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William P. Marshall



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CONSTITUTION
SOCIETY FOR
LAW AND POLICY

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Advance

The Journal of the ACS Issue Groups

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Advance

A*dvance*, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS), is published twice yearly by ACS. Our mission is to ensure that our country's founding values of human dignity, individual rights and liberties, genuine equality and access to justice enjoy their rightful, central place in American law.

Each issue of *Advance* features a collection of articles that emanate from the work of ACS's Issue Groups. Most editions of *Advance* feature a selection of Issue Briefs written for ACS in the preceding several months, on topics spanning the breadth of the eight Issue Groups. But others, such as this one, consist of papers on one particular topic addressed at a conference or other event hosted by ACS. ACS Issue Briefs—those included in *Advance* as well as others available at www.acslaw.org—are intended to offer substantive analysis of a legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas. ACS encourages its members to make their voices heard, and we invite those interested in writing an Issue Brief to contact ACS.

We hope you find this issue's articles, which span a range of views on the topic of constitutional interpretation, engaging and edifying.

ACS Issue Groups

ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome.

Access to Justice

The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

Co-Chairs: *Lucas Guttentag*, ACLU Immigrants' Rights Project
Marianne Lado, New York Lawyers for the Public Interest
Bill Lann Lee, Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

Constitutional Interpretation and Change

Ideological conservatives have been quite successful in promoting neutral-sounding theories of constitutional interpretation, such as originalism and strict construction, and in criticizing judges with whom they disagree as judicial activists who make up law instead of interpreting it. The Constitutional Interpretation and Change Group works to debunk the neutrality of those theories and expose misleading criticisms. It also articulates effective and accessible methods of interpretation to give full meaning to the guarantees contained in the Constitution.

Co-Chairs: *Jack Balkin*, Yale Law School
Rebecca Brown, Vanderbilt University Law School
Andrew Pincus, Mayer Brown LLP

Criminal Justice

The administration of our criminal laws poses challenges to our nation's fundamental belief in liberty and equality. Racial inequality permeates the system from arrest through sentencing. The United States' imposition of the death penalty increasingly has set us apart from much of the world and has raised concerns about the execution of the innocent. Sentencing law and policy have led courts to impose lengthier sentences, resulting in the incarceration of an alarming percentage of our population. The recent invalidation of mandatory federal sentencing guidelines has left sentencing in flux. Failure to provide adequate resources for representation of accused individuals and investigation of their cases has weakened the criminal justice system. Restrictive rules governing collateral review of convictions have closed the courts to many. This Group explores these and other issues affecting criminal justice.

Co-Chairs: *David Cole*, Georgetown University Law Center
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Ronald Sullivan, Harvard Law School

Democracy and Voting

The Democracy and Voting Group focuses on developing a comprehensive vision of the right to vote and to participate in our political process. It identifies barriers to political participation that

stem from race, redistricting, the partisan and incompetent administration of elections, registration difficulties, felon disenfranchisement and other problems that suppress access to voting and threaten the integrity of our electoral process.

Co-Chairs: *Julie Fernandes*, Leadership Conference on Civil Rights
Pamela Karlan, Stanford Law School
Nina Perales, MALDEF
Sam Hirsch, Jenner & Block

Equality and Liberty

The protection of individual rights lies at the core of a progressive approach to the law. The Equality and Liberty Group addresses means of combating inequality resulting from race, color, ethnicity, gender, sexual orientation, disability, age and other factors. It also explores ways of protecting reproductive freedom, privacy and end-of-life choices and of making work accessible and meaningful.

Co-Chairs: *Alan Jenkins*, The Opportunity Agenda
Nina Pillard, Georgetown University Law Center
Paul Wolfson, Wilmer, Cutler, Pickering, Hale & Dorr

Economic, Workplace, and Environmental Regulation

The work of the Economic, Workplace, and Environmental Regulation Group encompasses a broad range of issues in the areas of labor law, environmental protection, economic opportunity, and administrative law. Among the topics it examines are workplace democracy, climate change and the enforcement of environmental laws, the regulatory process, corporate governance, and wealth inequality.

Co-Chairs: *Stephen Berzon*, Altshuler Berzon LLP
Catherine Fisk, Duke Law School
Albert H. Meyerhoff, Coughlin, Stoia, Geller, Rudman & Robbins

Religion Clauses

No issue was more central to our Nation's founding than freedom of religion and no part of the Constitution continues to capture the imaginations and passions of Americans more than the Religion Clauses of the First Amendment. The Religion Clauses Group provides a forum for discussion about the meaning and interpretation of the Establishment and Free Exercise Clauses and also investigates broader questions regarding religion in America—including the appropriate relationship between church and state in contemporary society and the role of religion and religious belief in American politics and public life.

Chair: *William P. Marshall*, University of North Carolina School of Law

Separation of Powers and Federalism

Recent years have witnessed an increase in executive power at the expense of the other branches of the federal government. This change has had a profound effect on our civil liberties, government transparency and the rule of law. The Separation of Powers and Federalism Group addresses the proper balance of power in our system of checks and balances, as well as other issues related to the power of the President. It also addresses the importance of preserving the independence of the judiciary. In addition, this Group focuses on the federalism jurisprudence of the Supreme Court, which has led it to strike down an unprecedented number of congressional enactments, threatening the ability of Congress to protect civil rights, the environment and workers. It also addresses positive visions of federalism that will promote the ability of government at all levels to pursue progressive policies.

Co-Chairs: *Preeta Bansal*, Skadden, Arps, Slate, Meagher & Flom
Dawn Johnsen, Indiana University School of Law-Bloomington
Neil J. Kinkopf, Georgia State University College of Law
Simon Lazarus, National Senior Citizens Law Center
Christopher Schroeder, Duke Law School

Foreword

Rebecca L. Brown*

What does it mean to be faithful to the meaning of the Constitution? Can progressive approaches to constitutional interpretation persuasively lay claim to principle, fidelity, adherence to the rule of law and democratic legitimacy? How can these approaches be effectively communicated and made part of the public debate about the Constitution? On October 6–7, 2006, a diverse group of scholars, lawyers, and judges addressed different aspects of this inquiry during a conference at Vanderbilt University Law School entitled, “Keeping Faith with the Constitution in Changing Times,” sponsored jointly by ACS’s Constitutional Interpretation and Change Issue Group and Vanderbilt Law School’s Program in Constitutional Law & Theory. This issue of *Advance: The Journal of the ACS Issue Groups* features papers from a number of the leading practitioners and scholars who addressed the conference.

In *The Constitution: Change and Interpretation*, Barry Friedman traces three decades of debate over constitutional interpretation. Professor Friedman discusses how both liberals and conservatives developed agenda-driven responses to the decisions of the Warren and Burger Courts from the 1950s through the 1980s; the Left used moral philosophy to justify the Court’s work, while the Right honed its theory of originalism to develop a framework for criticizing Court decisions. Professor Friedman notes that neither view found favor with the public, which “[i]n large measure agreed with what the Supreme Court had decided, accepted the notion of a living Constitution, adaptable to changing circumstances and capable of addressing the felt needs of the times.” Professor Friedman concludes by examining two Supreme Court nominations. Judge Robert Bork’s nomination was defeated, at least in part, because the public feared the results of his originalist methodology. Justice Anthony Kennedy, in contrast, articulated a view that “squared with public opinion, eschewing both rigid originalism and moral philosophy for the middle ground of a living Constitution” and was confirmed unanimously.

In *Political Development and the Origins of the “Living Constitution”*, Howard Gillman examines historical and political debates surrounding constitutional interpretation. Dean Gillman traces constitutional theory through the 19th and 20th centuries, discussing how cultural shifts and historical events, such as the rise of industrialization and Darwinism, and the battles over the New Deal, led to significant changes, including a more expansive view of federal power and, among some, a corresponding expansion in constitutional rights and liberties. Gillman notes that in the 1980s and 1990s “we have witnessed a rise in the so-called New Originalism” which advocates a narrower scope of federal power. Gillman questions whether this school of thought will be wholly embraced by practitioners and politicians, concluding, “It is hard to see how the stubborn refusal to allow constitutional powers and rights to adapt to changing circumstances and historical experiences will be any more popular today that it was when it was rejected the first time around.”

* Allen Professor of Law, Vanderbilt University.

Erwin Chemerinsky exposes originalism's "false promise of constraining judges" in *Constitutional Interpretation for the Twenty-first Century*. In Professor Chemerinsky's view, "The goal is to develop an understanding of the Constitution for the 21st century. It makes no sense to find this by looking to the 18th century. Throughout American history the Supreme Court has decided the meaning of the Constitution by looking to its text, its goals, its structure, precedent, historical practice, and contemporary needs and values. This is what constitutional law always has been about and always should be about."

In *Constitutional Interpretation as Structured Choice*, Peggy Cooper Davis explores the history of the Reconstruction Amendments and the element of choice in legal decision-making. Professor Davis explains, "The liberty promised by the Fourteenth Amendment and extended to all by the interaction of the Thirteenth and Fourteenth Amendments was *understood as slavery's opposite*. Enslavement turned on denying natal ties; to be a slave was to be the property of a master rather than the child of a family. Freedom required that the right of family be restored to slaves and guaranteed to all. Enslavement turned on denying rights of self-determination and self-definition; human property lost its value if it could not be controlled. Freedom required that a measure of personal autonomy be restored to slaves and guaranteed to all. Enslavement turned finally on the denial of political status; slavery was ... civil death. Freedom required that political voice be restored to slaves and guaranteed to all." Professor Davis observes that "we have, and ought to acknowledge, a choice" about whether we apply the principles of the Reconstruction Amendments exactly as they would have been at the time of their enactment or whether we view them as "encompassing a continuing struggle to define the appropriate entitlements of free citizenship."

In *Originalism Within the Living Constitution*, Keith E. Whittington justifies a jurisprudence of originalism. Professor Whittington contends that, "[f]or judges who wish to exercise the power of judicial review, adherence to the original meaning of the Constitution is the only choice that is justifiable." He defends, however, only a very specific version of originalism, one that "does not mean that judges must hold a *séance* to call the spirit of James Madison to ask him what was on his mind in Philadelphia in the summer of 1787 or how he would deal with the tricky constitutional question that is raised by the case before the court.... It means that the constant touchstone of constitutional law should be the purposes and values of those who had the authority to make the Constitution—not of those who are charged with governing under it and abiding by it."

Jack Balkin discusses constitutional fidelity in *Fidelity to Text and Principle*. Professor Balkin explains, "Fidelity to the Constitution means grappling with its text and its principles, applying them to our present circumstances, and making use of the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution. Reasonable people may disagree on what those principles mean and how they should apply. But the larger point about constitutional interpretation remains. We decide these questions by reference to text and principle, applying them to our own time and our own situation, and in this way making the Constitution our own. The conversation between past commitments and present generations is at the heart of constitutional interpretation. That is why we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. The two are opposite sides of the same coin."

In *Originalism and the Living Constitution: Reconciliation*, Kermit Roosevelt analyzes the debate between "originalists and living constitutionalists [which] is generally

considered one of the most important current battles over how the Constitution should be interpreted.” Professor Roosevelt states that the significance of the debate is “drastically overstated,” demonstrating that “with respect to the most interesting and controversial constitutional provisions, the two approaches can be synthesized; that is, they should lead to the same interpretive results.”

In *Recognizing and Respecting Constitutional Structure*, Michael S. Greve contends, “Our real constitutional problem ... is not democracy. It is stability, or the lack thereof.” For Greve, “The point of a constitution, then, is to constrain the outcomes within a range that will generally be perceived as fair, reasonable, and acceptable. This may sound drearily familiar, but it has important implications.” He goes on to explain what kinds of standards may exist for determining acceptable outcomes while still preserving a commitment to the Constitution and not just politics.

Frank I. Michelman examines notions of constitutional legitimacy in *Fidelity and Legitimacy*. Professor Michelman explains, “Not everything that might call itself a constitution or that has the formal look of one can be considered ... capable of casting a mantle of legitimacy ... over whatever so-called laws pass muster under its provisions.... People can and do have differing ideas about the necessary properties or features of a legitimation-worthy constitution, and those differing ideas apparently can connect with differing conceptions of constitutional fidelity.” Michelman then sets forth a number of such ideas and explores their implications for constitutional interpretation.

In *Constitutional Fidelity and Democratic Legitimacy*, Robin West advocates for the legislative branch to take a more active role in constitutional interpretation. Professor West contends, “The way to express fidelity toward a constitutional vision that insists only on equality, equal compassion, and self-governance, is through the profoundly respectful, and deeply ennobling, but utterly ordinary practice of politics, and not through adjudicative process. One way to express fidelity with a text that directs us to give equal protection of the law to all, and to respect the privileges and immunities of all co-citizens, and otherwise, to self-govern, might be to constantly ask, and re-ask ourselves ... as we go about this work of self-governance: What would an ideally conscientious, morally responsible legislator—not judge—do?”

In *Self-Government, Change and Justice*, Rebecca L. Brown considers “why the Constitution should be binding on us” and what the implications of the answer are on constitutional interpretation. Professor Brown argues “the key to democratic legitimacy is the Constitution’s ability to provide a structure within which the polity can continue to exercise its right to self-government, including giving voice to its own commitments of political morality. Thus, it is imperative that the rights-bearing terms of the Constitution be interpreted in a way that can change and expand with the values of each generation. Not only is a dynamic constitutionalism defensible, therefore, it is absolutely essential in order for the Constitution to maintain its democratic legitimacy.”

In *Constitutional Interpretation: Reclaiming the High Road*, William P. Marshall exposes the disconnect between conservative rhetoric and jurisprudence over the last thirty years and calls for “a return to judicial decision-making that is perceived as legitimate because it actually is.” Professor Marshall notes that movement conservatives “engaged in a concerted effort to change the political perceptions surrounding judicial decision-making,” criticizing decisions with which they disagreed as “judicial activism” and professing originalism to be the one true faith. Yet, in numerous cases, conservatives abandoned originalism when that methodology did not lead to a

politically conservative result. Professor Marshall argues that to remedy this problem, we should not advocate, as some progressives have, that the Constitution justifies “whatever results these progressives believe are appropriate” but rather “return to decision-making that is driven by high jurisprudential principles and not ad hoc results.” Professor Marshall contends, “The Constitution is a progressive document ... based on principles of freedom, equality and democracy.” Nevertheless, “[i]t is inevitable that a court truly wrangling with numerous questions of constitutional law will reach some results that progressives (or anyone else for that matter) will not like as a political matter.”

A key purpose of the Conference was to inspire lawyers, policymakers, advocates and students to consider how we think and talk about the Constitution and what it means to apply the Constitution faithfully in today’s world. These papers reflect many different points of view on that question. By publishing them together, we invite our readers to examine these important issues and enter into the ongoing public debate that is at the heart of our nation’s constitutional identity.

The Constitution: Change and Interpretation

Barry Friedman*

“any theory worthy of consideration must ... state an acceptable range of judicial results”¹

From the 1950s to the 1980s, the Constitution saw terrific change in many areas concerning individual liberties. In response, scholars on the political left and right took widely divergent positions concerning how the Constitution should be interpreted. Neither of these positions found favor with the American public. The left essentially proposed leaving the document itself behind in favor of moral philosophy, a strategy that did not seem like constitutional *law* at all. The right insisted originalism was the only legitimate strategy, but originalism yielded a set of results the public would not accept. In large measure, the public agreed with what the Supreme Court had decided, and accepted the notion of a living Constitution, adaptable to changing circumstances and capable of addressing the felt needs of the times.

During the 1950s and 1960s, the Warren Court decreed sweeping constitutional change. It eliminated racial segregation, imposed dramatic new restraints on police, banned school prayer, decreed reapportionment of legislatures, and handed down many speech-protective First Amendment decisions. The work of the Warren Court was deeply controversial. In general, when it met substantial public opposition, the Warren Court backed off.

The ultimate downfall of the Warren Court was its criminal procedure decisions. Although the public accepted much of this change, when crime rates spiraled in the late 1960s and urban rioting occurred in America’s cities, the public lost its patience. Richard Nixon ran against the Court in 1968, and won.

Nixon came into office with a plan to change not only the Court, but the way it interpreted the Constitution. He vowed to appoint “strict constructionists”—judges who would not “twist or bend the Constitution” to “personal political or social views.”² Nixon got four appointments—Burger, Blackmun, Powell and Rehnquist. None was seen as liberal, and each took the pledge to adhere to the Constitution. As Justice Blackmun said during his confirmation hearings, “I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideals and philosophy, but would attempt to construe that document in the light of what I feel is its definite and determined meaning.”³

Despite Nixon’s agenda to slow the Court, the Burger/Nixon Court continued the

* Jacob D. Fuchsberg Professor of Law, New York University School of Law.

¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 141 (1991).

