanings that may be imprecise (e.g., vague or open-textured) or meanings that are relatively difficult to ascertain. The Privileges or Immunities Clause of the Fourteenth Amendment, for example, has opaque semantic content from a contemporary

consequence, the full implications of constitutional supremacy for many constitutional issues are uncertain for both contemporary ratification theory and originalism.

So, all three of the fundamental options create uncertain futures. There are plausible futures in which either progressives or conservatives would champion judicial supremacy and find both congressional and constitutional supremacy unacceptable—even as a compromise. Indeed, there are plausible futures in which each of the three options are ranked as preferred, unacceptable, or as an acceptable compromise by each of the two groups. Some of the possible permutations are illustrated in the following table.

perspective. *See* Emily Jennings, Note, *Let's All Agree to Disagree, and Move on: Analyzing* Slaughter-House *and the Fourteenth Amendment's Privileges or Immunities Clause Under "Sunk Cost" Principles*, 54 B.C. L. REV. 1803, 1804 (2013) ("Although most legal historians can agree that *Slaughter-House* wrongly interpreted the Privileges or Immunities Clause, these scholars cannot agree on exactly what its drafters intended for its meaning and scope."). Still other provisions may have original meanings that are substantially different than many scholars, judges, and elected officials assume. The Fifth Amendment Due Process of Law Clause may be an example. *See* Crema & Solum, *supra* note 33, at 451 (demonstrating that the original meaning of "due process of law" in the Fifth Amendment was limited to "process" in the technical sense associated with the phrase "service of process").

TABLE 1: PERMUTATIONS ACROSS STATES OF THE WORLD

State of the world	Political Group: Conservatives		Political Group: Progressives	
Progressive Supreme Court	Judicial Supremacy	Unacceptable	Judicial Supremacy	Preferred
Conservative Congress	Legislative Supremacy	Preferred	Legislative Supremacy	Unacceptable
Mixed Constitution	Constitutional Supremacy	Compromise	Constitutional Supremacy	Compromise
Conservative Supreme Court	Judicial Supremacy	Preferred	Judicial Supremacy	Unacceptable
Progressive Congress	Legislative Supremacy	Unacceptable	Legislative Supremacy	Preferred
Conservative Constitution	Constitutional Supremacy	Preferred	Constitutional Supremacy	Unacceptable
Progressive Supreme Court	Judicial Supremacy	Unacceptable	Judicial Supremacy	Preferred
Conservative Congress	Legislative Supremacy	Preferred	Legislative Supremacy	Unacceptable
Progressive Constitution	Constitutional Supremacy	Unacceptable	Constitutional Supremacy	Preferred

The table posits states of the world (column one) with respect to the composition of Congress and the Supreme Court and the general political outcome effects of constitutional supremacy. It then posits the evaluations by conservatives (column three) and progressives (column five) of each of the three options (columns two and four) given a state of the world as either (1) preferred (green), (2) unacceptable (red), or (3) compromise (yellow), as a function of the state of the world. Each of the three options is evaluated as unacceptable by conservatives or progressives in at least one of the permutations, and each is evaluated as preferred by conservatives or progressives in at least one as well. The table makes the simplifying assumption that the preferences are a function of outcome preferences for the present states of the world—in other words, the preferences are limited to

outcome effects in one state of the world (the state specified in column one) and hence do not range over shifting states of the world in the long run.

If Congress and the Presidency are controlled by the Democratic Party but the Supreme Court has a conservative supermajority, then progressives (if motivated solely by outcomes) would prefer legislative supremacy, whereas conservatives (if motivated solely by outcomes) would prefer judicial supremacy. But if the situation were reversed, then conservatives would prefer legislative supremacy and progressives would prefer judicial supremacy. Outcome-based preferences for these options depend on the composition of institutions that in turn depend on electoral politics and the accidents of history.

The compositions of Congress and the Supreme Court change over time. Congress and the Presidency are controlled by the Democratic Party during some periods and by the Republican Party during others. During periods of divided power (e.g., Democratic Congress, Republican President), the legislative process may be deadlocked, freezing the status quo in place. Hence, it is likely that statutory law on abortion rights, guns, delegation, federalism, and religious liberty will vary over time under legislative supremacy. Neither side would have long-run guarantees and both sides would be losers during some periods and winners at other times.

The same is true of judicial supremacy. The composition of the Supreme Court usually changes only gradually, though there can be periods of rapid change. During some periods (e.g., the New Deal and the Warren Courts), the Court was dominated by progressives, while during other periods (for example, the Berger, Rehnquist, and Roberts Courts), the Court was (and still is) dominated by conservatives. Sometimes the Court is almost evenly divided, with a centrist "swing justice" controlling the outcome of important constitutional cases—this was true in some ways during the period when Justice Anthony Kennedy was a swing vote[35] on some important issues,

35 *See* Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115, 150 (2016) ("Indeed, many of Justice Kennedy's liberal votes were decisive, 'swing votes'—votes that helped produce minimally-winning coalitions favoring the claims of the criminally accused or convicted."); Richard G. Wilkins, Scott Worthington, Elisabeth Liljenquist, Adam Pomeroy & Amy Pomeroy, *Supreme Court Voting Behavior: 2007 Term*, 37 HASTINGS CONST. L.Q. 287, 320 (2010) ("This Study predicts that Justice Kennedy will still have considerable influence over the outcome of swing-vote cases for the foreseeable future, but as to what those outcomes will likely be is hard to say—Justice Kennedy is notoriously difficult to predict."). The notion of a swing voter may well be ambiguous. *See* Kristin M. McGaver, *Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States*, 101 MINN. L. REV. 1247, 1249 (2017) ("This plethora of uses demonstrates that there is a multilayered and widespread confusion about what 'swing' actually means when applied to a Supreme Court Justice.").

including same-sex marriage,[36] affirmative action,[37] abortion,[38] and gun rights.[39]

Because the makeup of the Court changes over time, judicial supremacy will produce conservative outcomes during some periods of history and progressive outcomes during others. Outcome-motivated conservatives might prefer judicial supremacy with a six-to-three conservative supermajority, but they would likely prefer legislative supremacy if (1) the Court were dominated by Justices appointed by Democratic Presidents and either (2)(a) Congress were either controlled by Republicans or (2)(b) Republicans had the ability to block legislation through the filibuster or by control of either the Senate or the House. Of course, outcome-motivated progressives will have exactly the opposite preferences. Over time, constitutional law on abortion rights, guns, delegation, federalism, and religious liberty has varied under judicial supremacy. Once again, each side will sometimes win, sometimes lose. Importantly, there are no guarantees—outcomes are contingent.

What about constitutional supremacy? The implications of constitutional supremacy for constitutional questions depend in part on which version of constitutional supremacy would be employed. I will discuss two possibilities, which I shall call "contemporary ratification theory" and "originalism." Each of these two theories creates substantial outcome uncertainty, albeit for reasons that are quite different.

Contemporary ratification theory entails that constitutional meaning can change over time in response to changing public beliefs about the meaning of the constitutional text, and this creates uncertainty about the future of constitutional doctrine. In 1791, the phrase "due process of law" was understood to signify "process" in the technical legal sense that we now

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36 Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding the Fourteenth Amendment protects a right to same-sex marriage).

37 *See* Roberto L. Corrada, Ricci*'s Dicta: Signaling A New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 242 (2011) ("Justice Kennedy—stepping into the 'swing-vote' role formerly held by Justice O'Connor—has adopted key elements of Justice O'Connor's position on affirmative action: hostile and restrictive, yes, but not entirely opposed to it as are the more conservative members of the Court.").

38 *See* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 292 (2010) ("Justice Kennedy is the Court's swing vote on abortion issues . . . .").

39 *See, e.g.*, Josh Blackman, *The Supreme Court's New Battlefield*, 90 TEX. L. REV. 1207, 1212 (2012) (reviewing ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011)) ("Justice Kennedy, the decisive swing vote, 'tipped his hand': the Second Amendment protects a 'general right to bear arms . . . without reference to the militia either way.'" (quoting ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 157 (2011))).

associate with the phrase "service of process."[40] But today, the same phrase has come to refer to procedural fairness.[41] Such changes are unpredictable: we cannot know today how linguistic drift will alter the contemporary public understanding of the constitutional text in the future.

Uncertainty also holds for the originalist version of constitutional supremacy, but for different reasons. Some conservatives may believe that the original public meaning of the constitutional text favors conservative outcomes on most or even almost all of the important constitutional issues. They may believe that originalism entails no abortion rights, strong gun rights, a vigorous nondelegation doctrine, limited national legislative power, and robust religious liberty. Some progressives may share these beliefs; if motivated solely by outcomes, these progressives would likely prefer either judicial supremacy or legislative supremacy to constitutional supremacy in its originalist form. Other progressives may believe that originalism actually favors many progressive outcomes: perhaps an equality-based right to reproductive autonomy, gun rights limited to militia service, a very weak nondelegation doctrine, plenary national legislative power, and weak religious liberties. Some conservatives may fear that progressives are correct about one or more of these questions. In the here and now, original meaning is contested and uncertain. That might change in the long run, but it is a fact of life for the time being.

At the end of the day, the originalist version of constitutional supremacy may well be a very mixed bag for both progressives and conservatives.[42] Moreover, because the original public meaning of the constitutional text is determined by evidence (and not by the preferences of the Justices), it is likely that very few citizens, judges, or political actors actually know what the implications of the originalist version of constitutional supremacy would be—certainly not with a high degree of confidence. Even experts may be uncertain about the original public meaning of some of the most important constitutional provisions.[43]

Thus, both progressives and conservatives might come to believe that neither version of constitutional supremacy gives them everything they want. Indeed, both sides might come to believe that constitutional supremacy leads

40 Crema & Solum, *supra* note 33, at 451.

41 *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 308-09 n.310 (2004) ("The essence of due process is procedural fairness, as embodied in the elements of notice and opportunity to be heard." (quoting Milenkovic v. Milenkovic, 416 N.E.2d 1140, 1148 (Ill. App. Ct. 1981))).

42 For examples of some "surprising implications of an originalist approach," see Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 251-59 (2018) [hereinafter Solum, *Surprising Originalism*].

43 For example, I am uncertain about the meanings of the Privileges or Immunities Clause of the Fourteenth Amendment and the Necessary and Proper Clause of Article One.

to unacceptable outcomes. With respect to the originalist version, progressives might believe that strong abortion rights must be guaranteed and therefore originalist constitutional supremacy must be rejected. Likewise, conservatives might believe that a strong nondelegation doctrine is essential but come to fear that originalist constitutional supremacy does not entail such a doctrine. Because contemporary ratification theory produces long run uncertainty about constitutional meaning, neither conservatives nor progressives can have confidence that it will produce the outcomes they prefer.

Readers, this paragraph is especially important! Anyone can end up a loser on issues of fundamental importance under any of the three fundamental and feasible options. The possibility of losing is especially salient if the issue is considered to be of *transcendent importance*, where the phrase "transcendent importance" refers to an issue that always or almost always trumps (transcends) other considerations.[44] Thus, both progressives and conservatives might consider abortion rights to be a matter of transcendent importance and outside the set of issues for which compromise is an option. If they do, then any constitutional theory that fails to guarantee their preferred outcome on abortion would be unacceptable: "If your theory doesn't yield my result on abortion, then I cannot possibly accept it." This phenomenon would be like what is sometimes called "single-issue voting."[45] But serious problems can arise if there are two or more issues of transcendent importance. What if all three options yield some outcomes that you regard as "must haves" and other outcomes that you regard as "unacceptable"? Something would have to give! Otherwise, your preference structure would be deeply irrational. *I strongly suggest that you read this paragraph one more time and let it sink in.*

If this analysis is correct, constitutional theory is faced with a disturbing possibility. It might well be the case that citizens, politicians, and judges reject all of the fundamental alternatives. And what to do then? What is "outside the box" of the three fundamental options? Some constitutional actors and theorists may be tempted by the alluring belief that "their side" will win a permanent political victory and hence avoid the tragic choices produced by political uncertainty.[46] Another possibility can be called "constitutional

44 *See* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 755 (1993) (discussing this idea using the phrase "transcendent interest").

45 *See* Pamela Johnston Conover, Virginia Gray, & Steven Coombs, *Single-Issue Voting: Elite-Mass Linkages*, 4 POL. BEHAV. 309, 310 (1982) (characterizing single-issue voting as a singular focus on one issue above all other considerations).

46 *See infra* subsection V.A.2.

opportunism,"[47] a stance that abandons the quest for a principled theory and instead advises citizens, politicians, and judges to do "whatever it takes" to realize preferred outcomes.[48] Constitutional opportunism might give the following advice: "Favor judicial supremacy today, but legislative supremacy tomorrow." Indeed, constitutional opportunists might lie about the original or contemporary meaning of the constitutional text if that is "what it takes" to achieve preferred outcomes. Another set of alternatives adopts explicitly ideological approaches to constitutional theory: "social justice constitutionalism," and "historical traditionalism" might be examples.[49] These possibilities will be discussed in Section V.A below.

* * *

At this point, the cognoscenti will have noticed that we are well into the Article, without a normative claim for one of the three options. Normative claims are important—I make lots of those in other work. But this Article is not about which of the three options is best. Rather, it is about how to think in new ways about judicial, legislative, and constitutional supremacy. We need to "think different."[50]

Current debates in normative constitutional theory seem to have reached an impasse. There are many warring camps. There are clashes that can be understood as instantiations of strife among the three fundamental and feasible options. Originalists (constitutional supremacy) debate living constitutionalists (judicial supremacy). Advocates of legislative supremacy oppose both. But many of the debates occur within the three options. Thus, representation-reinforcement theorists disagree with those who would do away with judicial review and institute pure legislative supremacy. Public meaning originalists debate original methods originalists. Common law constitutionalists disagree with the moral readings approach. The resulting discourse is baroquely complex and, at its best, astonishingly sophisticated, but at a fundamental level, it doesn't seem to be going anywhere.

But maybe, just maybe, we could make some progress if we could get ourselves to "think different." What if we were able to see the whole forest and not just the trees? And what if the big picture was not the landscape we had imagined when were immersed in fine-grained detail of the debates within and among the warring camps. What then? Maybe, just maybe, we would be able to make a fresh start. Maybe, just

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47 *See* Solum, *Conceptual Structure*, *supra* note 7, at 1274–75 (categorizing constitutional opportunism as a form "constitutional antitheory").

48 *See infra* subsection V.A.3.

49 *See infra* subsection V.A.5.

50 Tom Hormby, *Think Different: The Ad Campaign that Restored Apple's Reputation*, LOW END MAC (Aug. 10, 2013), https://lowendmac.com/2013/think-different-ad-campaign-restored-apples-reputation/ [https://perma.cc/U5FR-ZDCN].

maybe, we could make some progress. And after that, then maybe, just maybe, we would be able to back off of our entrenched positions and arguments.

* * *

Outcome reductionism is deeply problematic. What is the alternative? Part II answers that question by distinguishing outcome reasons from process reasons. Both kinds of reasons are required for normative constitutional theory to make progress.

II. Outcome Reasons and Process Reasons in Constitutional Theory

We need a conceptual distinction between outcome reasons and process reasons.[51] This may sound abstract, but the distinction is actually quite simple once it is explained. Here we go!

A. *The Distinction Between Outcome Reasons and Process Reasons*

How can we engage in normative evaluation of the three options? On the one hand, we are interested in the outcomes each option produces. Good outcomes count in favor of an option; bad outcomes count against it. The goodness or badness of outcomes is what we will call an "outcome reason." But there is another kind of normative reason that focuses on the qualities that processes possess and not on the outcomes they produce. Thus, the process that produces an outcome might be undemocratic or democratic; similarly, some processes will result in the stability, coherence, and predictability of law, whereas others will lead to instability, incoherence, and unpredictability. These are examples of what we can call "process reasons." The distinction that I am marking here closely tracks a distinction made by Jeremy Waldron[52] and Richard Fallon[53] in their important exchange on judicial review in the two thousand aughts.[54]

Here is another way of thinking about the distinction: Outcome reasons are about the content of legal decisions—abortion rights or not, gun rights or

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51 It is possible that the outcome-reasons/process-reasons distinction predates the exchange between Fallon and Waldon. If so, my apologies to those whom I have failed to acknowledge.

52 Waldron, *Against Judicial Review*, *supra* note 1, at 1376-95 (distinguishing outcome- and process-related reasons)

53 Fallon, *For Judicial Review*, *supra* note 1, at 1710-28 (accepting distinction).

54 Waldron's definitions were as follows: "Process-related reasons are reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about the appropriate outcome." Waldron, *Against Judicial Review*, *supra* note 1, at 1372. "Outcome-related reasons, by contrast, are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome (i.e., a good, just, or right decision)." *Id.* at 1373.

not, delegation to administrative agencies or not, strong national government or strong states, religious exemptions or not. In each case, the normative desirability of the outcome provides an outcome reason. Process reasons are about processes, institutions, and decision procedures—what institution or norm should have power to produce outcomes of a particular kind? What political body or text should decide the content of abortion rights—the Supreme Court, Congress, state legislatures, or the Constitution itself? Process reasons focus on the characteristics or attributes of decision-making processes. For example, giving the gun rights decision to Congress or state legislatures might be favored by the process reason of democratic legitimacy over giving that decision to the Supreme Court or the constitutional text.

