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LEGITIMACY AND THE CONSTITUTION

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LEGITIMACY AND THE CONSTITUTION

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Legitimacy is a term much invoked but little analyzed in constitutional debates. Uncertainty and confusion frequently result. This Article fills a gap in the literature by analyzing the idea of constitutional legitimacy. It argues that the term invites appeal to three distinct kinds of criteria that in turn support three distinct but partly overlapping concepts of legitimacy — legal, sociological, and moral.

When we examine legitimacy debates with these three concepts in mind, striking conclusions emerge. First, the legal legitimacy of the Constitution depends more on its present sociological acceptance than on the (questionable) legality of its formal ratification. Second, although the Constitution deserves to be recognized as morally legitimate, it is only "minimally" rather than "ideally" so: it is not morally perfect, nor has it ever enjoyed unanimous consent. Third, because the Constitution invites disagreement about what it means and how it should be interpreted, many claims about the legal legitimacy of practices under the Constitution rest on inherently uncertain foundations. Significantly, however, a virtual consensus exists that at least some judicial precedents suffice to support future claims of legitimate judicial authority, even when those precedents were themselves erroneously decided in the first instance. Like the legal legitimacy of the Constitution, the legal legitimacy of precedent-based decisionmaking arises from sociological acceptance. Fourth, in the absence of greater legal and sociological consensus, judgments about many purportedly legal questions, including questions of judicial legitimacy, frequently reflect assumptions about the moral legitimacy of official action. Realistic discourse about constitutional legitimacy must therefore reckon with the snarled interconnections among constitutional law, its sociological foundations, and the felt imperatives of practical exigency and moral right.

INTRODUCTION

Legitimacy is a term much bruited about in discussions of constitutional law. Courts and commentators repeatedly profess their concern with judicial legitimacy.[1] Critics of judicial decisions, including dissenting judges and Justices, sometimes protest that challenged

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[1] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992) (asserting that "[t]he Court's power lies . . . in its legitimacy"); *id.* at 996–98 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the Court wrongly defined legitimacy and misunderstood the effect of its ruling on judicial legitimacy); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 163–64 (1985) (denying the legitimacy of some prophylactic rules); Leslie Gielow Jacobs, *Even More Hon-*

rulings lack legitimacy.[2] Occasionally questions are voiced about the legitimacy of entire doctrines, such as substantive due process,[3] or even about the Constitution itself.[4]

Although the concept of legitimacy features prominently in constitutional debates, it rarely receives analysis.[5] Those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ. Confusion often results — not only among readers and listeners but also, I believe, in the minds of those who write and speak about constitutional legitimacy.

This Article has two ambitions. The first is to clarify what we characteristically mean when we talk about legitimacy, especially in constitutional law. In pursuit of this goal I shall draw a number of distinctions. Perhaps most important, I shall argue that the term legitimacy invites appeal to three distinct kinds of criteria that in turn support three concepts of legitimacy: legal, sociological, and moral. When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience —

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est Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation, 1995 U. ILL. L. REV. 363 (discussing the capacity of judicial opinions to sustain judicial legitimacy); *see also* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285–95 (1989) (addressing contentions that legal indeterminacy undermines legal legitimacy).

[2] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 456–57 (2000) (Scalia, J., dissenting) (attacking *Miranda v. Arizona*, 384 U.S. 436 (1966), and characterizing the Court's refusal to overrule it as an "illegitimate exercise of raw judicial power" (quoting *Oregon v. Elstad*, 470 U.S. 298, 370–71 (1985) (Stevens, J., dissenting))); Murray v. Carrier, 477 U.S. 478, 525 n.4 (1986) (Brennan, J., dissenting) ("I continue to believe that *Wainwright v. Sykes* represented an illegitimate exercise of this Court's very limited discretion to order federal courts to decline to entertain habeas petitions."); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 791 (1986) (White, J., dissenting) (citing evidence of "the illegitimacy of the Court's decision in *Roe v. Wade*"); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 775 (2001) (noting that *Bush v. Gore*, 531 U.S. 98 (2000), gave rise to recurrent attacks on the legitimacy of the Supreme Court).

[3] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (taking a narrow view of judicial "authority to discover new fundamental rights imbedded in the Due Process Clause" because "[t]he Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"); JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) (maintaining that "'substantive due process' is a contradiction in terms — sort of like 'green pastel redness'").

[4] *See* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003).

[5] *See* Yoo, *supra* note 2, at 776 ("Legitimacy is a word often used in our political debate, but seldom defined precisely."). There are important exceptions. *See, e.g.*, Barnett, *supra* note 4; Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003) [hereinafter Michelman, *Ida's Way*]; Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101 (2003) [hereinafter Michelman, *Contract for Legitimacy*]; Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004) [hereinafter Michelman, *Justice as Fairness*].

or, in a weaker usage that I shall explain below, insofar as it is otherwise acquiesced in.[6] A final set of criteria is moral. Pursuant to a moral concept, legitimacy inheres in the moral justification, if any, for claims of authority asserted in the name of the law.[7]

Distinguishing among legal, sociological, and moral legitimacy often yields an immediate and practical payoff. It comes in increased understanding of constitutional debates, enhanced precision of thought, and the potential for clearer expression. When we can identify a particular legitimacy claim as legal, sociological, or moral, its meaning will typically become plain. We will also be better situated to consider the standards for assessing it.

As I shall also explain, however, the sorting of legitimacy claims into neat linguistic categories sometimes proves impossible. It is hardly accidental that distinguishable varieties of legitimacy take the same label. Judgments of legal, sociological, and moral legitimacy all reflect concerns with the necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority. Not surprisingly, legal, sociological, and moral legitimacy thus prove to be complexly interrelated in some cases. For example, when critics denounce controversial Supreme Court decisions such as *Roe v. Wade*[8] and *Bush v. Gore*[9] as illegitimate,[10] it would be more misleading than helpful to understand them as asserting separately that these decisions were legally indefensible and morally unjustified. Some of the asserted moral wrongness, amounting to an abuse of office, is surely thought to inhere in the decisions' (assumed) lack of legal justification. Critics also may

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[6] *See infra* pp. 1795–96.

[7] The claim that there are diverse concepts of legitimacy, rooted in diverse criteria, may seem counterintuitive. The most familiar definitions of legitimacy, as reflected in popular dictionaries, might seem to presuppose a legal concept. According to *Webster's New Twentieth Century Dictionary*, for example, "legitimacy" means "the quality or state of being legitimate." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1035 (2d ed. unabr. 1979). "Legitimate," in turn, means "sanctioned by law or custom; lawful; allowed." *Id.* As is well known, however, the terms "law" and "lawful" are themselves complex and diverse in their applications. It is widely thought that there are laws of morality as well as the positive laws enforced by governments. If so, then a claim about what is legitimate can be a claim about what is morally justified or "respect-worthy." *See, e.g.*, Michelman, *Ida's Way*, *supra* note 5, at 346; Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 169–73 (Larry Alexander ed., 1998) (exploring the character of law as a duality of social facts and norms claiming moral authority). Neither does the dictionary exclude the possibility of a sociological concept. Sociological acceptance is a necessary condition for a constitution or legal system to exist at all. It is therefore wholly unsurprising that there exists an extensive literature treating legitimacy as a sociological concept.

[8] 410 U.S. 113 (1973).

[9] 531 U.S. 98 (2000). For a sample of views on the legitimacy of *Bush v. Gore*, see *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

[10] For discussions of these charges, see *infra* notes 124–27 and accompanying text; and *infra* p. 1820.

wish to imply that part of the legal error lies in a morally culpable miscalculation of relevant considerations. In cases in which legal, sociological, and moral legitimacy are interconnected, enhanced conceptual understanding promises to illuminate complex truths about the foundations and justifiability of political authority.

This Article's second aim is to advance substantive understanding of constitutional law. When we examine legitimacy debates with improved conceptual tools — with a sharpened awareness of what we mean by legitimacy and why we care about it — striking conclusions emerge.

First, the legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other fundamental elements of the constitutional order, including practices of constitutional interpretation, also owe their legal legitimacy to current sociological acceptance. By contrast, most ordinary laws derive their legal legitimacy from distinctively legal norms established by or under the Constitution.

Second, although the Constitution deserves to be recognized as morally legitimate, the nature and significance of its moral legitimacy are easily misunderstood. The Constitution is not perfect, nor has it ever possessed the unanimous consent of the governed. As a result, the Constitution qualifies as legitimate only under what I shall describe as "minimal" (rather than "ideal") theories of moral legitimacy. The Constitution's moral legitimacy, like that of the constitutions of most nations, arises from the facts that it exists, that it is accepted as law, that it is *reasonably* (rather than completely) just, and that agreement to a better constitution would be difficult if not impossible to achieve. Because the Constitution is only minimally morally legitimate, it leaves room for argument that officials (including judges) might be morally justified in breaking the law in extraordinary cases. In other words, the minimal moral legitimacy of the Constitution does not guarantee the minimal moral legitimacy of every law passed or official action taken under the Constitution.

Third, among the features that mark the Constitution as only minimally morally legitimate is its indeterminacy or contestability. There is widespread disagreement about what kind of document the Constitution is and, accordingly, about how it should be interpreted. For example, some regard the Constitution as a document whose meaning was fixed by original historical understandings.[11] Others

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[11] For statements of the "originalist" position that the legitimacy of judicial decisionmaking requires adherence to the original understanding of constitutional language, see RAOUL BERGER, FEDERALISM 15–17 (1987); ROBERT H. BORK, THE TEMPTING OF AMERICA 143–46 (1990); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret*

think it a "living" charter with an evolving meaning.[12] Nor do disagreements about the Constitution's nature reflect simple misunderstandings. Only because the Constitution can mean so many things to so many people does it enjoy widespread sociological acceptance.

Fourth, because the Constitution invites disagreement about so much, many claims about the legal legitimacy of practices *under* the Constitution — especially those of the courts — rest on inherently uncertain foundations.

Fifth, however, as Part III argues at length, a virtual consensus exists that at least some judicial precedents suffice to ground further, future claims of legitimate judicial authority, even when those precedents were themselves erroneously decided in the first instance. Like the legal legitimacy of the Constitution, the legal legitimacy of precedent-based decisionmaking arises from sociological acceptance.

Sixth, constitutional arguments about which precedents deserve extension and which merit trimming frequently represent mixed judgments of legal and moral legitimacy. More generally, in the absence of greater consensus about the scope of judicial authority, purportedly legal questions, including questions of judicial legitimacy, often cannot be answered except on the basis of partly moral reasoning. As a result, issues of moral legitimacy often occupy the forefront of constitutional debates.

Finally, as should be evident already, constitutional law does not rest on a single rock of legitimacy, as many appear to assume, but on sometimes shifting sands. Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.

The remainder of this Article unfolds in six parts. Part I advances the claim that there are distinct legal, sociological, and moral concepts of legitimacy. It also introduces some of the terminological distinctions necessary to understand diverse legitimacy claims. Parts II and III develop the Article's principal substantive themes. Part II assesses the legitimacy of the Constitution, especially from a moral perspective.

Drafting History, 91 GEO. L.J. 1113, 1128–31 (2003); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38–47 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989); and Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996).

[12] *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (likening the relationship of contemporary constitutional law to the originally understood text of the documentary Constitution to "having a remote ancestor who came over on the Mayflower"); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977) (asserting that "the evolving content of constitutional law is not controlled, nor even significantly guided, by the Constitution, understood as an historical document").

Part III discusses issues of judicial legitimacy that arise *under* the Constitution. Partly for the sake of completeness but more for purposes of comparison, a brief Part IV addresses issues involving congressional, presidential, and administrative legitimacy. Against the background of the discussions that have preceded it, Part V furnishes an overview of the relationships among legal, sociological, and moral legitimacy in American constitutional law. Part VI supplies a brief conclusion.

I. THREE CONCEPTS OF LEGITIMACY AND THEIR OBJECTS

To make sense of the legitimacy claims that abound in constitutional debates, it is essential to identify the criteria to which those claims appeal. Legitimacy can be measured against three kinds of standards that produce different concepts of legitimacy — legal, sociological, and moral. Although these types of legitimacy are sometimes interconnected, it is analytically helpful to distinguish them.

A. Legitimacy as a Legal Concept

Legal legitimacy and illegitimacy depend on legal norms.[13] That which is lawful is also legitimate — although, as I shall explain below, legal decisions can sometimes be erroneous without thereby becoming illegitimate.[14] A charge of illegitimacy typically implies a strong condemnation not warranted by all legal errors.[15]

It is an open question, not clearly resolved by linguistic usage, whether characterizing a judicial decision as illegitimate necessarily implies that it has no legal claim to obedience. Under *Marbury v. Madison*,[16] a law that is constitutionally invalid or illegitimate possesses no authority to bind. With judicial rulings, however, the situation may differ. To cite a single example, critics who denounced *Bush v. Gore* as legally illegitimate did not necessarily imply that it should not be followed. It will therefore prove helpful to distinguish between the *substantive* legal legitimacy of judicial rulings, which reflects their correctness or reasonableness as a matter of law, and their *authorita-*

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[13] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments) (referring to a "statute's plainly legitimate sweep" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973))); United States v. Mendoza-Lopez, 481 U.S. 828, 838 n.15 (1987) (referring to "the legitimacy of an adjudicative procedure"); Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 797 (1989) (noting the "purely legalistic use" of the term "legitimate" to "mean the lawful").

[14] *See infra* notes 128–30 and accompanying text.

[15] *See* Calderon v. Thompson, 523 U.S. 538, 557 (1998) (distinguishing between legal errors that would not justify the recall of a judicial mandate and "a case of fraud upon the court, calling into question the very legitimacy of the judgment").

[16] 5 U.S. (1 Cranch) 137 (1803).

tive legitimacy or legally binding character, which may depend on standards that allow a larger margin for judicial error.

B. Legitimacy as a Sociological Concept

When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.[17] The sociological usage traces to Max Weber.[18] For Weber, legitimacy numbered among several foundations of political authority.[19] "Legal legitimacy," he thought, played the foremost role in explaining the generally law-abiding character of modern states.[20] In the Weberian sense, legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.

Following in Weber's trail, contemporary lawyers, sociologists, and political scientists have written extensively about the sociological legitimacy of particular governmental acts and also about the more general legitimacy of governmental institutions,[21] including the Supreme Court.[22] Surprisingly or not, references to sociological legitimacy

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[17] *See, e.g.*, SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 77 (1960) ("Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society."); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 26 (1990) (defining legitimacy by reference to "a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits"); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 307 (2003) ("Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.").

[18] *See* Tyler, *supra* note 17, at 307 ("The roots of the modern discussion of legitimacy are usually traced to Weber's writings on authority and the social dynamics of authority."). *See generally* 1 MAX WEBER, ECONOMY AND SOCIETY 33–38 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968) (distinguishing bases of legitimacy); *id.* at 215–16 (distinguishing among "pure types of legitimate domination"). For analysis of the diverse variety of senses in which Weber used the term "legitimacy," see Joseph Bensman, *Max Weber's Concept of Legitimacy: An Evaluation*, *in* CONFLICT AND CONTROL: CHALLENGE TO LEGITIMACY OF MODERN GOVERNMENTS 17 (Arthur J. Vidich & Ronald M. Glassman eds., 1979).

[19] *See* 1 WEBER, *supra* note 18, at 31, 213 (distinguishing legitimacy from other possible bases for obedience).

[20] *See id.* at 37.

[21] *See* Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL'Y 257, 257 (1986) (observing that "[t]he concept of legitimacy lies at the heart of social scientific analyses of the rise and fall of political regimes, the nature of legal order, and the significance of institutions such as religion and family in social relationships").

[22] *See, e.g.*, James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003) (identifying indicators for measuring Supreme Court legitimacy); Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675 (1994) (examining processes through which the Supreme Court

sometimes assume that public acquiescence in assertions of legal authority demonstrates their legitimacy.[23] If the term legitimacy is used in its strong Weberian sense, this assumption lacks adequate foundation. People may acquiesce in assertions of authority solely out of habit or self-interest.[24] Commentators who infer sociological legitimacy from mere acquiescence are therefore most charitably understood as using the term in a *weak* sense. Their references signify only that the public, or broad sections of it, have not overtly resisted claims of political authority.

A further point about sociological legitimacy bears notice. In both its strong and weak senses, sociological legitimacy is a variable, not a constant. In addition, decisions and institutions that enjoy high legitimacy with some groups may tend to lack sociological legitimacy among others.

C. Legitimacy as a Moral Concept

When the term is used in a moral sense, legitimacy is a function of moral justifiability or respect-worthiness.[25] Even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified.[26]

The leading theories of moral and political legitimacy have primarily addressed the legitimacy of constitutions or governmental regimes, though with important implications for the legitimacy of individual laws and official acts. These theories divide into two principal catego-

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might confer legitimacy on policy); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 764–65 (1994) (discussing public perceptions of Supreme Court legitimacy).

[23] *See, e.g.*, CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN DEMOCRACY 209 (1960) (inferring the legitimacy of judicial review from public acceptance); Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5, 18 (1968) (equating "legitimation" with "acceptance"). Robert Grafstein traces this pattern to Weber himself. *See* Robert Grafstein, *The Failure of Weber's Conception of Legitimacy: Its Causes and Implications*, 43 J. POL. 456, 462 (1981) (suggesting that "Weber's method leads most naturally to the imputation of a belief in legitimacy" as the explanation for observed behavioral patterns of obedience).

[24] *See, e.g.*, McEwen & Maiman, *supra* note 21, at 260 ("Self-interest and habit, in particular, may produce compliant conduct without any contribution from a sense of obligation." (citations omitted)); Tyler, *supra* note 17, at 302 ("Research suggests that the ability to threaten or deliver sanctions is usually effective in shaping people's law-related behavior.").

[25] *See, e.g.*, JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., Beacon Press 1979) (1976) ("Legitimacy means a political order's worthiness to be recognized." (emphasis omitted)); Michelman, *Ida's Way*, *supra* note 5, at 346 (noting that "governments are morally justified in demanding *everyone's* compliance with all the laws" and that citizens "can be morally justified in collaborating with the government's efforts to secure such compliance . . . if, and only if, that country's general system of government is . . . 'respect-worthy'").

[26] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 433–34 (1993) (Blackmun, J., dissenting) (maintaining that "the legitimacy of punishment is inextricably intertwined with guilt").

ries that yield rival conceptions of moral legitimacy. One consists of *ideal* theories, which attempt to specify the necessary conditions for assertions of state authority to be maximally justified or to deserve unanimous respect. Ideal theories come in two classic varieties. The first looks to the consent of the governed to provide the foundations of legitimate authority: people who have consented to be governed by specified principles cannot reasonably object when the government applies them.[27] For consent to justify coercion, theorists in the social contractarian tradition have usually maintained that it must be unanimous.[28] A second asserted foundation for moral legitimacy lies in ultimate standards of justice:[29] a perfectly just constitutional regime would be legitimate even without consent.

Perched between consent-based and substantive theories are those that root governmental legitimacy in hypothetical consent[30] —

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[27] *See, e.g.*, THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (terming "THE CONSENT OF THE PEOPLE" the "pure, original fountain of all legitimate authority"); Barnett, *supra* note 4, at 117 (noting that "genuine consent, were it to exist, could give rise to a duty of obedience"); George Klosko, *Reformist Consent and Political Obligation*, 39 POL. STUD. 676, 676–77 (1991) (identifying necessary conditions for consent to give rise to political obligation).