² The President’s Nationwide Address Announcing His Intentions to Nominate Lewis F. Powell, Jr., and William H. Rehnquist To Be Justices, 7 *Weekly Comp. Pres. Docs.* 1430, 1431 (1971).

³ Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 *WM. & MARY BILL RTS. J.* 585, 627, fn. 212 (2002).

Warren Court's project of social reform. It invalidated existing death penalty statutes in *Furman v. Georgia*,⁴ though it later tried to backtrack in the face of hostile public opinion. It established constitutional gender equality. And it created a constitutional right to abortion, grounded in the "privacy" right of *Griswold v. Connecticut*.⁵

The trouble with much of the Warren-Burger agenda was that it was difficult to square with pre-existing conceptions of constitutional meaning. Ruth Bader Ginsburg, then a law professor and women's rights advocate, told a Ford Foundation audience, "It was very clear that the framers of the 14th Amendment did not have women in mind."⁶ Indeed, the country rejected the Equal Rights Amendment, which would have enshrined equality for women in text. Yet, in cases like *Reed v. Reed*,⁷ *Frontiero v. Richardson*,⁸ and *Craig v. Boren*,⁹ the Burger Court did much of what the ERA would have. In 1970, Linda Greenhouse was a cub reporter for the New York Times covering early abortion litigation. She wrote "A right to abortion. Such a notion, at first hearing sounds fantastic, illusory. The Constitution is searched in vain for any mention of it. The very phrase rings of the rhetoric of a Women's Liberation meeting."¹⁰

No case seemed to pose the problem like *Roe v. Wade*.¹¹ *Roe* came under harsh attack from the "right to life" movement opposed to abortion rights. Yet *Roe* came under equally harsh attack from constitutional scholars of the left, who claimed to support a woman's right to an abortion. Writing scathingly of *Roe* in words that resonated with many, law professor John Hart Ely said the Constitution "simply says nothing clear or fuzzy about abortion." This, he insisted, was "a charge that can responsibly be leveled at no other decision in the past twenty years." As if that were not strident enough, he said *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be."¹²

Liberal scholars took on the agenda of justifying the decisions of the Warren and Burger Courts. Scholars like Thomas Grey, Paul Brest, Michael Perry and Ronald Dworkin wrote articles offering interpretive theories. Paul Brest coined the word "originalism" to refer to deciding cases based on constitutional text and the intent of the framers.¹³ At the core of these articles—particularly those by Grey and Brest—was a perfectly valid point. This "originalist" methodology could not support much of constitutional law—including everything from the New Deal expansion of federal power, the application of the Bill of Rights to the states, *Brown v. Board of Education*,¹⁴ and more.

⁴ *Furman v. Georgia*, 408 U.S. 238 (1971).

⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶ Ruth Bader Ginsburg and Jane Picker, Discussion of the Equal Rights Amendment at The Ford Foundation 5, May 22, 1972, summary prepared by Lauren Katzowitz.

⁷ *Reed v. Reed*, 404 U.S. 71 (1971).

⁸ *Frontiero v. Richardson*, 411 U.S. 677 (1971).

⁹ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁰ Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES MAGAZINE, Jan. 25, 1970, at 30.

¹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹² John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 923, 927, 936, 947 (1973).

¹³ Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

¹⁴ *Brown v. Board of Education*, 347 U.S. 482 (1954).

But the left-leaning scholars made the odd and ultimately uneasy move of—as one sympathetic commentator called it—“Abandoning the Constitution.”¹⁵ Instead, they argued judges should rely largely on moral philosophy. Paul Brest would have had judges ask, “How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government.”¹⁶ Ronald Dworkin, in *Taking Rights Seriously*, said that in interpreting the “vague constitutional provisions” a court “must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.”¹⁷ (Dworkin would later reshape his theory in response to criticism of left-leaning scholars, instead talking of “law as integrity” and condemning activism rather than interpretation.¹⁸)

It comes as little surprise that this failure to tie interpretation to the text and basis for the Constitution came under attack. Those on the right, troubled by Warren and Burger Court decisions, found an easy target in the theories of the scholarship that defended those decisions on the grounds of moral philosophy. As Attorney General, Edwin Meese III took a swipe at these scholars saying “constitutional adjudication is not primarily a matter of construction at all. They appear to view the United States Constitution as a document virtually without significant meaning.”¹⁹ Gary McDowell is a conservative constitutional scholar who served in the Meese Justice Department. He commented sharply “The question today is not so much how to read the Constitution as *whether* to read the Constitution.”²⁰

In contrast with these scholarly efforts, there was a prominent alternative defense of the Warren Court and Burger Court decisions, or at least some portion of them. That was the idea of the “living” Constitution. The idea was that the Constitution would grow over time, largely by adapting in the face of other changes the country was undergoing. This notion of constitutional evolution was like a tic, tripping off the tongues of Burger era judges and commentators. Pauli Murray and Mary Eastwood were activists in the women’s rights movement. In an important law review article, they wrote, “The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values.”²¹ In *Harper v. Virginia Board of Elections*, the case invalidating poll taxes, the Supreme Court said, “We have never been confined to historic notions of equality ... Notions of what constitute equal treatment for purposes of the Equal Protection Clause *do* change.”²² In *Reed v. Reed*, the first case in which the Supreme Court ruled for women’s equality, Justice Blackmun struggled behind the scenes because he recognized the Fourteenth Amendment “was not intended to meet any sex differentiation

¹⁵ John B. McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280 (1984).

¹⁶ Brest, *supra* note 13, at 226.

¹⁷ RONALD DWORIN, TAKING RIGHTS SERIOUSLY 137 (1977).

¹⁸ RONALD DWORIN, LAW’S EMPIRE 378 (1986) (condemning “activism” and insisting that the “justices enforce the Constitution through interpretation, not fiat, meaning that their decisions must fit [existing] constitutional practice, not ignore it”).

¹⁹ Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL’Y 5 (1988).

²⁰ Gary L. McDowell, *The Politics of Original Intention*, in THE CONSTITUTION, THE COURTS, AND THE QUEST FOR JUSTICE (Robert A. Goldwin and William A. Schambra eds., American Enterprise Institute, 1989).

²¹ Pauli Murray and Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 237 (1965).

²² *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966).

when it was adopted a hundred years ago.” Nonetheless, “my own feeling is that these constitutional provisions must have some flexibility and expansiveness in them as, in theory, we ourselves progress and expand in our concepts of equality.”²³ Similarly, on his retirement Justice Powell said “I have been alive eighty of the two hundred years of our Constitution. This country is very young. How can you say the Constitution should be frozen in time, that it is not a living document that must be interpreted?”²⁴

Admittedly, the idea of a living Constitution has its difficulties, as does any interpretive theory. One is that it cannot impose sharp constraints on judges. This, however, is a challenge most theories cannot meet, among them originalism. However, the idea does have its appeal. In attacking the notion of the living Constitution, then-Justice Rehnquist conceded: “At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution.” Then, in prescient words, he continued to speculate that if a poll were taken as to whether the Constitution should be living or dead, “the overwhelming majority of the responses doubtless would favor a *living* Constitution.”²⁵

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The response of the right to contested Warren and Burger Court interpretations was political mobilization. This is a long story that cannot be recounted here. Suffice it to say that in response to the Equal Rights Amendment and the abortion decisions, as well as other issues, grassroots activists worked to bring change from within the Republican Party. One result was the election of Ronald Reagan as President in 1980 and again in 1984.

The Reagan Administration was committed to working to change judicial rulings on issues that mattered to social conservatives.²⁶ It devoted huge efforts—documented elsewhere—to judicial selection.²⁷ Before and after the 1984 election the administration increased its efforts, in part because it became clear political solutions were unavailing.

The right needed a vocabulary of constitutional change. In the past, conservatives had spoken of “judicial restraint.” Though use of this language continued, the idea of restraint was not congenial given that the right wanted to see existing decisions swept away. The problem was *stare decisis*, a conservative doctrine of restraint that would serve only to enshrine the disliked judicial interpretations of the Constitution.

Numerous thinkers and groups on the right devoted themselves to concerns about a new judicial agenda and a vocabulary to sustain it. Chief among them was The Federalist Society, begun by a group of law students. Over time it grew to become an

²³ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 210-11 (2005).

²⁴ ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 24 (1989)(quoting Justice Powell).

²⁵ William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 693 (1976).

²⁶ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: ORGANIZATIONAL MOBILIZATION AND POLITICAL COMPETITION* (forthcoming 2008).

²⁷ Terry Eastland, *Reagan Justice*, *Public Affairs*, Fall 1988, at 21.

important locus for conservative constitutional thought. Attorney General Meese brought into the Justice Department many conservative thinkers, including prominent Federalist Society founders.²⁸

In 1985, the Attorney General gave speeches setting out the new interpretive methodology of the right: originalism. He called for a “Jurisprudence of Original Intention.”²⁹ This interpretive move was designed precisely to deal with entrenched precedents. As Robert Bork explained, “An originalist judge would have no problem whatever in overruling a non-originalist precedent because that precedent, by the very basis of his judicial philosophy, has no legitimacy.”³⁰

It would be foolish to claim conservative scholars on the right invented originalism. Judges had long used this as one of many ways to interpret the Constitution.³¹ Justice Black regularly relied on originalism during the Warren Court to justify liberal outcomes.³² Raoul Berger made originalism a genre with his many books.

Still, it is clear that conservative scholars tailored this idea into a theory designed to justify conservative outcomes. Indeed, the jurisprudence of original intentions underwent significant sculpting and modification in a rapid two years. In 1987, the Justice Department’s Office of Legal Policy released the new and improved product—“Original Meaning Jurisprudence: A Sourcebook.”³³ The sourcebook moved the focus off the framers’ subjective intentions, where it long had been, to objective views of the framing times. Stephen Markman was the head of the Office of Legal Policy in the Meese Justice Department. He also founded the District of Columbia Lawyers’ Chapter of the Federalist Society. He described how Society debates helped “refine” Meese’s original “nomenclature” and spoke with real enthusiasm about “our debate, to try to render more sophisticated what it is we are talking about.”³⁴ Similarly, Federalist Society Executive Director Eugene Meyer described how “these discussions and debates led not all but most conservatives to abandon original intent and adopt original meaning.”³⁵

There is nothing wrong with this sort of tailoring. People with a philosophical vision, constitutional or otherwise, naturally look for a vocabulary to capture and describe it. This is what the left-leaning scholars were doing when searching for a way to understand decisions they favored. It is also what led so many to speak of a “living” Constitution in the 1970s, just as Americans had in the 1930s.

²⁸ CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 151 (1992) (describing Meese’s Department of Justice as under “the influence of New Right” groups and discussing personnel).

²⁹ Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *TEX. L. REV.* 455 (1985).

³⁰ BRONNER, *supra* note 24, at 258-59.

³¹ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982) (describing the intentionalist, or originalist, modality of interpretation as just one of many well established strategies for interpreting the Constitution).

³² James Jackson Kilpatrick, *A Very Different Constitution*, *NATIONAL REVIEW*, Apr. 12, 1969, at 795-6. (When Justice Hugo Black relied on originalism to defend the Warren Court’s liberal criminal procedure decisions, Kilpatrick responded, “[t]his séance theory, which treats Supreme Court Justices as table-knocking mediums, speaking in a trance through the spirits of the founding fathers, is a theory of convenience.”)

³³ Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *Original Meaning Jurisprudence: A Sourcebook* (Mar. 12, 1987).

³⁴ TELES, *supra* note 26.

³⁵ *Id.*

However, these Federalist Society debates to “refine” originalism do give the lie to claims that an originalist jurisprudence is the one true faith or inexorable. One does not need to engage in sustained skull sessions to develop or hone a long-time existing methodology. In his book, *The Tempting of America*, Robert Bork says a telling thing. Discussing his view of the relationship between original understanding jurisprudence and democratic legitimacy, he observes that if it did not exist, “we would have to invent the approach of original understanding in order to save the constitutional design.”³⁶ In a sense, they did.

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It does not always work out this way, but in 1987, the country actually had the chance to witness a contest between the originalist methodology and the results of the Burger and Warren Courts. The occasion was the nomination of Robert Bork to a seat on the Supreme Court. That spring, Justice Lewis Powell resigned. He had been the important swing voter in many 5-4 decisions involving issues like affirmative action, abortion and the death penalty. “All at once,” said *Time Magazine*, “the political passions of three decades seemed to converge on a single empty chair.”³⁷

Bork’s nomination was the moment of which conservatives had dreamed. “We are standing at the edge of history,” said the Reverend Jerry Falwell. Daniel Popeo, of the Washington Legal Foundation, applauded the “opportunity now to roll back thirty years of social and political activism by the Supreme Court.”³⁸

The strategies of both sides guaranteed a fight on the basis of “judicial philosophy.” The White House asked conservatives to suppress debate over hot button issues like abortion and gay rights. Bork was sold on the basis of credentials and his originalist methodology, which would ensure judicial “restraint” rather than “activism.” The left conducted polls to determine which issues would garner most support from the American people.³⁹ They too largely left the issue of abortion to one side. Their chief arguments would be that Bork would—as Popeo had said—“turn back the clock” on civil liberties and reverse the “right of privacy” found in cases like *Griswold v. Connecticut*.⁴⁰

The left mounted an enormous publicity campaign against the nomination, but in a sense, the key moment was Bork’s five days of testimony in front of the Senate Judiciary Committee. After it, polls turned against Bork. Then, as a bloc, the Southern Democrats in the Senate decided to vote against the nomination. In doing so, they were following the deeply-felt wishes of their African-American constituents who opposed Bork.⁴¹ In 1986, Reagan had run against these Senators, saying it was important to elect Republicans to the Senate so he could appoint the judges he wanted. The Democrats owed their election to the loyal African-American voters, and

³⁶ BORK, *supra* note 1, at 155.

³⁷ Richard Lacayo, *The Battle Begins*, *TIME*, July 13, 1987, p. 10.

³⁸ MICHAEL PERTSCHUK and WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 27 (1989).

³⁹ BRONNER, *supra* note 24, at 158.

⁴⁰ PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* 40 (1990) (noting that Biden said he was worried about Bork’s outspoken views on ‘fundamental questions such as is there a right of privacy’”).

⁴¹ Dale Russakoff, *How the South Was Swayed*, *WASHINGTON POST*, Oct. 8, 1987, at A1.

they went with them on Bork. However, polls also showed opposition to Bork among whites or conservatives in the South.⁴² Largely, polls showed Bork on the losing end of public support.

Many commentators said the Bork nomination showed the public choosing results—i.e. general approval of the Warren and Burger Court decisions—over the originalist methodology.⁴³ Nina Totenberg at National Public Radio said “the public seemed to support most of the Court’s decisions in the areas of race and sex discrimination, free speech, privacy, and even abortion.”⁴⁴ Ethan Bronner of the Boston Globe wrote a book about the battle, deeply sympathetic to Bork. Still, he was unequivocal. Bork, he said, had argued the Court “stretched the national charter beyond its capacities, stitching together new rights with random bits of constitutional cloth” but “the results of his nomination indicated that most Americans disagreed.”⁴⁵

Conservatives preferred to ascribe the loss to other causes. They frequently pointed to what they believed was a smear campaign against Bork. Certainly, the media effort from the left had its low points, something the Washington Post noted firmly.⁴⁶ There were also those who said Bork just did not play to the American people. His beard, for example, got undue attention.⁴⁷

In moments of candor, however, even conservatives conceded the central point. Patrick McGuigan was a conservative activist deeply engaged in the Bork fight. He was deeply troubled that liberals “frequently lied in their advertising” but still admitted that Bork was attacked “not because he was misperceived by his opponents, but because he was *correctly* perceived.”⁴⁸ Terry Eastland, who was Ed Meese’s spokesperson, wrote in the aftermath that Bork never managed with his “legal arguments” what was stated in “laymen’s language.”⁴⁹ Senator Howell Heflin, who voted against, showed great ability to mix jurisprudential metaphors in a telling way. He worried that Bork “would be an extremist who would use his position on the Court to advance a far-right, radical judicial agenda” rather than being “a conservative justice who would safeguard the living Constitution and prevent judicial activism.”⁵⁰ Apparently the living Constitution and conservatism were not incompatible.

President Reagan’s ultimately successful nomination of Anthony Kennedy to the Court perhaps marked the symbolic (though not literal) end of the Warren and Burger

⁴² MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 287 (1992) (“A Roper poll...showed overall opposition in the south...with Southern whites the number was a startling 46 percent to 42 percent against”).

⁴³ Maggie Gallagher, *For Want of a Nail*, *National Review Online*, Nov. 20, 1987, available at <http://www.highbeam.com/library/docfree.asp?DOCID=1G1:6102807&ctrlInfo=Round20%3AMode20e%3ADocG%3AResult&ao> (“The American people agree with the Supreme Court. They don’t agree with Judge Bork.”) (quoting Senate Majority Leader George Mitchell) (last visited Feb. 6, 2007).

⁴⁴ PERTSCHUK, *supra* note 38, at 242.