B. *A Typology of Process Reasons*

Outcome reasons are all too familiar to constitutional theorists. Everyone understands the salience of outcome-based arguments for and against positions in constitutional theory—the examples in Part I of this Article are familiar to all constitutional scholars in the United States. Process reasons are familiar as well, but they are perhaps less well-understood. We can buy some clarity by developing a simple typology of three kinds of process reasons: (1) legitimacy, (2) the rule of law, and (3) institutional capacity.

1. Legitimacy

The word "legitimacy" is ambiguous.[55] For the purpose of this discussion, let us stipulate that "legitimacy" is to be used to refer to a set of characteristics of institutions and decision procedures that confer normative value that is not reducible to the outcomes that the institution or decision procedure produces.[56] One such characteristic is democratic legitimacy; another is role legitimacy.

a. *Democratic Legitimacy*

The phrase "democratic legitimacy"[57] captures the familiar idea that democratic processes confer legitimacy on legislation; a statute enacted by a

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55 For an introduction in the context of political legitimacy, see Fabienne Peter, *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2017), https://plato.stanford.edu/archives/sum2017/entries/legitimacy/ [https://perma.cc/JH2Z-8TFQ].

56 If a court has legitimate authority to render a judgment, that fact gives those who are bound by the judgment reasons to comply. Likewise, if a constitution is adopted by a legitimate process, that fact gives those governed by the constitution reasons to conform their behavior to its requirements.

57 For examples of the use of "democratic legitimacy" in constitutional theory, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 276–80 (2009); Reva B. Siegel, Heller

democratic majority possesses this quality, even if the statute itself is unwise or unjust. This notion is widely accepted among constitutional theorists,[58] even if it also is contested by some.[59] Much could be said about the theoretical foundations of democratic legitimacy, but this is not the occasion for an extensive discussion. Rather, I will simply assume that legislation is rendered more legitimate by the fact that it is enacted by democratically elected representatives. Constitutional decisions by the Supreme Court are rendered less legitimate by the fact that Supreme Court Justices are appointed for life terms; this familiar idea is sometimes called the "counter-majoritarian difficulty."[60]

Democratic legitimacy is a scalar and not a binary. Institutions can be more or less democratic. For example, a Supreme Court composed of Justices that are nominated and confirmed by elected officials is more legitimate than a self-perpetuating Supreme Court. Similarly, a constitution that was ratified by supermajoritarian democratic processes is substantially more legitimate than a constitution that was imposed by an occupying foreign power after consulting local elites. In other words, democratic legitimacy is not "all or nothing."

Finally, democratic legitimacy provides process reasons. Thus, if one argues that judicial supremacy has a democracy deficit, because Supreme Court Justices are unelected and appointed for life terms, the argument does not depend on the outcome of particular cases. The Supreme Court is less democratic than Congress, whatever the outcomes of the cases it decides. Democratic legitimacy arguments go to process, not results.

b. *Institutional Legitimacy*

Arguments from institutional legitimacy are based on the premise that institutions have legitimate roles and that they act illegitimately when they

& Originalism's Dead Hand—In Theory and Practice, 56 UCLA L. REV. 1399, 1404 (2009); M. Frances Rooney, Note, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 747, 782 (2017).

58 Famously, the notion of democratic legitimacy is discussed in connection with the so-called "counter-majoritarian difficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-18 (2d ed. 1986) (cautioning that judicial review may be undemocratic where it declares unconstitutional a legislative act passed by "representatives of the actual people of the here and now").

59 For example, some libertarians may reject the notion of democratic legitimacy and argue instead that only actual consent can confer legitimacy. This view may be intellectually powerful, but it is currently outside the mainstream of constitutional theory and popular opinion. For that reason, we will simply set it aside on this occasion. Notice, however, that consensual legitimacy is itself a conception of legitimacy that could operate as a process reason.

60 *See* BICKEL, *supra* note 58, at 16-18 ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

exercise powers that are not assigned to them. Consider the following simplified system of roles assigned by a constitution that has been ratified by a supermajority vote of citizens:

> *Legislative Role*: The legislature is assigned the role of making law through the enactment of statutes.
>
> *Executive Role*: The executive is assigned the role of carrying out and enforcing the laws made by the legislature.
>
> *Judicial Role*: The judiciary is assigned of deciding criminal and civil actions on the basis of the laws enacted by the legislature.
>
> *Constitutional Role*: The constitutional convention is assigned the role of drafting any constitutional amendments which are ratified by a supermajority vote of citizens.

Each institution is legitimate to the extent it acts within the boundaries of its assigned role. The legislature would act illegitimately if it enacted legislation that gave one of its committees the power to entertain criminal or civil actions and issue judgments. The executive would act illegitimately if began to issue "executive statutes," and then carried those into execution instead of the statutes enacted by the legislature. The judiciary would act illegitimately if it asserted the power to amend the constitution. The constitutional convention would act illegitimately if it started acting as a court that resolved constitutional disputes on a case-by-case basis.

Arguments from institutional legitimacy provide process reasons. Thus, a legislative committee that acted as a court would be illegitimate, even if its decisions resulted in good outcomes. Likewise, the judiciary acts legitimately if it decides cases on the basis of statutes, even if the legal norms established by the statutes result in bad outcomes.

2. The Rule of Law

The phrase "rule of law" represents an important and widely shared value of political morality.[61] There are at least two important aspects of this idea. The first aspect can be captured by the rule of law values, which include

61 *See generally* GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW (2022). The literature on the rule of law is vast. A representative sample might include the following: ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1982); Jeremy Waldron, *The Concept and Rule of Law*, 43 GA. L. REV. 1 (2008); LON L. FULLER, THE MORALITY OF LAW (2d ed. 1969); JOHN RAWLS, A THEORY OF JUSTICE 235-42 (1971).

consistency, predictability, stability, evenhandedness, and certainty.[62] A constitutional regime is better if it does a good job of realizing the rule of law values, but worse if it produces inconsistency, unpredictability, instability, and uncertainty.

The second aspect of the rule of law is captured by the phrase "the rule of law and not of men."[63] (We can substitute "individual persons" for "men.") This phrase captures the idea that rule by individual persons who are unconstrained by law is arbitrary. If citizens are subject to the arbitrary will of a ruler, they lose a significant aspect of the ability to govern their own lives. This idea is sometimes articulated as "republican freedom,"[64] and it is closely connected to Aristotle's critique of tyranny.[65]

The rule of law provides process reasons. Good outcomes might result from a regime that failed to achieve consistency, predictability, stability, and certainty. A tyrant might govern wisely. Nonetheless, there are good reasons to reject tyranny and support the rule of law.

3. Institutional Capacity

Institutions have different functional capacities. The differences in the institutional capacities of Congress, the judiciary, and the Constitution are the source of process reasons for and against the three options. For example,

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62 *See, e.g.*, Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/LPR6-TP2L]; Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 461 (2018) (reviewing RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017)) (listing rule of law values of predictability, certainty, stability, publicity, and uniformity").

63 *See* JOHN ADAMS, *Novanglus Letter No. VII*, *in* 4 THE WORKS OF JOHN ADAMS 99, 106 (Boston, Little, Brown & Co. 1851) (referring to "a government of laws, and not of men"). John Adams also incorporated this language when he drafted the Massachusetts Constitution in 1780. *See* MASS. CONST. art. XXX; *John Adams & the Massachusetts Constitution*, MASS.GOV, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution [https://perma.cc/HK5H-E59A] (last visited Nov. 2, 2023). It provides:

> In the government of this Commonwealth the Legislative department shall never exercise the Executive and Judicial powers, or either of them; the Executive shall never exercise the Legislative and Judicial powers, or either of them; the Judicial shall never exercise the Legislative and Executive powers, or either of them: To the end, it may be a government of laws and not of men.

MASS. CONST. art. XXX.

64 *See* Philip Pettit, *Republican Freedom: Three Axioms, Four Theorems*, *in* REPUBLICANISM AND POLITICAL THEORY, 102-30 (Cécile Laborde & John Maynor, eds. 2009).

65 *See* RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 106 (2002) ("Aristotle holds that it is typical of tyranny to rule by a series of edicts rather than by a stable system of law . . . ."); *see also* Solum, *The Constraint Principle*, *supra* note 14, at 56-57 (discussing Kraut's exposition of Aristotle's conception of law versus tyranny).

one virtue of legislative supremacy is the ability of Congress to assess policy impacts and compromise the interests of various groups. But Congress may lack the capacity to resolve disputes about legal rights, and Congress may not be structured to protect citizens against the ways in which political forces can endanger individual rights: Congress is designed to respond to political forces. To paraphrase Walter White, Congress is "the danger"[66] where rights are implicated. The Constitution is well-suited to the functional role of creating stable structures and procedures for politics and for entrenching individual rights, but this virtue is also a vice, because it makes constitutional change extremely difficult.

Institutional capacity arguments provide process reasons. Of course, institutional capacities are closely related to the outcomes they tend to produce, but capacities do not reduce to outcomes. Thus, the ability of Congress to respond to political forces that reflect the interests of citizens and groups can produce good and bad outcomes. Given varying political conditions, the very same institutional capacities that facilitate Congress reaching a good outcome on an issue at Time 1 can facilitate a bad outcome on the same issue at Time 2. The same point can be made about the courts and the Constitution.

We now turn to the relationship between process reasons and outcome reasons—and in particular to the view that some outcome reasons are decisive reasons whereas process reasons always provide pro tanto (nondecisive) reasons.[67]

C. *The Outcomes Fallacies*

Outcome reasons are ubiquitous in constitutional discourse, but it is all too easy to move from the truism that outcomes are relevant to the evaluations of normative constitutional theories, to the very different and deeply problematic idea that outcomes are all that counts and the related and even more problematic idea that only a limited subset of outcomes count. We can call the idea that only outcomes count "outcome reductionism." This reductionist move takes many forms. Conceptually, one possible version of outcome reductionism focuses exclusively on the past and is associated with arguments from canonical and anticanonical cases. Another quite different conceptual possibility would focus on the future and rest on the assumption that the outcomes that would be produced by some approach to constitutional

66 *See Breaking Bad: Cornered* (AMC television broadcast Aug. 21, 2011).

67 For a basic account of pro tanto reasons, see Maria Alvarez, *Reasons for Action: Justification, Motivation, Explanation*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2017), https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/ [https://perma.cc/P9ZV-FR5U].

theory are those outcomes that the theory would produce if it were employed by the theorist and not by the judges or legislators who would apply the theory in the real world. Each of these two possible forms of outcomes reduction rests on a fallacy.[68] We can begin with the version of outcome reductionism that focuses on the past.

1. Outcomes and the Past

We might think that the choice among the fundamental and feasible options (the three forms of supremacy) ought to be driven by the outcomes that each option would have produced in the past. The fallacious position is easy to state:

> *The Prior Outcomes Fallacy*: A normative constitutional theory can and should be evaluated *solely* on the basis of the outcomes that it would have produced if applied in the constitutional past.

Put that way, the position sounds pretty lame, but a version of the Prior Outcomes Fallacy underlies a widely accepted set of beliefs about the relationship of canonical and anticanonical cases to normative constitution theory.

One of the most popular moves in normative constitutional theory can be called the "Canonical Cases Argument."[69] The argument begins with a simple idea: certain cases are canonical—their legal correctness and moral rightness is beyond dispute.[70] An acceptable constitutional theory therefore must justify the outcomes of the canonical cases.

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68 If the word "fallacy" bothers you, substitute "mistake." These are informal mistakes in reasoning, akin to what are called "informal fallacies."

69 *See generally* Randy E. Barnett, *Clauses Not Cases*, 115 YALE L.J. POCKET PART 65, 66 (2006) (critiquing a proposal to ask Supreme Court nominees how they would have voted in previous "canonical" cases); Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 521-22 (2007) ("The confirmation process we now have is very poorly suited for discerning potential Justices' views about genuinely controversial issues that have been or are likely soon to come before the Court. . . . We hear nominees uniformly praising or accepting as settled those decisions widely regarded as canonical, while invoking anti-canonical cases as illustrations of the proposition that sometimes the Court must overrule its own precedents."); Jack M. Balkin, "*Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681 (2005) ("Canonical cases and materials are a terrain on which people fight battles about constitutional theory."); Pamela S. Karlan, *What Can* Brown *Do for You? Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) ("A constitutional theory that cannot produce the result reached in *Brown* . . . is a constitutional theory without traction."). I am discussing the canonical cases argument as an argument in normative legal theory. A parallel argument could sound in positive law; that is, it might be argued that the canonical cases are deeply rooted in the positive law and bind the Supreme Court, unlike other precedents which can be reversed by the Court. I am grateful to William Baude for this point.

70 The word "canon" is used in two different senses. In one sense, the canonical cases are simply those that are included in all or almost all of the casebooks. In another sense, the canonical cases are

The standard examples[71] of canonical cases include *Brown v. Board of Education*[72] and *Marbury v. Madison*;[73] beyond that, the list of canonical cases is contested.[74] The flip side of the list of canonical cases is the corresponding list of anticanonical cases.[75] These are cases that are clearly wrong, again both as a matter of law and morality. The anticanonical cases include *Dred Scott v. Sandford*,[76] *Plessy v. Ferguson*,[77] and *Korematsu v. United States*.[78]

Once we have defined the sets of canonical and anticanonical cases, the Canonical Cases Argument then uses these cases as the criterion by which normative constitutional theories must be judged:[79] "If your theory would not have guaranteed *Brown v. Board* (and the other canonical cases) and necessarily precluded *Plessy v. Ferguson* (and the other anticanonical cases), then your theory is certainly wrong." In informal discussion among constitutional scholars, it sometimes goes like this: "Originalism? *Brown v. Board*. Game over!"[80] Less frequently and from a different perspective, the argument might go, "Living constitutionalism? *Plessy*. Game over."[81] In either

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those that are definitely correct and that are beyond question. I am using the phrase "canonical cases" in the second, normative sense.

71 Mark Graber, *The Declaration of Independence and Contemporary Constitutional Pedagogy*, 89 S. CAL. L. REV. 509, 535 (2016) ("[A]ll general theories of constitutional interpretation claim to justify all the good canonical texts while repudiating all the bad ones."); Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 590–91 (2008) ("[The] canonical cases" include "*Marbury v. Madison*, *McCulloch v. Maryland*, *Plessy v. Ferguson*, and *Brown v. Board of Education*"); Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 388 (2000) ("*Brown* headlines a select group of materials, including Supreme Court decisions such as *Marbury v. Madison* and *McCulloch v. Maryland*, that belong in what should be known as the upper canon.").

72 347 U.S. 483 (1954).

73 5 U.S. 137 (1803).

74 Perhaps the next case on the list would be McCulloch v. Maryland, 7 U.S. (4 Wheat.) 316 (1819). *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749 (1999) (describing *McCulloch* as "the most central case in our constitutional canon").

75 *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 405–27 (2011) (including *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Korematsu v. United States* in the "anticanon").

76 60 U.S. 393 (1856).

77 163 U.S. 537 (1896).

78 323 U.S. 214 (1944).

79 There could be other versions of the Canonical Cases Argument that would draw different implications from the canonical cases. For example, it might be argued that as a matter of positive law, the canonical cases are correctly decided, and that any theory that disputes the legal correctness of these cases is not the positive law in the here and now. I am grateful to William Baude for this point.

80 For criticism of that line of reasoning, see Solum, *Surprising Originalism*, *supra* note 42, at 267.

81 In this paragraph, I am not taking a position on the assertions that originalism would not guarantee *Brown* or that living constitutionalism produced *Plessy*. The statements in text are offered for purposes of illustration. The question whether originalism would have produced *Brown* is much debated. *See* Solum, *Surprising Originalism*, *supra* note 42, at 261-65 (canvassing these arguments).

case, the Canonical Cases Argument is deployed as a conversation stopper—a move that ends the game.

There is no doubt that the Canonical Cases Argument (even in the form in which it has been stated) has a superficial appeal, but as the argument is usually developed, it is a constitutional enthymeme—there are many missing premises. And once we attempt to state the argument in full, it begins to become unclear whether there is actually any argument at all.

One possible version of the Canonical Cases Argument involves counterfactual history. After we have identified the sets of canonical and anticanonical cases, we then ask how each of these cases would have turned out if the theory we are evaluating had been adopted by the Supreme Court at-and-for the moment that case was decided. Call this the "Counterfactual History Version" of the Canonical Cases Argument. I believe that it is this version of the argument that informs the *Brown v. Board* objection that is levied against originalism and that applies to legislative supremacy as well.

This Counterfactual History Version of the Canonical Cases Argument is deeply flawed. First, this version of the argument cherry picks the past. If we are going to evaluate normative constitutional theories on the basis of the outcomes they would have produced in the past, surely, we ought to consider their effects on the past as a whole and not on the basis of a cherry-picked cases that elicit strong emotional responses. And this cherry picking is especially problematic if the basis for picking some cases and excluding all the others is not disclosed; such nondisclosure is characteristic of the enthymematic form of the objection we have been considering.

Second, the Counterfactual History Version holds everything but the canonical and anticanonical cases constant—the rest of history remains the same. But why? Our entire constitutional history would likely have been different under legislative supremacy, including the history of Jim Crow.[82] Why would we evaluate legislative supremacy on the basis of how the Supreme Court would have decided a few cases in a world in which legislative supremacy applied only to those cases?[83] It is hard to drum up a reason that even sounds plausible, much less convincing.