[28] *See* Leslie Green, *Authority and Convention*, 35 PHIL. Q. 329, 329 (1985) (noting that social contract theory adds the requirement of unanimity to consent theory).

[29] *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 747 (1991) (identifying a new public law movement committed to the idea "that the legitimacy of government rests primarily upon the values it represents, and not upon its procedural pedigree"); Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 J. INT'L CRIM. JUST. 26, 28 (2003) ("[T]he judgments of the Nuremberg and Tokyo Tribunals are viewed as legitimate because they were based on the highest 'principles of humanity' . . . ."); Joachim J. Savelsberg, *Cultures of Control in Contemporary Societies*, 27 LAW & SOC. INQUIRY 685, 705–06 (2002) ("In responsive law, . . . law's legitimacy is based on substantive justice . . . ."); *see also* Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 702 (2002) (arguing that consent cannot require compliance with grossly immoral commands); Raz, *supra* note 7, at 162–63 (arguing that consent cannot establish the legitimacy of authority in the absence of good reasons for that authority).

[30] *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (1971) (defining justice by reference to "the principles that free and rational persons would accept in an initial position of equality as defining the fundamental terms of their association").

In contrast with hypothetical consent theories, John Locke famously advanced an argument based on the concept of "tacit consent," under which mere residence in a country was understood to signal consent to its government and laws. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 392 (Peter Laslett ed., Cambridge Univ. Press, rev. ed. 1965) (1690) ("[E]very Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government . . . ."); *see also* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 153 (Maurice Cranston trans., Penguin Books 1968) (1762) ("After the state is instituted, residence implies consent . . . ."). But subsequent theorists generally reject this basis for political obligation. *See* Klosko, *supra* note 27, at 677–78 (noting rejection by subsequent theorists); Hanna Pitkin, *Obligation and Consent*, 59 AM. POL. SCI. REV. 990, 995 (1965) ("[W]hy go through the whole social contract argument if it turns out in the end that everyone is automatically obligated?").

whether everyone would consent to a scheme of governing principles, or would have good reason to consent, under fair conditions. According to John Rawls's "liberal" theory of legitimacy, for example, the "exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[31]

In contrast with ideal theories, *minimal* theories of moral legitimacy define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives. Proponents of minimal theories typically begin with the premise that decent human lives would be impossible without a government.[32] Against this background, minimal theories maintain that the need for effective government generates a moral duty to support any reasonably just legal regime, absent a fair prospect of its swift and relatively nonviolent replacement by more just institutions.[33]

Between the notions of ideal and minimal legitimacy, there obviously lies a large gap, available to be filled by theories that set the moral standard for governmental legitimacy lower than ideal theories yet higher than minimal theories. Randy Barnett has championed a theory that occupies this middle range.[34] In his view, the U.S. Constitution should be deemed morally legitimate only if the lawmaking processes that it establishes "provide good reasons to think that a law restricting freedom is necessary to protect the rights of others without improperly infringing the rights of those whose liberty is being restricted."[35] I am doubtful, however, that an intermediate theory can shed much light on central moral issues. Ideal theories establish the standards of justification to which political regimes ought to aspire,

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[31] JOHN RAWLS, POLITICAL LIBERALISM 217 (1993); *see id.* at 137 (offering a similar formulation); *see also* THOMAS NAGEL, EQUALITY AND PARTIALITY 30 (1991) ("The task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it.").

[32] *See* Michelman, *Ida's Way*, *supra* note 5, at 346, 353 ("Without the government's known and proven readiness to step in as necessary to make sure that everyone plays by the rules, the country's practice of legal ordering . . . by which the goods of union are produced, could not be expected to hold together.").

[33] *See* David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 43–44 (1999) ("Matters would have to be very bad for a state not to be legitimate . . . . It is as if we were at sea in a leaky boat. Unless there is another boat available to which we could easily move, there are strong considerations in favor of following the orders of the captain."); Raz, *supra* note 7, at 173 (asserting that "[a]s *long as they remain within the boundaries set by moral principles,* constitutions are self-validating in that their validity derives from nothing more than the fact that they are there").

[34] *See generally* Barnett, *supra* note 4.

[35] *Id.* at 146.

even if all existing governments fall short. Of comparable importance, minimal theories specify the threshold conditions that a regime must satisfy in order to deserve any support or justify any official coercion; for this purpose, the questions whether a regime is reasonably just and whether there is a better feasible alternative seem to be the right ones. By contrast, it is unclear what important moral function intermediate theories can usefully perform if they neither specify ultimate ideals nor set a minimal threshold for identifying when a constitution has forfeited all moral claim to support, notwithstanding the possibly anarchic consequences of its wholesale rejection.[36]

As these remarks may have suggested, some controversy exists about exactly which practical questions a theory of moral legitimacy ought to answer.[37] One question is whether exercises of coercive power by government officials are adequately morally justified.[38] This question focuses on the perspectives of those claiming authority and addresses the moral justifiability of their actions.[39] Another question is whether assertions of governmental authority deserve respect or especially obedience by those to whom they are directed.[40]

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[36] Above the threshold established by theories of minimal constitutional legitimacy, it seems unquestionable that some constitutional regimes are *relatively* more legitimate than others insofar as they more closely approximate ideals of justice or unanimous consent. If the ambition of intermediate theories were to assess relative moral legitimacy, their point would be clear. But Barnett's theory seems to have the different ambition of marking a single point along the scale of relative legitimacy beneath which there is no legitimacy and above which there is. My skepticism involves the moral utility of identifying such a point *above* the threshold marked by what I have called minimal theories.

[37] *Cf.* LESLIE GREEN, THE AUTHORITY OF THE STATE 221–22 (1988) (noting that "the problem of political obligation" subsumes a "whole family of questions" and that different classic writers have in fact addressed different questions).

[38] *See* Buchanan, *supra* note 29, at 693–94 (formulating "the agent-justifiability question").

[39] *See, e.g.*, KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 49 (1987) ("Justified coercion is a minimal condition of what one means by legitimate government . . . ."); Copp, *supra* note 33, at 16 (equating "the legitimacy of a state" with "a right to rule" (emphasis omitted)).

[40] *See* Copp, *supra* note 33, at 10 & n.11 (characterizing the position that "the legitimacy of a state would consist in its subjects' having a moral obligation to obey its law" as "[t]he traditional view" and finding it implicit in the classic writing of John Locke); *see also* Barnett, *supra* note 4, at 111 (equating a legitimate constitution or lawmaking system with one that creates "a prima facie duty to obey the laws it makes"); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 117 (1981) (maintaining that "legitimate authority implies an obligation to obey on the part of those subject to it").

In the view of some, the two questions that I have just distinguished — whether governments and their officials are morally justified in exercising coercive power and whether citizens have a duty to obey legal directives — ultimately collapse into one another: citizens have a duty to obey the law only in those cases in which officials are morally justified in enforcing it, and vice versa. *See, e.g.*, GREEN, *supra* note 37, at 235 ("It is usually suggested that [the questions of the government's right to rule and the duty of citizens to obey] are *correlative* in the way that claim rights are correlative to obligations."); Barnett, *supra* note 4, at 116 ("A lawmaking system is legitimate . . . if it creates commands that citizens have a moral duty to obey."). Others, however, insist that an answer to one of the questions does not necessarily entail an answer to the other. In

Among philosophers and political theorists, controversy persists about whether citizens have a "general" moral obligation to obey all the laws even of legitimate governments.[41] Because I have little to contribute to this classic debate, I shall attempt to bypass it in the following way: For purposes of this Article, I shall simply assume that a constitutional or legal regime is legitimate if, but only if, it meets the standards established by an ideal or minimal theory of constitutional legitimacy, as described above. I shall further assume that under a legitimate constitution or legal regime, officials' actions, including actions to enforce the law, are morally legitimate insofar as the officials are morally justified in acting as they do, regardless of whether citizens are under a general or specific moral obligation to obey the officials' directives.[42]

This assumption makes the moral legitimacy of official action depend heavily, though not necessarily exclusively, on the moral legitimacy of the Constitution. Because governmental officials take an oath to support the Constitution, they put themselves under at least a presumptive moral duty to obey the law, regardless of whether citizens who have not taken comparable oaths have similar obligations.[43] If the Constitution rises to the level of minimal legitimacy, then I assume

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their view, the government can have a moral "right to rule" without citizens having a moral duty to obey all lawful directives by the government. *See, e.g.*, GREENAWALT, *supra* note 39, at 47–61; M.B.E. Smith, *Is There a Prima Facie Obligation To Obey the Law?*, 82 YALE L.J. 950, 976 (1973) (asserting that "the questions 'What governments enjoy legitimate authority?' and 'Have the citizens of any government a prima facie obligation to obey the law?' both can be, and should be, kept separate"); Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211, 211–12 (1996) (equating political legitimacy with permissible coercion and maintaining that "political legitimacy is distinct from political obligation").

[41] *See* William A. Edmundson, *State of the Art: The Duty To Obey the Law*, 10 LEGAL THEORY 215 (2004) (assessing the state of the debate).

[42] The traditional view, still probably held by most non-philosophers, *see* Barnett, *supra* note 4, at 116, is that citizens have a general, prima facie moral obligation to obey all laws absent a supervening moral duty. But the traditional view has come under sustained scrutiny and attack. *See, e.g.*, Smith, *supra* note 40, at 950 (arguing that "although those subject to a government often have a prima facie obligation to obey particular laws . . . they have no prima facie obligation to obey all its laws"). Indeed, Professor Kress has described the position that there is no general obligation to obey the law as the "new orthodoxy." *See* Kress, *supra* note 1, at 290. This new orthodoxy, if such it be, does not imply that citizens typically have no obligation to obey particular laws; it maintains instead that there are many potential sources of moral obligations to obey particular laws, of which more than one, or sometimes none, may apply. *See id.* at 289–90 ("While no potential ground of legitimacy succeeds in establishing a general obligation for *all* citizens to obey the law, some grounds may nonetheless, under certain circumstances, obligate some citizens to obey some, or all, laws. . . . Summing the obligations arising from each of the particular grounds yields the full scope of citizens' obligations to obey the law.").

[43] *Cf.* GREEN, *supra* note 37, at 228 (noting that "public officials who have taken an oath to do so" probably have moral "obligations to obey all the laws"); DAVID LYONS, ETHICS AND THE RULE OF LAW 202 (1984) ("An official can be morally obligated, by virtue of his undertaking to apply the law as he finds it, to adhere to the law even when he judges (perhaps soundly and with justified confidence) that the law is defective.").

that officials who have pledged to uphold it will normally have morally compelling — and thus amply justifying — reasons for doing so. But if the Constitution is *only* minimally morally legitimate, and thus unjust in part or otherwise tolerant of legal injustices, there may be exceptional cases in which officials' pledges to uphold the law do not necessarily determine the moral legitimacy of their doing so. A general promise to uphold the law need not necessarily be morally conclusive if there are sufficiently powerful moral reasons to the contrary, as sometimes there may be under a constitution that is only minimally morally legitimate.[44]

D. An Aside on Legal Positivism and Natural Law

My distinction between legal and moral legitimacy assumes that a constitution, law, or official act can be legally legitimate without necessarily being morally legitimate: legal legitimacy depends on one set of tests, moral legitimacy on another. This distinction not only seems to me to be analytically useful, but also tracks ordinary linguistic usage familiar from constitutional debates. For example, it lets us talk about whether the fugitive slave laws once existing in the United States were morally legitimate — an interesting and important question that is not wholly captured by the alternative inquiry whether there were any true laws, or only purported ones, establishing slavery.

As the example of the fugitive slave laws will indicate, however, my distinction between legal and moral legitimacy will attract disagreement. In jurisprudential terminology, my analytical framework is "positivist": it assumes that an enactment can count as law despite serious moral defects.[45] By contrast, a natural law view maintains that an unjust law is "no law at all."[46] In treating arguments about moral

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[44] *See, e.g.*, Raz, *supra* note 7, at 178–79 (asserting that officials may sometimes have higher duties than their duty to obey the law).

[45] The view that the test or practices for identifying law within a particular legal system need not include a moral criterion as a matter of conceptual necessity has been termed "negative positivism." *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140 (1982) (defining "negative positivism" as denying "a necessary connection between law and morality"). I could not attempt to defend the negative positivist position in this Article without venturing very far afield, though I have expressed my reasons for accepting it elsewhere. *See generally* Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553 (1992). The negative positivist tenet that the tests for legal validity and legitimacy within a legal system need not include any moral criterion does not preclude the possibility that the test of legal validity within any particular legal system, such as that of the United States, may, as a matter of contingent fact, make legal validity and legitimacy dependent on moral criteria in at least some cases. *See* Coleman, *supra*, at 143 ("Because negative positivism is essentially a negative thesis, it cannot be undermined by counterexamples, any one of which will show only that, in some community or other, morality is a condition of legality at least for some [legal] norms.").

[46] The classic natural law claim that an unjust law is "no law at all" is traditionally ascribed to St. Augustine. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. II-I, Q. 95, Art. 2, Objec-

legitimacy as a category of constitutional discourse, I hope to capture some of the *spirit* of the natural law position that a formally valid law is nonetheless importantly deficient if it lacks moral legitimacy. Nevertheless, natural law proponents will think that my account overstates the distinction between legal and moral legitimacy. Insofar as the natural law position is judged correct, there would be a tighter interconnection between legal and moral legitimacy than I have suggested, and much of my analysis in the remainder of this Article would require amendment, as I shall note from time to time.

E. The Objects of Legitimacy Judgments

To clarify thinking about constitutional legitimacy, it does not suffice to distinguish among legal, moral, and sociological concepts. Additional relevant distinctions involve the *objects*, rather than the grounds, of legitimacy judgments.[47] Although legitimacy judgments have many possible objects, I shall divide them into just two categories, the second of which is an admitted composite. First, questions of legitimacy can be raised about the Constitution itself.[48] Second, legitimacy judgments can address particular institutions of government, such as the courts, the roles that such institutions play, and the laws enacted and official actions taken *under* the Constitution.

This distinction between possible objects of legitimacy judgments frames the agenda for the next three Parts of this Article. Part II addresses issues involving the legitimacy of the Constitution itself. Parts III and IV then take up issues involving the legitimacy of institutional roles and decisions once the Constitution is in place.

II. THE LEGITIMACY OF THE CONSTITUTION

Professor Barnett maintains that the most fundamental question about American constitutional law is whether we have a morally legitimate Constitution.[49] If the Constitution met his prescribed standard of legitimacy, he believes that it would justify the coercive enforcement of laws enacted and decrees issued under it.[50] If the Constitution were not legitimate, he suggests, then even governmental

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tion 4, *reprinted in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE 166 (2d ed. 1995).

[47] *See, e.g.*, DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 286–87 (1965) (differentiating the objects of legitimacy judgments).

[48] *See, e.g.*, Barnett, *supra* note 4 (exploring this question).

[49] *See id.* at 112 (characterizing the question as so fundamental and threatening that "others seem to fear" and avoid it).

[50] *See id.* at 145 (asserting that "a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just").

officials might have no reason to adhere to it.[51] These ideas warrant close examination.

Although our Constitution is morally legitimate, important qualifications attach to this conclusion. The Constitution is only minimally morally legitimate, not ideally so. What is more, it invites interpretive debates that it fails to resolve. Questions about the legal, sociological, and moral legitimacy of actions taken in the name of the Constitution therefore persist even after the Constitution's legitimacy is established. The blunt question of the Constitution's moral legitimacy thus proves less important than it might appear on the surface.

A. The Relationship Between the Constitution's Moral Legitimacy and Its Legal and Sociological Legitimacy

In inquiring about the Constitution's legitimacy, Barnett frames a moral question, which I shall address shortly. Preliminarily, however, it bears noting that the question of the Constitution's moral legitimacy presupposes its legal legitimacy. If the Constitution were not positive law, the question of its moral legitimacy would not arise.

Today the presupposition that the Constitution is valid law is undoubtedly correct. The situation once was more uncertain. Prior to the Constitution's ratification, the Articles of Confederation, which linked the thirteen then-existing states,[52] provided that significant changes in their terms required the state legislatures' unanimous consent.[53] Ignoring this requirement, the Constitution drafted by the Constitutional Convention provided that it would take effect upon ratification by special conventions in, rather than by the legislatures of, as few as nine states.[54] Under these circumstances, it was questionable in 1787 and 1788 whether the prescribed ratification process was legally legitimate and, relatedly, whether the draft Constitution, if so adopted, could establish a legally and sociologically legitimate government.

Significantly, the answer to those questions did not come through decisions by the Supreme Court or any other tribunal, but from widespread public acceptance of the new Constitution as legally valid. As is generally true with sociological legitimacy, the acceptance was probably never unanimous. To point only to the most urgent ground

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[51] *See id.* at 111 (maintaining that "if the Constitution is not legitimate, then it is not clear why we should care what it means").

[52] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 354–63 (1969) (describing government under the Articles of Confederation).

[53] *See* ARTICLES OF CONFEDERATION art. XIII, para. 1 (providing that no alteration could "hereafter be made in . . . [the Articles]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State").

[54] *See* U.S. CONST. art. VII.

for resistance, a Constitution that contemplated the race-based bondage of some could not plausibly have enjoyed unanimous acceptance.[55] Nevertheless, when enough people embraced the Constitution as the operative framework of government, there was no need for further questioning whether its ratification satisfied prior law.[56] Its sociological legitimacy gave it legal legitimacy,[57] at least under the positivist assumption that the test for what counts as law need not include any

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[55] In at least three places, the Constitution makes veiled references to slavery, even though it avoids the shameful term. *See* U.S. CONST. art. I, § 2, cl. 3 (basing a state's representation in the House of Representatives on its free population and three-fifths of "all other Persons" within its territory); *id.* art. I, § 9, cl. 1 (barring Congress from abolishing the slave trade before 1808); *id.* art. IV, § 2, cl. 3 (providing for the return of runaway slaves).

[56] The extent to which the framing and ratification of the Constitution accorded with requirements of preexisting law has recently stirred debate. *Compare* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017 (1984) (asserting that there cannot be "any doubt" that the Convention was acting beyond its authority), *with* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 464–69 (1994) (asserting the availability of legal justifications for the course of action followed at the Convention and after). For my own part, I lean toward the view that the mode of the Constitution's adoption could not be justified under prior law, but nothing in my argument hinges on this conclusion.

The argument that the Constitution's adoption lacked legal sanction is relatively straightforward and consists of two principal parts. First, the Constitution's ratification by state conventions, *see* U.S. CONST. art. VII, violated Article XIII of the Articles of Confederation, which provided that no alteration could "hereafter be made in any of them [the Articles]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." ARTICLES OF CONFEDERATION art. XIII, para. 1. In reply to this argument, Professor Amar has maintained that the Articles of Confederation were in essence a treaty, not a constitution, and that under international law a treaty that had been breached — as the Articles of Confederation had been by many or all of the states in some respects — ceased to be legally binding. *See* Amar, *supra*, at 464–69. As Amar acknowledges, however, a "breached treaty was voidable," not void, as a matter of international law, *see id.* at 468, and no state had taken the step of declaring the Articles void or withdrawing from them at the time of the Constitution's ratification. Second, the objection can be raised that the ratification of the Constitution by state conventions violated a number of state constitutions by stripping state legislatures of preexisting power in ways not authorized by state constitutional law. In rejecting this argument, Professor Amar maintains that the "right" of the people to alter the structure of government without following otherwise constitutionally prescribed legal forms was in fact recognized by the declarations of rights or by other background law in every state. *See id.* at 475–87. Amar's argument on this point is challenging and ingenious as well as carefully researched, but my own tentative conclusion is that in at least some of the states, any "right" of a majority of the people to change the frame of government without following specifically prescribed legal forms would need to count as a moral rather than a legal right. Again, however, my principal point is that the Constitution's legally valid or authoritative status arises from its acceptance and does not depend on the question, which is moot in every practical sense, whether the Constitution's ratification could be justified under prior law.