⁴⁵ BRONNER, *supra* note 24, at 348.

⁴⁶ The Bork Nomination, THE WASHINGTON POST, July 2, 1987, at A20 (The *Post*, which finally came down against Bork, said the campaign “did not resemble an argument so much as a lynching”).

⁴⁷ Stuart Taylor, *Politics in the Bork Battle*, N.Y. TIMES, Sept. 28, 1987, at A1 (noting that “public reactions to Judge Bork’s appearance and demeanor—his beard, his naturally gruff voice, his dignified but somewhat professorial display of stamina, patience and intellect in the face of harangues by impassioned opponents—may count for as much as his positions on such issues as when precedents should be overruled”).

⁴⁸ MCGUIGAN, *supra* note 40, at 209.

⁴⁹ MCGUIGAN, *supra* note 40, at 213.

⁵⁰ See BRONNER, *supra* note 24, at 314.

Court eras. In his confirmation hearings, Kennedy revealed himself a very different judge than Bork. He said he had no “overarching” interpretive theory, and insisted that the liberty afforded by the Constitution was “spacious.” His view of original intention sounded much like the living Constitution. “I think 200 years of history gives us a magnificent perspective on what the framers did intend.”⁵¹ In short, Kennedy’s view of constitutional interpretation squared with public opinion, eschewing both rigid originalism and moral philosophy for the middle ground of a living Constitution. Perhaps the best measure of how closely Kennedy’s articulated philosophy tracked that of the public can be seen in the vote on his nomination; he was confirmed unanimously.

⁵¹ *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 139, 154, 183 (1st Sess. 1987) reprinted in *THE SUPREME COURT OF THE UNITED STATES NOMINATIONS: 1916-1987*, Vol. 15, at 415, 428, 457 (1991).

Political Development and the Origins of the “Living Constitution”

Howard Gillman*

I. INTRODUCTION

Debates surrounding our so-called “living Constitution” have a specific historical and political origin. Historically they emerged during the late-19th century and reached an initial fever pitch during the New Deal constitutional battles. Politically the theory of the living Constitution was originally constructed, not for the purpose of identifying innovative *rights* that reflected developing conceptions of decency and justice, but to support the adoption of innovative government *powers* that could address new social and economic challenges arising out of industrialization.

Stephen Skowronek has famously declared that the emergent political order of the late-19th century amounted to “a new American state” in the sense that it required the dismantling of “already well-articulated governing arrangements” in favor of “national governmental capacities that were foreign to the existing state structure and that presupposed a very different mode of governmental operations.”¹ The central components of the transformation were the expansion of federal legislative authority and the establishment of a modern, regulatory executive establishment. However, many of these features were difficult to reconcile with prevailing understandings of the “original intent” of the scope and structure of federal power. Thus, the pressure of political development generated a corresponding jurisprudential development. Drawing on intellectual currents that were not available to the framers’ generation—including Darwinism, historicism, and pragmatism—progressives and their allies argued that the provisions of the Constitution were designed to adapt to changing environments and social purposes.

In the decades leading up to the battle over the New Deal, opposing political camps embraced opposing jurisprudential visions of constitutional stability and change. Conservatives insisted that the very idea of constitutionalism precluded an acceptance of an evolutionary conception of constitutional meaning. Reformers countered that constitutional adaptation was a natural and inevitable feature of any enduring constitutional system, especially in the face of rapid and deep social change. The defeat of

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¹ STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 4, 9 (1982).

traditional constitutional conservatism in the wake of the 1936 presidential election represented the collapse of what was perceived to be an anachronistic “horse and buggy” theory of constitutional meaning. Until the rise of the “new originalism” in the 1990s, almost all post-New Deal constitutional theorists—liberals and conservatives alike—embraced some form of the theory of the living Constitution. However, to see this, we need to go back to the origins of the tradition.

II. NINETEENTH CENTURY UNDERSTANDINGS

From the time of the Founding through most of the 19th century, there was an overwhelming consensus that the only appropriate methodology of constitutional interpretation was originalism, and (consequently) it was assumed that constitutional meaning was fixed until amended. Actually, consensus is not quite the right word, because at the time there was really no argument about it. During this period there was no cottage industry of constitutional theorists arguing about the meta-theoretical question of how one should approach the task of constitutional interpretation. There were simply important but conventional disagreements about what the Constitution meant.

This understanding about 19th-century beliefs may appear to be inconsistent with the modern view that Chief Justice John Marshall advocated a conception of the “living Constitution” when he declared in *McCulloch v. Maryland* that “we must never forget that it is a *constitution* we are expounding,” one that was “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”² However, this interpretation of *McCulloch* is a 20th-century invention. For Marshall’s contemporaries, adaptation might be permissible with respect to “the necessary means for the execution of the powers conferred on the government” but not with respect to the scope of Congress’ delegated powers. As Justice Story put it in his *Commentaries*, the “means” by which the government pursues its enumerated and fixed objects “must be subject to perpetual modification, and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers, or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies.”³ At the same time, “a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.... [T]he policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever.”⁴

Thomas M. Cooley similarly declared that “A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.”⁵ This

² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

³ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 143, §192 (1833).

⁴ *Id.* at 409-10, §192.

⁵ THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 54 (1868).

is because “A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.... The meaning of the constitution is fixed when it is adopted, and it is not different any subsequent time when a court has occasion to pass upon it.”⁶

During this era, Supreme Court justices frequently disagreed on the proper understanding of the Constitution, but they agreed on how one should attempt to interpret the document. For example, Chief Justice Taney wrote in *Dred Scott* that “The duty of the court is, to interpret the instrument [the founders’] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.... If any of [the Constitution’s] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.”⁷ Writing in dissent, Curtis also expressed the view that “When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who, for the time being have the power to declare what the Constitution is, according to their own views of what it ought to mean.”⁸

One of the reasons why it was possible to sustain the view that constitutional meaning would be anchored to original meanings was the relative stability of original institutional arrangements during the first three-quarters of the 19th century. However, this changed in the later part of 19th century, when industrialization created demands by progressives for unprecedented expansion in federal governing authority (as illustrated, for example, by the attempt in the Sherman Anti-Trust Act to assert national power over presumptively intra-state activities such as production, manufacturing, and agriculture). When critics complained about the unprecedented nature of these assertions of power their opponents countered that the country was facing unprecedented experiences and challenges. From their point of view, it was just common sense that the Constitution had to be made adequate to these new exigencies. As explained by Woodrow Wilson, while the framers believed that politics “was a variety of mechanics” and the Constitution a “display [of] the laws of nature,” we have since come to realize that “Society is a living organism and must obey the laws of life, not of mechanics”;⁹ “government is not a machine, but a living thing ... It is accountable to Darwin, not to Newton.”¹⁰

Just as the notion of a permanent Constitution was made possible by larger cultural assumptions associated with Protestantism and Newtonian science, so too did the emerging assault on that tradition draw support and inspiration from larger cultural changes in the late 19th century. In addition to Darwinism, late-19th-century reformers could draw on: the assumption in antiformalism that concepts were imperfect and indeterminate social constructs rather than stable, determinate principles; the emphasis in historicism on the inevitability of development in social life; pragmatism’s

⁶ *Id.* at 54.

⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405, 426 (1857).

⁸ *Id.* at 621 (Curtis, J., dissenting).

⁹ WOODROW WILSON, *THE NEW FREEDOM* 46-48 (1913).

¹⁰ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 22, 56 (1908).

insistence that habits of thought arise and become efficacious in the context of practical social problems; and legal positivism's suggestion that law is a product of political power and is not a disembodied presence. In time, these various strands were woven together in support of the view that constitutional meaning had to be adaptive to changing social circumstances.

III. THE TWO TRADITIONS OF THE LIVING CONSTITUTION

This innovation in constitutional theorizing manifested itself in two distinct traditions in 20th-century constitutional law and theory, corresponding to familiar conservative arguments about judicial restraint and familiar liberal arguments about judicial protection for new understandings of civil rights and liberties.

The first tradition, originating with Oliver Wendell Holmes but then carried on by Felix Frankfurter and his supporters, emphasized the need for judges to get out of the habit of imposing anachronistic constraints on contemporary officeholders, and embracing instead an ethic of judicial restraint and a tolerance for political adaptation through legislative innovation. In 1880, Holmes remarked, "as it embodies the story of a nation's development over centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs."¹¹ For Holmes, it was the accommodation of social pressure, rather than the stable regulation of social change, that characterized the relationship between law and society; as he put it in *The Common Law*, "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."¹²

For Holmes, what was true about the common law was also true about constitutional law. In his dissent in *Lochner v. New York*, he took the position that the Constitution should not be used to prevent the "natural outcome of a dominant opinion" from prevailing in legislation, except in extraordinary circumstances.¹³ This famously minimalist conception of constitutional constraint was almost anti-constitutional in its commitment to legislative supremacy and the sovereignty of elected officials. But this position makes sense in light of Holmes' belief, expressed in another opinion, that "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil," and their significance "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."¹⁴ As he put it in *Missouri v. Holland*, "[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors

¹¹ G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 147 (1993).

¹² OLIVER WENDELL HOLMES, THE COMMON LAW 1-2 (1881).

¹³ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

¹⁴ *Gompers v. United States*, 233 U.S. 604, 610 (1914).

much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”¹⁵

However, Holmes’ view of the living Constitution as mere judicial deference was not the only tradition to develop. A second, non-originalist tradition can be associated with the jurisprudence of Louis Brandeis and, later, civil libertarians such as Chief Justice Stone. These justices argued that it was unthinkable to adapt our understandings of constitutional *powers* without also adapting our understanding of constitutional protections for *rights and liberties*. For example, in his dissent in *Olmstead v. U.S.*, Brandeis insisted that the Fourth Amendment had to be interpreted in a way that was responsive to new threats to civil liberties, such as tapping phones, since the alternative was for that amendment to become an anachronistic irrelevancy in light of new technologies. The Constitution may have been adopted to address certain evils, but “its general language should not ... be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”¹⁶ From Brandeis’ perspective, the Constitution’s provisions embodied general principles of political morality, and it was the obligation of each generation to decide how best to realize these principles in light of contemporary experiences and circumstances. After all, the alternative to viewing the Fourth Amendment as a living commitment to “vital” principles (such as privacy or a right to be let alone) was that it would become a dead letter, relevant to 18th-century questions but silent on 20th-century questions.

IV. THE NEW DEAL AND THE COLLAPSE OF CONSTITUTIONAL ORIGINALISM

By the 1920s, the traditional conception of a Constitution whose meaning was fixed and immutable was under siege by the aforementioned versions of the living Constitution. In 1921, Cardozo formally joined the ranks of the non-originalists when he wrote in *The Nature of the Judicial Process* that, “The great generalities of the constitution have a content and significance that vary from age to age.”¹⁷ More than a decade later this view was threatening to become the accepted wisdom of a Court majority. When in *Home Building & Loan Association v. Blaisdell* the Court decided to uphold the constitutionality of a government effort to provide debtor relief through the form of moratory laws, Chief Justice Hughes wrote that “It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provisions of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.”¹⁸

¹⁵ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁶ *Olmstead v. United States*, 277 U.S. 438, 475-76, 472 (1928) (Brandeis, J., dissenting).

¹⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921), cited in Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 Harv. L. Rev. 54 (1993).

¹⁸ *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

It was an argument for innovative powers to meet innovative challenges—but the traditionalists were not impressed. Justice Sutherland responded on their behalf, arguing that it is “hardly necessary to say” that a “provision of the Constitution ... does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.”¹⁹ In contrast to Holmes and Cardozo, he insisted that “Constitutional grants of power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible.... The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it.”²⁰ He argued that there was no doubt but that the contract clause “was meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of such action aimed at giving relief to debtors *in time of emergency*.... If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”²¹

However, by the mid-1930s, it was becoming increasingly difficult to sell the argument that our institutions were limited to the powers imagined and authorized in 1787. As one of the foremost spokesmen for the new theory of the living Constitution, Edward Corwin argued that “the Constitution’s founders could never have had an intention as to something—social conditions of 1933, to wit—which they could not have imagined or foreseen,” and he insisted “that the Constitution must mean different things at different times if it is to mean what is sensible, applicable, feasible.”²² Elsewhere, he explained that the Constitution should be considered “a living statute, to be interpreted in the light of living conditions. Resistance it offers to the too easy triumph of social forces, but it is only the resistance of its words when they have been fairly construed from a point of view which is sympathetic with the aspirations of the existing generation of American people, rather than that which is furnished by concern for theories as to what was intended by a generation long since dissolved into its native dust.”²³

The theory of the living Constitution gained prominence, and then preeminence, because it was *the* alternative to the increasingly untenable conservative jurisprudence of the Four Horsemen during the battles over the New Deal. The choice between old and new conceptions was best summarized in 1936 by James Hart, a political science professor from Johns Hopkins and a member of one of the NRA’s Regional Labor Boards. “Whoever would be consistent in his thinking about the Constitution,” he wrote, “must choose between two fundamentally different philosophies.... The one assumes a dynamic universe in which new factors and hence new problems emerge. The other postulates a universe whose very changes take place in accordance with a few unchanging principles. The first recognizes the necessity of choice in the application to new situations of the lessons of the past, and hence regards principles as [quoting John Dewey’s *Human Nature and Conduct*] ‘methods by which the net value of past experience is rendered available for present scrutiny of new perplexities.’ The second treats principles as the unambiguous axioms from which the answer to every

¹⁹ *Id.* at 448-49 (Sutherland, J., dissenting).

²⁰ *Id.* at 451-53 (Sutherland, J., dissenting).

²¹ *Id.* at 465 (Sutherland, J., dissenting).

²² Edward S. Corwin, *Moratorium over Minnesota*, 82 U. Pa. L. Rev. 311 (1934), reprinted in CORWIN, CORWIN ON THE CONSTITUTION, VOLUME TWO: THE JUDICIARY 331-36 (Richard Loss ed.) (1987).

²³ Edward S. Corwin, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, 19 AMERICAN POLITICAL SCIENCE REVIEW 290 (1925), reprinted in CORWIN, CORWIN ON THE CONSTITUTION, VOLUME TWO: THE JUDICIARY 183-93 (1987).

problem may be automatically deduced.”²⁴ As applied to the Constitution, the alternatives are that it is either “a charter meant to endure for ages to come, and hence to be adapted to the circumstances and the dominant purposes of each succeeding generation” or “it is the enactment for all time of principles of fixed meaning and universal validity.”²⁵ Hart believed that, “Other things being equal, readaptation by interpretation is far preferable to readaptation by amendment,” since it was worse to suffer “an intolerable rigidity” than risk promoting “disrespect for the law.”²⁶

V. CONCLUSION: THE LEGACY OF THE LIVING CONSTITUTION

The political defeat of the conservatives in 1937 represented a triumph of the theory of the living Constitution. For the next few decades there was no serious legal or political constituency advocating a return to the jurisprudence of the Four Horsemen. Any controversy that might have erupted over the Brandeis/Stone civil libertarian version of the living Constitution (as manifested in the Footnote Four doctrine and the theory of “preferred freedoms”) was quickly vanquished by President Truman after Murphy and Rutledge left the Court in 1949 and were replaced by the deferential Clark and Minton.

The modern controversy over the living Constitution was (re)ignited by the Warren Court’s interpretations of the religion clauses, due process, and privacy rights in the 1960s. However, while conservative critics of these decisions sometimes claimed to represent an originalist sensibility, it is important to note that their invocation of originalism was limited to a critique of judicial protection for new rights rather than an advocacy of a jurisprudence of traditional enumerated powers; in other words, these conservatives were heirs of Holmes and Frankfurter, not Sutherland. As Rehnquist characterized it, the essential “nature of the Constitution” is “to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times.”²⁷ Through the 1980s, debates in constitutional theory remained bounded by the Holmes and Brandeis versions of the living Constitution argument. Presidents might have found some Supreme Court nominees who were willing to advocate the language of “strict construction,” but one would be hard pressed to find justices in the modern era who were willing to publicly commit themselves to a theory of constitutional interpretation that was limited to the meaning of the words at the time they were ratified.

In order for the theory of the living Constitution to face a real challenge it would be necessary to re-open the question of the legitimacy of the New Deal revolution, and it would be necessary to give advocates for that position some reason to believe that the judiciary had been made safe for neo-Sutherland-like judicial activism. As it turned out, the legitimacy of the New Deal revolution was called into question by the Reagan Revolution and by Gingrich’s “Contract with America” in 1994. Moreover, the concerted efforts of the Reagan and Bush (I and II) administrations resulted in the ideological transformation of the federal judiciary. Consequently, in the 1980s and 1990s, we have witnessed the rise of the so-called “New Originalism,” which is an originalism that (like Sutherland’s) focused more on traditional, libertarian

²⁴ James Hart, *A Unified Economy and States’ Rights*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 102-14 (1936).

²⁵ *Id.* at 102-03.

²⁶ *Id.* at 107.