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82 In this counterfactual world, the Supreme Court would not have enforced constitutional limits on federalism or constitutional property rights. Congress would have had the ultimate authority to define the limits on its own power, including power over the issue of slavery. It seems likely that this counterfactual world would have been different in profound but unknowable ways. There would have been no *Brown v. Board of Education* in that world because constitutional review would not have occurred at all.

83 Like most rhetorical questions, this one is supposed to answer itself by eliciting an intuition. Applying the theory only to the canonical cases without consideration of its effects as a whole is unreasonable because it fails to consider information that would be salient and likely affect our overall normative evaluation.

Third, the Counterfactual History Version of the Canonical Cases Argument looks only to the past. But the past is over and done. If we are really concerned about case outcomes *because case outcomes have consequences*, we should care about future outcomes first and foremost. The strong emotional response elicited by the thought that a canonical case like *Brown* might have come out differently is prompted by our abhorrence of segregation itself.[84] If a concern with outcomes is actually a concern about consequences and hence about the future, then the lists of canonical and anticanonical cases from the past are of secondary importance—relevant but not decisive *even from a perspective that elevates outcomes and their consequences above process considerations*.[85]

These problems are devastating to the claim that the Counterfactual History Version of the Canonical Cases Argument provides a *decisive* (as opposed to pro tanto[86]) reason for rejecting a normative constitutional theory. This does not entail the further conclusion that canonical cases are irrelevant—of course, they are *relevant*.

Suppose we reformulate the objection so as to focus on the future. Now we take the sets of canonical and anticanonical cases and ask whether they would be overruled in the future if the constitutional theory under evaluation were to be implemented in the here and now. Call this the Future Implications Version of the Canonical Cases Argument. But now the objection seems toothless. Hardly anyone thinks that legislative or constitutional supremacy would lead to Jim Crow. *Brown* cannot be overruled until and unless a state legislature reenacts de jure school segregation, but that seems extremely unlikely. Under the far-fetched scenarios in which Congress or state legislatures would bring back Jim Crow, the composition of the Supreme Court would likely change as well: judicial supremacy would provide no guarantee that *Brown* would be saved in those futures. And if we are evaluating outcomes in the future, why in the world would we limit ourselves to the questions of whether canonical cases would be preserved and anticanonical cases would not be revived? There are so many other issues that are likely to be salient in the future. Why should a list that has been cherry-picked from the past overwhelm all the other considerations? The Future

84 If you doubt this, consider the possibility that Jim Crow ended through political action before *Brown*, and the Supreme Court decision in *Brown* stated that this political solution, rather than judicial action, was the appropriate remedy. Then consider the variation in which the Supreme Court decision stated that the political solution was also required by the constitution. In these counterfactuals, it seems likely that it would be the political solution and not *Brown* that would be considered "canonical."

85 I am not contending that canonical cases *are* irrelevant. Rather, the point made in text is that the canonical cases of the past *would be irrelevant* if we care about outcomes for consequentialist reasons, since past consequences are unavoidable.

86 *See* Alvarez, *supra* note 67.

Implications Version of the Canonical Cases Argument rests on assumptions that are manifestly irrational—once they are exposed.

As far as I can tell, there is no way to save the Canonical Cases Argument *in the forms in which it was stated above*. But this is not to say that canonical and anticanonical cases are irrelevant. The point of the discussion so far has been to show that the implications of a constitutional theory for a cherry-picked list of canonical and anticanonical cases is not a normative trump card. Our intuitions about these cases are relevant and can be incorporated into the method of reflective equilibrium, which is discussed below in Section II.D.

At this point, we need to step back from the Canonical Cases argument and return to the Prior Outcomes Fallacy, for which the Canonical Cases Argument served as an illustrative example. What makes the Outcomes Fallacy fallacious is the idea that the implications of a constitutional theory for a small set of past outcomes provides *decisive* (and not merely pro tanto) reasons for the acceptance or rejection of the theory. That idea is crazy—indeed, I think "batshit crazy" is the proper descriptor.

2. Outcomes and the Future

There is another form of outcome reductionism that focuses on the future. Once again, the fallacy can be stated simply:

> *The Future Outcomes Fallacy*: A normative constitutional theory can and should be evaluated *solely* on the basis of the outcomes it would produce if applied by constitutional actors (judges or legislators) who share the relevant moral and factual beliefs of the evaluator (e.g., the theorist, judge, or legislator choosing which option to support).

And once again, if we state the position is this form, the idea is obviously ridiculous. But some version of the Future Outcomes Fallacy may be implicit in contemporary constitutional discourse. Thus, a proponent of judicial supremacy might argue that living constitutionalism is required in order to realize the proponent's vision of a just society, even though the Supreme Court, as constituted today and for the foreseeable future, does not share this vision. Likewise, a proponent of legislative supremacy might argue for that option on the grounds that it permits Congress to enact the proponent's preferred set of individual rights and social policies, again despite the fact that neither the current nor the foreseeable Congress shares the proponent's beliefs about what statutes should be enacted.

If we truly care about actual outcomes, then we cannot assume the actors who apply our theory will share all or most of our moral and factual beliefs all or most of the time. That assumption is almost always false, and there is never a guarantee that it will be true over the long run. Even if a majority of

Justices on the current Supreme Court or a working majority of Congress did share our beliefs today, that fact does not justify the inference that this will always be the case—and history suggests that it won't be.

The two versions of the outcome fallacy illustrate the folly of treating outcome reasons as decisive. What we need is an alternative framework that brings all of the relevant reasons to bear. Luckily, such a framework is already at hand in normative constitutional theory in the form of the method of reflective equilibrium.

D. *Reflective Equilibrium Among Outcome Reasons and Process Reasons*

At this point, we have established that there are two kinds of reasons that are relevant to the choice among the three fundamental and feasible options for normative constitutional theory. One response to this fact would be to discard one of the two kinds of reasons and rely solely on the other. Thus, we might try to argue that only future-focused outcome reasons count, but then we run into the problem that it is simply impossible to predict most of the outcomes that each option is likely to produce. Even in the near term, a complete accounting of outcomes and their wider consequences would be extraordinarily difficult; in the medium to long term, it is plainly impossible. Or we might try to argue that only process reasons count, but that would be hopping out of the frying pan and jumping into the fire. Surely, outcomes count. All the process reasons in the world cannot justify a constitutional order that would lead to truly terribly, really awful, just plain horrible consequences. So, we should reject both outcome reductionism (only outcome reasons count) and process reductionism (only process reasons count).[87]

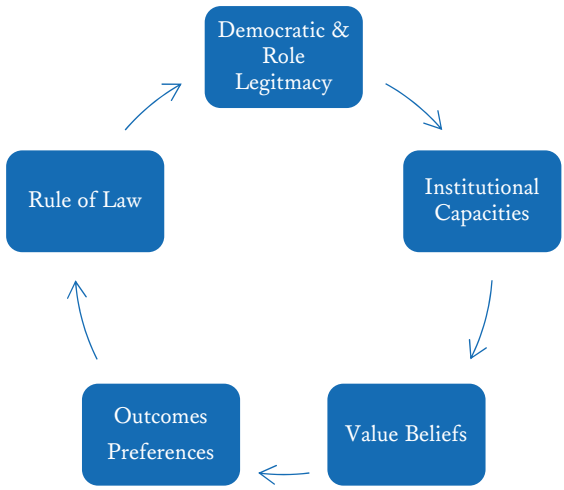
One alternative to outcome reductionism and process reductionism is the method of reflective equilibrium famously associated with John Rawls[88] and

87 The argument in text is directed at outcome reductionism and process reductionism, but it does not imply that outcome reasons and process reasons should have equal weight or importance. For example, there may be good reasons to weigh process reasons more heavily than outcome reasons, given the problem of outcome uncertainty. The method of reflective equilibrium, discussed immediately below, provides a method for resolving conflict between and among outcome and process reasons.

88 RAWLS, *supra* note 61, at 20, 46-53 (1971) (elaborating the concept of "reflective equilibrium"). There is now an enormous literature on this subject. For a selective guide, see Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/sum2020/entries/reflective-equilibrium [https://perma.cc/R24Y-39ML]. Rawls's application of the idea of reflective equilibrium was limited to the topic of justice, but the method is general and can be applied to questions of normative theory generally. For example, our intuitive beliefs about morality may not be fully consistent; some of our intuitions about particular cases could conflict with our more general views about moral principles. Reflective equilibrium allows us to adjust individual beliefs until they are consistent and mutually supporting.

deployed in constitutional theory by Richard Fallon[89] and others.[90] In the context of constitutional theory, the aim of reflective equilibrium is to bring our beliefs about general principles and particular cases into a relationship of coherence and mutual support. The process of reaching reflective equilibrium likely requires that we adjust our beliefs about both individual outcomes and process values.

Reaching reflective equilibrium requires us to evaluate our preferred outcomes in light of the process values of legitimacy, the rule of law, and institutional capabilities. Importantly, reflective equilibrium applies both within the domains of process and outcome reasons and between the two domains. A much-simplified version[91] of this idea is represented in the following diagram:



89 *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 143-44 (2018) (applying Rawls's theory of reflective equilibrium to constitutional theory in light of the "overriding commonality" between "constitutional law [and] moral and political theory"). For discussion of Fallon on reflective equilibrium, see Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 320-29 (2020) [hereinafter Solum, *Themes from Fallon*].

90 *See, e.g.*, Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1778-84 (2013) (advocating for the use of reflective equilibrium in judicial decision-making); Cass R. Sunstein, *On Analogical Reasoning Commentary*, 106 HARV. L. REV. 741, 750-60 (1993) (noting the search for reflective equilibrium as a common feature of legal philosophy); Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 379-89 (2015) (applying the approach to "questions of religious freedom").

91 This version is simplified for several reasons. For example, it represents reflective equilibrium as a cycle with a fixed order. A more accurate representation would involve two-way arrows from each box to all the others. In addition, it limits the process to five considerations, but many other normative and factual beliefs would be relevant to reaching reflective equilibrium.

Thus, our views about the rule of law may influence and require an adjustment in our beliefs about legitimacy, which may in turn influence our sense of the relevance of institutional capacities. All of these process values are connected to our more general value beliefs (e.g., beliefs about personal and political morality) and these in turn affect our beliefs about case outcomes. The process of reaching reflective equilibrium may require an adjustment in our views about what outcomes are preferred, acceptable, and unacceptable. For example, we might initially believe that the delegation of legislative power to regulatory agencies is unacceptable but then adjust that belief in light of other beliefs about democratic legitimacy.

The method of reflective equilibrium can be applied by individuals, seeking coherence and mutual support within and among their own beliefs—call this "narrow reflective equilibrium." But the method can also be applied in the deliberations of a political community. That is, we can widen the set of beliefs to include beliefs of other members of the community with whom we initially disagree on a variety of matters—call this "broad reflective equilibrium."[92] This distinction is important, because in a society characterized by the fact of pluralism, many of the outcome preferences will vary systematically across groups of citizens.

We saw a simplified example of the fact of pluralism above in the discussion of the disagreements between progressives and conservatives about issues like abortion, gun rights, delegation, federalism, and religious liberty.[93] Broad reflective equilibrium can consider these systematic differences of belief, but the fact that such beliefs are inconsistent ensures that we cannot hope for an overlapping consensus in favor of one of the three options if we rely on our own beliefs about the outcomes of these divisive disputes as the basis for agreement.

This leads to an unsurprising conclusion. If we are aiming at *broad reflective equilibrium* for the community and *overlapping consensus*[94] among citizens who have different moral beliefs and political ideologies, then it may well be important to focus on process values shared by those who disagree about outcomes. So, if it is possible to agree about democratic legitimacy while disagreeing about gun regulations, that fact may help us to reach overlapping consensus on the choice among the three fundamental and

92 *See* Solum, *Themes from Fallon*, *supra* note 89, at 321 (distinguishing narrow, wide, and broad reflective equilibrium).

93 *See supra* Part I.

94 *See* Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI-KENT L. REV. 549, 568 (1994) [hereinafter Solum, *Situating Political Liberalism*] (arguing that a pluralistic society can advance fairness through "an overlapping consensus among reasonable comprehensive doctrines on a political conception of justice").

feasible options. It is precisely this notion, that process reasons can overcome deadlock produced by different views about particular outcome reasons, that results in the widely shared belief that many issues ought to be resolved through democratic politics. Agreement on the process value overcomes disagreement on outcomes.

The search for reflective equilibrium may also affect our views about reasonable compromise. When we begin the search for reflective equilibrium, we might start with the idea that several issues are of transcendent importance, and hence that our constitutional system must guarantee our preferred outcome on those issues. But this idea may give if we learn large numbers of our fellow citizens have opposite beliefs on those issues. For this reason, if we aim at broad reflective equilibrium, we may come to revise our beliefs about what issues are subject to compromise.

Applying the method of broad reflective equilibrium aimed at overlapping consensus may enable us to grasp the reason why the outcome fallacies are especially dangerous as a basis for reasoning about the choice among judicial, legislative, and constitutional supremacy. The outcome fallacies are based on very poor reasoning and may create insuperable obstacles to reaching agreement on the basic structure of the constitutional order.

The next step is to return to the three fundamental and feasible options for normative constitutional theory in two steps. Part III takes the first step by clarifying the notions of supremacy, feasibility, and fundamentality that are used to identify the three options. Part IV takes the second step by identifying judicial, legislative, and constitutional supremacy as the three options that are both feasible and fundamental.

III. SUPREMACY, FEASIBILITY, AND FUNDAMENTALITY

We need to clarify three notions that frame our discussion of the judicial, legislative, and constitutional supremacy: (A) supremacy, (B) feasibility, and (C) fundamentality.

A. *Supremacy*

Each of the three options is identified as a form of "supremacy." Each of these options will be explained in greater detail, but the following definitions provide a preliminary understanding:

> Judicial Supremacy: A constitutional order is characterized by judicial supremacy if and only if judicial institutions have ultimate authority to determine the legal content of constitutional norms. For example, if the Supreme Court had the authority to create and change constitutional norms, that would constitute judicial supremacy.

> Legislative Supremacy: A constitutional order is characterized by legislative supremacy if and only if legislative institutions have ultimate authority to determine the legal content of constitutional norms. For example, if the Supreme Court no longer engaged in judicial review of statutes passed by Congress, thereby giving Congress de facto power to determine issues of federalism, separation of powers, and individual rights, that would constitute legislative supremacy.
>
> Constitutional Supremacy: A constitutional order is characterized by constitutional supremacy if and only if constitutional issues and cases are resolved in conformity with the communicative content of the constitutional text. For example, if the Supreme Court, Congress, and executive officials made constitutionally salient choices that were consistent with, fully expressive of, and fairly traceable to the meaning[95] of the constitutional text, that would embody constitutional supremacy.[96]

The name of each option includes the word "supremacy," which is used to represent a specific conception[97] of this general idea. This conception of supremacy can be stated as follows:

> Supremacy: An institution or text[98] is "supreme" in the constitutional context if and only if that institution or text has the ultimate authority to determine (make and change) the content of constitutional norms and the procedures by which such norms can be changed.

Importantly, "supremacy" does not require that the supreme institution or text directly determine every legal question. For example, in a system of legislative supremacy, Congress might delegate regulatory authority to independent agencies or common-law authority to courts. Similarly, judicial supremacy is consistent with the Supreme Court allocating legislative authority to Congress or state legislatures. Constitutional norms can allocate

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95 This formulation does not specify a particular theory of constitutional "meaning" or "communicative content." Thus, it is neutral between contemporary ratifications theory as described in *supra* note 13 and public meaning originalism as elaborated in the sources cited in *supra* note 14.

96 Constitutional supremacy requires that all constitutional actors be bound by the communicative content of the constitutional text. In cases of disagreement, constitutional supremacy requires that constitutional actors consider themselves bound by those procedures for resolving disagreement that are consistent with the constitutional text. Providing an account of those procedures is an important task for originalists and contemporary ratification theorists, but it is outside the scope of this Article.

97 "Conception" is used here in the sense specified by the concept-conception distinction. For further explanation of that distinction, see Solum, *The Fixation Thesis*, *supra* note 14, at 19.

98 The word "text" should be understood to refer to either a single integrated writing or to a well-defined set of such writings. In the context of the constitutional practice in the United States, the relevant text is the United States Constitution, which includes the provisions drafted in 1787 and twenty-seven amendments.

powers (federalism, separation of powers), specify rights (freedom of speech, free exercise), or even specify a policy (prohibition of alcohol). But the system of constitutional norms can allow for a variety of institutions to play a role in the creation of subsidiary norms, e.g., statutes, regulations, and common law. Supremacy is a function of ultimate authority and hence is consistent with less-than-ultimate authority being delegated to an institution other than the one that is supreme. For this reason, either judicial or legislative supremacy is consistent with the possibility that the Supreme Court or Congress would choose the same result on a particular issue as would result from constitutional supremacy.

"Supremacy" is related to, but not the same as, "finality." In a system of legislative supremacy, the Supreme Court might make the final decision in statutory cases. But if the Court considers itself bound by legislation, then the system is not one of judicial supremacy.