[57] *See* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 154 (Sanford Levinson ed., 1995) (asserting that the fact of the Articles of Confederation's displacement by the Constitution "is just that — a fact").

necessary moral criterion (such as one that might prevent a pro-slavery constitution from rising to the level of "law" at all).[58]

The process by which the Constitution achieved legal legitimacy contains a large lesson about the dependence of legal legitimacy on sociological legitimacy.[59] With respect to the most fundamental matters, sociological legitimacy is not only a necessary condition of legal legitimacy, but also a sufficient one[60] (except insofar as one may accept the natural law premise, of which I am skeptical, that a morally unjust law is not law at all[61]). The Constitution is law not because it was lawfully ratified, as it may not have been, but because it is accepted as authoritative. Similarly, the Articles of Confederation forfeited their legal legitimacy when they lost their sociological legitimacy. After the Articles had lost their sociological legitimacy, the question whether the new Constitution was adopted as required by the Articles became moot for all practical purposes.[62]

This blunt statement about the relation of the Constitution's legal legitimacy to its sociological legitimacy deliberately skirts many complexities. In particular, in asserting that the Constitution enjoys legal legitimacy because it is "accepted," I mean to elide the questions of exactly what needs to be accepted and by whom for the Constitution to enjoy its lawful status. In his classic *The Concept of Law*,[63] H.L.A.

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[58] *See supra* p. 1801. The thesis that the Constitution became law simply because it was accepted as such reflects the negative positivist tenet that the ultimate test for law need not include any moral criterion as a matter of conceptual necessity. Significantly, however, negative positivism does not preclude the view, which I believe to be true, that *currently* prevailing tests for what is lawful under the Constitution do sometimes incorporate moral criteria. *See* Fallon, *supra* note 45, at 582–85 (defending a version of "soft" conventionalism or positivism as providing the best account of the relation between law and morality within the current American legal system). *See generally* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 107 (2001) (advancing a theory of "inclusive legal positivism" maintaining that the criteria of legality are established by convention but acknowledging "that sometimes the morality of a norm can be a condition of its legality"); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 81–82 (1994) (defending a theory of inclusive legal positivism that recognizes the possibility of a contingent rather than a necessary connection between law and morals, pursuant to which "the identification of a rule as valid within a legal system, as well as the discernment of the rule's content and how it bears on a legal case, can depend on moral factors").

[59] *See* Schauer, *supra* note 57, at 153–57 (emphasizing that the question of a constitution's validity cannot be resolved by the constitution's text but depends instead on whether the constitution is accepted as authoritative).

[60] *See* H.L.A. HART, THE CONCEPT OF LAW 116 (2d ed. 1994) (asserting that the necessary and sufficient conditions for the existence of a legal system are that legally valid rules of behavior must generally be obeyed and that the "rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials").

[61] *See supra* note 46 and accompanying text (discussing the natural law view).

[62] *See* Schauer, *supra* note 57, at 154 & n.20 ("No amount of illegality according to the Articles would render the 1787 Constitution any less the law now . . . .").

[63] HART, *supra* note 60.

Hart suggested that for a legal system to exist, government officials must embrace shared legal norms — such as those embodied in the Constitution — as providing reasons for action and grounds for criticism.[64] As Hart took pains to note, however, not everyone's acceptance of legal norms need rise to the same level of critical and self-critical practice. "The ordinary citizen," he wrote, "manifests his acceptance largely by acquiescence."[65]

Assuming Hart to have been roughly correct, I say without hesitation that the Constitution is legally valid today because it is accepted as such, but in light of his caveat, this is a vague claim and in some respects a weak one. In particular, it does not entail that the Constitution enjoys sociological legitimacy in the strong, Weberian sense in the eyes of all, or even most, of the population. We know relatively little about the attitudes of those who have merely acquiesced. What is more, it seems likely that the nature and degree of acceptance varies from group to group. This is true not only of the Constitution but also of the roles played by courts and others under the Constitution.

Once the Constitution is accepted as legally valid, an additional basis for assessing claims of legal validity and legitimacy obviously exists. The legal legitimacy of governmental actions will typically depend on their conformity with constitutional norms.[66] As is illustrated by the Constitution itself, however, not all legally valid authority needs to be or even could be derived from more ultimate, purely legal norms. If embrace and acceptance confer legal validity on the Constitution, they might also confer legal validity on norms that supplement the written Constitution or even partially displace it.[67] For now I state this point as a conceptual possibility; I shall restate it below as a claim about contemporary constitutional law.

B. Assessing Ideal and Minimal Moral Legitimacy

The question of the Constitution's moral legitimacy is irreducibly moral in nature, not capable of resolution through historical inquiry. Despite its tautological character, this is an important point, not self-

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[64] *See id.* at 116–17 (asserting that officials must regard applicable rules of recognition for identifying valid laws as "common standards of official behaviour and appraise critically their own and each other's deviations as lapses").

[65] *Id.* at 61.

[66] Amendments to the Constitution may thus be valid because they are adopted pursuant to the standards prescribed by Article V, and federal legislation is valid if it satisfies constitutionally established criteria.

[67] *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 111–26 (2001) (arguing that the United States has unwritten constitutional norms, including norms of interpretation, that supplement the written Constitution); Schauer, *supra* note 57, at 156–57 (arguing that partial displacement and supplementation of a written constitution can occur as a result of public acceptance rather than constitutionally authorized procedures).

evident to everyone. Many believe that the Constitution possesses moral legitimacy today because it was lawfully adopted by the founding generation and subsequently amended through equally lawful processes.[68] But this line of thought is mistaken. First, as I have suggested, it is doubtful that the original Constitution was *lawfully* ratified; its ratification arguably contravened the Articles of Confederation as well as applicable state law.[69] Second, even if the Constitution had been lawfully adopted, it would not provide a morally legitimate foundation for coercive action today unless coercion pursuant to it could be justified *morally*.[70]

If we take seriously the question of the Constitution's contemporary moral legitimacy, few would contend that it fully satisfies the requirements of an ideal theory.[71] Although it is sometimes said that the Constitution derives its legitimacy from consent,[72] most people living today have never actively consented, and some would refuse if asked. With consent-based theories failing to establish the Constitution's ideal moral legitimacy, a defender might be tempted by the notion that con-

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[68] *See* Barnett, *supra* note 4, at 122–23 (describing though not endorsing this familiar chain of thought); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1098 (1989) (describing "the majoritarian argument for originalism" as reflecting the premise "that the Constitution gets its legitimacy solely from the majority will as expressed at the time of enactment"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) (observing that "prevailing theories of constitutional interpretation . . . rest on the view that the Constitution is binding because someone with authority adopted it").

[69] *See supra* p. 1803; *supra* note 56 and accompanying text. A comparable question exists as to whether the ratification of the Fourteenth Amendment, which creates guarantees of due process and equal protection applicable against the states, satisfied the requirements of Article V: a Reconstruction Congress effectively coerced the states of the former Confederacy into ratification by making it a condition of readmission to the Union. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 197–234 (1998) (describing the pressures brought to bear on the former Confederate states to secure ratification of the Fourteenth Amendment); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2042–46 (2003) (recounting the Southern states' "[r]atification by [f]orce" of the Reconstruction Amendments). *But see* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 451–57 (2001) (arguing that federal coercion likely made little difference in the former Confederate states' decisions to ratify the Reconstruction Amendments, and arguing against reading a "limited duress principle" into Article V).

[70] As David Strauss puts it, "[t]he Framers do not have any right to rule us today." Strauss, *supra* note 68, at 892. Nonetheless, we may have good reasons to accept, whether in whole or in part, the framework that the Framers established. *See id.* at 898 ("We follow judgments made long ago . . . for two reasons — serious judgments made in good faith merit some deference; and, more important, those judgments have worked, at least well enough to enjoy continued acceptance . . . .").

[71] *See supra* pp. 1797–98.

[72] *See, e.g.*, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1291 (1997) ("The people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves . . . .").

sent is unnecessary because the Constitution is perfectly just. This, however, is a claim that few, if any, are likely to defend.[73]

On the surface, an argument based on hypothetical consent might appear more promising. A champion might maintain that the Constitution embodies a set of political principles, stated at a suitably high level of generality, to which all reasonable people would consent. Ultimately, however, this suggestion fares no better than arguments that the Constitution is perfectly just. If the Constitution is flawed, then all reasonable people would not necessarily agree to it under fair bargaining conditions. To take a particularly obvious though perhaps minor ground for objection, the provision guaranteeing each state equal representation in the Senate, regardless of population, reflects a historical compromise,[74] not a principle to which all reasonable people would agree.

Other objections could also be raised. Our Constitution does not directly address fundamental issues of distributive fairness involving, for example, rights to nutrition, housing, education, and health care.[75] Some theories of justice recognize governmental obligations to promote a relatively equal distribution of important social goods;[76] others deny such obligations.[77] Given the fundamental character of issues of distributive justice, some reasonable people might withhold consent to a Constitution that did not contain clear commitments concerning these matters.[78] Moreover, even with regard to rights that the Constitution

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[73] *See* William N. Eskridge, Jr. & Sanford Levinson, *Introduction* to CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 1, 4 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (summarizing the conclusion of contributing essayists that "the Constitution is chock full of stupid provisions").

[74] *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91–106 (1913) (describing events surrounding "the great compromise").

[75] Other constitutions do confront such issues. *See, e.g.*, Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898–1908 (2004) (describing the positive social rights contained in the Irish, Indian, and South African constitutions); *cf.* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (asserting that "every state constitution in the United States addresses social and economic concerns" and provides the foundation for "positive rights rang[ing] from the right of children to receive free public schooling, to the right of workers on public construction projects to receive 'prevailing' wage rates" (footnote omitted)).

[76] *See, e.g.*, RAWLS, *supra* note 31, at 282–83 (advancing a "difference principle" maintaining that income disparities are consistent with justice only if they tend to promote the interests of everyone, including the least advantaged).

[77] *See generally, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (defending a rights-based theory of justice resistant to governmental redistribution of wealth).

[78] Interestingly, however, John Rawls, who championed a "difference principle" imposing stringent requirements of distributive equality as one of the two fundamental principles of justice, *see supra* note 76 and accompanying text, did not include the difference principle or "the principle of fair opportunity" among the essential elements of a just constitution. *See* RAWLS, *supra* note 31, at 227–30 (explaining the "grounds for distinguishing" those principles of justice that count as "constitutional essentials" from "the principles governing social and economic inequalities," which

does guarantee, its formulations are often vague and its practical meaning therefore uncertain. As Frank Michelman has argued, some reasonable parties might decline to consent to a constitutional compact that gave no definitive assurance concerning how matters of moral urgency would be resolved — whether capital punishment would be permitted, whether abortion would be protected or forbidden, whether religious education would or would not be subsidized, and so forth.[79]

Insofar as we apply ideal theories of moral legitimacy, we thus seem destined to reach a gloomy conclusion: the Constitution is not morally legitimate.

If we move from an ideal to a *minimal* theory, the Constitution's prospects for passing muster immediately look better. As noted above, the premises supporting minimal theories are spare and uninspiring: because nearly any legal regime is better than none, officials will normally be justified in enforcing existing law, and citizens will typically have a duty to support even flawed legal regimes that exist within their communities (even if they do not have a "general" obligation to obey every individual law) unless there is a better available alternative.[80] Surely, one might think, the Constitution must meet this minimal standard. I believe that it does, but an adequate defense even of this position requires the confrontation of one further obstacle.

C. What Is the Constitution?

In order to judge the Constitution minimally morally legitimate, we need to know what the Constitution is. On the surface, this may look like a trivially easy challenge: the Constitution is that set of norms duly adopted by the people of the United States through constitutionally prescribed processes and repeatedly printed in documents noncontroversially labeled as the United States Constitution. Significantly, however, even this bland statement papers over problems. As noted above, the original Constitution may not have been ratified legally under preexisting law.[81] Even if we put this issue to one side, however, to point to the words of the written Constitution will not suffice without further specification of what kind of document the Constitution is within the American legal system. Many countries have had written constitutions that appeared on paper to meet high moral standards but

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do not). For a discussion of Rawls's views on this matter, see Michelman, *Justice as Fairness*, *supra* note 5.

[79] *See* Michelman, *Ida's Way*, *supra* note 5, at 362 (arguing that "the respect-worthiness of any constitution, under an adequately complete description of it, will be subject to the same intractable, reasonable disagreements over major policy choices" that the appeal to principles at a high level of generality was meant to avoid).

[80] *See supra* notes 32–33 and accompanying text.

[81] *See supra* p. 1803; *supra* note 56 and accompanying text. Similar uncertainties attend the lawfulness of the Fourteenth Amendment's adoption. *See supra* note 69.

that were ignored in practice or otherwise rendered meaningless through interpretation.[82] To adjudge such constitutions morally legitimate would be at best an empty exercise and at worst a misleading one. To make a meaningful determination whether the Constitution is minimally morally legitimate, we therefore need to know more about what it means in practice *as law*.[83]

When the question of the Constitution's legal force and meaning is pressed, it becomes obvious that there is widespread disagreement — not least among judges, Justices of the Supreme Court, and legal elites — about what type of document the Constitution is and what it means.[84] For example, "originalists" claim that the Constitution has a historically determinate meaning: it means what those who wrote and ratified its various provisions understood those provisions to mean.[85] Others who agree that the Constitution has a determinate meaning believe that that meaning comes not from history but from moral reality: many of the Constitution's terms are moral terms, and they take their meaning from objective principles of moral right.[86] Some believe that "the Constitution" encompasses not only the words of the formal text, but also historic methods of interpretation and most judicial precedents.[87] Others regard the Constitution, or at least much of it, as a de-

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[82] *See* Heinz Klug, *Five Years On: How Relevant Is the Constitution to the New South Africa?*, 26 VT. L. REV. 803, 804 (2002) (describing the practical irrelevance of the Colombian constitution); Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, LAW & CONTEMP. PROBS., Spring 2002, at 251, 279–80 n.131 (describing the lack of enforcement of certain rights declared in the Soviet Constitutions of 1936 and 1977).

[83] My argument here largely follows Michelman, *Ida's Way*, *supra* note 5, at 362; and Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement*, *in* HABERMAS AND PRAGMATISM 113, 118–23 (Mitchell Aboulafia et al. eds., 2002).

[84] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (characterizing legal practice as "argumentative" and discussing theoretical disagreement about the grounds of law); Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999) (discussing methodological disagreement in constitutional law).

[85] *See, e.g.*, sources cited *supra* note 11.

[86] *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5, 304–05 (1985) (advocating a "natural law" interpretation of the Takings Clause); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985) (arguing that legal interpretation should reflect moral right); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–9 (1996) (observing that many constitutional provisions "refer to abstract moral principles" and thus incorporate those abstract moral principles, rather than the framers' and ratifiers' understanding of how those principles would be applied, into the Constitution).

[87] *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) (discussing a "catholic" position with respect to constitutional interpretation under which unwritten tradition supplements the constitutional text as an authoritative source of constitutional doctrine and institutional interpretations possess binding authority).

liberately vague articulation of ideals the content of which should be supplied by the American people, acting through politics.[88]

Nor is this the end of disagreement. Many Americans experience the Constitution as part of an integrated normative universe in which no sharp boundaries divide the legal from the moral.[89] Moral diversity thus produces a plurality of views about what the Constitution substantively requires as varied groups — including liberals and conservatives, believers in different religions and in no religion at all, traditionalists and iconoclasts — "establish their own meanings for constitutional principles."[90] The result may be "a radical dichotomy between the social organization of law as power and the organization of law as meaning,"[91] but if constitutional meanings could not be experienced in diverse ways, then the fabric of acceptance that surrounds the Constitution might unravel.

With the Constitution's meaning being "essentially contested,"[92] Professor Michelman suggests that to inquire about the moral legitimacy of the Constitution is to ask the wrong question.[93] In his view, the only meaningful questions of moral legitimacy concern the American legal system as a whole, including not only the Constitution and constitutional precedents and judicial methods of constitutional interpretation, but also the law of the fifty states.[94]

Although Michelman makes a forceful point, I think it possible to accept his central insight without proceeding all the way to his conclusion — which I resist because it forecloses all but the most holistic inquiries into moral legitimacy. If the moral legitimacy of the entire edifice of American law either stands or falls together, then it would have been impossible to judge the moral legitimacy of the original Constitution's Fugitive Slave Clause,[95] or of the original Constitution in light of its Fugitive Slave Clause, without making a global judgment about the moral legitimacy of the rest of the nation's law, including the tort

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88 *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (advancing a historical and normative theory of "popular constitutionalism").

89 *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 9 (1983) ("A legal tradition is . . . part and parcel of a complex normative world.").

90 *Id.* at 25.

91 *Id.* at 18.

92 *Id.* at 17 & n.46 (citing W.B. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157–91 (1964) as the origin for the term "essentially contested concept").

93 *See* Michelman, *Contract for Legitimacy*, *supra* note 5, at 105.

94 *See id.* (maintaining that legitimacy judgments are not made "law by law" but instead reflect assessments "of an entire system, or practice, or 'regime' of government").

95 U.S. CONST. art. IV, § 2 (providing that "[n]o Person held to Service or Labour" under the laws of one state could escape that status upon flight to another state but "shall be delivered up on Claim of the Party to whom such Service or Labour may be due").

and criminal law of the "free" states.[96] Nor, today, could we make judgments about the moral legitimacy of individual laws. Resisting the conclusion that the moral legitimacy of parts of the law can never be appraised independently of the whole, I believe that the moral legitimacy of the Constitution as it exists today can sensibly be judged in light of what has occurred within the framework of government that the written Constitution establishes, provided we can specify what the Constitution is with adequate precision.[97]

For this purpose, it should suffice to say that the Constitution is the document and set of amendments thereto that are broadly accepted as the written expression of the foundational commitments of the United States as a political community and that therefore structure debate about how those commitments ought to be understood, both inside and outside the courts. In elaborating this formulation, we should recognize that debate about the Constitution is reasonably open-ended and frequently contentious. The extent of discord proves maddening at least some of the time to nearly everyone involved. Nevertheless, there appears to be enough agreement, sometimes resulting from an overlap of otherwise competing views, to sustain a constitutional regime that can be characterized as one of government under law.

Described as the document that is accepted as expressing the nation's foundational commitments and that structures debate about their meaning, the Constitution could not plausibly count as ideally legitimate. Probably no one thinks it perfect.[98] In part because it leaves so much open to debate,[99] it provides no absolute assurance against morally lamentable laws and policies. Nor, for those who believe that political disagreements can be resolved fairly only through democratic

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[96] *See* LYONS, *supra* note 43, at 107 ("While it seems reasonable to hold that laws enforcing slavery could not be justified, it can be assumed that this aspect of the law did not render all the rest unjustifiable.").