²⁷ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

understandings of the scope of delegated powers than on complaints about school prayer, criminal procedure, and *Roe v. Wade*. It is an approach to constitutional interpretation that can claim a legitimate pedigree in American constitutional history.

Then again, it remains to be seen whether practitioners and politicians will be willing to embrace and defend this previously discredited approach, with all its implications for the exercise of judicial power, the maintenance of the (generally popular) canon of contemporary constitutional law, and the sustainability of the familiar scope and structure of federal authority. It is hard to see how the stubborn refusal to allow constitutional powers and rights to adapt to changing circumstance and historical experiences will be any more popular today than it was when it was rejected the first time around.

Constitutional Interpretation for the Twenty-first Century

Erwin Chemerinsky*

The goal is to develop an understanding of the Constitution for the 21st century. It makes no sense to find this by looking to the 18th century. Throughout American history, the Supreme Court has decided the meaning of the Constitution by looking to its text, its goals, its structure, precedent, historical practice, and contemporary needs and values. This is what constitutional law always has been about and always should be about. It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist.

Only a few Justices in American history have professed to follow an originalist philosophy and they are originalists only some of the time. For example, Justices Scalia and Thomas, the self-professed originalists on the Court, believe that the meaning of the Constitution was fixed when it was adopted and that constitutional interpretation is the process of finding and following this original meaning. But these Justices did not apply originalism in their Tenth and Eleventh Amendment decisions of the last decade. The Court's decisions prohibiting Congress from commandeering state governments and forcing them to adopt laws or regulations cannot be derived from the text of the Tenth Amendment or its intent or its historical meaning.¹ Nor can originalism explain the Court's expansion of sovereign immunity to bar suits against states by their own citizens in federal courts or in state courts.² Perhaps even more profoundly, these Justices pay no attention to originalism in condemning all affirmative action programs despite strong evidence that the original intent of the Fourteenth Amendment was very much to allow such efforts.³

Moreover, it must be remembered that on many occasions, the Supreme Court has expressly rejected originalism. In *Home Building & Loan Ass'n v. Blaisdell*, the Court declared:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation

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¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 919-22 (1997); *New York v. United States*, 505 U.S. 144, 155-58 (1992).

² See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (state governments cannot be sued in state courts without their consent).

³ See Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (arguing that the framers of the Fourteenth Amendment intended to allow affirmative action efforts).

which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.⁴

Most famously, in *Brown v. Board of Education*, Chief Justice Earl Warren, writing for the Court, stated: “In approaching the problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”⁵

For decades, prominent constitutional scholars have advanced devastating critiques of originalism.⁶ Yet, over the last few decades, originalism as a philosophy of constitutional interpretation seems to have gained legitimacy and even acceptance.

In this essay, I want to explore why this has happened. My thesis is that the appeal of originalism is that it offers a false promise of constraining judges and of limiting, if not eliminating, value choices by judges. Getting past originalism requires demonstrating that this truly is a false hope; no theory of constitutional interpretation can significantly reduce or eliminate judicial discretion. Progressives need to defend constitutional decision-making as it always has been practiced, by both liberals and conservatives: it is a product of judges considering a myriad of sources, including the Constitution’s text, its goals, its structure, precedent, historical practice, and contemporary needs and values. No theory can offer determinacy in constitutional decision-making or avoid the reality that results depend on value choices made by judges in determining the meaning of the Constitution. A John Paul Stevens and an Antonin Scalia will disagree in most important constitutional cases, not because one is smarter or has a better approach to constitutional interpretation. They will come to different results because they have vastly different ideologies and values.

First, there is no doubt that the appeal of originalism is its promise of constraining judges. It is the allure of formalism, of decisions derived deductively from sources external to the judges. Originalists claim that decisions in constitutional cases would be based on seemingly objective sources and not on the ideology of the judges. Justice Scalia, for example, has advanced exactly this defense for his originalist philosophy and declared: “Originalism ... establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”⁷ There is an understandable appeal to an approach to constitutional law which provides for decisions that have nothing to do with the identity or values of the individual judges.

Second, it is crucial to recognize and to expose this as a false promise. Originalism, no less than any theory of constitutional interpretation, still involves tremendous judicial discretion and decisions that are very much the result of value choices by the judges. There are many reasons for this. Balancing of competing interests is an inevitable part of constitutional law and inescapably involves judicial discretion, just as much for originalists as for non-originalists. Balancing competing interests is a persistent feature of constitutional decision-making. How should the president’s interest in executive privilege and secrecy be balanced against the need for evidence at a criminal

⁴ 290 U.S. 398, 442-43 (1934).

⁵ 347 U.S. 483, 492 (1954).

⁶ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981).

⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989).

trial?⁸ How should a defendant's right to a fair trial be balanced against the freedom of the press?⁹ How should legitimate, important, and compelling government interests be determined in individual rights and equal protection cases? Levels of scrutiny are, after all, just a tool for arranging the weights in constitutional balancing. Moreover, constitutional law constantly asks, as does so much of law, what is reasonable. Under the Fourth Amendment, courts routinely focus on whether the actions of police officers are reasonable.¹⁰ Under the Takings Clause, courts determine whether there is a public purpose by examining whether the government acted out of a reasonable belief that its action would benefit the public.¹¹ Such balancing is not an exclusively liberal exercise. In a recent case, Justice Scalia, writing for the Court, stressed that the application of the exclusionary rule depends on a weighing of its costs and benefits.¹²

Moreover, originalism allows tremendous judicial discretion because the intent behind any constitutional provision can be stated at many different levels of abstraction.¹³ For example, who was the equal protection clause intended to protect? The intent could have been solely to protect African Americans; to protect all racial minorities; to shelter all groups that have been historically discriminated against; or to defend all individuals from arbitrary treatment by the government. Each of these potential answers is a reasonable way of describing the drafters' intent for the Fourteenth Amendment. Yet a judge must eventually choose among these answers, and a great deal depends on that choice. Whether sex discrimination or affirmative action violates equal protection depends entirely on the choice among levels of abstraction. Here, too, neither formalism nor originalism can provide a discretion-free answer.

Originalism also provides enormous discretion to judges in deciding the original intent. The theory focuses on the Framers, but so many people were involved in drafting and ratifying the Constitution and its amendments that it is possible to find historical quotations supporting either side of almost any argument. The debate over the Second Amendment powerfully illustrates this, as both sides make strong arguments based on the original understanding of the provision.¹⁴

These critiques of originalism, of course, are familiar. Yet, their significance cannot be overstated in formulating an approach to constitutional law for the 21st century. No theory of constitutional interpretation can provide formalism or

⁸ See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding that the President has executive privilege, but that such privilege is not absolute and must yield to overriding interests, including a "demonstrated, specific need for evidence in a pending criminal trial").

⁹ See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("It is unnecessary, after ... two centuries, to establish a priority [as between the First and Sixth Amendments] applicable in all circumstances.").

¹⁰ See *Samson v. California*, 126 S. Ct. 2193, 2197 (2006) ("[U]nder our general Fourth Amendment approach we 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001))).

¹¹ See *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (explaining that in takings cases there is "a presumption that the government's actions were reasonable and intended to serve a public purpose").

¹² *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

¹³ See Dworkin, *supra* note 6, at 488-91.

¹⁴ Compare *Silveira v. Lockyer*, 312 F.3d 1052, 1060-61 (9th Cir. 2002) (determining that the original meaning of the Second Amendment was not to create an individual right to own or possess weapons, but to keep Congress from regulating firearms in a manner that would prevent states from protecting themselves through militias), with *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (determining that the original meaning of the Second Amendment was to protect the right of individuals to possess and bear firearms).

significantly reduce judicial discretion. Inevitably, judges in interpreting the Constitution must make choices as to the meaning of open-textured constitutional language and in balancing competing interests.

Antonin Scalia purports to have a more objective approach to constitutional law and repeatedly asserts a moral high ground compared to his colleagues.¹⁵ He finds in the Constitution no protection for reproductive choice, a prohibition of affirmative action, permission for prayer in public schools and government aid to religious schools, and no exclusionary rule. His views seem far more similar to the 2004 Republican platform than to anything in the original meaning of the Constitution.

Third, progressives must defend their alternative vision of constitutional law. Originalists try to put progressives on the defensive by asserting that originalists have a theory of constitutional law, but that others don't. But this is based on their claim of a theory which reduces judicial discretion and offers a seemingly objective method of decision-making. Once this is exposed as false it becomes clear that all judges are engaged in the same enterprise and that none have an objective methodology that permits decisions removed from their own values.

Progressives must offer a more complex and realistic description of judging in constitutional cases. Supporters of originalism present the debate as if there are only two choices: discretion-free judging or judging by whim and caprice. Of course, the reality is neither. Judges always have discretion, but the exercise of that discretion is not about what the judge ate for breakfast. Rather, discretion is about how judges look at multiple sources and decide the meaning of the Constitution. An accurate description of judicial review's reality is needed to compete with the value-neutral models and the rhetoric supporting them.

What, then, is the role for fidelity in constitutional interpretation for the 21st century? It all depends on "fidelity" to what. Constitutional interpretation always must show fidelity to the document's text. But all Justices throughout history have done this and have based their decisions on giving meaning to the text of the Constitution. Surely, too, fidelity must be to the goals of the constitutional provision. But the goals are inevitably abstract, not the specific intent of the framers. In deciding what is "cruel and unusual punishment," judges must be guided by the goal of ending degrading and inhumane punishments, not the specific views of the framers as to which punishments are unacceptable. In deciding that segregation violates equal protection, the Court rightly followed the general goal of equal protection, not the specific views of the Congress that both ratified the Fourteenth Amendment and segregated the District of Columbia public schools. Courts also need to consider all that has occurred since the ratification of a constitutional provision, including judicial precedents. Contemporary needs should be taken into account as well; there is no other way to balance.

This, of course, means that judges will have discretion in interpreting the Constitution. But that is how it always has been. *Marbury v. Madison*,¹⁶ establishing the institution of judicial review, was an exercise of judicial discretion because the Constitution is silent about the authority of courts to invalidate statutes or executive actions.

¹⁵ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Scalia, *supra* note 7.

¹⁶ 5 U.S. (1 Cranch) 137 (1803).

As progressives articulate a vision of constitutional law for the 21st century, it must be one based on the Constitution's commitments to freedom and equality. It must be based on the Constitution's respect for the dignity of each individual. It must be based on the Constitution's mandate for separation of powers and checks and balances.

Progressives must explain in judicial decisions, law review articles, and op-ed pieces why the Constitution includes protection for reproductive choice, why it allows affirmative action to achieve racial equality, why it requires a separation of church and state, why it does not permit indefinite detentions of human beings without judicial review. This is the challenge of a Constitution for the new century.

Constitutional Interpretation as Structured Choice

Peggy Cooper Davis*

As I¹ think about what I might contribute to a discussion of the role of history in constitutional interpretation, I am drawn equally to two apparently disparate aspects of my scholarly work—constitutional history in the Reconstruction period and Lawyering Theory. Combining these fields—one the study of a historical period and its influence on constitutional adjudication, the other a methodological approach to understanding the practice and evolution of law—has taught me something rather specific about how history is—and isn’t—used when lawyers and judges debate constitutional meaning. I began my historical research with the assumption that the story of how and why the Constitution was reformed during Reconstruction would be an obvious guide to interpreting the amendments (the Thirteenth, outlawing slavery; the Fourteenth, defining citizenship and establishing a charter of civil rights; and the Fifteenth, establishing universal male suffrage) by which it was reformed. Even the most ardent textualist would concede that interpreters of a constitution should not be unmindful of the authors’ circumstances and purposes.² I discovered, however, that the history of constitutional reformation during Reconstruction has been largely neglected in constitutional jurisprudence. Lawyering Theory provided tools for understanding 1) why this history had been neglected and 2) what interpretive uses lawyers and judges can appropriately make of it. In what follows, I will demonstrate tools of Lawyering Theory as I consider these two questions.

But the burden of my essay is greater than this demonstration, for the demonstration illustrates a broader principle of legal interpretation. I call this principle, drawn from Lawyering Theory, the principle of structured choice. It has two parts: The first is that what we make of our Constitution, and what we make of our constitutional history, are matters of structured choice. The second is that we will never find a workable structure for constitutional interpretation until we learn to come more fully to terms with the element of choice.

I will first briefly describe Lawyering Theory as it has developed at New York University and some of the tools that it provides for analyzing the interpretive process. I’ll next offer a brief account of how antislavery ideology motivated and influenced the design of the Reconstruction Amendments and how antislavery ideology came to be ignored in post-Reconstruction constitutional adjudication. I’ll then return to Lawyering Theory, using its principle of structured choice to explain how Reconstruction’s antislavery ideology might—and should—guide interpretation of

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¹ I argue in this essay for making the narrator visible in judicial opinions and in written and oral advocacy when stories are told about the development or interpretation of law. Because this argument applies as well to legal scholarship, I make it in the first person and try in other ways to avoid the legal scholar’s convention of concealing authorial perspective.

² See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-24 (1997) (comparing textualism and strict constructionism).

our reconstructed Constitution. Finally, with the hope of drawing out my somewhat implicit, broader argument, I'll offer an imagined example of judicial reasoning that follows the principle of structured choice.

I. LAWYERING THEORY

Lawyering Theory is the multi-disciplinary study of law in use. It is a study of the process rather than the outcomes of lawyering and judging. This kind of study evolved at New York University—as it did for the Legal Realists³—as a simultaneous examination of practice and pedagogy. More than twenty years ago, under the leadership of Anthony Amsterdam, we established an experiential component for our first year curriculum. We quickly realized that we lacked the theoretical underpinnings for teaching our students to use law, and, with collaborators like Jerome Bruner, Carol Gilligan and Peter Brooks, we began to try to develop those theoretical underpinnings.⁴ For example, we have used narratology, discourse analysis, and criticism to study formal and informal oral advocacy,⁵ written advocacy,⁶ and client interviewing and counseling.⁷ We have used relational psychology to expose barriers to effective interactive work.⁸ We have used narratology and cognitive psychology to analyze the work of persuasion in jury trials.⁹ And we have used all of these tools to study judicial decisionmaking.¹⁰

II. RECONSTRUCTION HISTORY

I came to Reconstruction history in the 1980s when, as a new family rights scholar, I wondered over the sense of tenuousness in post-*Lochner*¹¹ Supreme Court opinions establishing rights of marriage, procreation, and autonomy and security in the parental relation. I read the debates of the Reconstruction Amendments and found there clear statements of an intention that those amendments would guarantee the rights to

³ See, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

⁴ The most comprehensive published account of this work is ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

⁵ See Ty Alpert, et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Peggy Cooper Davis, *Law and Lawyering: Legal Studies with an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185 (1992); Peggy Cooper Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education*, in RACE, LAW & CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 23 (Austin Sarat ed., 1997); Philip N. Meyer, "Desperate For Love": *Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994); Philip N. Meyer, "Desperate For Love II": *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

⁶ See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996).

⁷ See Peggy Cooper Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991).

⁸ See Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795 (2005); Peggy Cooper Davis, *We Can Do Better*, 14 YALE J.L. & FEMINISM 263 (2002).

⁹ See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

¹⁰ AMSTERDAM & BRUNER, *supra* note 5; Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895 (2001).

¹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

marry, to procreate and to parent. The rationale for guaranteeing these rights was also clearly stated. The experience of slavery had sharpened our nation's understanding of freedom, making clear that measured liberty in familial engagement, personal expression and civic participation was a fundamental human entitlement.

I saw the imprint of anti-slavery ideology written clearly on the project of constitutional reconstruction. The liberty promised by the Fourteenth Amendment and extended to all by the interaction of the Thirteenth and Fourteenth Amendments *was understood as slavery's opposite*. Enslavement turned on denying natal ties; to be a slave was to be the property of a master rather than the child of a family. Freedom required that the right of family be restored to slaves and guaranteed to all. Enslavement turned on denying rights of self-determination and self-definition; human property lost its value if it could not be controlled. Freedom required that a measure of personal autonomy be restored to slaves and guaranteed to all. Enslavement turned finally on the denial of political status; slavery was, in Orlando Patterson's terminology, civil death. Freedom required that political voice be restored to slaves and guaranteed to all.¹² All of this caused me to wonder all the more at the thin and insecure prose with which Supreme Court justices had announced—and sometimes limited—these rights.

The cause was not hard to find. From *Slaughter-House*¹³ forward, the Court was implicated—albeit more subtly as time went on—in a comprehensive and in large part racially motivated campaign to repudiate Reconstruction and all that it represented. We will wonder less at the Court's failure to acknowledge the anti-slavery impetus of the Reconstruction Amendments when we recall Chief Justice and former Klansman Edward White sitting with President Woodrow Wilson, members of Congress and colleagues on the Court enjoying an advance screening of *The Birth of a Nation*. Thomas Dixon's engrossing depiction of how black lechery, ignorance, and vindictiveness were overcome by a Klan sworn to end the humiliation and vice of Reconstruction was intended as political propaganda, and it succeeded as such.¹⁴ Scholars, journalists, political figures, educators and historians who shared Dixon's view effected a revisionist rejection of Reconstruction and the antislavery ideology by which it was driven.