There is a contrary point of view, which holds that finality entails supremacy; the intuition behind this position is that any institution that has the last word necessarily has a de facto discretionary power to decide as it pleases and hence is supreme in fact even if subordinate in law. But this position fails in two ways. First, it assumes that the institution with the final word does not and cannot consider itself bound. But this assumption must be justified, and it will be difficult to explain why judges are somehow incapable of considering themselves bound by the Constitution or statutes and acting accordingly. In a constitutional monarchy, it is possible that the Queen or King has the final say on many matters, including legislation, but the reality is that the formal power to make a final decision is not the substantive power to make the choice. Second, even if judges were motivated to twist and bend statutes to achieve their own aims, in a system of true legislative supremacy, the legislature can squash the judges like a bug. In such a system, the legislature could, if necessary, use its powers over funding, jurisdiction, and even impeachment to strike back. Judges will know this and act accordingly. In other words, finality does not entail supremacy.[99]

B. *Feasibility*

The space of possibilities for constitutional theory is vast. There are so many options that even a descriptive catalog would require a very long article or book. But not all of the options are *feasible* or *fundamental*; these two properties make the three options especially salient and hence worthy of

99 There are deeper questions here about the relationship of the concept of supremacy to what H.L.A. Hart called the "rule of recognition." H.L.A. HART, THE CONCEPT OF LAW 100–10 (2d ed. 1994). Addressing these concerns would take us far afield and require many pages. I hope that readers will forgive me for bracketing these deep questions.

attention—for their own sakes and for their roles as templates for variations and hybrid options. The discussion that follows explicates feasibility and fundamentality; the aim is to justify and explain the focus on the three most salient possibilities (judicial, legislative, and constitutional supremacy). This section considers feasibility; the next section turns to fundamentality.

Some constitutional theories are feasible; others are "pie in the sky." The discussion that follows aims to give an account of feasibility that is appropriate for the enterprise of normative constitutional theory in "the here and now"—the United States today and in the near-to-medium future.[100] The focus on the here and now is a function of the relationship between constitutional possibilities[101] and constitutional time.[102] Options that are infeasible in the here and now may become feasible in a few decades; likewise, options that are feasible today may become infeasible in just a few years. As the time horizon extends beyond a decade or two, the space of possibilities becomes larger and prediction more perilous.

One manifestation of the close connection between constitutional possibility and constitutional time is the phenomenon of "path dependence"—decisions made today can foreclose options tomorrow.[103] One important implication of path dependence is that some options are "off the wall" in the near or medium term. In the long run, it might be possible for the citizens, politicians, and judges to converge on a single conception of morality or on a single religion, but in the short run this seems like a pipe dream. Options that are feasible in the short-to-medium term could be called "on the table."[104]

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100 The concept of the "near future" is vague. Next year is clearly in the "near future," five years from now might be a borderline case, and twenty years from now is not the "near future."

101 *See generally* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 337 (2008) [hereinafter Solum, *Constitutional Possibilities*] (arguing for the continuing viability of some seemingly illusory constitutional possibilities).

102 On the idea of constitutional time, see JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 7 n.15 (2020), which defines "constitutional time" as the interaction of three cycles of change—the rise and fall of political regimes in American history, the cycle of polarization and depolarization, and the decay and renewal of republican government.

103 *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 52 (2004) ("The claims in path-dependent arguments are that previously viable options may be foreclosed in the aftermath of a sustained period of positive feedback, and cumulative commitments on the existing path will often make change difficult and will condition the form in which new branchings will occur."); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 265 (2000) (describing path dependence in political science); Solum, *Constitutional Possibilities*, *supra* note 101, at 337 (cautioning against path dependence in constitutional theory).

104 The use of the "off the wall" and "on the table" metaphors was pioneered by Jack Balkin. For one usage, see Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/

Thinking about feasibility can be made more precise and transparent by specifying the criteria for inclusion in a "feasible choice set"—the set of options that are realistically available to the relevant actors. And the specification of such criteria requires that we think about "possibility."

Possibility is tricky![105] If we ask what is "possible," given the present state of the world and assuming that human behavior is ultimately caused the forces identified by the laws of science, the result is "constitutional determinism," the view that our constitutional fate is inevitable.[106] Constitutional determinism naturally leads to the attitude of "constitutional fatalism"—a view that implies that normative constitutional theory is irrelevant; if we cannot change our constitutional future, then there is not point in theorizing about what it ought to be. If you accept constitutional fatalism, then the appropriate stance regarding constitutional theory would seem to be "quietism": there would be no point to the discussion of the fundamental options for the constitutional order and hence constitutional theorists should "shut up."

Constitutional determinism is not an appropriate notion of possibility for normative constitutional theory. But neither is the view that every option is feasible. We imagine a possible world in which ideological differences disappear and human nature fundamentally changes to permit a constitutional utopia in which everyone always "does the right thing." Again, constitutional theory is beside the point; by imagining a perfect world that could never be realized, we eliminate the problems of disagreement and coordination that motivate constitutional theory in the first place.

The appropriate notion of constitutional possibility for normative constitutional theory in the here and now must begin with the situation we are actually in: The history of our constitutional order until "now," with "now" being a moving target, of course. And it needs to take basic facts about human psychology and sociology into account. Similarly, normative constitutional

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[https://perma.cc/B3BU-5SU9]. Balkin uses "on the wall" rather than "on the table," but the two expressions express the same idea.

105 In prior work, I have suggested that we might make our discussions of possibility more precise by deploying the resources of possible worlds semantics. For that argument, see Solum, *Constitutional Possibilities*, *supra* note 101, at 314-16. The idea of a possible world (really a possible state of all of reality) comes from Leibniz. *See generally* GOTTFRIED WILHELM FREIHERR VON LEIBNIZ, *The Theodicy: Abridgement of the Argument Reduced to Syllogistic Form*, *in* LEIBNIZ: SELECTIONS 509, 509-11 (Philip P. Wiener ed., 1951). For a comprehensive introduction to possible-worlds semantics and the metaphysics of modality, see JOHN DIVERS, POSSIBLE WORLDS (2002).

106 The view that reasons and human choice can operate even in a world in which beliefs and actions are causal is "compatibilism," the alternative to hard determinism and free-will libertarianism. These issues are outside the scope of this Article. For a short but now-dated statement of compatibilism, see DANIEL C. DENNETT, ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING 1-2, 19 (1984).

theory in the here and now needs to account for our political situation. Our society is characterized by what Rawls called "the fact of pluralism": there are deep disagreements about morality, religion, and political ideology.[107] A normative constitutional theory that requires these disagreements to simply disappear is pie in the sky.

But the appropriate notion of constitutional possibility also must allow for persuasion by reasons. That is, normative constitutional theory assumes that views about constitutional theory itself can change in response to reasons which take the fact of pluralism into account: we assume that constitutional views can (not must) change in response to "public reasons," justifications that can be accepted by an "overlapping consensus"[108] of constitutional actors given the fact of pluralism. I am not claiming that progress in constitutional theory will inevitably lead to changes in constitutional practice. Nor am I claiming that change will be fast: fundamental constitutional change is usually slow, though not always. What I am claiming is that views in constitutional theory can matter, and the contrary view (that normative arguments are inert) must be argued for and not just assumed.

The notion of feasibility gives rise to a closely connected idea, that is, the idea of the constitutional "second-best."[109] That phrase has a technical definition in economics,[110] but in this context, a second-best option captures the idea that the first-best option may be infeasible in constitutional practice. For example, a constitutional theorist might conclude that the first-best constitutional practice would be a parliamentary system, with a unitary legislature.[111] But in the United States today, that alternative might be outside the feasible choice set.[112] And this might lead to the conclusion that bicameral congressional supremacy is the second-best alternative, better than its rivals, but imperfect because of the Senate, which is not apportioned on the basis of population and is thus inconsistent with the ideal of democratic equality of citizens.

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107 *See generally* Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 8-9 (2006); Lawrence B. Solum, *Public Legal Reasons*, 92 VA. L. REV. 1449, 1469-1501 (2006).

108 *See* Solum, *Situating Political Liberalism*, *supra* note 94, at 568-70 (1994) (describing Rawls's idea of an overlapping consensus).

109 *See* Solum, *Constitutional Possibilities*, *supra* note 101, at 311-12.

110 *Id.*

111 *See, e.g.*, R. Kent Weaver, *Are Parliamentary Systems Better?*, 3 BROOKINGS REV. 16, 20 (1985) (observing that, "[i]n theory, [governance] should be better in parliamentary systems" because of coordinative efficiencies, but ultimately concluding otherwise).

112 *See* U.S. CONST. art. V; Drew DeSilver, "Proposed Amendments to the U.S. Constitution Seldom Go Anywhere," PEW RSCH. CNTR. (Apr. 12, 2018), https://www.pewresearch.org/short-reads/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/ [https://perma.cc/KUS9-X34G] ("The U.S. Constitution is famously difficult to amend . . . .").

The account of constitutional possibility offered in this brief discussion is undoubtedly incomplete and underdeveloped. A fuller account is offered in my prior article, *Constitutional Possibilities*.[113] On this occasion, I can only ask that readers provisionally accept the articulation of "Criteria for Inclusion in the Feasible Choice Set" that follows and consider its implications for normative constitutional theory. Judgments about feasibility are contestable, for whether a constitutional theory is feasible depends on both facts about the present and speculation about the future. Articulation of the criteria for inclusion in the feasible choice set allows constitutional theorists to identify the factual questions about which they disagree and hence improves the transparency and precision of theoretical arguments. Here are the criteria that I propose:

> *Criteria for Inclusion in the Feasible Choice Set*: Practical implementation of a constitutional theory is feasible in the here and now if and only if all of the following criteria are met:
>
> > (1) The theory is consistent with the core set of institutional arrangements that structure the current constitutional order, i.e., the existence of Congress, the President, and the judicial branch, as well as the existence of both state and federal government. Thus, a unicameral parliamentary system is outside the feasible choice set for the United States in the here and now.[114]
> >
> > (2) The theory is consistent with the basic facts of human psychology and sociology. Thus, a theory that requires citizens, politicians, and judges to undergo a psychological transformation resulting in universal altruism is outside the feasible choice set for the here and now.[115]

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113 *See* Solum, *Constitutional Possibilities*, *supra* note 101, at 311-12.

114 Given existing institutional arrangements, constitutional change that would eliminate the core set of constitutional institutions is infeasible. Such change would be resisted by those institutions. For example, Congress would not willingly dissolve itself. Given that fact, the change would have to occur through extra-constitutional mechanisms such as a revolution, general strike, or coup. But those mechanisms themselves are infeasible given current circumstances. *See generally* Robert S. Snyder, *The End of Revolution?*, 61 REV. POL. 5 (1999) (explaining why liberalism and other factors make revolution unlikely to occur in the modern age).

115 In the very long run, it might be possible to change human nature, but there is no mechanism by which such a radical change can be accomplished in the near term. *See generally* NICCOLÒ MACHIAVELLI, THE PRINCE (Mitch Horowitz ed., W.K. Marriott trans., G&D Media 2019) (1532) (showing a belief in a fixed, unmalleable form of human nature). *But cf.* David Estlund, *Human Nature and the Limits (If Any) of Political Philosophy*, 39 PHIL. & PUB. AFFS. 207, 208 (2011) ("[H]uman nature—more specifically, whatever motivational incapacities are possessed by humans as such—is a constraint on some tasks in political philosophy but not on others.").

> (3) The theory is consistent with the fact of pluralism. A theory that assumes religious, moral, and ideological differences will simply "go away" is outside the feasible choice set in the here and now.[116]
>
> (4) A constitutional regime governed by the proposed theory would be stable or have a reasonable chance at stability. It is possible, for example, that in a system of judicial supremacy, the Supreme Court would adopt principles of deference to Congress that function like legislative supremacy for most but not all constitutional issues. However, it is also possible that this system would destabilize over time as the Court succumbs to the pressure to carve out exceptions for those principles, creating a slippery slope back to judicial supremacy.[117] If so, then the regime of deference would not be feasible in the long run.

Undoubtedly, this is an imperfect statement of the criteria. Readers are invited to add, subtract, contest, revise, and restate. The aim is to provide a basis for discussion—not to foreclose further debate, reflection, and reformulation.

* * *

Disagreement is one thing, but willful ignorance of the problem of feasibility is quite another. Although it may be psychologically possible to ignore the difference between choices that are realistically available and those that are pie in the sky, that option is unreasonable when considering the plausibility of a constitutional theory. We can wish for a constitutional utopia, but wishing will not make it so. If constitutional wishes were constitutional horses, our constitutional rodeo would be a big, rowdy mess.

As Keith Richards and Mick Jagger wrote, "You can't always get what you want."[118] *None of the fundamental feasible options of constitutional theory will guarantee that I get what I want. And quite obviously, all of us cannot simultaneously*

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116 Eliminating pluralism would require that officials and citizens agree on a single ideology, religion, or philosophical conception of the good. There is no mechanism by which such agreement could be reached in the short run. For example, adherents to various religions will not voluntarily abandon their beliefs. Nor does it seem feasible to convince progressives to become conservatives or vice versa. *Cf.* Matthew L. Stanley, Paul Henne, Brenda W. Yang & Felipe De Brigard, *Resistance to Position Change, Motivated Reasoning, and Polarization*, 42 POL. BEHAV. 891, 909 (2020) ("Our results show that, after considering many reasons challenging their initial chosen positions for diverse socio-political issues, people are more likely to stick with their initial decisions than to change them.").

117 Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 622 (2012) ("The fall of judicial self-restraint has been less a fall than an accelerating slide of many years.").

118 THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT, LET IT BLEED (Olympic Studios 1969).

get the inconsistent constitutional outcomes that each of us may prefer. But the fact that we cannot get what we want should not lead to resignation. "If you try sometime, well you just might find, you get what you need."[119]

* * *

In the context of normative constitutional theory, feasibility is a scalar and not a binary.[120] Implementation of some constitutional theories is relatively more infeasible, because agreement on the theory would require a "heavy lift." For example, agreement on legislative supremacy would require agreement to end the institution of judicial review, a radical change in constitutional practice that would gore a lot of powerful oxen in most plausible futures. On the other hand, judicial supremacy is the status quo;[121] it might be difficult to get originalist judges on board with living constitutionalism, but since they are few in number,[122] arriving at an overlapping consensus on judicial supremacy would be relatively easier to achieve. Productive discussion of feasibility requires us to recognize that some options are more feasible, while other options are completely infeasible in the here and now.

One more thing: it might be argued that the conception of feasibility employed here contains a double standard. Why? Because it assumes the possibility of rational persuasion on issues of constitutional theory but not on questions of morality, religion, or political ideology. This topic will be considered below in connection with outcome-driven alternatives to judicial, legislative, and constitutional supremacy.[123] But at this point, I note that it is the existence of disagreements about morality, religion, and political ideology that amplifies the need for a constitution in the first place. In a world without such disagreements, the need for a stable constitutional order would be much diminished, and the project of normative constitutional theory would be

119 *Id.*

120 For discussion of scalars and binaries, see Lawrence B. Solum, *Legal Theory Lexicon 072: Scalars and Binaries*, LEGAL THEORY LEXICON, https://lsolum.typepad.com/legal_theory_lexicon/2014/09/legal-theory-lexicon-072-scalars-and-binaries.html [https://perma.cc/UR5Z-FW37] (June 11, 2022).

121 *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (discussing how the United States's political structure has led to a culture of judicial supremacy).

122 *See* Kelsey Reichmann, *America Gets First Taste of an Originalist Supreme Court*, COURTHOUSE NEWS SERV. (July 1, 2022), https://www.courthousenews.com/america-gets-first-taste-of-an-originalist-supreme-court/ [https://perma.cc/N3FJ-8MCC] ("'Over the history of the United States Supreme Court, about six justices have taken the view that the Constitution should be interpreted as solely as it was understood at the time that it was adopted.'").

123 *See infra* subsection V.A.5.

different in kind and much simpler.[124] Constitutions provide a structure for politics; the existence of a stable constitutional order allows for the legal settlement of issues upon which consensus is not realistically possible.

C. *Fundamentality*

Fundamentality is a subtle and elusive notion. The core of this idea is that some options provide the templates, models, or archetypes for others. Thus, since judicial supremacy is fundamental, it can be viewed as the template for a variety of constitutional theories that locate the power to make constitutional law in the judiciary, including common law constitutionalism, constitutional pluralism,[125] and the moral readings theory.[126] Likewise, legislative supremacy provides the model for a variety of views, including explicit abolition of judicial review,[127] very strong deference to legislative decisions,[128] and John Hart Ely's representation-reinforcement approach.[129] Similarly, constitutional supremacy provides an archetype for both contemporary ratification theory and various forms of originalism (public meaning, framers' intentions, original methods) and textualism.

Another way of explaining the idea of fundamentality invokes Max Weber's notion of an "ideal type":[130] the three options are fundamental in the

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124 If there were general consensus on morality and political ideology, the choice between judicial supremacy, legislative supremacy, and constitutional supremacy would have greatly diminished effects on outcomes. Congress and the Supreme Court would largely agree on the important constitutional questions. Constitutional amendments would be feasible if there were a supermajority consensus on these questions—and for that reason, constitutional supremacy would, for the most part, reach the same results as either judicial or legislative supremacy.

125 Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1107 n.19 (2002) ("[C]onstitutional pluralism expects the Court to recognize the principles that make democratic politics possible and to incorporate those principles into its constitutional interpretation.").

126 *See* Solum, *Constitutional Construction*, *supra* note 7, at 473 ("The Moral Readings Theory contends that the resolution of constitutional issues in the construction zone should be guided directly by considerations of political morality.").

127 *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (challenging the practice of judicial review).

128 *Cf.* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078–94 (2008) (exploring broadly why and when courts defer to the judgment of other decision makers, including the legislature).