[97] Once judgments about the moral legitimacy of less than the whole body of law are allowed, it of course becomes open to debate whether the proper focus is the whole Constitution, rather than particular provisions of the Constitution (such as the Fugitive Slave Clause of the original Constitution). My own view is that this is ultimately a moral question that does not permit a categorical answer. In ordinary cases there will be good moral reasons to focus on the Constitution as a whole. Nearly any imaginable government will either make or enforce political decisions with which some citizens conscientiously and fundamentally disagree. It is therefore vital to the rule of law that officials and citizens accept the moral authority of a Constitution that embodies or authorizes decisions with which they fundamentally disagree. But when certain parts or aspects of an otherwise morally legitimate constitution exceed some relatively high threshold of moral wrongness, the only acceptable option may be to assess the legitimacy of the morally egregious parts separately from the remainder.

[98] Indeed, Professor Balkin has argued that the Constitution may actually be "evil" in some respects. *See* J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1706–20 (1997).

[99] *See* Michelman, *Contract for Legitimacy*, *supra* note 5, at 123 (asserting that "the verbiage of the nominal constitution tells [us] too little of what [we] need[] to know").

processes,[100] does the Constitution always enable majorities to rule. Sometimes the courts impose their judgments. At least for the time being, however, I think that the Constitution satisfies the requirements of minimal legitimacy, as described above.

D. The Limits of Constitutional Legitimacy

The conclusion that the U.S. Constitution is only minimally morally legitimate should not occasion shock or depression. There are probably no actual constitutions that would satisfy an ideal theory of legitimacy.[101] Nevertheless, two conclusions deserve emphasis.

First, a successful defense of the Constitution's minimal legitimacy provides no warrant for moral smugness. By their nature, appeals to standards of minimal legitimacy aim to justify the status quo, not on the ground that it enshrines justice, but largely on the basis that it beats anarchy. Our Constitution and the legal regime that it helps to establish are surely better than anarchy, but so is the constitution of nearly every other nation-state.[102]

Second, if the Constitution is only minimally legitimate, questions arise about whether officials will always be morally justified in enforcing it and the laws enacted under it. Whereas officials would presumably always be morally justified in abiding by an ideally legitimate constitution, a merely minimally legitimate Constitution, such as ours, does not so obviously resolve all questions about the moral legitimacy of laws and official action.

III. JUDICIAL LEGITIMACY UNDER THE CONSTITUTION

Claims about judicial legitimacy under the Constitution come up in varied contexts. No single thread runs through all of them. As I have said, it is not always possible to discern which kind of legitimacy — legal, sociological, or moral — particular authors mean to put in issue. Reserving that question for the moment, I think it fair to say that the most recurrent disputes about judicial legitimacy involve judicial power to recognize rights that are not relatively uncontroversially defensible by reference to the Constitution's language and its original

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100 *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 188–89 (1999).

101 *Cf.* A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY 155–56 (2001) (acknowledging that, as measured by his theoretical standards, no existing states are legitimate).

102 *See* Copp, *supra* note 33, at 43 ("Matters would have to be very bad for a state not to be legitimate . . . ."); Raz, *supra* note 7, at 173 ("[W]ithin the broad bounds set by moral principles, . . . [t]he constitution of a country is a legitimate constitution because it is the constitution it has."). It is nevertheless possible, of course, for some constitutions to be *relatively* more legitimate than others under theories of minimal moral legitimacy insofar as they are relatively more just. *See, e.g.*, Barnett, *supra* note 4, at 147 (proclaiming the legitimacy of legal regimes not resting on unanimous consent to be "a matter of degree").

understanding.[103] My principal concern in this Part is with general issues of judicial role and methodology. Obviously, however, judgments about legitimate judicial authority blend with assessments of judicial performance in particular cases. For illustrative purposes, I shall therefore focus primarily on two famous decisions under the Due Process Clause, *Bolling v. Sharpe*[104] and *Roe v. Wade*,[105] and on a case decided primarily under the Equal Protection Clause, *Bush v. Gore*.[106]

In *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*,[107] the Supreme Court held that the Due Process Clause of the Fifth Amendment forbids racial discrimination by the federal government on substantially the same terms that the Equal Protection Clause bars discrimination by the states. Before ruling in *Brown* that the Equal Protection Clause precludes the states from maintaining segregated schools, the Justices manifested deep anxiety about the legitimacy — at least in the legal sense and possibly in others too — of the role they were about to assume.[108] *Brown* departed from historic understandings of the Equal Protection Clause, and it demanded revolutionary change. *Bolling*, which involved race discrimination by the federal government in the District of Columbia school system, had a narrower reach than *Brown*, but it raised comparably acute issues about legally and morally legitimate judicial power. The Due Process Clause contains no reference to race discrimination or even to the

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[103] *See, e.g.*, Ronald Dworkin, *Rawls and the Law*, 72 FORDHAM L. REV. 1387, 1401 (2004) (noting that when the Supreme Court recognizes a "new right, . . . its own standing and legitimacy may be called into question"); Strauss, *supra* note 68, at 878 ("An air of illegitimacy surrounds any alleged departure from the text or the original understandings.").

Not all debates implicating issues of judicial legitimacy have involved the recognition of new individual rights. For example, legitimacy debates have surrounded judicial decisions identifying limitations on congressional power under the Commerce Clause, *see* United States v. Morrison, 529 U.S. 598, 640 (2000) (Souter, J., dissenting) (questioning "the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation"), defining and enforcing state sovereign immunity, *see* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) (noting that "[t]he principal thrust of Justice Breyer's dissent is an attack upon the very legitimacy of state sovereign immunity itself"), and providing narrow interpretations of constitutional guarantees that may historically have been understood more robustly, *see* Maryland v. Craig, 497 U.S. 836, 861, 869–70 (1990) (Scalia, J., dissenting) (protesting that the Court had no constitutional authority to uphold a defendant's exclusion from the room in which a child gave testimony against him in the face of the Sixth Amendment guarantee that "[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (second alteration in original) (quoting U.S. CONST. amend. VI)).

[104] 347 U.S. 497 (1954).

[105] 410 U.S. 113 (1973).

[106] 531 U.S. 98 (2000).

[107] 347 U.S. 483 (1954).

[108] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 292–312 (2004); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 30–44 (1979); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1894–1929 (1991).

equal protection of the laws.[109] What is more, the Due Process Clause of the Fifth Amendment was ratified in 1791, when race discrimination was widely accepted and the Constitution protected chattel slavery.[110] When the Due Process Clause was ratified, virtually no one thought that it prohibited the federal government from discriminating based on race. *Bolling* derived some support from judicial precedent, but mostly from dicta.[111] The Court could not claim to follow any square prior holding.

Like *Bolling*, *Roe v. Wade* was decided under a due process analysis. It embodied the Supreme Court's determination — also lacking in specific historical support — that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment[112] encompassed a "fundamental" right of pregnant women to terminate their pregnancies in the absence of a "compelling" governmental interest.[113] The government's interest in protecting fetal life grows compelling, the Court held, only when the fetus becomes "viable" or capable of life outside the womb.[114] *Roe* drew support from precedent insofar as it held that the right to abortion is fundamental. Earlier decisions had recognized fundamental rights involving procreation and childbearing.[115] One had flatly affirmed "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[116] But the question whether the government had a supervening interest in protecting fetal life was new.

In *Bush v. Gore*,[117] the Supreme Court's per curiam opinion stopping a recount of presidential ballots following the disputed 2000 election in the state of Florida rested primarily on equal protection

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[109] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law . . . .").

[110] *See supra* note 55.

[111] In *Korematsu v. United States*, 323 U.S. 214 (1944), in the course of upholding a wartime military order excluding all persons of Japanese descent from parts of the West Coast of the United States, the Court stated in passing that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny." *Id.* at 216.

[112] Although *Roe* rested on the Due Process Clause of the Fourteenth Amendment and *Bolling* on the Due Process Clause of the Fifth Amendment, the language of the two provisions is almost identical.

[113] *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

[114] *See id.* at 163.

[115] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (childrearing).

[116] *Eisenstadt*, 405 U.S. at 453 (emphasis omitted).

[117] 531 U.S. 98 (2000).

grounds.[118] According to the majority, a recount conducted under a vague instruction that counters should attempt to discern "the intent of the voter" would have presented the risk that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[119] Based on this threat, the Court found an equal protection violation "in the special instance of a statewide recount under the authority of a single state judicial officer" who was otherwise competent to propound more determinate standards.[120] The Court emphasized that its holding was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[121] By a 5–4 vote, the Justices also held that Florida election officials could have no chance to cure the equal protection problem by promulgating clearer standards.[122] A state law deadline for certifying election results lay at hand, the majority said, and no time remained to implement a remedy.[123]

Bush v. Gore attracted a swarm of allegations of illegitimacy.[124] Perhaps the most common criticism maintained that the Court's majority had engaged in manipulative, result-oriented decisionmaking, contrary to some of the majority Justices' "own previously declared judicial principles — principles they still believe in and will apply in other cases."[125] Among other things, the majority Justices made no effort to reconcile their ruling with historic understandings of the Equal Protection Clause, which had not previously been interpreted to forbid vote-counting that occurs under a vague standard but is subject to ju-

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[118] *See id.* at 104–10. The Court's opinion also cited the Due Process Clause. *See id.* at 110. In addition, a concurring opinion authored by Chief Justice Rehnquist and joined by Justices Scalia and Thomas supported the result by arguing that the partial recount ordered by the Florida Supreme Court defied the clear dictates of relevant Florida statutes and thereby violated Article II, Section 1, Clause 2 of the Constitution, which prescribes that each state shall choose its presidential electors "in such Manner as the *Legislature* thereof may direct." *See id.* at 111–15 (Rehnquist, C.J., concurring) (quoting U.S. CONST. art. II, § 1, cl. 2 (emphasis added)).

[119] *Bush*, 531 U.S. at 105–06.

[120] *Id.* at 109.

[121] *Id.*

[122] *See id.* at 111; *see also id.* at 146 (Breyer, J., dissenting) ("[T]here is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case [for recount] in accordance with a single uniform standard."). This portion of Justice Breyer's dissent was joined by Justices Stevens, Ginsburg, and Souter. *Id.* at 144.

[123] *See Bush*, 531 U.S. at 111.

[124] *See* Yoo, *supra* note 2, at 775 (noting the "flurry of attacks" on the Court's legitimacy).

[125] ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 174 (2001). In Dershowitz's view, previous decisions committed some of the Justices in the majority to the view that the Due Process and Equal Protection Clauses should not be interpreted to forbid practices that were historically understood to accord with applicable constitutional norms and that the Supreme Court should defer to state court interpretations of state law. *See id.* at 121–72.

dicial review.[126] As might be expected, however, *Bush v. Gore* had defenders, too.[127]

The questions of judicial legitimacy presented by these cases can be approached from a legal, a sociological, or a moral perspective, or from some combination of the three. I shall begin with legal legitimacy, then consider sociological and moral issues.

A. Judicial Legitimacy as a Legal Concept

In considering issues involving the constitutional legitimacy of exercises of judicial power, it will help to distinguish two sets of questions. First, when the term is used in a legal sense, what does a claim of judicial legitimacy or an allegation of illegitimacy typically *mean*? For example, when critics denounce *Roe v. Wade* or *Bush v. Gore* as legally illegitimate, are they just using a fancier word to say that the decision was wrong? Does a defense of the decisions' legitimacy endorse their correctness? Or, despite the dependency of legal legitimacy on legal norms, are further complexities involved? Second, what are the criteria by which legal legitimacy and illegitimacy ought to be measured?

1. The Meaning of Claims of Legal Legitimacy and Illegitimacy. — Legal legitimacy seems plainly related to lawfulness and illegitimacy to lack of lawfulness, but the nature of the linkage is less clear. Without either pretending to capture the import of every claim or attempting to prescribe a linguistically preferred usage, I begin with two general observations. First, a claim of legal legitimacy, when applied to exercises of judicial power, is often a distanced evaluation amounting to less than full endorsement.[128] For example, we can say that a judicial decision was legally legitimate, or at least not illegitimate, even though we disagree with it. Second, to denounce a judicial act as illegitimate typically expresses a strong condemnation.[129] Virtually no one would

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[126] *See generally* Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587 (2001) (discussing lack of precedential support for the Court's opinion).

[127] *See, e.g.*, Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 432 (2004) (arguing that the majority's decision is "a reasonable application or extension of its vote dilution precedents"). *See generally* Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 9, at 3 (arguing that the equal protection analysis was solidly supported and that the decision not to allow promulgation of new rules was required by Florida law).

[128] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1453, 1455 (2001) (characterizing judicial decisions as legally legitimate whenever they "find support in existing sources and understandings of law" and terming this "a relatively easy test to meet").

[129] Dissenting in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Justice Blackmun appeared to put a charge of illegitimacy on par with an allegation of cowardice: "[B]y refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents,

characterize every judicial ruling reversed on appeal as legally illegitimate.[130]

Jointly summarized, these two observations yield the following conclusion: whereas an ascription of legal legitimacy often claims *less* than that a judicial judgment was correct, an allegation of illegitimacy almost invariably implies *more* than that a legal judgment was merely incorrect. On its face, this juxtaposition might appear odd, but two analogies may illuminate it.

One involves the concept of discretion. Although officials often possess discretion about how to make decisions,[131] discretion is characteristically limited.[132] Indeed, a charge that an official has exceeded her discretionary authority is often a serious one, triggering the term "abuse of discretion."[133] In some cases officials may exceed their discretion by acting for the wrong kind of reason: they may base their decisions on considerations that they have no lawful power to weigh.[134]

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the plurality invites charges of cowardice and illegitimacy to our door." *Id.* at 559–60 (Blackmun, J., concurring in part and dissenting in part).

[130] My claim about the predominant usage is offered as a generalization and no more. In certain usages, "legitimate" is simply a synonym for "lawful" and "illegitimate" for unlawful. *See, e.g.*, Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 896 (1991) (Scalia, J., concurring) (observing that "a litigant's prior agreement to a judge's expressed intention to disregard a structural limitation [on judicial power] cannot have any *legitimating* effect — *i.e.*, cannot render that disregard *lawful*"); South Dakota v. Dole, 483 U.S. 203, 210 (1987) (referring to "the range of conditions legitimately placed on federal grants").

[131] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[D]iscretion means the power to choose between two or more courses of action . . . ." (emphasis omitted)); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 368 (1975) ("[D]iscretion exists if there is more than one decision that will be considered proper by those to whom the decision-maker is responsible . . . ."); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985) (defining discretion by reference to situations "in which the decision maker has a choice of permissible outcomes under the governing rule of law"). Maurice Rosenberg helpfully distinguishes between "primary" discretion, which exists insofar as "the court can do no wrong, legally speaking, for there is no officially right or wrong answer," and "secondary" discretion, which is a "review-restraining concept" that "gives the trial judge a right to be wrong without incurring reversal." Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

[132] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."); HART & SACKS, *supra* note 131, at 152 ("In a government under law, it seems there can be no such thing as an official discretion which is absolute.").

[133] Cheney v. United States Dist. Court, 124 S. Ct. 2576, 2587 (2004) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)); *see also id.* (linking a "clear abuse of discretion" with "a judicial usurpation of power" as the only "exceptional circumstances" warranting the issuance of a writ of mandamus to restrain a lower court (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)); and *Holland*, 346 U.S. at 383) (internal quotation marks omitted)).

[134] *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.16 (3d ed. 1991) (discussing cases finding abuses of discretion involving improper purposes).

But an abuse of discretion can also occur when an official shows particularly bad judgment in assessing relevant considerations.[135]

The other helpful concept in thinking about legal legitimacy and illegitimacy is that of jurisdiction.[136] Although the concept of jurisdiction is itself chameleon-like, changing from context to context,[137] in one use it connotes a power that can be exercised either rightly or wrongly, at least within bounds.[138] In this usage, not every legal error provides a ground for jurisdictional objection.[139] The lawfully conferred power includes the authority to commit mistakes.

The concept of legal legitimacy appears to function somewhat analogously to the concepts of discretion and jurisdiction when applied to judicial decisionmaking. More particularly, a claim of judicial legitimacy characteristically suggests that a court (1) had lawful power to decide the case or issue before it; (2) in doing so, rested its decision only on considerations that it had lawful power to take into account[140] or that it could reasonably believe that it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment. Conversely, claims of judicial illegitimacy suggest that a court (1) decided a case or issue that it had no lawful power to decide;[141] (2) rested its decision on considerations that it had no lawful

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135 *See* Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."); SCHWARTZ, *supra* note 134, § 10.15 ("'[D]iscretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion . . . ." (quoting *Sharp v. Wakefield*, [1891] A.C. 173, 179 (H.L.))).

136 In perhaps the most basic sense, "[j]urisdiction is power to declare the law." *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

137 *See generally* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 54–178 (5th ed. 2001) (discussing various jurisdictional requirements and doctrines).

138 *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 8 (1946) (distinguishing "the lawful power" or jurisdiction of a tribunal to try a criminal defendant, which a reviewing court can reexamine in a habeas corpus hearing, from "the guilt or innocence" of the criminally accused); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (observing that "where there is jurisdiction a finding of fact by the executive department is conclusive and courts have no power to interfere unless there was either denial of a fair hearing or the finding was not supported by evidence or there was an application of an erroneous rule of law" (citations omitted)).

139 *See, e.g.*, Estep v. United States, 327 U.S. 114, 122–23 (1946) (plurality opinion) (concluding that a decision could be "erroneous" yet nevertheless within the jurisdiction of a draft board and that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant"); RESTATEMENT (FIRST) OF JUDGMENTS § 10 (1942) (discussing situations in which an erroneous judgment by a court possessed of jurisdiction will be treated as binding on the parties).

140 *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 265 (1998) (Scalia, J., dissenting) (agreeing that "statutory history is a legitimate tool of construction").

141 *See, e.g.*, Hudson v. United States, 522 U.S. 93, 112 (1997) (Stevens, J., concurring in the judgment) (observing that "a desire to reshape the law does not provide a legitimate basis for issuing what amounts to little more than an advisory opinion").

authority to take into account[142] or could not reasonably believe that it had lawful authority to consider; or (3) displayed such egregiously bad judgment that its ruling amounted to an abuse of authority, not a mere error in its exercise.

For example, critics who claimed that the Supreme Court acted illegitimately in *Bush v. Gore* mostly seemed to imply that the majority acted not merely erroneously, but with a willful disregard for applicable constitutional principles.[143] More particularly, some thought that the majority breached the requirement that judges must apply legal principles consistently, without regard to the parties or a case's partisan impact.[144] To cite just one more example, suggestions that the Court behaved illegitimately in *Roe v. Wade* have often reflected views that the Court lacked lawful authority to recognize substantive due process rights not firmly rooted in the nation's history,[145] or overstepped clear limits by resting its decision substantially on the majority Justices' personal views or preferences,[146] or abused its discretion by extending precedents recognizing personal rights of bodily integrity to encompass a morally insupportable entitlement that inherently involves the destruction of innocent human life.[147]

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[142] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting) (questioning the "legitimacy" of "the Court's decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency"); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history [when used as a source for judicial decisionmaking] is its illegitimacy. We are governed by laws, not by the intentions of legislators."). Similarly, it might well be thought illegitimate for a court to resolve a constitutional case on the basis of anything other than a good faith judgment about what the Constitution requires. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 456–57 (2000) (Scalia, J., dissenting) (maintaining that unless the Court believes that a state practice "violates the Federal Constitution," its prohibition would be "nothing more than an illegitimate exercise of raw judicial power" (quoting *Oregon v. Elstad*, 470 U.S. 298, 370–71 (1985) (Stevens, J., dissenting))).