The rejection of antislavery as a central principle of our re-founding deprived us of a normative compass that would serve us well in interpreting the constitutional guarantees of liberty and citizenship. I have argued over the last 20 years for taking up that lost compass.

On one of the many occasions when I made this argument, a distinguished law professor begged to differ. How, he asked, can you urge us to find a normative compass in the ideologies of the United States anti-slavery movement? Don't you know that many of the most ardent supporters of the Reconstruction Amendments were incapable of imagining or accepting principles of racial equality?

My response—by no means original—was that we have, and ought to acknowledge, a choice about how we will apply the lessons of Reconstruction history. We can choose to apply the principles for which the Reconstruction Amendments stand precisely as

¹² For a more complete articulation of this argument, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

¹³ *The Slaughter-House Cases*, 83 U.S. (10 Wall.) 36 (1872) (holding that the Fourteenth Amendment's guarantee that states would not deny "privileges and immunities of citizenship" did not protect basic civil rights but pertained only to rights uniquely pertinent to national citizenship).

¹⁴ For a full account of official involvement in disseminating the message of *Birth of a Nation*, see JOHN HOPE FRANKLIN, *The Birth of a Nation: Propaganda as History*, in *RACE AND HISTORY: SELECTED ESSAYS 1938-1988*, at 10 (1989).

we think members of the Reconstruction Congress and ratifying conventions would have applied them. If we make that choice, we will conclude that the Amendments permit bans on interracial marriage, or on what Justice Scalia likes to call homosexual sodomy, or on mixed-race schooling. But we can also choose to think broadly about liberty. To think of it as encompassing a continuing struggle to define the appropriate entitlements of free citizenship. To think of it as slavery's opposite as that concept is understood over time. *Neither choice is logically necessary or dictated by the Constitution's reconstructed text.* And this takes us ...

III. BACK TO LAWYERING THEORY

It is hard for us to own up to choice in the law.

As litigators, we know that judges make choices, but we dare not ask them to choose in our favor. We believe that we are on firmer ground, and that we serve our clients more effectively, when we argue that logic and precedent *compel* judges to rule in our favor. And so, even in hard cases we bend to habits of argumentation that presume determinacy, and we do our best to state our claims in certain terms: "The law is this or that, and it applies—or does not apply—indisputably in the case at hand."

In an essay that challenges lawyers to understand more deeply the narrative qualities of our work,¹⁵ Peter Brooks recruits Henry James to describe the limits and perils of this certain-sounding talk. Brooks, an early and regular Lawyering Theory collaborator, uses James to open our eyes to the discursive techniques by which we deny choice. In doing so, he helps us to see how lawyers and judges might replace our discourse of dueling certainties with a discourse of acknowledged and disciplined choice.

James disliked the "omniscient narrator" who speaks from a god-like perspective to tell readers what "is." He preferred, and created, narrators whose voices and perspectives were visible. This is apparent even in his early work. The narrator of *Daisy Miller*, for example, uses first person pronouns. This somewhat personalized narrator puts an arm around the reader's shoulder, referring to Winterbourne, the central character, as "our friend" or "our young man"¹⁶ and steps back from reportorial certainty to allow Winterbourne to turn inward and present his own perspectives on a scene. As a result, the reader is able to speculate and make judgments rather than be told. The following passage exemplifies all of this as "our" narrator invites speculation about Winterbourne, about Miller, and about the worlds they inhabit:

Winterbourne wondered how ... [Daisy Miller] felt about all the cold shoulders that were turned upon her, and sometimes found himself suspecting with impatience that she simply didn't feel and didn't know. He set her down as hopelessly childish and shallow, as such mere giddiness and ignorance incarnate as was powerless either to heed or to suffer. Then at other moments he couldn't doubt that she carried about in her elegant and irresponsible little organism a defiant, passionate, perfectly observant consciousness of the impression she produced. He asked himself whether the defiance

¹⁵ Peter Brooks, *Narrative Transactions: Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1 (2006).

¹⁶ HENRY JAMES, *DAISY MILLER AND OTHER STORIES* 39, 54 (Jean Gooder ed., Oxford University Press 1998) (1878).

would come from the consciousness of innocence or from her being essentially a young person of the reckless class. Then it had to be admitted, he felt, that holding fast to a belief in her “innocence” was more and more but a matter of gallantry too fine-spun for use. As I have already had occasion to relate, he was reduced without pleasure to this chopping of logic and vexed at his poor fallibility, his want of instinctive certitude¹⁷

James wrote in this way because he believed that nearly any visible narrator, regardless of perspective, is preferable to what he called “the mere muffled majesty of irresponsible authorship”¹⁸—irresponsible, on James’s view, because, as Brooks tells us, “[N]o one takes responsibility for how things are seen and known.”¹⁹

Judges, like lawyers, fall easily into the mode of “irresponsible” authorship. To illustrate this, let’s use James’s narrative insights to examine the authorial voices in *Lawrence v. Texas*,²⁰ the case in which the Supreme Court overruled *Bowers v. Hardwick*²¹ to rule that criminalization of adult consensual sodomy violates the Fourteenth Amendment protection against excessive infringements of liberty. To simplify the analysis, we will limit it to a consideration of how assertions are framed. We’ll use a somewhat narrow definition of framing as choosing words that introduce and provide context for an assertion. And we’ll restrict our analysis to three types of frames, all of which are common and revealing in legal talk. We will consider first the mental state verb frame. This is a frame that calls attention to the speaker’s, or to another authority’s, mental processes, establishing the assertion as a product of someone’s thought rather than an isolated fact. “I think X.” is perhaps the simplest example. Notice how these mental state verbs hedge an assertion. The hedge in the mental state verb can be mitigated (After careful analysis, we have concluded X.), but it is always there. Our *Daisy Miller* narrator does not use self-referencing mental state verbs in the passage above. But Winterbourne’s observations and conclusions are regularly framed by mental state verbs: Winterbourne doesn’t announce or report; he wonders, finds himself suspecting, doesn’t doubt, asks himself, and feels one thing or another.

We will also consider the authority frame. This is a frame that rests the speaker’s assertion on the authority of someone other than the speaker. In legal discourse, some authority frames can be decisive with respect to the validity of an assertion: “This Supreme Court of the United States has recently held that....” But they can also be dismissive of the framed assertion: “The Plaintiff wrongly asserts that....” As we have seen, authority frames are used in the *Daisy Miller* passage to offer Winterbourne’s perspective to the reader, and they are usually paired with mental state verb frames.

The last frame we will consider is not a frame *per se*, but the *absence* of both mental verb and authority frames. In silence—“The law is X.”—or with the flourish of a

¹⁷ *Id.* at 69-70. These techniques of the visible and less than certain narrator are also nicely captured in the following:

The finest gallantry here was surely just to tell her the truth; and the truth, for our young man, as the few indications I have been able to give have made him known to the reader, was that his charming friend should listen to the voice of civilized society.
Id. at 54.

¹⁸ Brooks, *supra* note 15, at 9 (quoting HENRY JAMES, *THE GOLDEN BOWL* (1904)).

¹⁹ *Id.*

²⁰ 539 U.S. 558 (2003).

²¹ 478 U.S. 186 (1986).

descriptive frame— “We must accept that the law is X.”—the speaker who withholds mental state and authority frames takes on the muffled majesty of irresponsible authority: Nobody thinking or believing; just the word of god. James gives us the word of god in the *Daisy Miller* passage, but only to introduce his character’s obviously fallible ruminations, as in the “Winterbourne wondered...” with which the passage begins.

The opinion of the Court in *Lawrence* is structurally and linguistically complex, and I am certainly unable to do it justice here. It is admirable in so many ways that I hesitate to critique it. Still, even a limited frame analysis reveals that it is locked in the pose of certainty. Although the opinion from time to time drops into the world of mental verbs (and although these drops are fascinating and important to the overall impact of the opinion) its crucial passages are in the voice of certainty. The opinion begins with a string of absolutes in the voice of god:

Liberty protects the person from unwarranted intrusions into a dwelling or other private places²²

Freedom extends beyond spatial bounds.²³

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.²⁴

And the crux of the holding is contained in a series of pronouncements that are artfully placed under the wing of controlling authority,²⁵ and unmediated by mental states:

[I]ndividual decisions by married persons ... are a form of ‘liberty’ protected by the Due Process Clause²⁶

[T]his protection extends to intimate choices by unmarried as well as married persons.²⁷

Whereupon, the majority declares that *Bowers* “was not correct.”²⁸

Scalia in dissent is equally certain in his crucial passages—he speaks from omniscience or on the authority of the Court itself, and his authority frames are declarative rather than speculative:

[T]here is no right to ‘liberty’ under the Due Process Clause²⁹
We have held repeatedly ... that *only* fundamental rights qualify for ... so-called ‘heightened scrutiny’ protection.³⁰

²² *Lawrence*, 539 U.S. at 562.

²³ *Id.*

²⁴ *Id.*

²⁵ The majority’s decisive language is a quote of an earlier statement by one of the members of the majority. This self-referencing authority frame introduces an embedded frame attributing what follows to controlling Supreme Court precedent. Then come the assertions quoted above.

²⁶ *Lawrence*, 539 U.S. at 578.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 592 (Scalia, J., dissenting) (emphasis not added).

³⁰ *Id.* at 593.

As I've said, this certain-sounding talk is natural to opinion-writing. It is understandable that judges will want their decisions to seem inevitable and indisputably right. In many ways, we all want their decisions to seem inevitable and right, for the legitimacy of the Court's authority appears to depend on it. I think of the massive resistance to the Court's decision in *Brown v. Board of Education*³¹ and shudder to think what resistance might have followed a decision that seemed more tentative. Legitimacy seems to demand certainty.

But our attraction to certainty may be motivated by more than a desire that judicial decisions seem legitimate. Jerome Frank made the psychological speculation that indeterminacy is denied by lawyers and judges because we crave the comfort of an all-knowing and always wise father.³² My work with Gilligan allows us to expand on Frank's psycho-dynamic critique of the certainty pose. In her more recent work, Gilligan challenges Freud's choice of the Oedipal myth as the model of human psychological development. Gilligan tells us that this choice—establishing the mother as the dangerous siren against whom the psyche must fortify itself—normalizes an undesirable, two-step developmental process: The relational world of early childhood (associated with the mother) is stigmatized and charged with negative emotion, and emotional separation is designated as a central goal of maturation.

This developmental model encourages us to privilege rule-bound and detached decision-making processes and to distrust those that require us to work relationally and consider context and particularity. It makes us skittish about engaging different perspectives and talking through an open choice and deeply comfortable with going to our corners and coming out with truth claims. And all of this leads to rhetoric that denies choice.

Frank thought, of course, that infantile craving for certainty was no excuse for failing to own up to the choices we inevitably make in the law. A choice that is denied, he argued, can not be a considered choice, and unconsidered choices are likely to be poor ones.

The expanded psycho-dynamic critique grounded in Gilligan's work magnifies our concerns about the certainty pose. If, as Gilligan suggests, our aversion to relationship, complexity, context and choice has the emotional charge of a developmental trauma, it may be harder to let go of than the Peter Pan anxieties that Frank described. But the difficulty may be worth brooking.

If the Realists were right that explicitly considered choices are likely to be better choices, then there is value in moderating lawyers' and judges' rhetorical claims of certainty. Gilligan's work doesn't only instruct us about the difficulty of stepping back from the world of apparent certainty; it also suggests ways of overcoming the difficulty. We overcome it by diving into the often troubled waters of relationship. By sharing reasons and acknowledging the choices we make in light of those reasons. If we give up the false comfort of certainty and take a plunge into candid, relational legal discourse, we might just improve the quality of our advocacy and our decisionmaking.

Candor about choice improves the quality of advocacy and decisionmaking because it requires that choices be defended by reasons. Responsible decisionmaking in a world of admitted indeterminacy is not free-form but structured and disciplined in relation to the history, purpose and function of the laws being interpreted and in relation to defensible theories about the needs and workings of our social order. Decisions

³¹ 347 U.S. 483 (1954).

³² See JEROME FRANK, *LAW AND THE MODERN MIND* 13-21 (1930).

that are well defended in these terms may, in the end, seem more legitimate than those that are made to sound certain. This is so because lay and law-trained readers alike know that the sound of certainty is often a pretense and that open and honest deliberation is ultimately more trustworthy.

Let's just imagine what more open and honest deliberation about constitutional meaning would look like. Let's imagine grounding an important Supreme Court decision in admitted choice. And let's imagine structuring that choice in relation to a contemporary understanding of constitutional history, the purpose and functions of the Fourteenth Amendment.

Imagine these words in the opinion for the Court in *Lawrence*:

We must decide whether the Fourteenth Amendment protects the liberty of two adult men to have an intimate, consensual relationship without threat of criminal sanction.

The Fourteenth Amendment was conceived in the aftermath of the Civil War to define citizenship in a reconstituted Union and to describe its attributes. Congressional debates concerning this Amendment (and companion measures) were full of allusions to the constraints on liberty and civic participation that defined slavery and full of commitments to the principle that it is wrong to impose those constraints categorically and without special cause on any fellow human being.

We acknowledge that the terms of the Fourteenth Amendment are vague, that the intentions of its drafters and supporters were various, and that the attitudes and practices of many, if not most, people in the newly reconstructed union continued to reflect hierarchical beliefs about race, gender and sexuality that are in tension with the antislavery principle. Nonetheless, we believe it is consistent with our highest national values and continuous with our history of experiencing and then rejecting slavery that we adopt the antislavery principle as a guide for interpreting the Fourteenth Amendment guarantees of citizenship, liberty and equality.

For the reasons that follow, we conclude that liberty, understood as slavery's opposite, presumes a measure of personal autonomy with respect to thought, belief, expression, and association.

This introduction might frame a persuasive and grounded account, albeit not an inexorable argument, of why consensual, intimate partnerships should not be criminalized on account of the sex of the parties. And it might help us learn, finally—all these years after we all became realists—how to reason together rather than feign certainty.

Originalism Within the Living Constitution

Keith E. Whittington*

The argument that original meaning should guide constitutional interpretation is nearly as old as the Constitution itself. Before there were strict constructionists, before there were judicial activists, there were originalists. In those early days, few seriously objected to the notion that the Constitution should be read in accord with its original meaning, though there were plenty of debates over how best to ascertain that original meaning and what exactly was required to be faithful to the Constitution of the founding.

The modern originalism debates are different. The authority of the original meaning of the Constitution has been routinely challenged in basic ways. The claim that the Constitution should be understood differently—that it is a “living Constitution” that means something different today than it meant when it was adopted, for example—is now itself quite old. It is now thought that adherence to original meaning is one alternative among many, a choice that might be made or that might not. If originalism is not exactly on the defensive, it at least has to be defended.

For judges who wish to exercise the power of judicial review, adherence to the original meaning of the Constitution is the only choice that is justifiable. We might make use of the language of the Constitution to help make sense of and to express our highest political ideals and aspirations. We might borrow from the constitutional text to help remind us of our past political struggles or inspire us to take on new national projects. When judges attempt to set aside the policy decisions of our elected representatives, when they claim that their own constitutional judgments trump those of others, then they cannot rest such claims on mere political idealism couched in a loose constitutional rhetoric. Judges are only entitled to respect when asserting that a law is null and void when they can back up such assertions with a persuasive explanation of how the law violates the meaning of the Constitution as it was framed and ratified.

I. WHY ORIGINALISM?

There are several interrelated justifications for jurisprudence of originalism. Originalism is implicit in the design of a written constitution. The adoption of a written constitution is justified by the desire to fix certain principles and raise them over others as having special weight. The writing of a constitution allows the people to assemble and, in a moment of reflection and deliberation, adopt those specified principles. Originalism makes sense of the fact that it was *this* text and no other that was adopted and ratified, and it channels the judicial inquiry into discovering what was

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meant by those who adopted this text. A jurisprudence of originalism recognizes and emphasizes that the Constitution is a communication, an instruction, from an authorized lawgiver, the sovereign people, and that the task of the faithful interpreter is to discover what that instruction was and to apply it as the situation demands.

At heart, all of these justifications are concerned with explaining the basis on which judges can claim the authority to ignore the policies made by elected legislators. Government officials in the United States do not exercise force and power by divine right. Their authority for making legitimate laws that average citizens are expected to obey ultimately comes from their constitutional office. Government officials are chosen to make policy within the limited scope of their predefined legal authority. Legislators are elected to make laws that are intended to serve the public good and operate within constitutional limits. The president is elected to secure the national interest and to insure that those laws are implemented effectively. Judges are not elected for the general purpose of making good policy. Judges are selected to interpret and apply the law in the cases and controversies that arise before them.