129 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

130 Max Weber formulated the notion of an "ideal type" as follows:

> An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct

sense that they are ideal types of constitutional order. They also serve as the templates for hybrid views, which combine elements of the three basic options. For example, representation-reinforcement theory combines elements of legislative supremacy (for most constitutional questions) with judicial supremacy (for issues regarding the right to vote and political speech).[131]

The point of limiting the discussion to fundamental options is to reduce complexity without sacrificing conceptual clarity. By way of contrast, a discussion of constitutional options could proceed by pairwise comparison[132] between each and every form of originalism with each other and with all the varieties of living constitutionalism and legislative supremacy. We could compare public meaning originalism with all the other forms of originalism, constitutional pluralism, representation-reinforcement theory, and so forth. But this would require dozens or hundreds of comparisons. Even if we limit the discussion to several of the most important options, the discussion would still be lengthy and complex. Limiting our consideration to the fundamental options enables us to see some of the most important issues that would frequently recur in complete pairwise comparison—without having to undertake overwhelmingly burdensome analysis.

IV. THE THREE FUNDAMENTAL AND FEASIBLE OPTIONS

At this point, our discussion pivots from preliminaries to the options themselves. We begin with judicial supremacy.

A. *Judicial Supremacy*

Recall that a constitutional order is characterized by what I call "judicial supremacy" if and only if the theory governing the order grants judicial institutions ultimate authority to determine the legal content of constitutional norms. In a system of judicial supremacy, courts are granted the power to determine what constitutional law is on the basis of their own judgments about what it ought to be. Thus, a system that imposes a duty on judges to strictly follow the constitutional text is not a system of judicial supremacy—even if judges are to decide constitutional cases. Likewise, a system that requires judges to defer to Congress on constitutional questions

> (Gedankenbild). In its conceptual purity, this mental construct (Gedankenbild) cannot be found empirically anywhere in reality. It is a utopia.

MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (emphasis omitted).

131 *See* ELY, *supra* note 129.

132 *See* Solum, *Conceptual Structure*, *supra* note 7, at 1292–93 (discussing pairwise comparison).

is not a system of judicial supremacy, even if judges must implement the commands of Congress in resolving particular disputes.

We began with the claim that the constitutional status quo is best understood as a system of judicial supremacy. Fundamentally, that is because the Supreme Court does not consider itself bound by the constitutional text and makes decisions that are inconsistent with the text. This is not the occasion to get bogged down in laying out a lengthy discussion of examples. That task has been performed many times, notably by Professor David Strauss in his 2015 foreword to the annual Supreme Court issue of the Harvard Law Review.[133] But the following may be illustrative. First, the First Amendment is not limited to actions by Congress, which directly contravenes the text of the Constitution.[134] Second, the Privileges or Immunities Clause of the Fourteenth Amendment has been virtually nullified by the Supreme Court.[135] Third, the Recess Appointments Clause has been extended to presidential appointments even when the Senate is not in recess.[136] Fourth, the Due Process of Law Clauses of the Fifth and Fourteenth Amendments have been transformed into "oxymoron[ic]" guarantees of specific substantive rights.[137] The list goes on and on. Taken one by one, some of these examples are contestable, but taken as a whole, the constitutional jurisprudence of the Supreme Court is hard to explain as a form of constitutional supremacy.

At this point an attempt might be made to argue that the Supreme Court's decisions are consistent with the constitutional text because its decisions

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133 *See generally* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

134 This point is illustrated by *New York Times v. Sullivan*, 376 U.S. 254 (1964) which applies the First Amendment to state common law. As the *Sullivan* Court wrote,

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.

Id. at 265; *see also* U.S. CONST. amend. I ("*Congress* shall make no law . . . .").

135 This issue is complex. The starting point is the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), but the argument for this conclusion cannot be made here. For a more in-depth discussion of the Privileges or Immunities Clause, *see* Solum, *Triangulating Public Meaning*, *supra* note 14, at 1666 ("[T]he [*Slaughterhouse*] majority restricted the meaning of 'Privileges or Immunities of Citizens of the United States' to an extremely small set so as to virtually nullify the clause.").

136 This occurred in *Noel Canning*. *See* NLRB v. Noel Canning, 573 U.S. 513, 570 (2014) (Scalia, J., concurring) ("[T]he majority casts aside the plain, original meaning of the constitutional text . . . ."); *see also* U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen *during the Recess of the Senate* . . . .") (emphasis added).

137 *See* Ill. Psych. Ass'n v. Falk, 818 F.2d 1337, 1342 (7th Cir. 1987) (describing "substantive due process" as a "durable oxymoron" that rests on "broad-ranging judicial creativity").

satisfy the criterion of "semantic availability"[138]—that is, they are consistent with the literal meaning of at least one word in the clause upon which the Court relies. Thus, it follows that the Due Process Clause is consistent with unenumerated substantive constitutional rights, because the word "liberty" appears in the text of the Fourteenth Amendment.[139] The Recess Appointments Clause is consistent with the outcome in *Noel Canning*,[140] because the word "recess" can mean a break of any kind, including a lunch break.[141] Again, this is not the occasion to make the supporting arguments, but it is difficult to believe that anyone really thinks the criterion of semantic availability is sufficient to reconcile the current practices of the Supreme Court with constitutional supremacy. Relying on the acontextual meaning of individual words is not good faith interpretation of the whole text.

Judicial supremacy is clearly feasible. It is the status quo. It is consistent with the existing set of core constitutional institutions: the presidency, Congress, and the judiciary. It is consistent with human psychology and sociology; judges have no trouble acting in ways that are consistent with judicial supremacy, and in fact, many of them seem to rather like it. Judicial supremacy does not require that we do away with the fact of pluralism. Finally, judicial supremacy has persisted over a period of decades and therefore satisfies the criterion of stability.

What about fundamentality? Here, the claim is that judicial supremacy provides the template for a variety of forms of living constitutionalism. The paradigm case is the explicit view that the Supreme Court acts as a "super-legislature,"[142] but judicial supremacy can be realized functionally in a variety of forms. The most obvious form of functional judicial supremacy is common law constitutionalism, which explicitly adopts the position that the Supreme Court is not bound by the constitutional text.[143] But judicial supremacy is also

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138 For discussions of semantic availability, see Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 569-72 (2010); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1481 n.77 (2020).

139 *See* Obergefell v. Hodges, 576 U.S. 644, 663-75 (2015) (relying on "liberty" as the basis for unenumerated right to same sex marriage).

140 *Noel Canning*, 573 U.S. at 536.

141 *See* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse. 1828) (listing the sixth definition of "recess" as "[r]emission or suspension of business or procedure; as, the house of representatives had a *recess* of half an hour").

142 *See generally, e.g.*, Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015) (discussing how the Supreme Court operates as a super-legislature by making decisions based on the moral and political values of the Justices); *see also* Solum, *Conceptual Structure*, *supra* note 7, at 1273 (discussing Leiter).

143 As David Strauss, the leading exponent of common law constitutionalism, writes:

> [P]rovisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other

the template for a variety of other theories, including constitutional pluralism and the moral readings theory. These theories are forms of judicial supremacy because they do not require the Supreme Court to adhere to the constitutional text. Constitutional pluralism posits text as one of several modalities of constitutional argument, but text can be overcome by the others, including historical practice, precedent, constitutional values, and institutional capacities.[144] The moral readings theory requires judges to take the constitutional text seriously as one of the features of our constitutional history, but judges are required to depart from the text if the moral theory that justifies the law as a whole requires that they do so.[145]

B. *Legislative Supremacy*

Recall that a constitutional order is characterized by legislative supremacy if and only if legislative institutions have ultimate authority to determine the legal content of constitutional norms.[146] Pure legislative supremacy would require the abolition of the institution of judicial review. Congress would have the authority to pass statutes that change the Constitution. For example, Congress might pass a statute that eliminates the electoral college, that limits

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> time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward—on subsequent decisions and on judgments about the direction in which the law should develop.

Strauss, *supra* note 132, at 4-5 (2015).

144 Constitutional pluralism is the view that there are multiple modalities of constitutional argument, and that a constitutional decision can be justified by any of the modalities. There are several versions of constitutional pluralism. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1751-84 (2013); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252-68 (1987). For descriptions of constitutional pluralism, see Solum, *Conceptual Structure*, *supra* note 7, at 1271; Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of "Citizens" in Article III*, 72 HASTINGS L.J. 169, 177 (2020).

145 Dworkin clearly states his belief that the moral reading of the Constitution can override the constitutional text:

> [Laurence Tribe's statement of the constraining role of the constitutional text] is a stronger statement of textual fidelity than I [Dworkin] would myself endorse, because, as I said, precedent and practice over time can, in principle, supersede even so basic a piece of interpretive data as the Constitution's text when no way of reconciling them all in an overall constructive interpretation can be found.

Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1259-60 (1997).

146 The locus classicus for legislative supremacy is James B. Thayer, *The Origin and Scope of American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

the Senate to an advisory role, or that abolishes the Second Amendment. But there may be a different way to achieve functional legislative supremacy. The Supreme Court might adopt a conclusive presumption of constitutionality;[147] the formalities of judicial review would be observed, but they would be rendered functionally irrelevant. Similarly, the Supreme Court might adopt a toothless form of rational basis review for all statutes enacted by Congress, upholding legislation so long as it had a conceivable basis.[148] Legislative supremacy is explicit or implicit in the work of a variety of constitutional theorists.[149]

It is important to distinguish legislative supremacy from a superficially similar form of constitutional supremacy. It would be possible, in theory, to have a system that combines the abolition of judicial review with strict compliance by Congress to the constitutional text. This option raises a variety of issues;[150] for the purposes of this discussion, the important point is that this would not be a form of "congressional supremacy" as that phrase has been defined here.

Is legislative supremacy feasible? This is not the occasion to consider that question in a rigorous way. I believe pure legislative supremacy would be a

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147 *See* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1448 (2010) (describing the "presumption of constitutionality" as a principle limit on judicial review).

148 *See* Tara A. Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77, 88 (2017) ("[W]hen the rational basis test presides, government authority is the default. In practice, this means that government power is expanded.").

149 Examples include Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy [https://perma.cc/4R63-5WXJ]; Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 784-820 (2022); Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/ [https://perma.cc/4RW5-MLB9]; Samuel Moyn, *The Court Is Not Your Friend*, DISSENT, Winter 2020, at 70 [https://perma.cc/Z7Y5-W2WS]; MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 18 (2008); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6 (1999); Waldron, *Against Judicial Review*, *supra* note 1, at 1349; Eric J. Segall & Christopher Jon Sprigman, *Reducing the Power of the Supreme Court: Neither Liberal nor Conservative but Necessary (and Possible)*, N.Y.U. J. LEGIS. & PUB. POL'Y: QUORUM (Oct. 31, 2020), https://nyujlpp.org/quorum/segall-sprigman-reducing-power-supreme-court [https://perma.cc/8HLF-4YXL]; Rachel Reed, *'We Have to Reject the Idea That Judicial Supremacy Is an Essential Ingredient of Federal Authority'*, HARVARD L. TODAY (Feb. 10, 2023), https://hls.harvard.edu/today/harvard-law-professor-daphna-renan-says-we-should-give-the-supreme-court-a-little-less-control-over-the-constitution/ [https://perma.cc/Q8DR-CAJX].

150 This option would be incoherent if we assume that when Article III conferred the "judicial Power" and created a supreme "Court," it implicitly communicated the presupposition that judges have a duty to apply the law, which combines with the Supremacy Clause of Article IV to create a judicial duty to resolve conflicts between ordinary statutes and the Constitution in favor of the higher law. *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (discussing the history of judicial duty).

heavy lift in the here and now. Getting the Supreme Court to formally abdicate its duty (or renounce its power) to engage in judicial review would require it to act contrary to what is widely perceived as its self-interest. A gradual transition to legislative supremacy might begin with a revival of a weighty presumption of constitutionality and an expansion of a conceivable-basis form of rational basis review. Those treading this path must climb a steep hill because a court that retains the formal power of judicial review will be tempted to backslide and weaken the presumption of constitutionality or strengthen the requirements of rational basis review on a case-by-case basis. Nonetheless, my judgment is that legislative supremacy is in the feasible choice set.[151] Recall that feasibility is a scalar and not a binary. The fact that the route to legislative supremacy is a long and winding road does not mean that the destination cannot be reached.

There are important variations on the theme of legislative supremacy. Chief among these is John Hart Ely's representation-reinforcement theory.[152] The core idea is that the institution of judicial review should be limited to the protection of democratic processes. Laws that infringe on the right to vote or engage in political speech should be invalidated by judges, but laws that invade the right to privacy or alter the balance of power between states and the national government should not be subject to judicial review. Something like representation-reinforcement theory is presented in footnote four of *Carolene Products*.[153]

Representation-reinforcement theory comes in at least two flavors that are very different in character: we can call these forms "restrained" and "empowered." Restrained representation-reinforcement theory would restrict judicial review to issues that have a direct and unmediated connection with protection of democratic processes (e.g., the right to vote). Empowered representation-reinforcement theory is quite different. The empowered version of the theory would authorize judges to engage in judicial review in order to create the conditions for democratic equality. Thus, a constitutional right to reproductive autonomy might be justified if such a right were necessary to the political equality of women. This version of representation-reinforcement theory risks collapse into judicial supremacy, because almost all constitutional law can be given plausible justifications that sound in

151 This is my judgment, and reasonable disagreement on this point is certainly possible.

152 *See* ELY, *supra* note 129 at 87.

153 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* Jane S. Schacter, *Glimpses of Representation-Reinforcement in State Courts*, 36 CONST. COMMENT. 349, 350 (2021) (noting the canonical footnote four in *Carolene Products* as an example of representation-reinforcement).

democratic equality (or some other value, such as liberty, that is arguably constitutive for democratic processes).[154]

Legislative supremacy is a fundamental option because it serves as the template for representation-reinforcement theory and a wide variety of related options. The question whether an option is truly a form of legislative supremacy hinges on the question of whether Congress would retain control over the core set of constitutional questions. If the answer to that question is "yes," then we have legislative supremacy. On the other hand, if the Supreme Court functions as the shot caller, making the ultimate decisions about the proper shape of democratic processes and the relationship between constitutional issues and legislative power, then the system ought to be classified as a form of judicial supremacy, even though the Supreme Court may have chosen to give Congress wide latitude on a wide variety of issues.

C. *Constitutional Supremacy*

The third option that is both fundamental and feasible is constitutional supremacy. Recall that a constitutional order is characterized by constitutional supremacy if and only if constitutional issues and cases are resolved in conformity with the constitutional text. There are many possible forms of constitutional supremacy. One form is "contemporary ratification theory"[155]—the view that the contemporary public meaning of the constitutional text should bind constitutional actors.[156] Versions of contemporary ratification theory have been articulated by Justice William Brennan,[157] Professor Tom Bell,[158] Professor Hillel Levin,[159] and Professor Fred Schauer in his magisterial article, *Unoriginal Textualism*.[160] Professor James Ryan's *Laying Claim to the Constitution: The Promise of New Textualism* provides a similar view.[161]

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154 For further discussion of these two forms of representation-reinforcement theory, *see infra* Part V.A.4.

155 *See supra* note 13.

156 *See* Solum, *Conceptual Structure*, *supra* note 7, at 1275. There are many possible variations on contemporary ratification theory. For example, the relevant meaning of the constitutional text could be the legal meaning as determined by contemporary methods of constitutional interpretation. Consideration of such variations is outside the scope of this Article.

157 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986). It is not clear whether Justice Brennan would accept constraint by contemporary public meaning, but for present purposes, this question of exegesis is not important.

158 Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 285 (2013).

159 Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1105. While Professor Levin's theory is articulated in the context of statutory interpretation, the idea could be extended to constitutional interpretation.

160 Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 830 (2022).

161 James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011).

Constitutional supremacy can also take originalist forms. There are several variations. The most prominent version is public meaning originalism,[162] but the originalist family also includes original intentions originalism,[163] original methods originalism,[164] and original law originalism.[165] Professor Jack Balkin's *Living Originalism* represents yet a different approach–-framework originalism.[166] Almost all originalist theories share a commitment to the Fixation Thesis (the meaning of the constitutional text is fixed at the time each provision is framed and ratified) and the Constraint Principle (constitutional actors are bound by this fixed original meaning).[167]

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At this point, I imagine the reader exclaiming, "Hey! Wait a minute! Your list of the forms of constitutional supremacy is incomplete." Different readers will then suggest that the list should include a theory they support. Here are some examples:

> *"Dworkin's moral readings theory is a form of constitutional supremacy, because it includes both the criterion of 'fit' and the criterion of 'justification.' Moral readings best fit the communicative content of the constitutional text." And that version of law as integrity might be a form of constitutional supremacy, but it would require a substantial change in Dworkin's theory, because the current version requires fit with and justification of the law as a whole and allows judges to override the constitutional text.*
>
> *"Strauss's common law constitutionalism is a form of constitutional supremacy, because it requires that constitutional actors consider themselves bound to the common law constitution." This is inaccurate, because the common law constitution is the product of case-by-case judicial lawmaking. You can call that "constitutional supremacy," but then you are using that phrase in an entirely different sense. There*

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162 *See* Solum, *The Public Meaning Thesis*, *supra* note 14.

163 Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 928 (2009).

164 *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1411 (2018); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 768-69 n.66 (2009).

165 *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

166 JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) ("[T]he Constitution [is] an initial framework for governance that sets politics in motion, and . . . Americans must fill [it] out over time through constitutional construction.").