[143] *See, e.g.*, Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 9, at 110, 117 ("*Bush v. Gore* looks like a legal opinion, but it isn't a legal decision, because it is outside the boundaries of acceptable argument.").

[144] *See, e.g.*, DERSHOWITZ, *supra* note 125, at 174.

[145] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 791 (1986) (White, J., dissenting) (citing evidence of "the illegitimacy of the Court's decision in *Roe v. Wade*").

[146] *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting) (asserting that the standard applied by the Court to invalidate anti-abortion legislation "is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace"); *Thornburgh*, 476 U.S. at 797 n.5 (White, J., dissenting) ("I believe that *Roe v. Wade* . . . rests on . . . extraconstitutional assessments of the value of the liberty to choose an abortion.").

[147] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 951–52 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("Unlike marriage, procreation, and contraception, abortion involves the purposeful termination of a potential life. The abortion decision must therefore be recognized as *sui generis*, different in kind from the others that the Court

2. Standards for Assessing the Legal Legitimacy of Assertions of Judicial Power. — The gravest difficulty in assessing charges of legally illegitimate judicial decisionmaking arises from disagreement about the legal bounds of judicial authority under the Constitution. As I emphasized in Part II, it is crucial to understanding the nature of our Constitution, as well as debates about institutional legitimacy, that widespread disagreement exists about what kind of document the Constitution is and how it should be interpreted. Under these circumstances, claims about the legal legitimacy of judicial action often reflect hidden premises about the nature of constitutional law that are themselves ardently contested.

Against this background, little more could be said in a strictly analytical vein. If further insights can be gleaned, they are not about legal legitimacy as a concept, but about the substantive nature of constitutional law — about what is, or can plausibly be said to be, legitimate and illegitimate under the Constitution. Venturing into that contested terrain, I offer three large claims, all involving the centrally disputed question of whether and when it is legally legitimate for courts to depart from the original understanding of constitutional language to recognize rights not firmly rooted in tradition. Each of my claims is supported, though none is entailed, by the analytical framework developed so far.

First, any claim that it is always legally illegitimate for courts to uphold rights that were not historically recognized under relevant constitutional language is simply not sustainable. The obstacle lies in the legally authoritative status of judicial precedent.[148] Throughout constitutional history, Supreme Court Justices have assumed with near unanimity that they are legally authorized and sometimes bound to follow precedents, sometimes even when prior cases were themselves erroneous at the time of their decision.[149] Indeed, I know of no Justice in the history of the Supreme Court who has persistently questioned

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has protected under the rubric of personal or family privacy and autonomy." (citation omitted) (quoting *Thornburgh*, 476 U.S. at 792 (White, J., dissenting); and *Harris v. McRae*, 448 U.S. 297, 325 (1980)) (internal quotation marks omitted)).

[148] For discussions of precedent and its legal authority, see, for example, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

[149] *See generally* Lee, *supra* note 148 (tracing the history of stare decisis).

precedent-based decisionmaking.[150] Even leading constitutional originalists — those who maintain that courts otherwise ought to decide cases in accordance with the original understanding[151] — have accepted the authority of judicial precedent, including past decisions that could not themselves be justified under originalist principles.[152]

The accepted capacity of precedent to authorize judicial decisions contrary to what would otherwise be the best interpretation of the written Constitution is a matter of enormous practical and jurisprudential significance.[153] The legal legitimacy of decisionmaking based on sometimes erroneous constitutional precedents cannot be derived directly from the written Constitution, which pronounces itself "the supreme Law of the Land."[154] Instead, the constitutionally lawful status of precedent-based decisionmaking, at least as applied to prece-

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[150] Fallon, *supra* note 148, at 583. For references to occasional expressions of doubt, see *id.* at 583 & nn.57–58.

[151] For statements of the "originalist" position that the legitimacy of judicial decisionmaking requires adherence to the original understanding of constitutional language, see, for example, sources cited *supra* note 11.

[152] *See, e.g.*, BORK, *supra* note 11, at 155–59 (acknowledging a role for stare decisis in constitutional adjudication); Scalia, *Common-Law Courts*, *supra* note 11, at 140 ("[*S*]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."). *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that the Constitution forbids courts from deciding cases on the basis of erroneous past decisions).

[153] Because a court that believes a prior decision to have been correct can always reaffirm the correctness of its ruling without reliance on its precedential status, the force of the doctrine of stare decisis lies in its capacity to perpetuate what once was judicial error or to forestall inquiry into the possibility of legal error. *See* Paulsen, *supra* note 148, at 1538 n.8 ("The essence of the doctrine [of stare decisis] . . . is adherence to earlier decisions, in subsequent cases . . . even though the court in the subsequent case would be prepared to say, based on other interpretive criteria, that the precedent decision's interpretation of law is *wrong*."); Schauer, *supra* note 148, at 575 ("[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.").

[154] U.S. CONST. art. VI, cl. 2. Although it might be argued that the Constitution's provision for the exercise of "judicial Power," U.S. CONST. art. III, § 1, implicitly authorizes the Supreme Court to issue decisions with binding effect, even when the decisions are erroneous, and that it further contemplates that the Court's decisions will possess precedential authority, again even when erroneous, this argument "proves either too much or too little." FALLON, *supra* note 67, at 115.

> If it proves that the Constitution authorizes courts to develop doctrine as they will, then it proves too much; if the Constitution made itself wholly subject to judicial revision, it could not provide a solid foundation for any conclusion. If, instead, the argument proves that the Constitution contemplates the bounding of judicial and other powers (for example, to establish precedent with binding authority) by legal norms that cannot themselves be derived from the written text, then the argument proves too little; it effectively concedes [the need for legal norms, which are not themselves derivable from the Constitution, that define the lawful scope of precedent-based decisionmaking and that are thus as practically fundamental as the Constitution itself].

Id.

dents that were initially erroneous, must arise directly from acceptance,[155] just as does the legal legitimacy of the Constitution itself.

The same might be said of at least a few other interpretive norms and practices. Although the Constitution presupposes the existence of interpretive norms that will define and limit judicial power, the most fundamental of these cannot be derived from the Constitution (because they shape the very process of interpretation from which they would purportedly be "derived"),[156] but owe their status to facts of acceptance that are as much sociological as legal.

Having accepted the lawfulness of judicial decision in accordance with precedent, originalists might be expected to say that although it is legally legitimate for courts to accept and follow non-originalist precedent, it is not legally legitimate to *extend* non-originalist rulings to new contexts.[157] Interestingly, however, originalist Justices have displayed little more adherence to this position than have other jurists, as the history of *Bolling v. Sharpe* illustrates. Justices of all substantive persuasions have felt entitled not only to uphold *Bolling* but also to expand upon its commitments.[158] One set of Justices has relied upon *Bolling* to invalidate gender-based discriminations by the federal government.[159] Another has cited *Bolling* as authority for imposing barriers to federal affirmative action policies.[160] In explaining its decision to require strict judicial scrutiny of affirmative action programs under a Fifth Amendment Due Process Clause ratified in 1791, a Supreme Court majority that included the Court's most originalist Justices, Antonin Scalia and Clarence Thomas, adverted to neither constitutional

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155 *See* FALLON, *supra* note 67, at 113–24; *see also* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 653–54 (1987) (recognizing that the authority of precedent flows from acceptance).

156 *See* Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 11, at 65, 76 (noting the "deep problem of self-referential regress whenever one seeks to validate, from within any text's four corners, a particular method of giving that text meaning").

157 For example, Justice Scalia took this view in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), when he concurred in a Court judgment applying dormant commerce clause principles that he took to be firmly settled by precedent, but declared that he would not extend the doctrine into new contexts because he thought it inconsistent with the Constitution's text and original understanding. *See id.* at 211 (Scalia, J., concurring in the judgment) (terming any extension of settled dormant commerce clause principles "unacceptable").

158 *See* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 989 (2004) ("From *Bolling* forward . . . constitutional doctrine has behaved as if the Fifth Amendment's Due Process Clause incorporated the full apparatus of Fourteenth Amendment equal protection against the federal government.").

159 *See* Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973) (plurality opinion).

160 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–17 (1995) (citing *Bolling* among authorities establishing that "[e]qual protection analysis in the Fifth Amendment area is the same as under the Fourteenth Amendment" (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976))).

language nor originalist history. That majority relied instead on "ideas . . . central to this Court's understanding of equal protection."[161]

At this point one could of course reconsider whether it is legally legitimate for a precedent that recognizes rights not firmly rooted in the original understanding of constitutional language to be treated as authority for decisions extending its rationale.[162] As I emphasized in Part II, however, the foundations of law, including constitutional law, lie in sociological facts: in reasonably convergent practices of identifying what counts as law, in officials' embrace of that law as deserving of obedience, and in further embrace or acquiescence by the public. As I have now argued more specifically, the practice of judges in embracing precedent as deserving of enforcement and sometimes extension, when conjoined with the public's acceptance of precedent-based decisions as legally authoritative, suffices to confer legal legitimacy on adherence to and reasonable extension of non-originalist precedent.[163] Just as the Constitution is law only because it is embraced by a sufficient core of officials and is accepted by enough of the broader public, so judicial decisionmaking on the basis of constitutional precedent is lawful because it is viewed as legally valid among judges and lawyers and is at least acquiesced in by enough of the rest of the citizenry.[164]

Second, although the foundations of law and thus of constitutional legitimacy lie in the acceptance of interpretive practices as well as substantive norms, reliance on precedent to justify the extension of constitutional rights beyond their historically understood contours suggests how shallow the notion of acceptance can be. Plainly debate resounds among legal elites about the precise scope of the courts' lawful power to construe the Constitution in light of precedent, as witnessed by the furious controversy surrounding decisions such as *Roe v. Wade*. And the claim to *public* acceptance of any particular conception of judicial power to recognize "new" rights seems equally amorphous. To cite another example arising from the abortion debate, as of 1994, survey

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[161] *Id.* at 227. The Justices otherwise most committed to originalism adopted a similar stance in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In an opinion by Justice Scalia, the Court's majority affirmed the holdings of earlier cases that the Constitution's Takings Clause applies to "regulatory as well as physical deprivations" of property by the states, even though "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all," and even though the Court's account of "the 'understanding' of land ownership that informs the Takings Clause [was] not supported by early American experience." *Id.* at 1028 n.15.

[162] For a skeptical discussion of the authority of precedent not supportable by reference to the original understanding of constitutional language, see Lawson, *supra* note 152.

[163] *See* Robert Post, *Sustaining the Premise of Legality: Learning To Live with* Bush v. Gore, *in* *BUSH V. GORE*: THE QUESTION OF LEGITIMACY, *supra* note 9, at 96, 100 ("Even a decision like *Brown v. Board of Education*, which self-consciously breaks with precedent, can . . . be prospectively transformed into a fountainhead of perfectly legitimate doctrine.").

[164] *See* Greenawalt, *supra* note 155, at 653–54 (noting that the authority of precedent rests on acceptance).

data indicated "a widespread public view that the Supreme Court should *not* be empowered to make abortion decisions."[165] This finding is at least consistent with the conclusion that the majority of the American public has not accepted the Court's assertions of authority to protect abortion rights, except in the very weak sense that most people have not risen up in protest. (Significant minorities have of course made their opposition unmistakable.)

Complicating efforts to gauge which judicial practices the public has accepted, however, is the relationship between the Supreme Court's controversial decisions protecting abortion rights, such as *Roe*, and other decisions that the public more likely approves, such as *Bolling v. Sharpe*. Many of those who question the legal legitimacy of *Roe* probably believe (or would assume if challenged) that the Court behaved entirely correctly in deciding *Bolling* as it did, even though *Bolling* too rested on due process grounds and reflected the Court's non-originalist judgment about the requirements of fundamental fairness.[166] If so, it would be hard to disentangle public views about *Roe* and abortion rights on the merits from views about the Supreme Court's legally legitimate institutional role in recognizing rights not rooted in history. The mass public lacks sufficient information to have clear, considered, and internally consistent judgments about exactly what the judicial role under the Constitution either is or ought to be.[167]

To me, at least, these are jarring conclusions. When defenders maintain that the legal legitimacy of the Supreme Court's role rests largely on public acceptance,[168] as I myself have done, we may be saying scarcely more than that the public, being little informed about the Court's practices, has not mounted a revolt.[169] The American people have allowed constitutional law to become what legal elites, especially

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165 Tyler & Mitchell, *supra* note 22, at 761.

166 *See* Primus, *supra* note 158, at 977 (noting that "the dominant approach has been to regard *Bolling* and reverse incorporation as justified by the force of sheer normative necessity"); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365–66 (2002) (noting the futility of justifying *Bolling* on originalist grounds).

167 *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620 (2003) ("Scholars are uniform in their assessment that the salience of the output of courts is low."); Walter F. Murphy & Joseph Tannenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 360–64 (1968) (finding low public awareness of Supreme Court decisions).

168 *See, e.g.*, BLACK, *supra* note 23, at 209 (arguing that the continued acceptance of judicial review demonstrates its "legitimacy"); *see also* Washington v. Glucksberg, 521 U.S. 702, 756 (1997) (Souter, J., concurring in the judgment) ("The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review . . . .").

169 *Cf.* BLACK, *supra* note 23, at 210 (asserting that "the people have . . . given the stamp of approval in the only way they could give approval to an institution in being — by leaving it alone").

the Supreme Court, say that it is under interpretive standards evolved by the courts and little understood outside the legal elite.[170] The point may grow more disconcerting when we recognize that legal elites disagree among themselves about acceptable interpretive practices and thus about legally legitimate judicial power.

As if acknowledging that the mass public knows little about judicial practice, some writers root judicial legitimacy (in the legal sense) in adherence to ideals of judicial craft.[171] In their view, shared professional norms establish the requisites of legitimate judging, including opinions that articulately link particular decisions with the law that justifies them and that reflect candid, professionally competent engagement with all relevant arguments.[172] If such shared norms exist, however, they are very vague.[173] There seems to be little consensus about when they are satisfied — as evidenced, once again, by disputes about the legal legitimacy of decisions such as *Roe v. Wade*[174] and *Bush v. Gore*.[175]

The conjunction of my first and second points could be summarized as follows: judicial practice over more than two centuries has made it difficult to say that many assertions of judicial power violate clearly recognized legal limits, especially if precedent furnishes plausible support. If the burden of persuasion is reversed, however, and

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[170] *See* David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 LAW & POL'Y Q. 405, 407–08 (1983) (noting that although most judicial opinions have relatively little salience with the general public, awareness goes up among elites, and "[s]upport for the Court among these elites is . . . very closely correlated with their approval of specific court decisions").

[171] *See, e.g.*, CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 81 (1981). *But see* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 152–53 (2001) (maintaining that "[a] decision is not lawless merely because the majority opinion is weak" and suggesting that there are few consistent adherents to the contrary view).

[172] *See, e.g.*, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 746–47, 750 (1987) (arguing that a lack of judicial candor would be unacceptable to the public and that candor is necessary to measure judges' fidelity to law).

[173] *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 52 (1988) ("The limits of craft . . . are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants.").

[174] *Compare* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (pronouncing that *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be"), *with* Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 765 (1973) (arguing that *Roe* "is amply justified both by precedent and by those principles that have long guided the Court [in the interpretation of constitutional rights]").

[175] *Compare* Jack M. Balkin, *Legitimacy and the 2000 Election*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 9, at 210, 215 (characterizing the Court's opinion as "so shoddy and so badly reasoned that it seemed lawless"), *with* Fried, *supra* note 127, at 5 (defending "the reasonableness of *Bush v. Gore*" and "its rightful place among the large number of important Supreme Court decisions on which reasonable minds might differ").

proponents must precisely define the scope of legitimate judicial power to recognize rights that are not uncontroversially grounded in constitutional language and history, then the acceptance to which those proponents must appeal will often prove weak and amorphous. There is too much controversy among legal elites, and too little informed endorsement among the mass public, to warrant strong claims of legal legitimacy (as opposed to weak or disputable ones) for the interpretive methodologies that substantially define the judicial role.

Third, against the background of both widespread debate about the boundaries of legitimate judicial power and the existence of numerous precedents upholding historically novel rights, many claims of legal illegitimacy are best understood as maintaining that particular decisions — even if supported by precedent — are so morally objectionable that they should be deemed abuses of power and classified as constitutionally illegitimate for that substantially moral reason.[176] This account explains why many of those who castigate *Roe v. Wade*, but accept *Bolling v. Sharpe* without complaint, may see no inconsistency in their positions. It is surely possible to regard *Roe* as morally reprehensible, *Bolling* as well-justified. Still, a logically consistent explanation of the position that *Roe* is *legally* illegitimate whereas *Bolling* is not could not maintain that the flaw in *Roe* lay solely in the Court's recognition of rights not grounded in history or in the Justices' reliance on moral values in extending precedents to a new context. Either of those claims would tell equally against the constitutional legitimacy of *Bolling* or of subsequent decisions that have relied on *Bolling* for support. Rather, the fault that deprives *Roe* of substantive legal legitimacy, if there is one, must lie in the majority Justices' dramatic misapprehension of the weight of morally as well as legally relevant considerations. In other words, judgments concerning *Roe*'s legal legitimacy depend almost inescapably on considerations of moral legitimacy. This interconnection between legal and moral legitimacy is not, in my view, a conceptually necessary one, but is a contingent feature of American constitutional practice.[177]

B. The Sociological Legitimacy of Judicial Power and Its Exercise

To think about the sociological legitimacy of courts and their decisions, especially those recognizing rights not strongly anchored in traditional understandings of constitutional language, it will again help to introduce some conceptual distinctions.

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[176] *See generally* DWORKIN, *supra* note 84, at 254–58 (arguing that political morality must play a role in hard "interpretive" judgments since legal and sociological concerns will not be dispositive).

[177] *Cf. supra* notes 43–44 and accompanying text.

1. Some Conceptual Varieties of Sociological Judicial Legitimacy. — Social scientists, law professors, and others who are interested in judicial legitimacy as a sociological phenomenon use the term in myriad ways that are by no means always explained.[178] At least three types of sociological legitimacy need to be distinguished.

First stands the *institutional* legitimacy of a branch or organ of government such as the Supreme Court. The Court's institutional legitimacy resides in public beliefs that it is a generally trustworthy decisionmaker whose rulings therefore deserve respect or obedience.[179] Employing a measure such as this, social scientists commonly equate the Court's institutional legitimacy with what they call "diffuse support" among the public, as reflected in opinion surveys.[180] So defined, institutional legitimacy is relative, not absolute. At any particular time, some citizens will believe that the Supreme Court is a trustworthy institution, whereas others will not.[181]

Distinct from institutional legitimacy is *substantive* legitimacy or what political scientists sometimes call "content legitimacy."[182] Whereas institutional legitimacy is a property of institutions, substantive legitimacy is a property of judicial acts. It refers to the public's belief that a particular judicial decision is substantively correct. Like institutional legitimacy, the substantive legitimacy of judicial decisions can vary from group to group.

A third, conceptually distinguishable type of sociological legitimacy is *authoritative* legitimacy. Decisions possess authoritative legitimacy insofar as the public either believes that they ought to be obeyed or acquiesces in them. Like substantive legitimacy, authoritative legitimacy is a property of judicial acts, but it does not necessarily imply agreement, just acquiescence.