The claim to exercise the power of judicial review, the claim to the authority to ignore an otherwise valid law, can only be inferred from the Constitution. The Constitution does not in so many words simply give judges the power to veto laws. The power of judicial review in a particular case is merely an inference from the judicial duty to apply the law—all the law—correctly and appropriately to the case at hand. As Chief Justice John Marshall explained over two centuries ago, if Congress were to instruct the judges that a citizen be convicted of treason on the testimony of only one witness when the Constitution requires two or that a citizen be held criminally liable for actions that were legal when they were committed, then judges would have no choice but to recognize that the superior law of the Constitution would have to govern the case, regardless of the instructions of Congress.¹ A jurisprudence of originalism makes better sense of why John Marshall was correct than does any alternative. Once judges depart from originalism, once they are no longer guided by the original meaning of the Constitution in resolving the cases that come before them, then their very claim to the power of judicial review becomes open to question.

The point of issuing an instruction is to convey the meaning of those authorized to issue them to those obliged to obey them. As James Madison noted, the faithful interpreter must recur to “the sense in which the Constitution was accepted and ratified. In that sense alone it is the legitimate Constitution.”² It is only by recurring to the original meaning intended by those who created the Constitution that we can make sense of and maintain the notion that we seek to establish, in the words of the *Federalist*, “good government from reflection and choice.”³ It is only by “carry[ing] ourselves back to the time when the constitution was adopted, recollect[ing] the spirit manifested in the debates,” seeking the most “probable [meaning] in which it was passed,” rather than by seeing what meaning “may be squeezed out of the text, or invented against it,” that we can avoid rendering the Constitution a “blank paper by construction.”⁴

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803).

² JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 191 (Gaillard Hunt ed., vol. 9, 1910).

³ *THE FEDERALIST* NO. 1, at 33 (Alexander Hamilton), (Clinton Rossiter ed., 1961).

⁴ THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 296 (H.A. Washington ed., vol. 7, 1859); THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 247 (Paul Leicester Ford ed., vol. 8, 1899).

For some this may seem to be begging the question: Must even a faithful constitutional interpreter be committed to the language and intent of the founders? The short answer is yes. The implicit link between “language” and “intent” indicates the direction of the interpretive imperative. We readily recognize that we cannot be said to be interpreting the text if we disregard its language. But the language of the text does not emerge from the sea or drop from the sky; it was intentionally written by the authors of the text in order to communicate a message, to convey their thoughts to others. At a minimum, the choice of constitutional language reflects the intentions of the framers that a faithful interpreter is bound to respect. But language is a means, not an end in itself. We use language to convey meaning. We interpret language in order to understand that meaning. If we are free to ignore the meaning that the founders sought to convey in the text, then why are we not equally free to ignore the text itself? Why be bound by the words that they happened to write down if we are not bound by what they meant to say with those words? Why should the language of the Constitution, disassociated from any intended meaning, have any particular authority? If the authority of the Constitution lies in the fact that founders were specially authorized to give instruction, to create supreme law, then the meaning of the law that they laid down must be as authoritative as the particular words they used to convey that meaning.

II. WHAT IS ORIGINALISM?

By the original meaning of the Constitution, I am referring to the meaning that the constitutional text was understood to have at the time it was drafted and ratified. To adopt originalism does not mean that judges must hold a *séance* to call the spirit of James Madison to ask him what was on his mind in Philadelphia in the summer of 1787 or how he would deal with the tricky constitutional question that is raised by the case before the court. It does mean that judges should not feel free to pour their own political values and ideals into the Constitution. It means that the constant touchstone of constitutional law should be the purposes and values of those who had the authority to *make* the Constitution—not of those who are charged with governing under it and abiding by it.

One important point should be clarified. The commitment to originalism is not a commitment to the particular practices, plans and expectations of particular framers or of the founding generation. We are bound by the constitutional text that they adopted and by the principles embodied in that text. Their understandings about the practical implications of those principles and the particular applications that they expected to flow from them may be helpful to us as we try to figure out what exactly those constitutional principles were, but those early applications are rarely equivalent to the constitutional requirements themselves. The founders and early government officials who were members of or close to the founding generation may well have fully implemented the principles of the Constitution, but in many cases they did not. Some issues may simply not have arisen at an early date, or the circumstances with which they dealt may not have tested the limits or full extent of those constitutional principles. They may have self-consciously limited themselves, adopting policies that did not test or stretch the limits of the powers that they thought the government possessed or the rights to which they thought individuals were entitled. They could also be wrong about what their own principles required.

The members of the founding generation were as aware as anyone of the limits of human reason and of the temptations of political power. They drafted constitutions

precisely because they knew that they and their successors would need constant reminders of the principles that they held dear and the foundational agreements that they had struck. As constitutional interpreters, we are required to reason from the principles that they laid down, not take their word for the particular applications that should be made of those principles. The task of constitutional interpretation requires wisdom, learning and discernment, but it also requires humility and discipline. The operative question for a faithful constitutional interpreter is not what *would* Madison do in such a situation, or even what *did* Madison do in such a situation, but what does the principle that Madison and his fellows wrote into the Constitution require in such a situation. Reference to the founders is indispensable to answering such a question, but it remains only a starting point.

This should also caution us against confusing a commitment to originalism with hostility to the full range of methods that judges normally employ to resolve legal problems. A jurisprudence of originalism is entirely consistent with traditional doctrinal analysis, engagement with constitutional text and structure, and attention to constitutional purposes and values. Originalism does not insist that judges eschew doctrinal analysis or that they refuse to draw inferences from the structure of the Constitution and the government that it creates (“unwritten” though those structural implications might be). Originalism does insist that such interpretive aids be recognized as the tools that they are. Their value lies in their ability to help us in the process of discovering and applying the original meaning of the Constitution. They become inimical to originalism only when the interpreter forgets that they are mere tools, when the manipulation of precedent becomes an end in itself or when a focus on larger constitutional purposes leads us to ignore the specific ways in which the original Constitution was designed to achieve those purposes.

III. ORIGINALISM AND JUDICIAL ACTIVISM

It should be emphasized that the point of originalist constitutional interpretation is not to clear the way for current legislative majorities. Originalist arguments have frequently been marshaled to criticize what the Supreme Court has done, to show how the Court is guilty of “judicial activism” and of striking down laws without constitutional warrant. In that context, it makes sense to say that the Court was mistaken because it departed from original meaning and that a properly originalist Court would not have taken the same action, that an originalist Court would have upheld rather than struck down a particular statute, that an originalist Court would have left a particular policy choice up to the legislature. But we should not generalize from those particular cases. Originalist judges are not necessarily deferential judges. It may well be the case that the originalist Constitution has little of substance to say about some particular current political controversy. The Constitution may not require anything in particular in regards to euthanasia, abortion, homosexuality, or affirmative action. Deferring to the Constitution in such cases may simply mean holding them open for future political resolution, and the constitutional interpreter should be sensitive to that possibility. The judge should have the humility to recognize that the Constitution may not provide clear answers to all the questions asked of it, that elected officials have the right to make important policy choices without judicial intervention, and that the Constitution may not simply write the judge’s own preferred policies into the fundamental law.

Nonetheless, it may also be the case that faithful constitutional interpretation requires turning aside the preferences of current legislative majorities. The Constitution enshrines popular, not legislative, sovereignty. It creates a republic with a limited government, not simply a majoritarian democracy. The goal of a jurisprudence of originalism is to get the Constitution right, to preserve the Constitution inviolable. It denies that judges are freewheeling arbiters of social justice, but it also denies that they are mere window dressing. As Chief Justice William Rehnquist once wrote, “The goal of constitutional adjudication is ... to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not.”⁵ The jurisprudence of originalism seeks to hold true that balance, whether that requires upholding the application of a statute in a particular case or striking it down. The issue for originalism is which laws should be struck down, not how many (something which, after all, also depends greatly on the behavior of legislators). Proponents of originalism merely open themselves up to charges of hypocrisy when they approve of instances of judicial review if they do not make plain that it is not deference to politicians that they seek but fidelity to the Constitution.

It is also sometimes contended that the value of originalism lies in its ability to limit the discretion of judges. Originalism, it has been argued, will prevent judges from legislating from the bench or imposing their own value judgments on society. There is something to this argument but it can be overstated. To be sure there was a time in which judges and scholars often thought that the very purpose of courts and the power of judicial review were simply to pursue social justice. Thankfully, such hubris is less common today. But here again, judicial discretion as such is not the issue. The issue is the role of the courts and how the power of judicial review is to be used. Individual judges may well feel little discretion about what they should do in a given case, even if their jurisprudential philosophy is one based on, say, theories of liberal egalitarianism or utilitarian pragmatism. Such judges are in error not because they feel free to do what they personally want in constitutional cases but because they misperceive the basis of their own power and the requirements of constitutional fidelity.

At the same time, proponents of originalism should not delude themselves or others as to the difficulty of the task of identifying and applying the original meaning of the Constitution. It is in no way “mechanical.” Disagreement among individuals seeking in good faith to follow a jurisprudence of originalism is entirely possible. The judgment, intelligence, skill, and temperament of the individuals called upon to interpret the Constitution still matter. Judges must still resist the temptation to line up the constitutional founders to agree with their own personal views, just as they must resist the temptation to line up the precedents or the moral philosophies or the policy considerations. A jurisprudence of originalism will at least insure that judges are focused on the right discussion—what the Constitution of the founders requires relative to a given case—even though it cannot insure that everyone will reach the same or the correct conclusion once engaged in that discussion. It is one thing, however, for judges to be open to the criticism that they cut corners in their effort to discover the original meaning of the Constitution. It is quite another for them to be open to the criticism that they are imposing the wrong moral value judgments on the political process. A jurisprudence of originalism insists that judges should strive never to be guilty of the latter criticism, while endeavoring to avoid being guilty of the former.

⁵ *Webster v. Reproductive Health Services*, 492 U.S. 490, 494 (1989).

IV. CONSTITUTIONAL SELF-GOVERNMENT

There are three ways to resolve current political disagreements. We can somehow work them out ourselves, through majority rule, bargaining and compromise, deliberation and debate, and the like. That is, we can make our decisions through normal politics. Alternatively, we can delegate the decision to somebody else. To some degree we almost always delegate anyway, by electing and hiring representatives to hash out the nation's business in the capital while we get on with the more important business of living our lives. But "we" could choose to delegate our controversial political decisions to an even greater degree, throwing the issue into the lap of a "blue-ribbon commission," some executive administrator, or even the courts, perhaps with little or no guidance as to how that issue ought to be resolved by this favored agent. We can simply divest political discretion to some third party and live with the results. We do sometimes use courts in this way. The Sherman Antitrust Act famously handed the problem of identifying monopolies and monopolistic behavior over to the courts, instructing them to do *something* but not leaving many clues as to what they were to do.

It is possible to use courts in that way, but we should be reluctant to conclude that constitutional judicial review was such a delegation of unfettered policy discretion. Statutory delegations such as those contained in the original Sherman Act are subject to legislative oversight and revision; judges exercise discretion, but only for now and only with implicit or explicit accountability to elected representatives. It is possible that the Constitution contains similar delegations to judges. The founders might have said the equivalent of "protect 'liberty,' whatever that is." Given the general design of the Constitution and the political assumptions on which it was based it would be surprising if they did so, or at least did so very often or in especially important ways. Those who would claim such an authority on the part of judges bear a very high burden not only to show that the founders did not give more substantive content to their constitutional language but also to show that when they left constitutional discretion to later generations that they entrusted that discretion to unelected and largely unaccountable judges rather than to the people and their representatives. Those who would give a freewheeling discretion to judges to develop and enforce "preferred freedoms," "fundamental values," or "active liberty," unconstrained by the value choices that were already made at the time of constitutional drafting, bear a heavy burden to show why it is that judges rather than legislators or citizens should have the ultimate authority to identify "our" favored values and most cherished liberties or what is to be done to best realize our national aspirations.

The other way to resolve our current disagreements is to abide by decisions that have already been made; that is, we can adhere to the existing law. Rather than revisit controversies ourselves or trust the discretion of someone else, we can simply defer to earlier judgments embodied in the law. Having made the decision to keep faith with the law, we may appoint someone to interpret and apply the law for us and keep things on even keel until we are ready to revisit the issue—perhaps recognizing that we ourselves may be too tempted to deviate from the law in particular instances or may be too prone to make unintended or unthoughtful mistakes in applying the law. We should recognize that the interpretive effort will require the exercise of some judgment, but we would, of course, expect the appointed interpreter not to exercise the discretion of a delegated decisionmaker.

The issue is what standard should be used to resolve contemporary political controversies and who should have the authority to make the resolution. Contemporary political actors are displaced by any judicial decision. If judges offer an interpretation

of the text in accord with the language and intent of the founders, then those contemporary political actors have only deferred their right to make the choice themselves and remake the law. If judges make constitutional law without offering an interpretation of the original Constitution, then we have simply replaced one relatively democratic set of contemporary policymakers with another much less democratic one. If judges interpret the originalist text, then the people retain their sovereign lawmaking authority to create, amend or replace the higher law. If judges do not, then the legislative power of the sovereign people would have been lost. The basic constitutional choices would be made by judges rather than by those who draft and ratify the constitutional text, whether those drafters and ratifiers did their work two hundred years ago or yesterday. As future Supreme Court justice James Iredell observed even as the federal Constitution was being drafted, there would be no point to assembling and writing a constitution if those charged with interpreting and adhering to it could ignore what was decided in those assemblies and instead chose to follow a different rule.⁶ The supreme power would no longer lie with those who write the Constitution but instead would lie with those who write the constitutional law.

We privilege the intentions of the founders out of respect for the role of the constitutional founder, not out of respect for any particular founder. It is commonplace that we distinguish between the office and the officeholder, between institutional and personal authority. We respect the actions of the president and the Congress out of regard for the offices, not out of regard for the individuals who hold those offices. Likewise, those who drafted and ratified our present Constitution occupied a political role. It is a role that we do and should respect, not least because it is a role that we could ourselves play. There is no question that the founding generation was uniquely situated at the historical birth of the new nation and uncommonly blessed with political talent and wisdom, but too much myth-making can also be subversive of consensual constitutional governance and should certainly form no part of our current justification for adhering to the inherited Constitution. We should respect the substance of the constitutional choices of the founding not because the founders were especially smart, because they necessarily got it right or because we happen to agree with them on the merits. Although the founders did create a remarkably flexible and successful constitutional system, there are any number of individuals in our own society who are smart, think they can get it right, or whose values others would likely endorse. If being smart or “right” was the sole lodestar for our judgments about constitutional meaning, then there would be plenty of aspirants who could claim that we should follow them rather than the founders. We should respect the substance of choices of the founders because only they spoke on the basis of the “solemn and authoritative act” of the people. We should respect their choices because we should take seriously the idea of constitutional deliberation and choice through democratic means, of constitutional foundations as conscious, real-time political events. We should act so as to preserve the possibility of constitutional self-governance.

⁶ JAMES IREDELL, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 174 (Griffith J. McRee ed., vol. 2, 1858).

Fidelity to Text and Principle

Jack M. Balkin*

Is our Constitution a living document that adapts to changing circumstances or must we interpret it according to its original meaning? For years now people have debated constitutional interpretation in these terms. But the choice is a false one. Constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text. The task of interpretation is to decide how best to apply them in current circumstances. This is the method of *text and principle*. It is faithful to the original meaning of the constitutional text and its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles. Although the constitutional text and principles do not change without subsequent amendment, their application and implementation can. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees.

I. ORIGINAL MEANING VERSUS ORIGINAL EXPECTED APPLICATION

Constitutional interpretations are not limited to applications specifically intended or expected by the framers and adopters of the constitutional text. For example, the Eighth Amendment's prohibitions on "cruel and unusual punishments" bans punishments that are cruel and unusual as judged by contemporary application of these concepts (and underlying principles), not by how people living in 1791 would have applied those concepts and principles.

This marks the major difference between my approach and the one popularized by one of originalism's most prominent champions, Justice Antonin Scalia.¹ Justice Scalia agrees that we should interpret the Constitution according to "the original meaning of the text, not what the original draftsmen intended."² He also agrees that the original meaning of the text should be read in light of its underlying principles. But he insists that the concepts and principles underlying those words must be *applied* in the same way that they would have been applied when they were adopted. As he puts it, the principle underlying the Eighth Amendment "is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not ... 'whatever may be considered cruel from one generation

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¹ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-864 (1989); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) [*hereinafter* A MATTER OF INTERPRETATION].