167 Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941.

> *is nothing wrong with using different terminology, but then the disagreement is merely definitional and not substantive.*
>
> *"The Constitution has multiple meanings, including semantic meaning, contextual meaning, reasonable meaning, and others. As long as a constitutional decision is consistent with one of these meanings, we have constitutional supremacy." I disagree. My view is that the communicative content of a text is a fact and not a Humpty Dumpty choice. I believe allowing judges to pick and choose between meanings and then putting both reasonable meanings and bare semantic meanings on the list is the functional equivalent of judicial supremacy with a little bit of window dressing. But you are free to disagree.*

I am sure that there are many other versions of this objection. And obviously, this is not the place to go through all the possible variations on judicial supremacy and constitutional supremacy. You wouldn't read that article, and I won't write it.

Here is the important point: we won't get anywhere by litigating the label "constitutional supremacy." If you believe I have misclassified some theory, then you are certainly free to use your preferred label for that theory. I do not think anything hangs on what we call a particular theory.

For now, I would ask that you bracket your objection to the terminology and focus on the substance of the argument. The point of this article is not to label particular theories. Identifying the three fundamental and feasible options serves the purpose of simplifying the discussion in a way that enables us to see the problems of outcome reductionism and the importance of process reasons. The phrase "constitutional supremacy" does not and cannot do any substantive normative work—it is just a label.

* * *

Importantly, constitutional supremacy is different in kind from both judicial and legislative supremacy because it makes the text of the Constitution the supreme law of the land,[168] whereas the other two options make institutions that are composed of individual persons supreme.[169] This difference in kind raises two questions. First, is constitutional supremacy better described as Article V supremacy, e.g., supremacy of some combination of Congress, state legislatures, and/or a constitutional convention?[170] Second,

168 To be more precise, we can say that constitutional supremacy requires that the legal content of constitutional doctrine be consistent with, fully expressive of, and fairly traceable to the communicative content of the constitutional text.

169 The difference in kind will be discussed again below. *See infra* Part IV.D.

170 Here is the text of Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures

is constitutional supremacy meaningfully different from judicial supremacy? I will examine each question in turn.

Should constitutional supremacy be redescribed as the supremacy of Article V institutions? The idea is that Article V gives final authority over the content of the constitutional text to a complex set of institutions, with different roles for Congress, state legislatures, and constitutional conventions; for the provisions drafted in Philadelphia, Article VII provided for ratification by "the Conventions of nine States."[171] In one sense, there is nothing wrong with this redescription; after all, the Article V institutions do have power to change the Constitution. But this description is misleading, because it suggests a false equivalence between Article V institutions on the one hand and Congress and the Supreme Court on the other. Both Congress and the Supreme Court are ongoing and cohesive institutions that have the capacity to act in the here and now. The complex institutional structure of the Article V process is different. It would be misleading to say that under constitutional supremacy, these institutions are supreme in the same way that Congress is supreme under legislative supremacy, or the Supreme Court is supreme under judicial supremacy. The Article V institutions are too diffuse, episodic, and fragmented to act as governing bodies in the same way that Congress and the Supreme Court can.

Is constitutional supremacy a disguised form of judicial supremacy? One might argue that the Constitution must be interpreted and therefore the institution that does the interpreting is, in fact, supreme. We have already discussed a version of this argument when we distinguished supremacy and finality,[172] and we will return to this topic in Part V.A.7 below. Under a system of constitutional supremacy, the Supreme Court considers itself bound by the constitutional text and acts accordingly.

A critic of the distinction between constitutional and judicial supremacy has several possible lines of response. First, the critic might argue that the communicative content of the constitutional text is radically indeterminate; hence, the Supreme Court can, in fact, make any decision it wants in any

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> of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

171 U.S. CONST. art. VII.

172 *See supra* Part III.A.

constitutional case. Constitutional supremacy assumes that the communicative content of the constitutional text is only moderately underdeterminate; given this assumption, constraint by the text is substantial.

This is not the occasion to analyze this response in depth, but some points are worth making. The assumption that the constitutional text is only moderately underdeterminate raises empirical questions that can only be addressed by a clause-by-clause analysis of the constitutional text from the perspective of both contemporary ratification theory and public meaning originalism. I acknowledge that many readers are likely to reject the assumption of moderate underdeterminacy because they believe that the communicative content of the constitutional text is substantially indeterminate with respect to the most important constitutional questions and, therefore, that constitutional supremacy collapses into judicial supremacy. The following points are offered as a rough and ready explanation of my reasons for rejecting this argument for collapse. (A full discussion would likely require a series of lengthy articles.) The responses that follow assume a public-meaning originalist framework. Different arguments would be required for contemporary ratification theory, and for the purposes of this article, I am agnostic on the question of whether such arguments can be produced.

First, it is important to distinguish between indeterminacy (no constraint), determinacy (total constraint), and underdeterminacy (some constraint).[173] A complete collapse of constitutional supremacy into judicial supremacy would require radical indeterminacy but claims that the constitutional text is radically indeterminate are implausible, for reasons that I have explained at length in prior work.[174]

Second, the case that constitutional underdeterminacy on the important questions is so substantial that constitutional supremacy collapses into judicial supremacy seems to me dependent on "armchair originalism,"[175] that is based on living constitutionalist assumptions that are not supported by evidence. For example, the argument that the original meaning of the Equal Protection of the Laws Clause requires judges to articulate a theory of "equality" ignores the originalist scholarship that suggests that communicative content of the clause is limited to "protection of the laws," that is, an affirmative obligation to protect persons against violence, theft, fraud, and similar rights invasions.[176] Likewise, the suggestion that the Due

173 *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 54 U. CHI. L. REV. 462, 473 (1987); *see also* W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20, 42-43 (1951) (discussing the underdetermination of scientific theories by evidence).

174 Solum, *supra* note 173, at 473-76.

175 Solum, *Conceptual Structure*, *supra* note 7, at 1294-95.

176 Solum, *Surprising Originalism*, *supra* note 42, at 259–60.

Process of Law Clause authorizes judicial inquiry into the fairness of all legal processes is inconsistent with the actual original meaning of the Due Process of Law Clause.[177] More egregiously, proponents of the collapse thesis might argue that the word "liberty" in the Due Process of Law Clause or the word "equal" in the Equal Protection of the Laws Clause licenses modern substantive due process and equality jurisprudence from an originalist perspective. That position is obviously false for many reasons, one being that plucking a single word out of a clause ignores context.

Third, it is nonetheless true that some provisions of the constitutional text are underdeterminate, creating what can be called "construction zone[s]."[178] A complete originalist theory must provide a theory of constitutional construction for these zones of underdeterminacy. Constitutional supremacy is best realized by theories of construction that maximize the influence of the constitutional text and minimize judicial construction. An example of such a theory is provided by Professors Randy Barnett and Evan Bernick.[179]

These three remarks are not intended to be convincing. Rather, my goal is to enable skeptical readers to see that there can be reasonable disagreement about the extent of constitutional underdeterminacy and to understand that originalist theory has resources for dealing with underdeterminacy to the extent that it exists.[180]

The first objection concerned indeterminacy. A second objection might argue that the Supreme Court will not and cannot act in compliance with the constitutional text even if the text were sufficiently determinate. This argument relies on implausible assumptions about human psychology—after all, the view that the Supreme Court can do anything it wants relies on the ability of lower court judges and other officials to comply with decisions of the Supreme Court. If they can comply, why can't the Justices? But a full assessment of this line of objection is beyond the scope of this Article, which assumes, but does not argue for, the proposition that it is possible for judges to follow written sources of law.[181] This follows from the conception of feasibility discussed above; normative constitutional theory rejects

177 *See* Crema & Solum, *supra* note 33, at 451-53.

178 *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 14, at 108.

179 Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

180 I am grateful to Professor Michael Dorf for emphasizing the importance of these issues.

181 Notice that congressional supremacy also assumes that judges can follow statutes. If judges are truly incapable of following written texts, then judicial supremacy would be the only feasible option.

constitutional determinism and assumes that reasoned arguments can play a role in shaping judicial behavior.[182]

Constitutional supremacy is one of the fundamental options for constitutional theory because it serves as the template for a variety of theories, including both contemporary ratification theories and the originalist family of constitutional theories. There may well be other theories that follow the constitutional supremacy template. For example, the moral readings theory might be modified to require fit to the constitutional text. Constitutional pluralism would be a form of constitutional supremacy if modalities were given a lexical ordering and the textualist modality came first. Even common-law constitutionalism could be a form of constitutional supremacy if common-law development was constrained by either the original or contemporary meaning of the constitutional text. Notice, however, that these transformations would require the proponents of these theories to specify a theory of constitutional meaning and to articulate principles of constraint by that meaning.

D. *Apples and Oranges?*

As mentioned above,[183] it might be argued that identification of the three options is conceptually unsound because it involves a comparison between apples and oranges. Judicial supremacy and legislative supremacy are options for the allocation of decisional authority to institutions composed of human actors, i.e., the Supreme Court and Congress. Constitutional supremacy is different—it involves the allocation of supremacy to the Constitution itself—but the Constitution is a document (a text with communicative content), not an institution with decision-making capacities. Judicial supremacy and legislative supremacy are apples. Constitutional supremacy is an orange. So, what about the claim that you cannot compare apples and oranges?

The superficial appeal of this objection is itself based on a kind of conceptual confusion between two different dimensions of a constitutional order. The first dimension involves the authority to make constitutional law; the second dimension concerns the authority to resolve constitutional disputes. Table 2 lays out the relationship between the two dimensions as a two-by-three matrix with six numbered possibilities:[184]

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182 *See supra* Section III.B

183 *See supra* Section IV.C.

184 The table does not consider executive constitution-making or executive resolution of constitutional disputes. Those possibilities may or may not be feasible, but their omission does not affect the point for which the chart is introduced.

TABLE 2: TWO DIMENSIONS: CONSTITUTION-MAKING AUTHORITY VERSUS DISPUTE RESOLUTION AUTHORITY

		Constitution-Making Authority		
		Judiciary	Legislature	Constitutional Text
Constitutional Dispute Resolution Authority	Judiciary (Judicial Review)	POSSIBILITY 1 Judicial Review with Judicial Supremacy	POSSIBILITY 2 Conceptually Impossible	POSSIBILITY 3 Judicial Review with Constitutional Supremacy
	Legislature (No Judicial Review)	POSSIBILITY 4 Conceptually Impossible	POSSIBILITY 5 No Judicial Review with Legislative Supremacy	POSSIBILITY 6 Inconsistent with Actual Constitution

Unpacking the conceptual structure of the relationship can begin with the conceptual links between constitution-making function and the constitutional dispute resolution function. If judges have no authority to resolve constitutional disputes, they will have no opportunity to engage in constitutional lawmaking; for this reason, Possibility 2 is conceptually impossible. Similarly, with respect to Possibility 4, if the legislature has the sole authority to make constitutional law in a pure system of legislative supremacy, then there can be no judicial review of legislative action.[185] Possibility 6 is conceptually possible, but in the case of the United States Constitution, Possibility 6 would not actually exist if Article III of the Constitution itself creates a duty for courts to apply higher constitutional law in cases of conflict with ordinary statutory law.[186] In Table 2, these three possibilities are shaded gray.

Once we disregard the second, fourth, and sixth possibilities, the remaining three possibilities are the three fundamentally feasible options. Possibility 1 is judicial supremacy. Possibility 5 is legislative supremacy. And

185 This is an oversimplification. Courts might require legislatures to adhere to the procedures they have established by statute. For present purposes, however, the simplification does not affect the argument.

186 The question whether such a duty is created by either the original public meaning or the contemporary meaning of the constitutional text is beyond the scope of this Article.

possibility 3 is constitutional supremacy. Each of the three options involves a combination of constitution-making authority and the authority to resolve constitutional disputes.

Some readers may believe that Possibility 3 must collapse into Possibility 1 for reasons associated with legal realism. One such reason is associated with the Indeterminacy Thesis: if the constitutional text were radically indeterminate, then the power to resolve constitutional disputes would entail the power to make constitutional law. This objection has already been discussed above.[187] Another realist objection might be based on the idea that judges are incapable of setting aside their own constitutional preferences and following the constitutional text. To the extent this objection is based on notions of constitutional determinacy, it is discussed Part III.B above. Further discussion is provided in Part V.A.7 below. Both realist objections collapse the conceptual distinction between constitutional lawmaking and constitutional adjudication.

* * *

You can compare apples and oranges. Or to make the analogy a bit more refined: you can compare one type of orange (Minneola Tangelos) with two types of apples (Honeycrisp and Braeburn). What you can't do is ask whether Minneola Tangelos are good apples or whether either Honeycrisps or Braeburns are better oranges than Minneola Tangelos. You can ask which of these fruits is the tastiest; I hope that is obvious.

Suppose we offer someone a Minneola Tangelo, a Honeycrisp, and a Braeburn, and they make a choice. We ask why they made the choice. No sane person will say, "You can't compare apples and oranges." They just did that implicitly by making a choice! But they might say, "They are all good, but Honeycrisps have just the right balance of crispness and sweetness. I like them the best." And if someone said, "I can't choose among these three pieces of fruit, because they are apples and oranges," we would worry about their cognitive state.

We can choose among the three fundamental options, and we can give reasons for our choice. There may be a conceptual confusion in the air, but it is with the apples-and-oranges objection and not with the framing of the choice as one among the three fundamental and feasible options.

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187 *See supra* Section IV.C.

The apples-and-oranges objection has a superficial appeal because constitutional supremacy is different in kind from both judicial and legislative supremacy. Constitutional supremacy is premised on the idea that the constitutional text is binding on all constitutional actors (Presidents, Senators, Representatives, Justices, and Judges) and constitutional institutions (the legislative, executive, and judicial branches). Judicial and legislative supremacy are premised on the opposing notion that courts or legislatures have the power to make and change constitutional norms outside of the Article V process. But this fact does not entail the conclusion that comparison of constitutional supremacy with judicial supremacy and legislative supremacy is not possible. Of course, it is possible, and a good deal of writing about constitutional theory is dedicated to making such comparisons.

E. *Impure and Hybrid Theories*

I am making the claim that the three options are both feasible and fundamental, but by doing this I do not mean to claim that every version of the three options is "pure." Common law constitutionalism might incorporate an element of constitutional supremacy in the form of a requirement that judges consider themselves bound by the hard-wired structure of the branches of government. In other words, even a common-law constitutionalist might accept that the Supreme Court should consider itself bound by the clear constitutional text that establishes the House of Representatives and the Senate and requires that legislation pass both houses and be presented to the President for signature or veto.[188] This theory is an impure version of judicial supremacy, but its impurity would not change the fact that the outcome of most important constitutional disputes would be contingent on the composition of the Supreme Court. Likewise, representation-reinforcement theory[189] might be viewed as a hybrid, containing some elements of judicial supremacy (for the right to vote and political speech) and some elements of legislative supremacy (for everything else). Again, this does not affect the core point about outcome uncertainty: constitutional decisions will depend on the future composition of Congress and the Supreme Court, with different issues decided by each institution.

The claim that judicial, legislative, and judicial supremacy are fundamental is consistent with the possibility of impure or hybrid versions of the three theories. In Part I, we made a simplifying assumption that limited

188 U.S. CONST. art. I, § 7.

189 *See* ELY, *supra* note 129 at 87-104.

the discussion to relatively pure forms of the three options, but that assumption was made to avoid complexity in exposition and to make the basic insight accessible. Under the more complex conditions that characterize both the world of constitutional practice and scholarship and the most likely implementations of the three options, impure or hybrid versions are on the table. The claim that the three options are fundamental is not the same as the claim that they are only feasible in their purest forms.

Now that we have identified the three fundamental and feasible options, we can return to the conclusion that we reached in Part I: None of the three fundamental and feasible options can reliably produce the outcomes that either progressives or conservatives prefer. Worse than that, any one of the three options can lead to outcomes that either group would consider unacceptable. This leads to our next question: is there an approach to constitutional theory that avoids these tragic conclusions? In other words, is there a way out?

V. Is There a Way Out?

The three options are fundamental. They structure our choices in ways that limit the feasible choice set, even when impure and hybrid versions of judicial, legislative, and constitutional supremacy are considered. This results in choices that are tragic because none of the three options or their variations and combinations can guarantee acceptable outcomes on issues that many citizens may consider to be of transcendent importance. This leads to the question: is there a way out? And if not, what are the consequences for normative constitutional theory?

A. *Potential Escape Routes and their Difficulties*

We can begin with a catalog of the possible "ways out"—the escape routes from the three fundamental and feasible options. All the escape routes have serious problems.

1. Constitutional Evasion

A first possibility is that we simply refuse to consider the problem. Someone might say, "I refuse to consider the possibility that normative constitutional theory involves tragic choices." Or "I am not for judicial supremacy with bad judges. I want judicial supremacy with judges who share my values." Imagine a progressive citizen or constitutional scholar who takes that position. They are confronted with the reality that the current Supreme Court does not share their values, that it seems very unlikely this will change in the near to medium term, and that the long-term future is unpredictable

in this regard. They reply, "That's why we need to expand the Supreme Court to counterbalance the illegitimate Justices." But this too looks very unlikely, and if progressives packed the Supreme Court at their next opportunity, it seems probable that conservatives would retaliate when the political balance turned in their favor.