2. Assessing the Sociological Legitimacy of Judicial Power. — Recent studies by social scientists have advanced understanding of judi-

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178 *See* McEwen & Maiman, *supra* note 21, at 258 (identifying divergent uses of the term legitimacy).

179 *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

180 *See, e.g.*, Gibson et al., *supra* note 22, at 356–58 & n.4 (noting that "[m]ost analysts distinguish between 'diffuse' and 'specific' support," and "essentially equat[ing]" the terms "diffuse support" and "institutional legitimacy" (citing EASTON, *supra* note 47, at 273 (distinguishing between "specific" support for an institution, reflecting approbation of particular decisions, and "diffuse support," referring to "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed"))).

181 *See, e.g.*, Tyler & Mitchell, *supra* note 22, at 754–55 (reporting divided but "generally positive" responses to polling questions designed to measure the sociological legitimacy of the Supreme Court).

182 *See* Mondak, *supra* note 22, at 676–77 (distinguishing between "symbolic legitimacy," or "acceptance of authoritative standing," and "content legitimacy," which exists insofar as citizens accept a policy or decision "due to support for its substantive content").

cial legitimacy in numerous ways. Nevertheless, many of the most important questions remain unanswered.

(a) The Relationship Between Institutional Legitimacy and the Substantive Sociological Legitimacy of Judicial Decisions. — Recent scholarship supports two interesting conclusions about the relationship between the institutional legitimacy of the Supreme Court and the substantive sociological legitimacy of particular decisions. First, although the Court's institutional legitimacy varies with public responses to particular rulings, it does so less sharply than earlier, less sophisticated studies had indicated.[183] For example, recent surveys show that *Bush v. Gore* has had almost no impact on "diffuse support" for the Court, notwithstanding critics' predictions.[184] The Court apparently possesses a reservoir of trust that is not easily dissipated.[185]

Second, even though indicators suggest that the Court's institutional legitimacy is quite broad and robust,[186] this legitimacy apparently gives the Court relatively little ability to sway public views about

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[183] *Compare* Gibson et al., *supra* note 22, at 361 (concluding that "[j]udgments of specific policies are entirely *unrelated* to confidence in the Court"), *and* Tyler & Mitchell, *supra* note 22, at 781 (reporting findings that views of "institutional legitimacy" and thus of whether to empower the Supreme Court to make abortion decisions were "generally unrelated to support for Court decisions"), *with* Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of* Webster *and* Texas v. Johnson *on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 651–52 (1998) (concluding that confidence in the Supreme Court depends on perceptions of particular decisions and that unpopular decisions erode the Court's institutional capital).

Whereas earlier studies had relied substantially on polls expressly inquiring into public "confidence" in the Court, and had found that confidence declined when the Court rendered controversial decisions, *see, e.g.*, *id.* at 641–43, 651–52, Gibson, Caldeira, and Spence differentiated confidence in the Court from institutional loyalty. Their study found that:

> [T]he confidence variable is not a particularly useful measure of legitimacy, especially since those with hardly any confidence in the leaders of the Court nonetheless believe that the Court should not be done away with, that the Court should be the interpreter of the Constitution, and that the Court generally can be trusted.

Gibson et al., *supra* note 22, at 362. According to Gibson, Caldeira, and Spence, "over four of five Americans assert that it would *not* be better to do away with the Court, even if there were fairly widespread displeasure with its decisions." *Id.* at 358.

[184] *See* Gibson et al., *supra* note 22, at 364 (citing a study that reveals a "high level of legitimacy in the aftermath of the disputed presidential election"); Radin, *supra* note 143, at 113 (quoting a statement signed by 673 law professors asserting that "the Supreme Court has tarnished its own legitimacy" through its decision in *Bush v. Gore*).

[185] That supply is of course not limitless. *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659–60 (1992) (discussing factors that might cause an erosion of "diffuse support" for the Supreme Court); Gibson et al., *supra* note 22, at 365 (acknowledging that "sustained policy disagreement can undermine legitimacy"); *see also* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1747–64 (2001) (developing a historically based account of the factors affecting the Supreme Court's institutional stature or legitimacy).

[186] *See* Caldeira & Gibson, *supra* note 185, at 640 (reporting high levels of support for retaining the Court and its power of judicial review); Gibson et al., *supra* note 22, at 358 (finding "a remarkably high level of loyalty toward the Supreme Court on the part of most Americans").

the constitutional validity of specific laws and policies.[187] In work that deeply influenced constitutional thinkers, Professors Robert Dahl,[188] Charles Black,[189] and Alexander Bickel[190] all maintained that the Court possesses what Bickel termed a "mystic"[191] capacity to "legitimate" laws or policies in the public mind.[192] Subsequent studies indicate that most of the public knows too little about Supreme Court decisions,[193] and that those who are well-informed tend to be too difficult to sway, for the Court to exert the influence that Dahl, Black, and Bickel all postulated.[194]

Perhaps even more significant than what the recent studies establish, however, is something that poll-based measures of diffuse support cannot capture. As I have suggested already, the public's relative lack of attentiveness makes it impossible to gauge the substantive sociological legitimacy — in the strong sense of active endorsement — of controversial methods of constitutional interpretation. If we focus on this concern, we will remain chronically uncertain about judicial legitimacy in the sociological sense — even though other measures, including that of institutional legitimacy (or diffuse support), would often support more affirmative judgments about the Court's sociological legitimacy.

(b) Authoritative Legitimacy and Its Limits. — Today, nearly all Supreme Court rulings possess a high degree of authoritative legitimacy, whether in the strong or the weak sense, at least with respect to

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187 *See, e.g.*, Mondak, *supra* note 22, at 681, 690 (reporting study results indicating that the Supreme Court possesses "the ability to confer legitimacy, boosting the magnitude of legitimacy [defined as policy agreement] by a half point or more on a nine-point scale," but characterizing this capacity as likely operating "on the margins of public opinion").

188 *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294–95 (1957) (asserting that "at its best the Court operates to confer legitimacy").

189 *See* BLACK, *supra* note 23, at 47–53 (describing the Supreme Court's "legitimating" function).

190 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 29–31, 95–96 (1962) (discussing the Supreme Court's capacity to legitimate and the circumstances under which it should withhold legitimation).

191 *Id.* at 29–33 (describing the "mystic function" of judicial review).

192 *See generally* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 752 (1989) (describing "the legitimation hypothesis").

193 *See supra* note 167.

194 *See, e.g.*, *supra* note 183 (discussing numerous studies). Earlier studies generated even more skeptical results. *See, e.g.*, David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 807–08 (finding almost no evidence to support claims that Supreme Court rulings confer legitimacy); Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AM. POL. Q. 335, 353 (1984) (reporting findings that cast "a long shadow of doubt upon the claims advanced (or assumptions made) by many writers that judicial validation by the Supreme Court serves substantially to enhance the public esteem for otherwise controversial or unappealing policy prescriptions").

the parties before the Court.[195] In plainer terms, the parties almost always obey the Court's rulings. No logical necessity undergirds this state of affairs. In the past, General Andrew Jackson famously defied a judicial ruling.[196] So did President Abraham Lincoln.[197]

To measure the authoritative legitimacy of judicial rulings, however, it does not suffice to look at the parties' responses. The effect on other officials and the broader public also matters. In a well-known and provocative book, Gerald Rosenberg maintains that such celebrated Supreme Court decisions as *Brown v. Board of Education* and *Roe v. Wade* proved largely ineffectual as engines of social change.[198] Judicial declarations may not achieve much, he argues, unless other officials implement the Court's message or citizens litigate on a national scale. Although critics have attacked both his methodology and his conclusions,[199] Rosenberg raises important issues about the broader effects of court decisions.[200] On a few points, the facts speak for themselves. Clearly the authoritative legitimacy of judicial decisions can be relative, rather than absolute. Regional variations also can occur. For

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[195] Because nearly all Supreme Court decisions review the judgments of lower courts, Supreme Court rulings that reverse lower court judgments are normally addressed in the first instance to the lower courts, which are typically advised that they should take further action "not inconsistent" with the Court's opinion. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 481 (5th ed. 2003) [hereinafter HART & WECHSLER]. On techniques available to the Court to ensure enforcement of its mandates, both against lower courts and the parties to Supreme Court litigation, see *id.* at 481–83.

[196] *See* Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 241–44 (1981).

[197] *See infra* pp. 1845–46. For more extensive discussion, see DANIEL FARBER, LINCOLN'S CONSTITUTION 157–63, 188–95 (2003).

[198] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). *See also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 221–29 (1988) (identifying factors that can lead to noncompliance with Supreme Court decisions, including "deliberate evasion," "poor communication of judicial opinions," and "[t]he sheer force of inertia").

[199] *See, e.g.*, Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1030 (1992) (book review) (asserting that Rosenberg's book "deserves harsh criticism because . . . [i]t endorses inconsistent measures of effective judicial action, focuses on the Court in isolation rather than as part of a larger political culture, uses presumptions hostile to the recognition of a broad judicial role, and employs inadequate data and questionable portrayals of existing research"); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1771–72 (1993) (book review) (criticizing Rosenberg's theory for being "radically indeterminate," for neglecting certain "dynamic effects unleashed by many Court decisions," and for failing "to differentiate between constitutional and statutory interpretation decisions").

[200] Useful studies of the impact of judicial decisions on nonlegal actors include JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996); Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117 (Keith O. Boyum & Lynn Mather eds., 1983); Sally Engle Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEG. STUD. F. 59 (1985); and Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992) (reviewing ROSENBERG, *supra* note 198).

at least a decade, *Brown v. Board of Education* met "massive resistance" through much of the South before sentiment hardened that recalcitrance should not be tolerated.[201] Years and even decades after the Supreme Court had declared officially sponsored prayer in public schools to be unconstitutional,[202] teacher-led prayers remained common in broad swaths of the country.[203]

Among the complications in gauging the authoritative legitimacy of Supreme Court rulings is the possibility of change across time. In an important book, Larry Kramer has argued that many among the Constitution's founding generation subscribed to a "departmental" theory under which Congress, the President, and even the states would act according to their own interpretation of the Constitution, sometimes in disagreement with the Supreme Court.[204] In cases of persistent interbranch dispute, the departmentalists expected ultimate resolution by "the people themselves,"[205] presumably through political action. As Kramer documents, the departmental theory gradually lost currency,[206] but a similar approach could imaginably take root again. Such a development would not require the Supreme Court to revise its claims about the legal authority of its decisions. The authoritative sociological legitimacy of judicial rulings is ultimately a matter of fact, capable of either evolutionary or revolutionary change regardless of the Court's pronouncements.

(c) Measures of Sociological Legitimacy and the Limits of Judicial Power. — The measures of sociological legitimacy commonly used by social scientists provide poor gauges of the effective limits of judicial

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[201] *See* KLARMAN, *supra* note 108, at 344–68 (detailing the pattern of resistance and concluding that "[t]he 1964 Civil Rights Act, not *Brown*, was the proximate cause of most school desegregation in the South"). For arguments that Klarman's scholarship underestimates *Brown*'s significance, see, for example, David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 156–57 (1994); and Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973 (2005) (book review). Whatever *Brown*'s ultimate significance, there is no dispute that the Supreme Court's ruling initially encountered broad-based resistance in the Southern states. *See, e.g.*, NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE 67–91 (1969).

[202] *See* Engel v. Vitale, 370 U.S. 421, 436 (1962).

[203] *See* KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 5 (1971) ("We shall tell the story of five . . . towns where, five years after the Court's outlawing of the practice, the schools have continued to say prayers, read from the Bible, and conduct many other forms of supposedly unconstitutional religious observances."); FISHER, *supra* note 198, at 222 (reporting that "school authorities continue to set aside time during the day for students to say prayers").

[204] *See* KRAMER, *supra* note 88, at 109 ("Each branch could express its views as issues came before it in the ordinary course of business . . . . But none of the branches' views were final or authoritative . . . [for all were] subject to ongoing supervision by their common superior, the people themselves.").

[205] *Id.*

[206] *See id.* at 206–26 (describing a gradual decline in public acceptance of the departmental theory that culminated in its nearly total rejection by the late twentieth century).

power. Indeed, excessive focus on the authoritative legitimacy of Supreme Court rulings and on the Court's institutional legitimacy — as measured by surveys charting "diffuse support" — could prove affirmatively misleading for some purposes. Among other things, the public's belief that the Supreme Court is a legitimate institution need not entail a view that the Justices currently are doing a good job.[207] When significant fractions of the public disagree with the Court on salient issues, they may support political candidates pledged to change the Court's ideological balance. In recent decades, presidential candidates have repeatedly campaigned against unpopular claims of judicial authority and promised to appoint Justices whom their constituencies would regard as more right-thinking.[208] Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could cause their doctrinal handiwork to collapse.[209] Possibly as a result of the Court's concern for its own sociological legitimacy, it has seldom remained dramatically at odds with aroused public opinion for extended periods.[210] In ways that are still little understood, the Justices undoubtedly are influenced by popular political movements and by the evolving attitudes of their society.[211]

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[207] *See, e.g.*, Caldeira & Gibson, *supra* note 185, at 638 & n.4 (reporting that during the 1930s, "[e]ven though most of the public opposed the stands the Court had taken against the New Deal, far fewer than half of [a poll] sample expressed any degree of approval for a limitation on judicial review").

[208] During the 1968 presidential campaign, Richard Nixon repeatedly attacked the Warren Court and pledged to appoint Justices sympathetic to "strict construction" of the Constitution and to his law-and-order philosophy. *See* JOHN MORTON BLUM, YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961–1974, at 313 (1991) (discussing Nixon's campaign themes and strategy). Issues involving abortion and the appointment of judges and Justices who are pro- or anti-abortion rights have also featured prominently in presidential campaigns in the aftermath of *Roe v. Wade*. *See, e.g.*, Richard L. Berke, *The 2000 Campaign: The Overview; Bush and Gore Stake Out Differences in First Debate*, N.Y. TIMES, Oct. 4, 2000, at A1 (reporting exchanges about judicial nominees and their attitudes toward abortion in a presidential debate between Republican nominee George W. Bush and Democratic nominee Al Gore).

[209] *See generally* Friedman, *supra* note 167, at 2611–13 (noting that "[j]udges do not live in a cocoon" and recognizing the incentives "to remain within the range of public opinion"). Other possible political responses to unpopular Supreme Court decisions would include stripping the Court of jurisdiction, *see generally* HART & WECHSLER, *supra* note 195, at 319–57 (discussing the history of jurisdiction-stripping efforts and the constitutional issues that they present), and increasing the Court's size to permit its "packing" with compliant Justices, *see generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (discussing President Roosevelt's failed Court-packing attempt).

[210] *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand.").

[211] Whereas some political scientists hypothesize that Supreme Court Justices are "single-minded" in their efforts to promote ideological agendas but feel obliged for tactical reasons to

C. *The Moral Legitimacy of Judicial Power and Its Exercise*

Like assessments of legal legitimacy, judgments concerning the moral legitimacy of judicial action are sometimes detached appraisals of permissibility, not endorsements of correctness. A decision can be morally legitimate, in the sense of falling inside a range within which reasonable people understandably disagree, even if it is not optimal or correct.[212] Too, charges of moral illegitimacy, like those of legal illegitimacy, typically communicate severe condemnations. They imply that a court has breached an especially clear or important moral norm.

Because the Constitution is minimally legitimate, and because judges and Justices have pledged to uphold it, I assume that they normally will be morally justified (in the sense of behaving morally permissibly) in doing so. The interesting questions involve potentially exceptional cases: when if ever might it be morally illegitimate for judges to enforce the law, and when if ever might it be morally legitimate for them to attempt to alter the law for the future by creating precedents that they have no current legal authority to establish? As in discussing the legal legitimacy of judicial power and its exercise, I shall offer brief comments on these issues that are supported, though not strictly entailed, by the analytical framework developed earlier.

First, any categorical claim that judges' sworn duty to uphold the law necessarily prevails over what would otherwise be their moral duties seems untenable under our old, minimally legitimate Constitution, many elements of which may lack a current democratic mandate. This is obviously a contestable position implicating deep issues about

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"avoid reaching decisions considerably outside the range acceptable to the legislature and the president," Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 592–95 (2001), law professors have increasingly emphasized that the Justices tend to be influenced by the political and cultural movements of their times, *see, e.g.*, Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302 (2001) (discussing "the role of social movements in shaping constitutional meaning"), and thus give us not judicial supremacy in constitutional interpretation but instead what Barry Friedman has called "mediated popular constitutionalism," Friedman, *supra* note 167, at 2602.

[212] For discussions of reasonable disagreement and its relevance to constitutional and political theory, see, for example, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996); RAWLS, *supra* note 31, at 54–58; and CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996).

To acknowledge the phenomenon of reasonable disagreement is not to embrace skepticism or relativism but simply to recognize that constitutional argument, like moral discourse, "often fails to produce certainty, justified or unjustified," THOMAS NAGEL, THE LAST WORD 101 (1997), and that the persistence of disagreement can itself be a reason to question the certainty of one's own conclusions. Given the limits of human reason and "the burdens of judgment," RAWLS, *supra* note 31, at 54, we may often have as much justified confidence in our powers to identify the bounds or limits of morally reasonable judgments as we have in our capacity to identify uniquely correct conclusions.

the significance of promises (including promises to uphold the law) and about the relation of officials' role-based obligations to general principles of moral right. Without pausing to probe those matters, I would agree with Joseph Raz that "[c]ourts whose decisions determine the fortunes of many people must base them on morally sound considerations," for "[n]othing else could justify their actions."[213] Promises of fidelity to law surely possess moral relevance, as do interests in preserving legal continuity and "a government of laws, and not of men,"[214] but other factors may also matter.

To make a more concrete claim, I would say that the Supreme Court acted morally legitimately in deciding *Bolling v. Sharpe* as it did,[215] *even if* the Court's constitutional holding was erroneous or possibly even illegitimate as a strictly legal matter, as some have argued.[216] Among the relevant considerations, the lack of a constitutional norm forbidding the federal government from discriminating against racial minorities was a serious moral deficiency in the preexisting constitutional regime. In my view, the moral importance of the situation would have justified the Court in appealing less to the letter of positive law than to principles of moral right and what Lincoln termed "the better angels of our nature"[217] in calling upon the parties and the nation to accept its decision as deserving of lawful status.

This is of course a controversial and even dangerous form of argument. It might be objected that by forging a new constitutional norm, the Court offended principles governing the fair allocation of political power: the Court should leave the implementation of constitutional change to political majorities acting through the Article V amendment process, not arrogate a power of innovation to itself. It bears emphasis, however, that the status quo ante had been established by political processes from which racial minorities were almost wholly excluded. Under those circumstances, the argument that the Court should have stayed its hand based on concerns about the fair allocation of political power rings slightly hollow.

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213 Raz, *supra* note 7, at 178.

214 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

215 *See* Eskridge, *supra* note 166, at 2365–66 (noting that normative considerations were more important in *Bolling* than were interests in constitutional methodology); Primus, *supra* note 158, at 977 (observing that *Bolling* is widely regarded as "justified by the force of sheer normative necessity").

216 *Cf.* Michael W. McConnell, *McConnell, J., Concurring in the Judgment*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 158, 165–68 (Jack M. Balkin ed., 2001) (questioning the constitutional holding in *Bolling* but suggesting that the Court could have disapproved racially segregated schooling in the District of Columbia schools on the grounds that no statute authorized the school board to practice segregation and that it should be presumed to lack such authority in the absence of a clear statement of congressional intent).