² See A MATTER OF INTERPRETATION, *supra* note 1, at 38.

to the next,³ but ‘what we consider cruel today [i.e., in 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions of *the time*.³

Scalia’s version of “original meaning” is not original meaning in my sense, but actually a more limited interpretive principle, *original expected application*. Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art). Justice Scalia can accommodate new phenomena and new technologies—like television or radio—by analogical extension with phenomena and technologies that existed at the time of adoption. But this does not mean, Scalia insists, that “the *very acts* that were perfectly constitutional in 1791 (political patronage in government contracting and employment, for example) may be *unconstitutional* today.”⁴

II. MISTAKES AND ACHIEVEMENTS

Scalia realizes that his approach would allow many politically unacceptable results, including punishments that would clearly shock the conscience today. So he frequently allows deviations from his interpretive principles, making him what he calls a “faint-hearted originalist.”⁵ For example, Scalia accepts the New Deal settlement that gave the federal government vast powers to regulate the economy that most people in 1787 would never have dreamed of and would probably have strongly rejected.⁶

Scalia’s originalism must be “faint-hearted” precisely because he has chosen an unrealistic and impractical principle of interpretation, which he must repeatedly leaven with respect for *stare decisis* and other prudential considerations. The basic problem with looking to original expected application for guidance is that it is inconsistent with so much of our existing constitutional traditions. Many federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond original expectations about federal power, not to mention independent federal agencies like the Federal Reserve Board and the Federal Communications Commission, and federal civil rights laws that protect women and the disabled from private discrimination. Even the federal government’s power to make paper money legal tender probably violates the expectations of the founding generation.⁷ The original expected application is also inconsistent with constitutional guarantees of sex equality for married women,⁸ with constitutional protection of interracial marriage,⁹ with the constitutional right to use contraceptives,¹⁰ and with the modern scope of free speech rights under the First Amendment.¹¹

³ See *id.* at 145 (emphasis in original).

⁴ See *id.* at 140-41 (emphasis in original).

⁵ See Scalia, *Originalism*, *supra* note 1, at 861-64.

⁶ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

⁷ See Kenneth Dam, *The Legal Tender Cases*, 1981 Sup. Ct. Rev. 367, 389 (“difficult to escape the conclusion that the Framers intended to prohibit” use of paper money as legal tender); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 84-85 (1987).

⁸ See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁹ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1971).

¹¹ See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (protecting public expressions of profanity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting advocacy of sedition and law violation); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding unconstitutional aspects of common law of defamation);

The standard response to this difficulty is that courts should retain nonoriginalist precedents (i.e., those inconsistent with original expectation) if those precedents are well established, if they promote stability, and if people have justifiably come to rely on them. Interpretive mistakes, even though constitutionally illegitimate when first made, can become acceptable because we respect precedent. As Scalia explains, “[t]he whole function of the doctrine” of *stare decisis* “is to make us say that what is false under proper analysis must nonetheless be held true, all in the interests of stability.”¹²

There are four major problems with this solution. First, it undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by the framers, and that decisions inconsistent with the original expected application are illegitimate. It suggests that legitimacy can come from public acceptance of the Supreme Court’s decisions, or from considerations of stability or economic cost.

Second, under this approach, not all of the “incorrect” precedents receive equal deference. Judges will inevitably pick and choose which decisions they will retain and which they will discard based on pragmatic judgments about when reliance is real, substantial, justified or otherwise appropriate. These characterizations run together considerations of stability and potential economic expense with considerations of political acceptability—which decisions would be too embarrassing now to discard—and political preference—which decisions particularly rankle the jurist’s sensibilities. Thus, one might argue that it is too late to deny Congress’s power under the Commerce Clause to pass the Civil Rights Act of 1964 but express doubts about the Endangered Species Act. One might accept that states may not engage in sex discrimination but vigorously oppose the constitutional right to abortion or the unconstitutionality of anti-sodomy statutes. This play in the joints allows expectations-based originalism to track particular political agendas and allows judges to impose their political ideology on the law—they very thing that the methodology purports to avoid.

Third, allowing deviations from original expected application out of respect for precedent does not explain why we should not read these mistakes as narrowly as possible to avoid compounding the error, with the idea of gradually weakening and overturning them so as to return to more legitimate decisionmaking. If the sex equality decisions of the 1970’s were mistakes, courts should try to distinguish them in every subsequent case with the goal of eventually ridding us of the blunder of recognizing equal constitutional rights for women.

This brings us to the final, and more basic problem: Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride. These decisions are part of why we understand ourselves to be a nation that has grown freer and more democratic over time. No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people. It confuses achievements with mistakes, and it maintains them out of a grudging acceptance.

Miller v. California, 413 U.S. 15 (1973) (protecting pornography that does not fall within a narrowly defined three part test); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (protecting truthful non-misleading commercial speech from paternalistic regulation); see also A MATTER OF INTERPRETATION, *supra* note 1, at 138 (contemporary First Amendment protections are “irreversible” “whether or not they were constitutionally required as an original matter”).

¹² See A MATTER OF INTERPRETATION, *supra* note 1, at 139.

Indeed, those who argue for limiting constitutional interpretation to the original expected application are in some ways fortunate that previous judges rejected their theory of interpretation; this allows them to accept as a starting point nonoriginalist precedents that would now be far too embarrassing for them to disavow.

By contrast, a focus on text and principle views most, if not all of these achievements as plausible constructions of constitutional principles that underlie the constitutional text and that must be fleshed out in doctrine. Whatever the framers of the Fourteenth Amendment might have expected, equal rights for women are fully consistent with the original meaning of the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment and its underlying principles of equal citizenship and opposition to class and caste legislation. We need not regard decisions recognizing women's equal rights as mistakes: quite the contrary, they are our generation's attempt to make sense of and implement the Constitution's text and its underlying principles. These decisions—and others like them—do not sacrifice constitutional fidelity on the altar of precedent; they demonstrate how development of judicial doctrine over time can implement and maintain constitutional fidelity. It is rather those who would retreat from the achievements of our constitutional tradition or accept them only grudgingly who lack fidelity, because they lack faith in the ability and the authority of succeeding generations to accept the Constitution as their Constitution and to make constitutional text and constitutional principles their own.

Original expectation originalism cannot account for how social movements and post-enactment history shape our constitutional traditions. It holds that social movements and political mobilizations can change constitutional law through the amendment process of Article V. They can also pass new legislation, as long as that legislation does not violate original expected application—as much federal post-New Deal legislation might. But no matter how significant social movements like the civil rights movement and the women's movement might have been in our nation's history, no matter how much they may have changed Americans' notion of what civil rights and civil liberties belong to them, they cannot legitimately alter the correct interpretation of the Constitution beyond the original expected application.

The model of text and principle views the work of social movements and post-enactment history quite differently. The constitutional text does not change without Article V amendment. But each generation of Americans can seek to persuade each other about how the text and its underlying principles should apply to their circumstances, their problems, and their grievances. And because conditions are always changing, new problems are always arising and new forms of social conflict and grievance are always being generated and discovered, the process of argument and persuasion about what the Constitution's principles mean is never-ending.

When people try to persuade each other about how the Constitution and its principles apply to their circumstances, they naturally identify with the generation that framed the constitutional text and they claim that they are being true to its principles. They can and do draw analogies between the problems, grievances and injustices the adopters feared or faced and the problems, grievances, and injustices of our own day. They also can and do draw on the experiences and interpretive glosses of previous generations—like the generation that produced the New Deal or the Civil Rights Movement—and argue that they are also following in their footsteps.

Most successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles. Thus, the key tropes of constitutional interpretation by social movements and political parties are restoration on the one hand, and redemption on the other. Constitutional meaning changes by arguing about what we already believe, what we are already committed to, what we have promised ourselves as a people, what we must return to and what commitments remain to be fulfilled.

When political and social movements succeed in persuading other citizens that their interpretation is the right one, they replace an older set of implementing constructions and doctrines with a new one. These constructions and implementations may not be just or correct judged from the standpoint of later generations, and they can be challenged later on. But that is precisely the point. Each generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time. Interpreting the Constitution's text and principles is how each generation connects its values to the commitments of the past and carries forward the constitutional project of the American people into the future.

From the standpoint of text and principle, it matters greatly that there was a women's movement in the 1960's and 1970's that convinced Americans that both married and single women were entitled to equal rights and that the best way to make sense of the Fourteenth Amendment's principle of equal citizenship was to apply it to women as well as men, despite the original expected application of the adopters. The equal protection decisions of the 1970's that gave heightened scrutiny to sex-based classifications are not "mistakes" that we must grudgingly live with. They are *applications* of text and principle that have become part of our constitutional tradition. They might be good or bad applications; they might be incorrect or incomplete. That is for later generations to judge. But when people accept them, as Americans accept the notion of equality for women today, they do not do so simply on the basis of reliance interests—i.e. that we gave women equal rights mistakenly in the 1970's, and now it's just too late to turn back. They do so in the belief that this is what the Constitution *actually means*, that this is the best, most faithful interpretation of constitutional text and principles.

Originalism based on original expected application fails because it cannot comprehend this feature of constitutional development except as a series of errors that it would now be too embarrassing to correct. Justice Scalia correctly notes that his reliance on nonoriginalist precedents is not consistent with originalism, but rather a "pragmatic exception."¹³ And that is precisely the problem with his view: The work of social movements in our country's history is not a "pragmatic exception" to fidelity to the Constitution. It is the lifeblood of fidelity to our Constitution—as an ongoing project of vindicating constitutional text and principle in history.

In this way, the theory of text and principle explains—in a way that original expectation originalism cannot—why the Constitution is more than the dead hand of the past, but is a continuing project that each generation takes on. It is not a series of orders from the past but a vibrant conversation between generations, in which succeeding generations pledge faith in the constitutional project of their forbearers and exercise fidelity to the Constitution by making the Constitution their own.

¹³ See *id.* at 140.

None of this means that the original expected application is irrelevant or unimportant. It helps us understand the original meaning of the text and the general principles that animated the text. But it is important not as binding law but rather as an aid to interpretation, one among many others. It does not control how we should apply the Constitution's guarantees today, especially as our world becomes increasingly distant from the expectations and assumptions of the adopters' era.

III. IMPLEMENTING TEXT AND PRINCIPLES

Although the original expected application is not binding, the constitutional text certainly is. That is because we have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its text and the principles that underlie the text as legal rules and legal principles. We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than the people who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace. Sometimes the text refers to terms of art or uses figurative or non-literal language;¹⁴ in that case we must try to figure out what principles underlie that term of art or figurative or non-literal language. If we do not look to underlying principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes. We can and should use history to discover the Constitution's underlying principles. But the principles we derive from history must be at roughly the same level of abstraction as the text itself. The question is not what principles people specifically intended but what principles the text enacts.

When the text is relatively rule-like, concrete and specific, underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement. But where the text is abstract, general, or offers a standard, we must look to the principles that underlie the text to make sense of the text and produce applications consistent with the text. Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be worked out by later generations.

Some principles are directly connected to particular texts and help us understand how to apply those texts. Other principles we infer from the constitutional structure as a whole. For example, there is no single separation of powers clause in the Constitution; rather we must derive the principle of separation of powers from how the various institutions and structures outlined in the constitutional text relate to each other. The principle of democracy—which includes the subprinciple that courts

¹⁴ For example, the Copyright Clause in Article I, section 8 refers to "writings," which is a non-literal use. It refers to more than written marks on a page, but also includes printing and (probably) sculpture, motion pictures, and other media of artistic and scientific communication. The term "due process of law" in the Fifth and Fourteenth Amendment is a term of art; that is, it has a specialized legal meaning over and above the concatenation of the words in the phrase. *See id.* at 37-38 (the text of the First Amendment must be construed as a synecdoche in which "speech," and "press" stand for a whole range of different forms of expression, including handwritten letters).

should generally defer to majoritarian decisionmaking—is nowhere specifically mentioned in the constitutional text, and yet it may be the most frequently articulated principle in constitutional argument. It is, ironically, the principle that people most often use to object to courts inferring constitutional principles not specifically mentioned in the text. Although the principle of democracy does not directly appear in the text, we infer it from various textual features that presume democracy and from the basic character of our government as a representative and democratic republic.

Finally, many other materials gloss text and principles and help apply them to concrete circumstances. These include not only the original expected application but also post-enactment history, including the work of social movements that have changed our constitutional common sense, and judicial and non-judicial precedents. These materials offer a wide range of theories and interpretations about how to understand and apply the Constitution's structures and guarantees. They are entitled to considerable weight. Precedents in particular not only implement and concretize principles, they also help settle difficult legal questions where reasonable people can and do disagree. Precedents also help promote stability and rule of law values. However, because glosses and precedents accumulate and change over time, and because they often point in contrasting directions, they are not always dispositive of constitutional meaning.

Constitutional doctrines created by courts and institutions and practices created by the political branches flesh out and implement the constitutional text and underlying principles. But they are not supposed to replace them. Doctrines, institutions and practices can implement the Constitution well or poorly depending on the circumstances, and some implementations that seem perfectly adequate at one point may come to seem quite inadequate or even perverse later on. Because the Constitution, and not interpretations of the Constitution, is the supreme law of the land, later generations may assert—and try to convince others—that the best interpretation of text and principle differs from previous implementing glosses, and hence that we should return to the best interpretation of text and principle, creating new implementing rules, practices and doctrines that will best achieve this end. The tradition of continuous arguments about how best to implement constitutional meaning generates changes in constitutional doctrines, practices, and law. That is why, ultimately, there is no conflict between fidelity to text and principle and practices of constitutionalism that evolve over time. Indeed, if each generation is to be faithful to the Constitution and adopt the Constitution's text and principles as its own, it must take responsibility for interpreting and implementing the Constitution in its own era.

IV. FIDELITY AND INSTITUTIONAL CONSTRAINTS

Expectations-based originalists may object that the text-and-principle approach is indeterminate when the text refers to abstract standards like “equal protection” rather than concrete rules. Therefore it does not sufficiently constrain judges. That might be so if text and principle were all that judges consulted when they interpreted the Constitution. But in practice judges (and other constitutional interpreters) draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions and implementations, structural and inter-textual arguments, and judicial and non-judicial precedents. In practice, judges who look to text and principle face constraints much like those faced by judges who purport to rely on original expected application. As we have seen, the latter cannot and do not use original expected

applications for a very large part of their work, because a very large part of modern doctrine is not consistent with original expected application. So even judges who claim to follow the original understanding are, in most cases, guided and constrained by essentially the same sources and modalities of argument as judges employing the method of text and principle.

I think there is a deeper problem with the objection that the method of text and principle does not sufficiently constrain judges. Many theories of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications. The first is the question of *fidelity*; the second is the question of *institutional responsibility*.

Theories about constitutional interpretation that conflate these two questions tend to view constitutional interpretation from the perspective of judges and the judicial role; they view constitutional interpretation as primarily a task of judges and they assess theories of interpretation largely in terms of how well they guide and limit judges. For example, one of the standard arguments for expectations-based originalism is that it will help constrain judges in a democracy. Alexander Bickel's theory of the passive virtues and Cass Sunstein's idea of minimalism, although often described as theories of constitutional interpretation, are actually theories about the judicial role and how judges should interpret the Constitution. So, too, obviously, are other theories of "judicial restraint." From the perspective of these theories, non-judicial interpreters are marginal or exceptional cases that we explain in terms of the standard case of judicial interpretation.

I reject this approach. Theories of constitutional interpretation should start with interpretation by citizens as the standard case; they should view interpretation by judges as a special case with special considerations created by the judicial role. In like fashion, constitutional interpretations by executive officials and members of legislatures are special cases that are structured by their particular institutional roles. Instead of viewing constitutional interpretation by citizens as parasitic on judicial interpretation, we should view it the other way around.

Why emphasize the citizen's perspective? Each generation must figure out what the Constitution's promises mean for themselves. Many of the most significant changes in constitutional understandings (e.g., the New Deal, the Civil Rights Movement, the second wave of American feminism) occurred through mobilizations and counter-mobilizations by social and political movements who offered competing interpretations of what the Constitution really means. Social and political movements argue that the way that Constitution has been interpreted and implemented by judges or other political actors is wrong, and that we need to return to the Constitution's correct meaning and redeem the Constitution's promises in our own day.

Often people do not make these claims in lawyerly ways, and usually they are not constrained by existing understandings and existing doctrine in the way that we want judges to be constrained. In fact, when social movements initially offer their constitutional claims, many people regard them as quite radical or "off the wall." There was a time, for example, when the notion that the Constitution prohibited what we now

call sex discrimination seemed quite absurd. Yet it is from these protestant interpretations of the Constitution that later constitutional doctrines emerge. Many of the proudest achievements of our constitutional tradition came from constitutional interpretations that were at one point regarded as crackpot and “off the wall.”

I hasten to add that most of these arguments go nowhere. Only a few have significantly changed how Americans look at the Constitution. Successful social and political movements must persuade other citizens that their views are correct, or, at the very least, they must convince people to compromise and modify their views. If movements are successful, they change the minds of the general public, politicians and courts. This influence eventually gets reflected in new laws, in new constitutional doctrines, and in new constitutional constructions. Successful social and political mobilization changes political culture, which changes constitutional culture, which, in turn, changes constitutional practices outside of the courts and constitutional doctrine within them.