One possible reaction to all of this could be: "I refuse to think about feasibility. I know what I am for, and that is that." Of course, this reaction is psychologically possible, but it is an evasion and not a response. Moreover, a refusal to think about feasibility forecloses consideration of second-best alternatives, some of which are likely better than others. It is difficult to see how constitutional evasion could be justified as a position in constitutional theory, even if it is attractive as a psychological mechanism for the avoidance of constitutional anxiety.

2. Constitutional Optimism

Here is another possibility. One might adopt an attitude of constitutional optimism or even profess constitutional blind faith. "I believe that [conservatives/progressives] will achieve a permanent victory in electoral politics. Over the long run, we will control the presidency and Congress; therefore, we will always control the Supreme Court. Therefore, I favor [legislative supremacy/judicial supremacy]. In the long run, [Congress/the Supreme Court] will [enact statutes/decide cases] that provide my preferred outcomes on every issue of transcendent importance." Notice that constitutional optimism is consistent with either judicial or legislative supremacy and with either a progressive or conservative constitutional ideology—assuming only outcomes count.

The obvious rejoinder to constitutional optimism is that it is based on wishful thinking, as it ignores the evidence that neither progressives nor conservatives have been able to achieve stable long-run dominance in American electoral politics. There are, of course, theories advanced by the partisans of both sides that attempt to show that "our side" will achieve a permanent majority.[190] In the recent past, such predictions have fared poorly,[191] but it is, of course, possible that politics in the United States will

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190 *See, e.g.*, JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 163-64 (2002) (asserting that demograhphic, lifestyle, and cultural shifts are "intimately bound up" with an emerging Democratic majority).

191 *See, e.g.*, Nate Silver, *Nevada Could Be Senate Republicans' Ace in the Hole*, FIVETHIRTYEIGHT (Oct. 7, 2022, 1:13 PM), https://fivethirtyeight.com/features/nevada-could-be-senate-republicans-ace-in-the-hole/ [https://perma.cc/6KLM-QRCX] (characterizing the emerging-democratic-majority thesis as "unsuccessful"); Hans-Georg Betz, *What Happened to the Emerging Democratic Majority?*, FAIROBSERVER (Feb. 18, 2021), https://www.fairobserver.com/region/north_america/hans-georg-betz-donald-trump-populism-

decisively change in favor of progressives or conservatives in the long run. However, the fact that some state of affairs is possible does not make it certain or even likely. Constitutional optimism is not warranted by a well-founded belief that permanent victory for "our side" is possible.[192]

Constitutional optimism might be psychologically beneficial, because it promotes hopeful attitudes and helps quell bouts of constitutional depression, but these psychological benefits cannot ground constitutional theory. We can hope for the best, but unrealistic optimism cannot serve as a reasonable basis for constitutional theory.

3. Constitutional Opportunism

Neither constitutional evasion nor constitutional optimism provides an adequate response to the deep problems that are inherent in outcomes reductionism. Perhaps the solution is to abandon the effort to develop a consistent and principled approach to normative constitutional theory. We might instead adopt the attitude of constitutional opportunism. The core idea is that constitutional actors should champion the option that best achieves their preferred outcomes in the short run but switch to another option if political conditions change.[193]

Constitutional opportunism is the "situation ethics"[194] of constitutional theory. Unlike evasion and optimism, opportunism is realistic. It accepts the fact that outcomes reductionism leads to the rejection of all three of the feasible and fundamental options. The constitutional opportunist affirms outcomes reductionism, but something's got to give—and what gives is consistency. The constitutional opportunist affirms legislative supremacy at Time 1 when it leads to preferred outcomes but opposes it at Time 2 when it leads to unacceptable outcomes.

As a normative constitutional theory, constitutional opportunism is no theory at all. It is a strategy that embraces deception and rejects principle. As a strategy, it has an obvious problem: the persuasive force of arguments made by a constitutional opportunist will erode over time as the inconsistencies

republican-party-emerging-democratic-majority-us-politics-news-18211/ [https://perma.cc/6EZR-VSKB] (same).

192 In possible futures in which one side or the other achieve permanent victory in politics, outcomes would be more predictable. I am not contesting that point.

193 R. George Wright, *The Proper Role of Judicial Opportunism in Constitutional Rights Scrutiny*, 26 RICH. PUB. INT. L. REV. 49, 51 (2023) (asserting that judges should employ "opportunistic judicial scrutiny" where they can to promote a "nearly consensual and reasonably well-established public good").

194 I am using the phrase in the pejorative sense. There is a theoretical position in moral theology that gave rise to this secondary meaning. *See* JOSEPH FLETCHER, SITUATION ETHICS: THE NEW MORALITY 26-29 (1966).

become apparent.[195] In this regard, it is important to distinguish opportunism from two other positions, the mix-and-match alternative we can call "constitutional hybridity" and the move to outcome-drive theories—these two alternatives are the topics of the next two subsections.

4. Constitutional Hybridity

Up to this point, I have suggested that hybrid options do not change the basic structure of constitutional choice. Their existence adds complexity, but it does not constitute a way out of the problem of outcome uncertainty. The discussion that follows explains why this is the case.

The most prominent example of a hybrid theory is John Hart Ely's Representation-Reinforcement Theory.[196] The core idea is that the Supreme Court can retain supremacy over constitutional questions that involve democratic processes. On issues like voting rights and the freedom of political speech, judicial supremacy governs. On all other questions, Congress is supreme. Thus, the separation of powers, federalism, and all other individual rights questions are decided by Congress.

The most important point about this hybrid alternative is that it does not fundamentally change outcome uncertainty. Ely's theory allocates some decisions to Congress and others to the Supreme Court, but that does not change the fact that the composition of both institutions is uncertain, and this creates outcome uncertainty in the medium-to-long run. *Hybridity does not eliminate uncertainty.*

In addition, there is another conceptual question regarding hybrid theories that can be stated as follows: which institution has the power to decide whether a constitutional question lies within the domain of Congress or of the Supreme Court? If the Supreme Court has the power to decide whether a constitutional question implicates democracy, then there is the possibility that Representation-Reinforcement Theory will collapse into judicial supremacy.

Why might this collapse occur? Consider reproductive autonomy rights. John Hart Ely himself was a critic of *Roe v. Wade*,[197] but supporters of *Roe* have mounted a powerful argument that reproductive autonomy is essential

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195 The question whether constitutional opportunism can work in practice is complicated. It is my impression that politicians are able to flip-flop without losing credibility—although this may be a function of the fact that they never had credibility in the first place. Whatever the merits of flip-flopping as a political strategy, it seems unlikely to succeed in the realm of constitutional theory. And even if it does succeed, it shouldn't.

196 ELY, *supra* note 129, at 87.

197 *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).

to the equal participation of women in democratic politics.[198] And one can imagine that an advocate of economic rights of the sort associated with the so-called *Lochner* era might make similar arguments: economic liberty, they would argue, is essential to political independence and equal participation in politics.[199] Likewise, issues of federalism and the separation of powers determine the ultimate structure of democratic politics. Both the advocates of a strong nondelegation doctrine and the champions of the administrative state can claim that the institution of democracy is at stake in their debates. The advocates of a strong national government and the advocates of states' rights can each claim that their preferred vision of federalism is prerequisite for democracy. Using the vocabulary introduced above in Part IV.B, the restrained version of representation-reinforcement theory is at risk of transforming itself into the empowered version.

My point is not that all of these arguments are of equal strength. Rather, if the Supreme Court has the power to decide what constitutional issues involve democracy, then Representation-Reinforcement Theory may well be on a slippery slope to judicial supremacy. In other words, this option may well fail the fourth criterion for feasibility, the stability criterion.[200]

There are other possible hybrid theories. For example, one might argue for constitutional supremacy on issues governed by the so-called "hardwired constitution" but judicial supremacy for the rest. Thus, the Supreme Court would have the power to decide questions regarding the separation of powers, federalism, and individual rights, but the Constitution would govern on a limited set of questions for which it provides clear bright-line rule. For example, the Constitution would govern the age requirements for federal officials, bicameralism and presentment, and the existence of the President, Congress, and the Supreme Court. This might be a true hybrid view. The line between clear bright-line rules and open-textured provisions seems clear and bright. But in operation, this hybrid variation would function very much like judicial supremacy because the Supreme Court would call the shots on almost every imaginable constitutional question while leaving the hard-wired constitution in place. Within the framework of this article, this hybrid is not a true alternative, because it is simply a minor variation on judicial supremacy. For that reason, it is not a way out of the choice among the three fundamental and feasible options.

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198 *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375 (1985); Alan James Kluegel, *The Link Between* Carolene Products *and* Griswold*: How the Right to Privacy Protects Popular Practices from Democratic Failures*, 42 U.S.F. L. REV. 715, 717-20 (2008); Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 419 (1995).

199 Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

200 *See supra* Section III.B.

Hybrid theories may well be real options that differ in significant ways from the purest forms of judicial, legislative, and constitutional supremacy, but the advocates of such theories need to deal with the inherent difficulty that attaches to any attempt to split the atom of supremacy. Some institution must decide what to do when there are disputes about the nature of the split, and that institution will have the power to move the system in the direction of its own supremacy. Any argument that hybrid theories can overcome the problem of outcome uncertainty must account for this fact.

5. Outcome-Driven Theories

What about the possibility of an explicitly outcome-driven constitutional theory? For example, why not advocate progressive constitutionalism (e.g., social justice constitutionalism) or conservative constitutionalism (e.g., traditional values constitutionalism)?[201] The idea is to combine judicial supremacy with a substantive vision of justice or political ideology. Outcome-driven theories attempt to avoid the Future Outcomes Fallacy[202] by building outcomes-criteria into the theory and hence making it resistant to manipulation by Justices and judges whose ideology is opposed to the outcomes.

If we do not ask too many questions, this approach avoids the inconsistency that attaches to constitutional opportunism. The proponent of an outcome-driven theory is always for one thing and does not alternate their theoretical stance based on the political circumstances: "I'm always for progressive living constitutionalism, even when the Justices are conservative."

Outcome-driven theories obviously face a problem of feasibility. For the reasons we have already discussed,[203] neither progressive constitutionalism nor conservative constitutionalism is likely to be stable. One side or the other might control the court for years or even decades, but in the long run, control of the court is likely to switch. At that point, the outcome-driven theory will say that the Court is illegitimate, because its legitimacy depends on adherence to the right views about justice or the correct political ideology. But the members of the new Court and its supporters will not see it that way; they will believe that the old Court was illegitimate.

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201 There are many possible versions of outcome-driven constitutionalism. At a high level of generality, these options include libertarian, social-conservative, progressive, and liberal versions. Another framing might include critical constitutionalisms, including feminist constitutionalism, critical-race constitutionalism, intersectional constitutionalism, and so forth. Likewise, one could imagine various forms of social conservative constitutionalism, including options ground in Catholic or Protestant moral theology, Burkean conservatism, and so on.

202 *See supra* Section II.C.2.

203 *See supra* Part I.

This point about the relationship between outcome-driven theories and legitimacy is important. One of the roles of a normative constitutional theory is to identify the conditions for constitutional legitimacy. That role is especially important in a society that is characterized by the fact of pluralism. And that importance is magnified at those moments in history when the division between groups is both polarized and close to equal. Under these conditions, an outcome-driven form of judicial supremacy may create a crisis of legitimacy for the constitutional regime. The losing side may take the position that it is no longer obliged to cooperate in the constitutional order, and that it is morally entitled to take extreme measures (insurrection or rebellion) to resist the existing order. Under these conditions, the collapse of the constitutional order may be a real possibility. The worst-case scenario is civil war.

Another danger of an outcomes-driven approach to judicial supremacy is the possibility that the Supreme Court might attempt to entrench itself by using its constitutional power to influence electoral politics. Such attempts might be relatively indirect. The Court might manipulate the freedom of speech or voting rights doctrines in ways that favor the party that supports the political ideology of the Court. Or the Court might intervene directly and decide the outcome of a presidential election by judicial fiat covered by a thin veneer of legal argument.

The danger of self-entrenchment via the direct or indirect manipulation of electoral politics implicates the process values of legitimacy and the rule of law. Recall that democratic legitimacy is a scalar and not a binary.[204] Once the Supreme Court begins to manipulate elections in order to entrench the majority that supports an outcome-driven constitutionalism, it loses the degree of democratic legitimacy it possesses via the fact that appointment and confirmation responds to democratic politics. Moreover, self-entrenchment is clearly contrary to any plausible conception of the legitimate role of the judiciary as an institution. Self-entrenchment directly undermines the rule of law. A self-entrenched judiciary that rules by constitutional decree is a juristocracy and a form of tyranny in the classic, Aristotelian sense.[205]

One way to make the unattractiveness of outcome-driven theories vivid is simply to imagine that the Supreme Court that adopts an outcome-driven theory is composed of Justices who are your ideological opponents and who disagree with you about the most important questions of justice and morality. If you are like me, your reaction is "Yikes!" And now put yourself in the shoes

204 *See supra* subsection II.B.1.a.

205 *See* Kraut, *supra* note 65, at 106 ("Aristotle holds that it is typical of tyranny to rule by a series of edicts rather than by a stable system of law."); Solum, *The Constraint Principle*, *supra* note 14, 58-60.

of those who disagree with your views and ask yourself how they would react to a Supreme Court that is dominated by the outcome-driven theory that you would espouse. If you would reject their outcome-driven theory and they would reject yours, then how could either theory serve as the basis for a stable and legitimate constitutional regime?

6. Agonistic Constitutionalism

There is another possibility that is not much discussed in contemporary constitutional theory in the United States but seems important.[206] Constitutional theory might embrace the conclusion that fundamental constitutional conflict is inevitable. Even if the conditions for near-ideal deliberative democracy were fully met, fundamental disagreements about the fundamental and feasible options will remain unresolved. At any given moment in time, some constitutional regime will be in effect, but even fundamental questions (e.g., judicial review or not) will be answered differently at different moments in constitutional history. The point of agonistic constitutionalism, as I have defined it, is to embrace the endless conflict over constitutional theory and recharacterize it as a virtue rather than a vice.

Ongoing constitutional struggle creates constitutional uncertainty, which is more than just outcome uncertainty. In the world endorsed by agonistic constitutionalism, the rules of the game are always up for grabs. In the vocabulary of the three options, such a system could involve successive

206 I am not aware of any theorist who affirms the precise view described here, but several sources are suggestive. *See, e.g.*, CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 103 (2000) ("[F]or 'agonistic pluralism', the prime task of democratic politics is not to eliminate passions from the sphere of the public . . . but to mobilize those passions towards democratic designs."); JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995); Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 93 (2017) ("While deliberative democracy focuses on how reasoned deliberation can lead to legitimate collective choices, agonistic democracy emphasizes that people in power ultimately make those decisions, and there are inevitably 'losers' when those decisions are made[.]"); Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803, 817 (2013) ("Within an agonistic system, reconciliation remains impossible, yet the presence of irreducible pluralism must not frustrate action. Hence the moment of decision becomes crucial for Mouffe—a decision that does not represent a final and unquestionable verdict but a provisional step."); Danny Michelsen, *Agonistic Democracy and Constitutionalism in the Age of Populism*, 21 EUR. J. POL. THEORY 68, 80 ("Therefore an agonistic stance on constitutionalism – in contrast to a populist one – would have to pursue the goal of curbing any attempts . . . to monopolize the interpretation and amendment of the constitution . . . .") (2022); Alan Greene, *Agonistic Constitutionalism and Accountability,* U.K. CONST. L. BLOG (Feb. 26, 2024), https://ukconstitutionallaw.org/2024/02/26/alan-greene-agonistic-constitutionalism-and-accountability/ [https://perma.cc/Q3TB-J6HU] ("An agonistic constitutionalism should therefore seek to inject 'the people' into this constitutional order while simultaneously acknowledging the pluralistic nature of this people. . . . [I]t cautions against one organ of the state claiming to speak on behalf of the people.").

temporary regimes of judicial, legislative, and judicial supremacy—and their many variations and hybrids. Agonistic constitutionalism abandons the goal of a provisionally stable constitutional regime that enables politics to operate within "the rules of the game."

Here is my take. Agonistic constitutionalism shares some assumptions with what we might call "constitutional quietism." Suppose that an overlapping consensus on the fundamental constitutional order is unachievable, perhaps because outcomes reductionism cannot be overcome by appeals to reasoned argument. What then? One option would be constitutional quietism: we simply stop talking about the big questions of normative constitutional theory. Agonistic constitutionalism shares the supposition that overlapping consensus is impossible but rejects quietism. Instead, we continue to argue and struggle over the constitutional order—and that is a good thing according to the proponents of an agonistic approach.

My view (which I cannot defend here) is that agonistic constitutionalism is a cop out—the flip side of constitutional quietism. Agonistic constitutionalism shares quietism's pessimism without sharing quietism's attitude of resignation. Agonistic constitutionalism seems to counsel "shouting into the wind" or "sound and fury, signifying nothing."[207] The agonistic approach rejects the possibility of compromise and embraces endless struggle, but to what end? I can accept the proposition that deliberation about our constitutional options is a good thing—good, independently of the outcomes that such deliberation produces. But surely the main point of normative constitutional theory is not to generate academic or political argument in support of the endlessness of political struggle that precludes a stable constitutional order. Maybe I just don't get it. If that is the case, I would welcome an elaboration of the case for agonistic constitutionalism that will enable me to better understand the position.