217 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 224 (Don E. Fehrenbacher ed., 1989).

It also might be objected that if the Supreme Court is to rely on extralegal considerations to give moral legitimacy to a ruling not otherwise justified by positive law, it ought at least to say so, so that the foundation for its claim to authority can be judged fairly. Although this is a troubling argument, several considerations help to meet it. First, the *Bolling* opinion was at least relatively transparent. Chief Justice Warren claimed no support from the original understanding of constitutional language. Rather, after citing cases establishing that "discrimination may be so unjustifiable as to be violative of due process,"[218] he said simply that it would be "unthinkable" for the federal government not to be held to the same antidiscrimination norm that *Brown v. Board of Education* applied to the states.[219] This reasoning can easily be understood as advancing a substantially moral justification. Second, consequences need to be taken into account in judging the moral legitimacy of judicial action. For the Court to have stated plainly that its ruling exceeded its legal authority might have precipitated a sociological legitimacy crisis that would have imperiled the authoritative legitimacy of *Brown* as well as *Bolling*. If this risk was serious, less than full candor would seem to me to have been morally defensible in light of the supervening importance of the substantive values at stake.

In a recent book, Judge Richard Posner has advanced broader claims regarding judicial legitimacy. According to him, we should regard a number of prominent Supreme Court decisions that he believes to have been influenced by "pragmatic" considerations as being ultimately defensible for reasons other than strict legality.[220] Among the cases that he places in this category is *Bush v. Gore*.[221] Posner maintains that the outcome in *Bush v. Gore* could not be justified within the equal protection framework that the Court employed,[222] but he believes that the decision was appropriate nonetheless for "pragmatic" reasons.[223] First, Posner thinks that Florida's highest court had behaved recklessly in issuing the ruling that the Supreme Court reviewed in *Bush v. Gore*.[224] In his view, the Court's decision thus achieved a kind of "rough justice," even if not strictly legal justice.[225] Second, and apparently more important, Posner thinks that the Court's ruling may

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218 Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

219 *Id.* at 500.

220 *See* POSNER, *supra* note 171, at 169–75.

221 *See id.* at 172.

222 *See id.* at 128 (describing the Court's equal protection analysis as "not persuasive").

223 *See id.* at 172.

224 *See id.* at 127–28 (maintaining that no "reasonable process of interpretation" could support the ruling of the Florida Supreme Court).

225 *Id.* at 149.

have averted a political crisis that threatened severe damage to the nation.[226]

Although clearly of the view that a judicial decision can be indefensible from "a narrowly legal standpoint"[227] yet still not illegitimate, Posner seems to believe that the legitimacy possessed by decisions within this category is a species of legal rather than ultimately moral legitimacy. "The willingness to weigh the practical consequences of decisions is the pragmatic approach to law, and if it is sound then the Supreme Court was not acting illegitimately in bringing a concern with avoiding disaster to bear on the decision of the constitutional issues in *Bush v. Gore*," he writes.[228] Notwithstanding Posner's formulation, I think his argument could be more aptly characterized as claiming that concerns of moral or pragmatic legitimacy sometimes do and should prevail over legal legitimacy. Though skeptical of Posner's specific conclusions about *Bush v. Gore*,[229] I agree that a judicial decision might be erroneous as a strict matter of law, yet morally justified under the circumstances.

Second, although questions about the moral legitimacy of Justices "disobey[ing] the law of their country"[230] would seem in principle to be highly important, they hold little prominence in contemporary constitutional debates,[231] despite Judge Posner's comments about *Bush v. Gore*. A large part of the reason, I would speculate, is that today, judges and especially Supreme Court Justices rarely experience acute tugs between their senses of moral desirability on one hand and legal duty on the other. If the Justices seldom feel a tension, I would further speculate, it is not because our Constitution is morally perfect, but because practice and precedent across more than two centuries have *created* a situation in which Supreme Court Justices can plausibly claim authority to accommodate almost any perceived exigency without

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[226] *See id.* at 143 (citing "a real and disturbing potential for disorder and temporary paralysis" (emphasis omitted)). Posner also believes that it would have been at least "respectable" for the Court to have reached the same result on the alternative ground that the Florida Supreme Court had violated Article II of the Constitution — which provides that the states "shall appoint" their electors "in such Manner as the Legislature thereof may direct," U.S. CONST. art. II, § 1, cl. 2 — by effectively prescribing a "manner" of choosing electors other than that directed by the Florida legislature. *See* POSNER, *supra* note 171, at 152.

[227] *See* POSNER, *supra* note 171, at 171.

[228] *Id.* at 172.

[229] *See* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001) (developing a partly pragmatic critique of Posner's pragmatic argument).

[230] Raz, *supra* note 7, at 179.

[231] *But see* Guido Calabresi, *In Partial (But Not Partisan) Praise of Principle*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 9, at 67, 79 (defending the view that "judges must on occasion be permitted to issue decisions that lack principle").

overstepping clear bounds of legal legitimacy.[232] Even before *Roe v. Wade*, Justices who believed recognition of abortion rights to be morally urgent could find support in judicial precedent,[233] despite the lack of firm historical foundations. Even after, Justices who believe abortion to be morally abominable are not strongly bound by *Roe*, but can plausibly dismiss it as a judicial mistake that ought to be corrected,[234] notwithstanding the doctrine of stare decisis.[235]

Even Supreme Court Justices may of course face role-based limits on their capacity to achieve results that they think morally important. For example, some might believe that justice requires broad redistributions of wealth. If so, however, those Justices would likely also believe that far-reaching economic redistributions lie beyond the practical and morally defensible reach of judicial authority, at least in the absence of widespread political support.[236] A Justice presumably ought not im-

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[232] *Cf.* HART, *supra* note 60, at 154 (contemplating that the courts, by "tak[ing] powers and us[ing] them" might "acquire[] authority *ex post facto*" from the "success" of their efforts, even if their legal claims to authority were doubtful or even illegitimate at the time of their assertion). An alternative explanation for what I take to be the relative absence of felt conflict between substantive justice and legal obligation, at least among Supreme Court Justices, would assimilate American constitutional practice more closely to the natural law tradition. From the beginning of constitutional history, some have maintained — though by no means uncontroversially — that the Constitution incorporates moral principles in light of which an egregiously unjust law should be deemed invalid simply by virtue of its injustice. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (asserting that "[t]here are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative* power"); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 867–68 (1978) (suggesting that some in the founding generation expected courts to enforce natural law limits on permissible legislation); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1157–59 (1987) (identifying expectations that natural law would supplement the written Constitution). This view would obviously call for a different explanation of *Bolling v. Sharpe* from that offered *supra* pp. 1835–36.

[233] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

[234] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (calling for the overruling of *Roe*); *id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (same).

[235] In the Supreme Court, abundant authorities establish that "*stare decisis* is not an inexorable command," but requires only that "a departure from precedent . . . be supported by some special justification" going beyond the mere fact that the previous decision was in error. Dickerson v. United States, 530 U.S. 428, 443 (2000) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)); and *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne*, 501 U.S. at 842 (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)))) (internal quotation mark omitted).

[236] *See, e.g.*, Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1008–10 (1973) (citing reasons, based in concerns about fair allocation of political power, for limiting judicial power to recognize welfare rights); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217 (1978) (citing reasons to believe that a constitutional norm creating

pose the costs that would attend a predictably futile ruling, nor should a Justice claim more power to mandate social change than can be justified under norms of democratic fairness.[237]

Third, the most contentious questions about the moral legitimacy of judicial power tend to involve the *exercise* by courts of powers to which they have legally plausible claims in light of precedent. Above I maintained that claims concerning the legal legitimacy of judicial power often rest on weak and amorphous acceptance. The upshot, I now suggest, is that considerations of moral legitimacy recurrently shape judgments concerning the legal legitimacy of controversial assertions of judicial power. In the face of controversy about the legal scope of judicial power, it is often a live and searching question whether it is morally legitimate for a court to substitute its judgment for that reached by another, often more democratically accountable, institution. But it is often an equally cogent question whether it might be morally illegitimate for a court to fail to vindicate a claim of right when the doctrinal tools to do so lie at hand. Among the consequences of debate about the bounds of legal legitimacy is that issues of moral legitimacy move from the background to the foreground of constitutional debate.

D. Three Concepts of Legitimacy: A Test Case

Planned Parenthood of Southeastern Pennsylvania v. Casey[238] illustrates the value of distinguishing the concepts of legal, sociological, and moral legitimacy insofar, but only insofar, as they prove distinguishable in practice. The majority opinion, which reaffirmed the "central holding" of *Roe v. Wade* that the Constitution protects abortion rights, notoriously argued that the Supreme Court would put its

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rights to welfare or education should be deemed beyond the competence of courts to enforce due to lack of relevant expertise and traditions of local democratic control).

[237] Any theory of political legitimacy that requires equal regard for persons must be sensitive to concerns involving the fair or equal distribution of political power. *See* Buchanan, *supra* note 29, at 712 (arguing that legitimacy requires democracy).

Lower court judges obviously face a different set of considerations. Much more commonly than Supreme Court Justices, they may be bound by precedent to reach results that they find deeply morally offensive. *See* Hutto v. Davis, 454 U.S. 370, 374–75 (1982) (per curiam) (stating that "unless we wish anarchy to prevail . . . a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). But if lower court judges confront more determinate legal obligations than do Supreme Court Justices, who are less strongly bound by stare decisis, the moral calculus with which they are confronted is also different. Seldom would it be morally legitimate for a lower court judge to refuse to apply the clearly controlling law, however objectionable that law might be deemed, when the only practical effect would be to force the parties to the case through additional litigation until a higher court predictably imposed the legally mandated result. Indeed, for a judge to take this futile and thus wasteful step would in many cases be a morally illegitimate abuse of judicial power in its own right.

[238] 505 U.S. 833 (1992).

legitimacy at risk if it were to overrule *Roe* "under fire."[239] The Court's discussion merits extended quotation:

> Our analysis would not be complete . . . without explaining why overruling *Roe*'s central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. . . .
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> . . . [T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of the substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and declare what it demands.
>
> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. . . . But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, . . . the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.
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> . . . .
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> . . . There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[240]

In this passage, the Supreme Court invoked — sometimes alternately and sometimes simultaneously — sociological and legal concepts of legitimacy. When the Court equated its institutional legitimacy with its power and said that its power depends on acceptance, it referred to legitimacy in a sociological sense: the Court's sociological legitimacy resides in the public's acceptance of its role (institutional legitimacy) and in the public's willingness to accept judicial mandates (authoritative legitimacy).[241] As the Court recognized, however, its sociological legitimacy depends on its adherence or apparent adherence to legal

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239 *Id.* at 867.

240 *Id.* at 864–66.

241 *See* Caldeira & Gibson, *supra* note 185, at 659 ("To the extent that the Court becomes politicized or perceived as such, it risks cutting itself off from its natural reservoir of goodwill . . . ."); Tyler & Mitchell, *supra* note 22, at 788 (concluding that "[t]he Justices in *Casey* . . . appropriately seize[d] on a conception of neutrality as crucial to the maintenance of Court legitimacy").

norms. If the Court did not base its decisions on legal principles, the public would lose respect for it.[242]

Only when the concepts of sociological and legal legitimacy are distinguished does *Casey*'s provocative aspect come into focus: the majority opinion suggests that the Supreme Court is permitted and perhaps required by law to base its decisions partly on public perceptions and, in particular, on an asserted interest in preserving its own sociological legitimacy.[243]

The Court's suggestion that it is legally legitimate for it to let considerations of sociological legitimacy influence its judgments, rather than decide cases solely on substantive legal principles, triggered a protest from Justice Scalia. "Instead of engaging in the hopeless task of predicting public perception — a job not for lawyers but for political campaign managers — the Justices should do what is *legally* right," Scalia wrote.[244] In this assertion, he obviously insisted upon the primacy of a legal concept of legitimacy in assessing Supreme Court decisionmaking. But even Scalia's argument was not narrowly legal. "[T]he notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening," he wrote.[245] Among its points of interest, this and other language in Scalia's opinion hinted at the influence of a moral, and perhaps even a sociological, concept of legitimacy on his views about legal legitimacy. Courts should accept his standards of legal legitimacy, Scalia argued, not only because it would be frightening for them not to do so, and thus presumably morally undesirable and possibly illegitimate, but also because if they did otherwise "a free and intelligent people's attitudes towards [the Court] can be expected to be" ones of resentment or even rejection.[246] With this argument, Scalia appeared to assert that by openly basing its decisions on public perceptions, the Court would jeopardize its sociological legitimacy rather than help to preserve it.

Clearly, however, Scalia meant to do more than prophesy. By decrying the Court's claim of authority to invalidate anti-abortion legislation under the Due Process Clause, he apparently hoped to rally support for his views about legal legitimacy and thereby to create pub-

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[242] *See* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 994 (2004) (speculating that "naked value selection" by the Supreme Court would erode the Court's "legitimacy").

[243] For a thoughtful defense of the Court's approach, see Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995).

[244] *Casey*, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part).

[245] *Id.* at 998.

[246] *Id.* at 1001.

lic pressure on the Court.[247] This strategy suggests that Scalia, no less than the majority, apprehended that legal and sociological legitimacy are profoundly intertwined in the foundations of constitutional law.[248]

IV. LEGISLATIVE, PRESIDENTIAL, AND ADMINISTRATIVE LEGITIMACY

Although my principal concerns in this Article involve the legitimacy of the Constitution and judicial legitimacy under the Constitution, it may be useful to talk briefly about legislative, presidential, and administrative legitimacy, both for the sake of completeness and especially for comparative purposes.

A. Legal Legitimacy

Because the Constitution creates Congress and the presidency, their legal legitimacy is generally unquestioned. Administrative agencies stand on a more contentious footing and, partly as a result, subsist in a chronic "legitimacy crisis."[249] It has not always seemed obvious how, and indeed whether, agencies performing a mix of administrative, rulemaking, and adjudicative functions could satisfy basic constitutional norms.[250] Supreme Court decisions have resolved the most fundamental challenges, at least for now, but debates about the legal legitimacy of administrative adjudication and rulemaking never wholly disappear.[251]

Issues involving the legal legitimacy of discrete legislative, presidential, and administrative actions arise in diverse contexts in which legitimacy assumes varied meanings. When courts inquire whether congressionally enacted legislation is rationally related to a legitimate governmental interest, legitimacy and illegitimacy frequently function

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[247] Although most judicial opinions have relatively little salience with the general public, awareness goes up among elites, and "[s]upport for the Court among these elites is . . . very closely correlated with their approval of specific court decisions." Adamany & Grossman, *supra* note 170, at 408.

[248] *Cf.* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1699–1700 (2004) (describing Scalia's *Casey* opinion as "not so much part of a reasoned deliberative exchange of ideas, but . . . rather an invitation to people outside the Court to try to replace sitting Justices with others with correct views").

[249] *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9–11 (1978); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.").

[250] For a brisk introduction to some of the issues, see RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 23–38 (2d ed. 1992).

[251] *See* Bressman, *supra* note 249, at 492 (asserting the continuing importance of issues of administrative legitimacy under the Constitution).

as synonyms for validity and invalidity.[252] Legitimate purposes are lawful ones.[253] Similarly, laws and acts that are not legally legitimate lack legal effect.[254]

Sometimes, however, judgments about presidential, congressional, or administrative legitimacy — like some assessments of the legal legitimacy of judicial action — appear to appraise motives or constitutional good faith. Although it would seem rhetorical overkill to claim that Congress acts illegitimately whenever it passes a law that the courts subsequently hold unconstitutional, it might well be thought constitutionally illegitimate for the President or Congress to act in deliberate defiance of the Constitution or to demonstrate the kind of egregiously bad constitutional judgment that amounts to an abuse of discretion.

B. Sociological Legitimacy

As Weber pointed out long ago, "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."[255] The sources of sociological legitimacy can be multiple, however.[256] By providing for elections, the Constitution assumes that electorally accountable officials will derive sociological legitimacy not only from their formal legal authorizations, but also from electoral mandates.[257] Such mandates can prove fragile. In winning elections, candidates commonly make pledges, some explicit and some implicit. When officials break faith with their constituencies, they risk forfeiting public trust. Concerns about sociological as well as legal legitimacy thus loomed large in late-twentieth-century debates about whether

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[252] *See* cases cited *supra* note 13.

[253] *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996) ("The second . . . and the third provision . . . violate the First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to 'patently offensive' material."); Clark v. Jeter, 486 U.S. 456, 461 (1988) ("At a minimum, [to satisfy the requirements of equal protection,] a statutory classification must be rationally related to a legitimate governmental purpose."); Moran v. Burbine, 475 U.S. 412, 426 (1986) (distinguishing "between legitimate efforts to elicit admissions and constitutionally impermissible compulsion").

[254] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 208 n.3 (1987) ("*Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached.").

[255] 1 WEBER, *supra* note 18, at 37.

[256] *See, e.g.*, Balkin, *supra* note 175, at 214–18 (discussing the relationship between political legitimacy and procedural legitimacy).

[257] *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (referring to "the legitimizing power of the democratic process" (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting))); Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring) ("The counting of votes that are of questionable legality does in my view threaten irreparable harm to the petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.").

Presidents Nixon and Clinton should be impeached and removed from office. In the minds of some, a central question was whether the President had so lost the public's confidence that he had relinquished the capacity to exert effective leadership.[258]

In comparison with the President and members of Congress, who can point to empowerment by democratic majorities as a ground for their decisions to be treated as authoritative, administrative agencies are widely believed to face a serious, even alarming, sociological legitimacy deficit.[259] Academic writings attest recurrently to this concern,[260] as do judicial opinions.[261]

C. Moral Legitimacy

Like judges, officials of other branches of government pledge to uphold the law, and they will normally be morally justified in doing so under our minimally just Constitution. Again as with judges, however, questions can arise about whether and when it might be morally legitimate for officials to defy the law or illegitimate for them to obey it.

Some of the greatest American presidents have grappled with these questions. Thomas Jefferson believed the Louisiana Purchase to be constitutionally unauthorized[262] but defended his role in effecting it. "[S]trict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not the *highest*," he wrote, for "laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[263]

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[258] *See, e.g.*, THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 322–43 (1975) (explaining how a "breach of faith" with the American public resulted in Richard Nixon's resignation from the presidency in disgrace); David Tell, Editorial, *Dishonest Excuses for a Dishonest President*, WKLY. STANDARD, Nov. 23, 1998, at 7, 8 (noting but rejecting the view that "[i]t 'fails the legitimacy test[]' . . . to impeach a president who retains majority support").

[259] *See, e.g.*, FREEDMAN, *supra* note 249, at 9–11 (describing a legitimacy crisis "concerned with popular attitudes toward" the exercise of administrative power).

[260] *See id.* at 259–66 (discussing "the challenge of administrative legitimacy"); Bressman, *supra* note 249, at 490 (critically reviewing a "presidential control model" that "attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences"). *See generally* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (reviewing and critiquing scholarly efforts to identify available sources of sociological legitimacy on which agencies might draw).

[261] *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–60 (1975) (tracing judicial efforts to implement an "interest representation" model of administrative legitimacy).

[262] *See* FARBER, *supra* note 197, at 193.

[263] *Id.* at 192–93 (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* THOMAS JEFFERSON, WRITINGS 1231, 1231 (Merrill D. Peterson ed., 1984)).

Abraham Lincoln exhibited greater ambivalence. Early in his career he argued that no higher duty existed than obedience to law.[264] Indeed, in his First Inaugural Address he pledged that he would enforce the fugitive slave laws, despite his moral opposition to them.[265] He apparently believed that his sworn duty to uphold the laws not only justified his doing so, but put him under a moral obligation. Then the Confederate states seceded from the Union. In the early months of the Civil War, with Congress out of session, Lincoln purported to authorize the suspension of the writ of habeas corpus, even though the Constitution locates the authority to suspend the writ in Article I, which deals with the powers of Congress, not in Article II, which confers presidential authority.[266] Pursuant to Lincoln's directive, Union officials suspended the writ in Maryland and detained John Merryman. In a petition for his client's release, Merryman's lawyer claimed that the President lacked the authority to suspend the writ. In *Ex parte Merryman*,[267] Chief Justice Roger Taney agreed.[268]

Lincoln defied the Chief Justice's ruling. In a subsequent message to Congress, he argued that Taney misconstrued the Constitution. In an emergency, Lincoln maintained, the President could lawfully suspend the writ of habeas corpus at least until Congress reassembled.[269] Significantly, however, Lincoln mounted little defense of his authority to disobey a direct judicial order.[270] In his book *Lincoln's Constitu-*

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264 *See* Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *in* SPEECHES AND WRITINGS, *supra* note 217, at 28, 32 (calling upon "every American" to swear "never to violate in the least particular, the laws of the country; and never to tolerate their violation by others").

265 *See* Lincoln, *supra* note 217, at 216–17 (quoting the Fugitive Slave Clause and pledging that his administration would enforce all provisions of the Constitution and the laws).

266 Article I provides that the privilege of the writ of habeas corpus may be suspended "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

267 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

268 *See id.* at 152. Taney stipulated that he issued his opinion as an "in chambers" opinion of the Chief Justice, rather than in his capacity as circuit justice. *See id.* at 146.

269 In his Message to Congress in Special Session, Lincoln argued that "as the provision [authorizing suspension of the writ] was plainly made for a dangerous emergency, it cannot be believed the framers of the [Constitution] intended, that in every case, the danger should run its course, until Congress could be called together." Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430–31 (Roy P. Basler ed., 1953) (footnotes omitted); *see also* FARBER, *supra* note 197, at 162 (arguing that Lincoln enjoyed statutory authority to suspend habeas corpus under the same statute that authorized the President to call out the militia).

270 Within American constitutional law, it would normally be assumed that "'[t]he judicial Power' means the power to decide cases *with finality*, so that judgments must by their nature bind the executive (and Congress) to enforcement." Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1314 (1996) (quoting U.S. CONST. art. III, § 1, cl. 1). The most prominent dissenter from this view is Michael Paulsen. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 228–62 (1994). Without directly contesting the normal view about par-

tion, Daniel Farber speculates that Lincoln thought the case one in which practical and moral imperatives prevailed over legal duty:[271] if obeying Taney's decision would have compromised efforts to preserve the Union and ultimately abolish slavery, the President may have believed that his action was morally justified and therefore legitimate, even if illegal.[272]

This view seems compelling. As Jefferson put it, an official's duty to obey the Constitution can be very strong yet still yield to moral or practical imperatives.[273] As with respect to the moral legitimacy of judicial action, to recognize that the President might sometimes be morally justified in disobeying the Constitution is by no means wholly comforting. Not every President will exhibit Lincoln's tempered judgment. Nevertheless, the conclusion that Farber imputes to Lincoln — that the true foundation for his claim of authority to defy the Chief Justice lay more in moral and practical considerations than in law — reveals volumes.[274] When we speak of the legitimacy of presidential action, especially in matters of war and peace, it is often moral legitimacy that most concerns us, sometimes at the expense of legal legitimacy.[275]

Michael Paulsen disagrees. He argues for a principle of constitutional interpretation under which any executive action reasonably thought necessary to national security should be deemed constitution-

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ties' duties to obey judicial orders, which he himself had previously defended, *see* Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 269, at 398, 400–01, Lincoln implied in his message to Congress that this ordinary constitutional role did not apply to the extraordinary situation that he confronted — one in which the entire Constitution stood at risk, he maintained, unless he could take necessary steps to preserve it. *See* Lincoln, *supra* note 269, at 430–31. But he left this claim more implicit than explicit and did not attempt an articulate defense. *See id.*

271 *See* FARBER, *supra* note 197, at 192–94.

272 *See id.* at 188–92 (reviewing arguments pro and con before concluding, albeit equivocally, that "we should concede that Lincoln's action was unlawful"). Farber also suggests that Lincoln's unilateral actions increasing the size of the Union army while Congress was out of session probably violated the Constitution, but observes that "this is as sympathetic a case as we could ever expect to see for the claim that the president is sometimes justified in violating the law in the name of necessity." *Id.* at 137–38.

273 *See supra* p. 1844.

274 *See generally* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023–24 (2003) (arguing that extraconstitutional or constitutionally forbidden executive acts may sometimes be morally defensible and appropriate).

275 Apart from issues involving the moral legitimacy of officials' obedience to law stand questions about the moral legitimacy of presidential, congressional, and administrative action in making law or policy within the bounds of their legal authority under the Constitution. Issues of this kind arise because of the widespread understanding that grants of authority can be bounded morally as well as legally. A law or policy that violates clear or important moral norms can thus be pronounced illegitimate on that ground, with the claim of illegitimacy representing a strong statement of moral condemnation. Objectors can thus believe the prosecution of a war to be morally illegitimate even if legally authorized.

ally valid, notwithstanding apparent conflicts with constitutional language or judicial rulings.[276] In my view, however, this analysis more clouds than clarifies the issues that are posed when presidents claim extraordinary powers to override otherwise controlling constitutional principles that the courts deem applicable even in war or emergency. In such cases, the President must appeal — and sometimes may appeal successfully — to sources of sociological and moral legitimacy other than ordinary legality.

Admittedly, presidents seldom if ever openly ask the public to accept their authority to take extraordinary actions not adequately justified as a matter of law. Presidents, including Lincoln, typically have felt a sociological or political need to offer colorable legal justifications for their decisions. Moreover, when emergency executive acts have drawn legal challenges, the courts have often strained to uphold executive authority, even when the supporting arguments were tenuous.[277] In such cases, however, we should not mistake colorable legal justifications for sufficient ones, even if acceptance of the colorable claims establishes a precedent that will help to define legally legitimate presidential authority in the future.[278]

V. CONNECTIONS AND DISJUNCTIONS

Although I have insisted repeatedly that the legal, sociological, and moral concepts of legitimacy are sometimes intertwined, despite differences among them, I have not yet attempted to trace either the connections or the disjunctions in a systematic way. The time has come to do so.

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[276] *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258 (2004) (maintaining that "the Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it").

[277] *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 45–46 (1942) (upholding executive authority to try suspected saboteurs before military commissions rather than ordinary courts); The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) (upholding presidential authority to impose a military blockade of Confederate ports without a congressional declaration of war). *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (rejecting a claim of inherent presidential authority to seize steel mills to avert a strike during wartime).

[278] Neither should we overlook the importance of precedent in defining the scope of legally legitimate presidential authority. The pattern by which legally legitimate executive power has evolved and expanded parallels the pattern, described in Part III, by which legally legitimate judicial power has expanded through the accretion and acceptance of precedent. Once precedents are established, they can of course be applied or even reasonably extended to cover new cases. Hard questions then arise about what counts as a reasonable extension. And answering those questions often requires moral or ethical judgments. As is the case in assessing the legal legitimacy of claims of judicial authority, issues involving the legal legitimacy of presidential action thus become intertwined with questions of moral legitimacy.

A. Legal Legitimacy

Following a well-trod jurisprudential path,[279] I have maintained that legal legitimacy depends fundamentally on sociological legitimacy. To repeat now familiar formulae, the foundations of law, including constitutional law, lie in sociological embrace and acceptance of rules, norms, and interpretive practices. The Constitution is law because it is accepted as such. Judicial precedent contrary to what otherwise would be the best interpretation of the Constitution is law for the same reason.

By no means, however, does legal legitimacy collapse into sociological legitimacy. As I have noted already, once the Constitution acquires status as fundamental law, then laws that are duly promulgated under it can possess legal legitimacy even if they have relatively little substantive or authoritative sociological legitimacy. Laws barring alcohol during Prohibition were legally legitimate, even if widely ignored.

Perhaps more important, it is possible for prevailing majorities of judges and officials, including Supreme Court Justices, to err about what the Constitution requires, despite the sociological predominance of their views. Only the most fundamental legal norms owe their legitimacy directly to acceptance. The Constitution is fundamental in the relevant sense. So, I have maintained, are at least some interpretive norms that effectively define the judicial power. Once the most fundamental legal norms are established by acceptance, however, they supply legal standards, not sociological gauges, against which legal correctness and legitimacy can be measured. The Supreme Court's decision in *Korematsu v. United States*[280] illustrates the importance of this distinction. *Korematsu* upheld the forced exclusion of all persons of Japanese descent from parts of the West Coast during World War II. The selective exclusion policy wrought a severe deprivation of liberty that should have required individualized loyalty hearings under the Due Process Clause. Even if most Americans agreed with *Korematsu* at the time of its announcement, it remained vulnerable to condemnation as constitutionally illegitimate.[281]

Legal and constitutional legitimacy can also depend on moral considerations closely aligned with moral legitimacy. As earlier discussion suggested, the interdependence occurs because fundamental norms of

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[279] The modern intellectual path-breaker on this front was H.L.A. Hart. *See generally* HART, *supra* note 60.

[280] 323 U.S. 214 (1944).

[281] *See, e.g.*, Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 949–58 (2004). In light of the government's failure to provide the fair hearings required by the Due Process Clause, this conclusion need not rest on the premise, not conclusively established until *Bolling v. Sharpe*, 347 U.S. 497 (1954), that race-based discrimination by the federal government is inherently constitutionally suspect. *See supra* pp. 1814–15.

constitutional law, themselves grounded in acceptance, permit and sometimes require decisionmakers to weigh moral considerations in determining how otherwise indeterminate legal materials are best interpreted.[282] As I noted above, whether *Roe v. Wade* was legally legitimate may depend on an assessment of the partly moral judgment that it reflected.[283]

B. Sociological Legitimacy

Once the Constitution is accepted, the sociological legitimacy of governmental institutions and decisions *under* the Constitution will typically depend, as I have pointed out, on perceptions of legal legitimacy. As Weber emphasized, legal legitimacy — the belief that officials' decisions ought to be followed because they are lawful — provides the vital sociological support for most governments.[284]

Especially in American constitutional law, which invites and sometimes requires appeal to moral values as an element of constitutional analysis, sociological legitimacy is also likely to depend partly on the public's moral views. A judicial decision that diverged too far from the public's sense of justice would lack substantive sociological legitimacy.[285]

It would be a mistake, however, to conclude that sociological legitimacy necessarily corresponds to moral legitimacy. Judgments of moral legitimacy require moral inquiries, not opinion surveys. Even if the public widely regarded *Korematsu v. United States* as morally legitimate, the public may have been mistaken.

C. Moral Legitimacy

Although moral legitimacy is an inherently moral concept, considerations of legal and sociological legitimacy sometimes matter crucially to the moral legitimacy of official acts. As I have emphasized, public officials, including judges and Justices, take oaths to enforce the law. The resulting obligations to uphold the law, whatever it might be, carry moral weight. If an action would be legally illegitimate, then an official presumptively ought not to take it, for it would be contrary to her oath and, accordingly, most often morally illegitimate as well under our minimally legitimate Constitution.

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[282] *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204–09 (1987) (discussing the role of "value arguments" in constitutional law).

[283] *See supra* p. 1827.

[284] *See supra* p. 1795.

[285] *See* Friedman, *supra* note 128, at 1387 (observing that "if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate").

Considerations of sociological legitimacy may also bear on moral legitimacy within a moral framework that gives weight to consequences. For example, in my view it is morally as well as legally legitimate for courts to take public reaction into account in determining whether to extend judicial precedents to recognize new rights.[286] If upholding a previously unrecognized right would likely trigger a public backlash, more harmful than helpful to the interests that the right would be crafted to protect,[287] the anticipated consequences provide a morally relevant reason for a court to stay its hand. I therefore agree with Cass Sunstein that the Supreme Court should not recognize a constitutional right to gay marriage at this time,[288] even if a majority of the Justices were otherwise disposed to do so. The likely backlash numbers among the considerations that the Justices may legitimately consider.

D. Conflicts and Priorities

Although the interconnections among the various concepts of legitimacy are interesting and important, it is also important not to forget the potential for conflict. As Parts II and III emphasized, judges and other decisionmakers can sometimes experience a conflict between the demands of legal and moral legitimacy. There also may be situations in which a decision possessing moral or legal legitimacy would lack much sociological legitimacy. Or a decision with sociological legitimacy might lack legal or moral legitimacy. Once again, *Korematsu v. United States* furnishes an example of a decision that apparently enjoyed broad sociological legitimacy but could plausibly be regarded as so tainted by prejudice as to be morally or legally illegitimate.[289]

Cases involving conflicts among legal, sociological, and moral legitimacy frame the question whether these three concepts are really distinct, as I have maintained, or should instead be regarded as component elements of broader judgments of what might be called "over-

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[286] *See* FALLON, *supra* note 67, at 55 (arguing that the Supreme Court appropriately weighs democratic acceptability in determining whether to extend constitutional language to cases not covered by "doctrinally entrenched understandings," but should not "fail to enforce doctrinally entrenched rights in a particular case simply to avoid popular hostility").

[287] *See generally* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 347–51 (1993) (arguing that rights reflect underlying interests).

[288] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 161–62 (1999). Sunstein argues that:

> If the Supreme Court of the United States accepted the view that all states must authorize same-sex marriages in 2001, or even 2003, we might well expect a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying hatred of homosexuals, a constitutional amendment overturning the Court's decision, and much more. Any court should hesitate in the face of such prospects.

Id. at 161.

[289] *See, e.g.*, Kang, *supra* note 281, at 949–58.

all" legitimacy. The notion of overall legitimacy is not one that I have encountered in the literature, but it has been suggested to me by several colleagues. The idea would be this: after separately assessing legal, sociological, and moral legitimacy, a decisionmaker or observer may often want to ask whether a decision was or would be legitimate overall.[290] Overall legitimacy would thus be some function of the three sub-varieties of legal, sociological, and moral legitimacy.

The central difficulty with this suggestion is that it conflates normative and empirical variables. Whereas moral legitimacy is a normative concept, sociological legitimacy is a matter of fact, involving what people think is legally or morally legitimate, not what really is legally or morally legitimate. It is impossible to imagine how normative and empirical judgments could be combined within a concept of overall legitimacy unless that term were simply a placeholder for a judgment concerning what, all things considered, a decisionmaker ultimately *ought* to do or could be regarded as behaving morally permissibly in doing. Perhaps no harm would come from using the term overall legitimacy in this way. In my judgment, however, there is a real risk that the terminology would obscure the ultimately moral or ethical character of the underlying judgment.

VI. CONCLUSION: THE PERSISTING IDEAL OF CONSTITUTIONAL LEGITIMACY

We often speak of legitimacy as if it were a single, undifferentiated phenomenon, goal, or ideal. It is not. Our interests in legitimacy are diverse. Those diverse interests give rise to three concepts of legitimacy.

We care about legal legitimacy because we care about law and fidelity to law, notably including the Constitution. Law is a vitally important institution, crucial to securing peace and permitting social cooperation. Not for nothing does "the rule of law" stand among the most exalted social ideals.[291]

Our interests in sociological legitimacy are often instrumental. We may care which claims of authority and which decisions will possess authoritative sociological legitimacy. Indeed, reflection on historical examples — including the collapse of British authority in colonial America and the later slide into the Civil War — may create a vivid sense that the most important kinds of sociological legitimacy are con-

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[290] *Cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 980 (2000) (assigning legitimacy a meaning that is both "empirical" and "normative").

[291] On the rule of law as a constitutional ideal, see Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 24–36 (1997).

tingent, not necessarily permanent, even with respect to the Constitution. We may have reason to want to foster sociological legitimacy in many contexts.[292]

Our interests in moral legitimacy are varied. In some contexts we want to know about ideal legitimacy for purposes of specifying a standard at which governments should aim. In others we want to assess and criticize the Constitution and decisions made under it. Issues involving the moral legitimacy of the Constitution and laws of the United States also bear on the moral obligations of public officials.

With our interests in legitimacy being so multifarious, an obvious risk exists that our invocations of the concept will be confused, our debates cacophonous. What should we do?

To some extent, I have suggested, we should simply pay closer heed to what we and others mean when we talk about legitimacy. If we can identify a particular appeal as being legal, sociological, or moral, enhanced understanding may follow, as may more precise assessment of the claim being offered.

But sometimes, I have argued, linguistic categorization of this kind will prove impossible. It is no mere unfortunate accident that sometimes distinguishable varieties of legitimacy have congregated under the same label, for the concerns that underlie them all — involving the necessary, sufficient, and morally justifiable conditions of government under law — are often complexly interconnected. This is a truth about thought and language. It helps to illuminate other complex truths about constitutional law, three of which I would emphasize by way of conclusion.

First, the foundations of contemporary constitutional legitimacy — regardless of whether that term is used in a legal, sociological, or moral sense — necessarily lie in current states of affairs. If precedent is accepted as a legally valid source of authority for future decisions, then it enjoys legal legitimacy, regardless of its relation to the original understanding of constitutional language. Nor does any tinge of moral illegitimacy sully this state of affairs. If the current constitutional regime deserves to be supported, as I believe that it does, it is because the current regime furnishes the great benefits of the rule of law and because it is reasonably just, not because we are bound by the intentions of generations now long dead.

Second — again regardless of whether the term is used in a legal, sociological, or moral sense — the foundations of contemporary constitutional legitimacy are more uncertain and contingent than many peo-

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[292] *See* TYLER, *supra* note 17, at 62 (concluding on the basis of social scientific studies that "[c]itizens who view legal authority as legitimate are generally more likely to comply with the law").

ple assume. Legal and sociological legitimacy rest on a diverse and unknown mix of attitudes. These range from active embrace of constitutional and legal norms by some to indifferent or grudging acquiescence by others. Especially in the domain of constitutional law, the public's acceptance of the interpretive practices that substantially define legitimate judicial power may be rooted more in ignorance than in knowledge. Among legal elites, including judges and Justices, there is widespread methodological as well as substantive disagreement about constitutional matters, much of which reflects underlying moral disagreements potentially bearing on issues of moral legitimacy. More broadly, moral disagreement is a pervasive fact of political and social life.

Third, under circumstances in which we disagree about so much else, it is hardly surprising that we should disagree about what is legally and morally legitimate. Nor is it surprising that judgments of constitutional legitimacy frequently rest on moral predicates.

In his book *The People and the Court*, Charles Black recounted the story of a foreigner who exclaimed upon entering the United States that it was "wonderful . . . to breathe the sweet air of legitimacy."[293] We can both understand and savor the story while also appreciating that the air of constitutional legitimacy consists of diverse elements and fragrances. It is by no means a perfect compound, and never has been, nor is it necessarily stable. The foundations of constitutional legitimacy are easily misunderstood. They should not be idealized, nor taken for granted.

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[293] BLACK, *supra* note 23, at 34 (internal quotation marks omitted).