7. Judicial Supremacy Is Inevitable

There is one final possibility that ought to be considered. It might be argued that there is only one feasible option, and that option is judicial supremacy. If judicial supremacy is inevitable, we do not need to find a way of out the choice among three options. There is no choice. All we can do is make the best of rule by judges.

To make the case that judicial supremacy is inevitable, one would need to argue that neither legislative supremacy nor constitutional supremacy is possible.[208] The most plausible version of that argument would begin with

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207 WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, ll. 22-28 (1606).

208 *See supra* Section III.B.

the observation that the status quo is judicial supremacy. From that point, the argument will walk well-trodden paths. Legislative supremacy is infeasible because the Supreme Court has the power to strike down laws that threaten judicial supremacy. Because of the way that Congress is structured, Congress will not be able to take the extreme measures required to beat the Court into submission. Such measures must overcome the hurdles posed by bicameralism, filibuster in the Senate, and presidential vetoes. It is true that there are moments in history where a single party controls a supermajority in both houses and the presidency, but those are precisely the moments when the ruling coalition has the best prospects of controlling the composition of the courts and, hence, entrenching its ideology on the Supreme Court. If FDR was unable to pack the Court during the height of the New Deal, then when, if ever, would legislative supremacy be feasible?

Constitutional supremacy suffers from a different sort of obstacle. Again, the argument walks a familiar path. Supreme Court Justices are simply incapable of treating the constitutional text as binding. The temptations of power are too great, and the pull of motivated reasoning is irresistible. Even Justices who were persuaded by the case for constitutional supremacy as a matter of normative constitutional theory could not bring themselves to act as theory requires.

There are strong arguments for the feasibility of both legislative supremacy[209] and constitutional supremacy[210] given the criteria for inclusion in the feasible choice set that are laid out above.[211] But this is a matter upon which reasonable disagreement is possible. Nonetheless, it is important to realize the views about human psychology and sociology that ground the argument that only judicial supremacy is possible have broad implications. If the facts about human psychology and sociology are such that judicial supremacy is our inevitable constitutional fate, then it seems likely that there is very little room for normative argument to operate within judicial supremacy. Judges and politicians will do what they will do, and the enterprise of normative argument is simply irrelevant. Normative discourse may occur, but it is epiphenomenal.

This is significant, because those who argue that judicial supremacy is inevitable and that both legislative and constitutional supremacy are infeasible may not want to face the consequences of constitutional determinacy for their own normative arguments. In a world of constitutional determinacy, there is no point in arguing that the Supreme Court ought to reach outcomes supported by progressive or conservative views. Criticism of

209 *See supra* Sections III.B, IV.B.

210 *See supra* Sections III.B, IV.C.

211 *See supra* Section III.B.

the court is pointless. Even the argument that the Justices should be honest and admit that their decisions are driven by morality, religion, or political ideology would have no practical effect, because judges will say what they want to say about the reasons for their decisions. Arguments won't affect the Justices' transparency, which is itself predetermined, and even if the Justices were to become more transparent, that would not affect anything else.

In other words, the view that judicial supremacy is the only member of the feasible choice set is a form of constitutional determinism and leads to the accompanying attitude of constitutional fatalism. But determinacy and fatalism are inconsistent with the constitutional optimism that is required to get outcome-driven alternatives off the ground. The arguments that lead to the conclusion that judicial supremacy is inevitable would seem to counsel constitutional quietism. If criticism or praise can have no effect, the response would seem to be silence. Making normative arguments against the Court's ideology or its lack of transparency would itself be misleading because the very act of making such arguments suggests that the Court and the political actors who select Justices are reason-responsive, even though the critic believes the contrary. Of course, in a fully determined social world, critics of the Court will do what they are compelled by causal forces to do, whether it is rational or not. Presumably, constitutional determinists believe that their own actions and beliefs are shaped by reason and normative argument, but it is not clear how this is constituent with the belief that the attitudes and actions of judges are not responsive to reasons and normative argument.

B. *Constitutional Compromise, Reconsidered*

Suppose, then, that there is no way out of our constitutional predicament that does not suffer from very serious defects. There are three fundamental and feasible options (with many variations and hybrid forms) for normative constitutional theory in the here and now. Choosing among the options based on outcomes alone is unreasonable. None of the three options can guarantee progressives or conservatives the outcomes that they want in the long run. None of the three options can reliably avoid outcomes that many progressives and conservatives find unacceptable. Uncertainty is a fact of constitutional life.

For this reason, outcomes reductionism cannot provide a reasonable basis for the choice among judicial, legislative, and constitutional supremacy. Process values, including legitimacy,[212] the rule of law,[213] and institutional

212 *See supra* subsection II.B.1.

213 *See supra* subsection II.B.2.

capacity[214] must be considered.[215] The most reasonable way to proceed is to seek broad reflective equilibrium among all of the outcome reasons and process reasons that bear on the choice among the three options.[216] And once we are engaged in the search for broad reflective equilibrium, it becomes apparent that we will need to consider constitutional compromises—positions in normative constitutional theory that can serve as the basis for an overlapping consensus among citizens who disagree about morality and political ideology. In other words, the choice among the three fundamental options may require agreement on a constitutional second best, because we (collectively, as citizens) cannot agree on what constitutes the first best option in a world of unlimited constitutional possibilities.

The search for constitutional comprises requires some (perhaps most) constitutional theorists to see their task differently. Rather than conceptualizing normative constitutional theory as an extension of their moral, philosophical, or ideological beliefs within the constitutional sphere, constitutional theorists would search instead for positions that are the object of agreement among those who disagree (passionately) about the deepest normative questions.

How can we think about the three options as constitutional compromises? That is a large question, and a comprehensive analysis would be a very hefty task. Instead, we might consider illustrative compromise variations of the three fundamental options, beginning with judicial supremacy.

1. Judicial Supremacy as Constitutional Compromise

How might judicial supremacy be reconfigured as a form of constitutional compromise? One possibility would be to seek moral, religious, and ideological balance on the court—along with diversity of life experiences and backgrounds. This option would be difficult to achieve, because it requires political actors to seek balance rather than dominance. If a very conservative justice resigns and this upsets the balance on the court, a progressive President and Senate would be required to nominate and confirm a conservative replacement. That would be difficult or impossible given the realities of electoral politics. Another perhaps more promising option would select Justices and judges who are ideological moderates, always appointed from near the center of the political spectrum. Whether this is more promising as a practical matter is an open question. But it may well be difficult for political actors to support moderates; judicial nominees who are

214 *See supra* subsection II.B.3.

215 *See supra* Section II.C.

216 *See supra* Section II.D.

near the center on national political spectrum are likely to be distant from the center of their own political parties.[217] There is a further difficulty in era of political polarization: as the political parties move to the extremes, the pool of candidates in the center might become sparse. Moreover, if prospective candidates for elevation to the Supreme Court know that moderation (plus competence or excellence) is the criterion for selection, they may well feign moderation beginning very early in their legal career but then revert to their true beliefs once they have a life term on the Supreme Court.

There is another strategy for crafting a compromise version of judicial supremacy. The Supreme Court might adopt a much stronger version of the doctrine of stare decisis. This approach vests supremacy in the Court as an institution but distributes power across time. The strongest version of this compromise would treat horizontal stare decisis decisions on constitutional cases as binding—no reversals would be permitted.[218] But we can imagine weaker versions of this doctrine. For example, the Court might decline to consider reversal of a constitutional decision for some period, e.g., twenty or fifty years. Or the Court might not consider reversal until all the Justices who participated in the case have left the Court. Or the Court might adopt a supermajority rule for overruling (9–0, 8–1, 7–2, or 6–3). Alternatively, the Court could adopt a set of limited and well-defined defeasibility conditions that allow for overruling precedent only in truly extraordinary circumstances. Finally, the Court might consider a qualitative approach, giving stare decisis very great weight (much greater than at present) but not a binding effect. Given that the composition of the Court changes over time, a stronger version of the doctrine of stare decisis would tend to distribute power between progressives and conservatives in the long run. The overall pattern of judicially created constitutional law would include a mix of progressive and conservative decisions that would change only gradually in response to changes in the composition of the Court.

2. Legislative Supremacy as Constitutional Compromise

What about legislative supremacy? We can begin with the obvious: given the party system, legislative supremacy necessarily would require that constitutional issues be decided by procedures that are dominated by partisan political processes. But legislative supremacy can be combined with a system of constitutional norms that constrain the process of constitutional change. For example, even with pure legislative supremacy, Congress might pass

217 I will not attempt to summarize the reasons for this well-known phenomenon or to document its existence.

218 In the United Kingdom, until the Practice Statement [1966] 3 All ER 77, the House of Lords considered itself bound by its own precedent.

legislation that institutionalizes bicameralism and presentment and observe a constitutional norm against ad hoc exceptions to this structure. Or Congress might enact a statutory bill of rights and observe a norm against the repeal of such rights except by supermajority vote that would require bipartisan consensus.

Perhaps the most important way in which legislative supremacy can be seen as a compromise derives from the process value of democratic legitimacy. Progressives and conservatives might agree that the resolution of constitutional questions via democratic processes is legitimate and ought to be regarded as binding irrespective of the outcome that is produced. Conceiving of legislative supremacy as this kind of compromise naturally leads to emergence of constitutional norms against disenfranchisement and of the silencing of political speech.

3. Constitutional Supremacy as Constitutional Compromise

The third fundamental and feasible option is constitutional supremacy. We have identified two forms of constitutional supremacy: contemporary ratification theory and originalism. Either of these two forms might serve as a constitutional compromise.

Consider originalism first. I believe the current perception of many progressives and liberals is that originalism cannot serve as a constitutional compromise, because it favors conservative outcomes.[219] For originalism to be viewed as a compromise that could serve as the basis of an overlapping consensus that includes both progressives and conservatives, this perception would need to change. This would require a demonstration that the original meaning of the constitutional text leads to a mix of outcomes, some conservative and some progressive. This might be accomplished in part by scholarship, but it seems likely that more would be required. Confidence in originalism would require that originalist judges and Justices come from a diversity of backgrounds and ideological orientations. Originalist Justices appointed by Republican Presidents would need to demonstrate that they adhere to original meaning, even if it leads to outcomes that progressives would prefer—and the same would be required of originalists appointed by Democrats.

There is another requirement: for originalism to serve as a compromise, the Court should not view itself as authorized to depart from originalism on an ad hoc basis. For example, if the Court were to take the position that it

219 Other progressives may argue that the original meaning of the constitutional text is radically indeterminate or substantially indeterminate with respect to the most important constitutional issues.

will sometimes follow precedent that is inconsistent with original meaning, there would need to be clear criteria guiding this decision. These criteria would need to be ideologically neutral; ideally, the criteria would produce intersubjective agreement on their application, at least most (if not all) of the time.

The process values of legitimacy and the rule of law provide support for constitutional supremacy as a form of constitutional compromise. Constitutional supremacy avoids the problems of institutional legitimacy that inhere in both judicial and legislative supremacy. Judicial supremacy turns the Supreme Court into a perpetual constitutional convention and gives the Court the authority to rewrite statutes. Legislative supremacy makes Congress the only check on its own power. And constitutional supremacy conforms to the rule of law because it requires the Supreme Court to decide cases and articulate doctrines on the basis of the Constitution itself.

A similar set of considerations might apply to contemporary ratification theory. My guess is that many conservatives would object to contemporary ratification theory on the ground that it creates a one-way ratchet that locks in progressive constitutional outcomes but permits conservative decisions to be overruled on the basis of changing public beliefs about the meaning of the constitutional text. To overcome this perception, contemporary ratification theory would need to establish clear criteria that (1) specify when a meaning of the constitutional text has been ratified by the public and (2) establish an evidentiary standard to demonstrate that a change in meaning has occurred. And the theory would need to make it clear that it does not endorse constitutional changes that are driven by "bootstrapping," where the change in contemporary beliefs about the meaning of the constitutional text comes after the Supreme Court decision that initiates the change. Once again, confidence in the theory might require a mix of progressive and conservative Justices on the Supreme Court.

These sketches of compromise positions are obviously incomplete. Moreover, I have said nothing about the question as to which of the compromise positions should be viewed as best or most feasible. I have suggested that broad reflective equilibrium (including both outcome reasons and process reasons) provides a method for thinking about that question. On this occasion, the point is to open the door to further discussion and not to argue for one theory over another.

* * *

Compromise may require trust, empathy, and civility as well as mutual understanding and respect. There are moments in history when these attitudes and capacities are taken for granted. But there are other moments when compromise is

difficult. Those moments are characterized by distrust, disdain, demonization, deplatforming, and demagoguery. In periods of extreme polarization, there is a natural tendency to which we might call "sideism." We hear things like, "Whose side are you on?", "You must pick a side!", "You are on the wrong side!"

In the context of normative constitutional theory, my perception is that sideism has run rampant. Scholars, judges, lawyers, and officials feel the need to pick a side—a team, if you will. There is "Team Living Constitutionalism" and "Team Originalism." Recently, an old team, "Team Congress," has begun to attract some new fans. If you are a liberal, you had better be on Team Living Constitutionalism. If you are progressive, you are thinking about leaving that team and joining Team Congress—all the cool kids are doing it. If you are conservative, you will get a lot of flak if you don't join Team Originalism.

Sideism produces an impoverished discourse. The arguments for and against the three fundamental and feasible options become strident. Exaggerations are not only tolerated—they are encouraged. Bad arguments are treated as good arguments—if they favor my side. If you are on the left, then originalists are either evil or dupes. If you are on the right, then living constitutionalists are conniving opportunists who are trying to pull a long con on the American people. And both sides are asking, "What about those crazy Team Congress folks?"

This has got to stop. The way to make it stop is not to bludgeon the other side into submission with arguments, shaming, or denunciations. The way to make it stop is not going to be easy, because it requires that we step back from our own positions and try to see things from the perspective of the other side.

Here is the way John Lennon and Paul McCartney put it, "Try to see it my way. Do I have to keep on talking till I can't go on? . . . . Think of what you're saying. You can get it wrong and still you think that it's alright."[220] *John and Paul were optimistic, "We can work it out."*[221] *But can we? Are we even willing to try?*

* * *

Finally, it's time to wrap things up.

CONCLUSION

There are three fundamental and feasible options for normative constitutional theory in the here and now, the United States in the twenty-first century. Judicial supremacy vests ultimate constitutional authority in the Supreme Court. Legislative supremacy vests that authority in Congress. Constitutional supremacy makes the Constitution itself the binding authority

220 THE BEATLES, *We Can Work It Out*, *on* DAY TRIPPER (EMI 1965).

221 *Id.*

on constitutional questions. These three options come in various flavors: very few of these are pure, and some are best understood as hybrids.

Much of modern constitutional discourse about these options is implicitly premised on some form of outcomes reductionism. One version of reductionism is the view that normative constitutional theories should be evaluated based on a handful of canonical and anticanonical cases from our constitutional past. Another version of reductionism focuses on the implications of the three options for our constitutional future on the basis of implausible assumptions about electoral politics. Both versions of outcomes reductionism are deeply problematic on their own terms, and both versions subordinate important process values (legitimacy, the rule of law, and institutional capacity) that provide important reasons for and against the three fundamental and feasible options.

Outcomes reductionism when combined with the fact of pluralism has left normative constitutional theory in a woeful state. The problem is not a shortage of important ideas and brilliant arguments. Instead, the problem is that the discourse of constitutional theory is all too often predicated on unrealistic assumptions about our constitutional possibilities. All too frequently, theories are evaluated without realistic appraisal of the interactions between the theory and politics. One especially clear example of this pie-in-the-sky approach is provided by progressive arguments for various forms of living constitutionalism that simply assume the Justices applying the theory will have the same progressive values as the advocate of the theory. The future composition of the Supreme Court and Congress and the full implications of originalism for constitutional doctrine are, to a large extent, unknown. But constitutional theory cannot wait for an ever-receding future. The decision to wait is actually a decision to stick with the constitutional status quo. That means a conservative form of judicial supremacy today, but it could easily mean a progressive version of living constitutionalism in a decade or two. Perhaps that is our best option, but that is far from clear, and the existing structure of constitutional argument seems to conceal rather than reveal the most important questions.

These arguments lead to uncomfortable conclusions—and that discomfort is sure to provoke resistance and the quest for a way out of our current constitutional dilemmas. Some of the escape routes are obviously nonstarters. Ignoring the problem will not make it go away. Blind constitutional faith will not lead to a land of milk and honey. Opportunism is both unprincipled and, in the long run, doomed to failure. Agonistic constitutionalism is a cop out. Outcome-driven theories are tempting but they offer false hope because they wish away the problem of feasibility. There is always the option of constitutional fatalism and quietism—we can simply give up and shut up. But

surely that should be a last resort. Before we fall silent or change the subject, we need to think hard about compromises about matters of fundamental importance—compromises with fellow citizens with whom we strongly disagree about matters of fundamental importance.

* * *

We dwell in the here and now—a world of second bests and uncomfortable compromises. That means we must make tragic choices—choices that will sacrifice things of great value. Normative constitutional theorists should take a long hard look at the real world of tragic choices—and not avert their gaze or retreat to castles in the sky. A good deal of conventional wisdom will need to be put to the side. We will need to abandon entrenched positions and reconsider options rejected long ago. This requires that we imagine new constitutional possibilities and abandon old constitutional sureties. Old narratives will be set aside; new narratives will take their place. Old paradigms will fade; new paradigms will emerge. Old theories will wither on the vine; new theories will grow and flourish.

We are stuck. We must get unstuck.