The causal influences, of course, do not run in only one direction. Judicial interpretations like those in *Brown v. Board of Education*¹⁵ or *Miranda v. Arizona*¹⁶ can become important parts of our constitutional culture; they can be absorbed into ordinary citizens’ understandings of what the Constitution means, and they can act as focal points for citizen reaction. Nevertheless, we cannot understand how constitutional understandings change over time unless we recognize how social movements and political parties articulate new constitutional claims, create new constitutional regimes and influence judicial constructions.

To understand how these changes could be faithful to the Constitution, we must have a theory that makes the citizen’s perspective primary. I do not claim that all social mobilizations that produce changes in doctrine are equally legitimate or equally admirable. But some are both legitimate and admirable, and a theory of constitutional interpretation—which is also a theory of constitutional fidelity—must account for them. The text-and-principle approach can offer a much better explanation of how successful social and political movements make claims that are faithful to the Constitution than expectations-based originalism can. Indeed, expectations-based originalism is virtually useless for this purpose, because it views many of the most laudatory changes in our understandings of the Constitution as not faithful to the Constitution and therefore illegitimate. Thus, according to the logic of expectations-based originalism, the second wave of American feminism either cowed or bullied the federal judiciary into mistaken readings of the Fourteenth Amendment. Having blundered in the 1970’s, judges must now maintain these errors because of respect for precedent and political realities.

For similar reasons, expectations-based originalism cannot really constrain judges because too many present-day doctrines are simply inconsistent with it; as a result judges must pick and choose based on pragmatic justifications that are exceptions to the theory. Indeed, the exceptions threaten to swallow the theory in many areas of the law. Because expectations-based originalism conflates the question of constitutional fidelity with the question of judicial constraint, it offers the wrong answer to both questions.

Constraining judges in a democracy is important. But in practice most of that constraint does not come from theories of constitutional interpretation. It comes from institutional features of the political and legal system. Some of these are internal

¹⁵ 347 U.S. 483 (1954).

¹⁶ 384 U.S. 486 (1966).

to law and legal culture, like the various sources and modalities of legal argument listed above. Others are “external” to legal reasoning but nevertheless strongly influence what judges produce as a group.

First, judges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites. Second, the system of judicial appointments and practices of partisan entrenchment determine and limit who gets to serve as a judge, helping ensure that most successful judicial candidates come from within the political and legal mainstream. Third, lower federal courts are bound to apply Supreme Court precedents. Fourth, the Supreme Court is a multi-member body whose decisions in contested cases are usually decided by the median or “swing” Justice. Over time, this keeps the Court’s work near the center of public opinion.

This combination of internal and external features constrains judicial interpretation in practice far more effectively than any single theory of interpretation ever could; it does much of the work in constructing which constitutional interpretations are reasonable and available to judges and which are “off the wall.” Equally important, this combination of internal and external factors keeps judicial decisions in touch with popular understandings of our Constitution’s basic commitments, continually translating, shaping and refining constitutional politics into constitutional law.

In short, we should not confuse the question of what it takes for actors in the system—including those actors who are not judges—to be faithful to the Constitution with the question of what features of the system constrain judicial interpretation. We must separate these questions to understand how constitutional fidelity occurs over time. When we do, we can also see why fidelity to original meaning and belief in a living Constitution are not at odds.

Fidelity to the Constitution means grappling with its text and its principles, applying them to our present circumstances, and making use of the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution. Reasonable people may disagree on what those principles mean and how they should apply. But the larger point about constitutional interpretation remains. We decide these questions by reference to text and principle, applying them to our own time and our own situation, and in this way making the Constitution our own. The conversation between past commitments and present generations is at the heart of constitutional interpretation. That is why we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. The two are opposite sides of the same coin.

Originalism and the Living Constitution: Reconciliation

Kermit Roosevelt*

In modern constitutional theory, originalism (an approach that attempts to enforce the original understanding of the Constitution) sets itself against the interpretive practice known as living constitutionalism, which gives greater priority to contemporary understandings. The debate between originalists and living constitutionalists is generally considered one of the most important current battles over how the Constitution should be interpreted. In what follows, I will briefly set out the debate and then explain why I think its significance is drastically overstated. My conclusion is that with respect to the most interesting and controversial constitutional provisions, the two approaches can be synthesized; that is, they should lead to the same interpretive results. (This argument is drawn from my recent book *The Myth of Judicial Activism* (Yale University Press 2006), which I hope interested readers will consult.)

The standard argument for originalism is relatively straightforward. The Constitution gets its legal effectiveness from the approval of the ratifiers. When the original Constitution was ratified, and when amendments were added to it over the course of years, a particular meaning was enacted, and judges are not given the authority to change that meaning. The role of a judge is to say what the Constitution *does* mean, not what it ought to mean; if change is needed, Article V sets out the procedure by which it can be amended. Allowing judges to have free rein to change the meaning of the Constitution to suit the perceived needs of the day takes sovereignty away from the American people and places it in the hands of an unelected judiciary. Adherence to original understanding, by contrast, prevents judges from imposing their own values. Originalists thus argue that constitutional cases should be decided according to our best guess as to how the ratifiers would have decided them. Judges should protect a right to abortion only if the ratifiers would have agreed that it existed; if the ratifiers believed that racially segregated schools were consistent with the Equal Protection Clause, then judges should not interfere. Anything else, originalists say, is illegitimate (or even “activist”).

The standard argument for the living Constitution focuses on the fact that conditions and attitudes have changed greatly since the framers’ times. Living constitutionalists argue that the Constitution must be able to adapt to respond to current needs and problems rather than remaining frozen in time. Because the amendment process is so difficult and cumbersome, requiring a two-thirds majority in both the House and the Senate and then ratification by the legislatures of three-quarters of the states, living constitutionalists seem to view judicial modification of the Constitution with equanimity—a necessary evil, at the worst. Without judicial changes, they say, states would still be allowed to segregate schools, ban interracial marriage, and exclude women from the practice of law, to give just a few prominent examples.

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When the debate is viewed in these terms, it seems fairly clear that the originalists have the better of it. The Constitution as written may not be perfect, but what is the point of a written Constitution at all if judges have the freedom to modify it as they see fit? And what reason is there to think that judges will write a better Constitution than the one we have? As Justice Antonin Scalia is fond of pointing out, judges might as well decide to disregard individual rights provisions as to expand them. That is, although originalists tend to be political conservatives and living constitutionalists tend to be political liberals, there is no reason to think that judges would consistently modify the Constitution in a liberal direction. In speeches, Justice Scalia has gone so far as to say that one would have to be “an idiot” to believe in the living Constitution. And if the descriptions I have given of originalism and the living Constitution are accurate, he might well be right.

But things are not that simple. Originalism is not quite all it claims to be, in part because the precise understandings it seeks to enforce are frequently imaginary. The understanding of the ratifiers, in many cases, probably did not go beyond the vague or general plain meaning; that is, the ratifiers would have disagreed among themselves as to how specific cases should be decided.

Consider, for instance, the question of whether the Necessary and Proper Clause, which allows Congress to pass laws necessary and proper to implement the powers granted to it by Article I, permits the creation of a federal bank. This was one of the big disputes of the framing era, and it divided the framers themselves. Alexander Hamilton argued that the bank was constitutionally allowed, while James Madison asserted that it was not. If Hamilton and Madison—who were both present at the Constitutional Convention and who had collaborated on the *Federalist Papers*—could not agree, what are the odds that the ratifiers had a clear and uniform understanding on this question?

For a more recent example, consider the Equal Rights Amendment. The ERA was submitted to the states for consideration by Congress in 1972 but never ratified. Section 1 of the ERA provided that “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” This is, of course, very much like the Equal Protection Clause, except that it focuses specifically on sex discrimination. (One of the reasons it failed to achieve ratification, ironically, may have been the Supreme Court’s contemporaneous use of the Equal Protection Clause itself to forbid sex discrimination.) How clear and consistent were the contemporary understandings of its meaning for specific cases?

Not very. Supporters and opponents clashed over a number of issues—whether sex segregated bathrooms would become unconstitutional, whether the ERA would require that women be drafted into combat, and even whether it would require states to permit same-sex marriage. Harvard law professor Paul Freund, a widely respected constitutional authority, testified to a Senate subcommittee that this last consequence would indeed result: “If the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation.”¹

On the other hand, it seems unlikely that the concern for women’s equality that inspired the ERA is necessarily connected to approval of same-sex marriage, so the drafters might have had a different view. The ERA never gained the required thirty-eight state ratifications, so courts never had to grapple with these issues. But the

¹ CONG. REC. S4578 (1972).

debate over them suggests that the consequences of the ERA were less than entirely clear to the drafters and potential ratifiers.

The existence of this sort of disagreement suggests that originalism will not deliver clearly correct answers in many cases. This is not simply a practical problem. Originalists like to claim that adherence to original meaning prevents judges from imposing their own values, while living constitutionalism does not. But if the ratifiers would not have agreed on how specific cases should be decided, the supposed constraint is illusory. That is, a judge following an originalist methodology could still reach whatever results he wanted by highlighting some historical evidence and downplaying the rest. So originalism, as a methodology, does not in fact prevent judges from imposing their preferences on society. Historical evidence does not do much more than offer “plain meaning,” as far as deciding difficult cases goes.

Still, if the choice is between plain meaning plus history and judicial whim alone, originalism may be the better option. My broader claim here is that the conventional way of framing the debate is deeply misleading. It is misleading because the argument I gave for originalism makes a fundamental error. It assumes that if constitutional *meaning* remains the same, then the outcomes of cases must remain the same, even as surrounding facts and circumstances change.

Living constitutionalists and originalists share this assumption, but it is easy to demonstrate that they are both wrong. Imagine for a moment that the Constitution had a clause it does not—a clause providing that senators, while engaged in debate, “shall wear the latest Fashions.” This clause would, quite clearly, direct one thing in 1789 and another now. Conduct that the ratifiers deemed consistent with the clause—dressing in knee breeches and a powdered wig—would be inconsistent with today’s understanding of the language. Should an originalist judge, exercising fidelity to the ratifiers’ understanding, hold that senators must dress according to the fashions of the 18th century?

The answer is obviously no. The ratifiers of a clause requiring “the latest Fashions” plainly expected the set of activities permitted by that clause to change over time. The word “latest” is a dead giveaway. Still, even if the clause just required “fashionable Attire,” it would be reasonable to think that the ratifiers intended its requirements to change. A provision that required senators to adhere to the ratifiers’ understanding of what was fashionable would be a rather foolish one. It would be easy to see, at the time of ratification, that such a provision would quickly lose its fit and fail to serve the intended purpose. Requiring 21st-century senators to dress in 18th-century costumes would make them look not fashionable but ridiculous.

In adjusting the outcome of cases to follow the evolution of fashion, a judge would not be engaged in modifying constitutional meaning. She would be following the original understanding—an understanding that clothes that seemed fashionable in 1789 would appear anachronistic and silly centuries later, and that the purpose of ensuring fashionable senators requires reference to future notions of fashion.

So it is clearly possible to write constitutional provisions that direct different outcomes as times change. To put the point in the terminology I shall use for the rest of this discussion, it is possible for the *meaning* of a constitutional provision to remain constant while its *applications* change. Most originalists ignore this possibility; they are what we could call “application originalists” rather than “meaning originalists.” But the possibility does exist. The question, once we have established this initial point, is which, if any, of the provisions in our actual Constitution fit that description.

One way to decide this would be simply to look at the language. Some words, like “latest,” clearly announce that their range of application is to be flexible. Others, like “thirty-five,” suggest that their applications are meant to be fixed. If we look through the Constitution, we will certainly find some words that suggest flexibility. “Unreasonable” searches and seizures are prohibited by the Fourth Amendment, “speedy” trial guaranteed by the Sixth, and “excessive bail” and “cruel and unusual punishment” forbidden by the Eighth.

The possibility of concealing a lethal handgun in a pocket might make reasonable searches that would have been considered unreasonable by the framers. The available means of transportation for judge, jury, and accused might bear on what counts as a “speedy” trial. An inquiry into “excessive” bail might take inflation into account, and whether a punishment is “unusual” might depend on whether it is common now, not whether it was in 1791 when the Eighth Amendment was ratified.

We should not, however, focus solely on the words of the Constitution, for it is semantically possible that these terms incorporate by reference not current circumstances but those of the ratifiers’ times. The appropriate inquiry looks to the words and also to the purpose of the relevant constitutional provision, asking whether that purpose is better served by a static or a flexible range of applications.

Each of the provisions I have mentioned probably better serves the purpose the ratifiers intended if its range of applications is flexible. A Fourth Amendment that banned police from patting down suspects would expose them to serious danger; it would no longer strike a sensible balance between individual privacy and public safety. A Sixth Amendment speedy trial guarantee that was keyed to travel by horseback would make little sense in the modern world; it would allow authorities to impose arbitrary delays. A prohibition on excessive bail expressed in 1791 dollars would set an absurdly low threshold in the 21st century; it would make bail requirements meaningless. And defining “cruel and unusual punishments” by reference to 1791 understandings and practices would allow punishments that have now become rare or nonexistent because they were deemed barbaric and inhumane.

Those examples are relatively minor, though the proper interpretation of the Cruel and Unusual Punishment Clause has been a matter of some dispute in cases I will discuss later. The Equal Protection Clause is an issue of greater significance, in part because the changes that judges might take into account include changes in values as well as facts. Changes in values are relevant because a prohibition on unjustified discrimination is value-laden. There is no objective and timeless standard by which to determine whether discrimination is justified, not even cost-benefit analysis, for costs and benefits depend on attitudes as well as material facts. And even those who accept the idea of a reasonableness standard that takes changing facts into account in evaluating Fourth Amendment searches and seizures might argue that changes in societal values should not be allowed to change the outcome of constitutional cases.

But the line between facts and values is not as clear or as sharp as it might seem, for value judgments about the justifiability of discrimination may depend on background factual beliefs and assumptions. We can see this by considering a few examples of practices that the ratifiers believed were acceptable, but that modern Americans do not. The historical evidence strongly suggests that the ratifiers of the Equal Protection Clause did not believe that it would stop states from segregating schools, or banning interracial marriage, or excluding women from the practice of law.

Why would anyone think these things—some of which seem obviously unjustified to modern sensibilities—were constitutionally unproblematic? Until relatively recently, many “facts” justified these forms of discrimination. Interracial marriage was considered likely either to produce monsters or at the least to compromise the purity of the white gene pool. Educating black and white children together probably seemed simply impossible; as Abraham Lincoln put it in 1858, “[t]here is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality.”² And as for women lawyers, as Justice Joseph Bradley wrote in *Bradwell v. Illinois*, five years after the ratification of the Fourteenth Amendment, “the natural ... timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”³

Additionally, discrimination was considered justified as a reflection of the natural order of things, a conclusion often couched in religious terms. Justice Bradley rested his assertion that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother” on the simple ground that “[t]his is the law of the Creator.”⁴ And the trial court judge who enforced Virginia’s ban on interracial marriages against Mildred Jeter and Richard Loving observed that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.... The fact that he separated the races shows that he did not intend for the races to mix.”⁵ These rationales may once have been sufficiently widely accepted to count as adequate justification for discrimination; they may once have seemed like common sense. But they no longer appear that way. A modern legislature would be unlikely to rely on them in enacting a law, and a modern judge would be less likely still to accept them as justification.

If the ratifiers’ beliefs about the likely applications of the Equal Protection Clause depend on facts that are now deemed false and on beliefs about the nature of the world that are no longer shared, working in concert to produce attitudes that now seem reprehensible, what is a court to do? It could attempt to enforce those attitudes despite the fact that they command results now clearly at odds with an ordinary understanding of the constitutional language. That is what application originalism would require. But a sensible originalism—what I call *meaning originalism*—does not require such results, and their perversity is itself a suggestion that application originalism is not the right way to proceed.

Living constitutionalists sometimes argue that originalism should be rejected because it would allow practices we now think are unjust. That is a result-oriented argument, and it is not very convincing. It boils down to the proposition that we should read the Constitution to mean what we want it to mean. What I am suggesting here is somewhat different. It is that reading the Equal Protection Clause to contain a fixed set of applications will predictably lead to results that future generations will find outrageous. And because fixed applications lead to those results, it is more sensible to suppose that the ratifiers understood and intended the applications to be flexible. It is more sensible to suppose that the Equal Protection Clause is one of those provisions whose applications change while its meaning remains constant.

² ABRAHAM LINCOLN, *Fourth Debate with Stephen A. Douglas at Charleston, Illinois*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN, 3145-46 (Roy P. Basler ed., 1953).

³ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

⁴ *See id.*

⁵ *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

This approach is consistent with the words of the Constitution. The Equal Protection Clause cannot be read as setting out a clear rule that all forms of discrimination are prohibited. It must allow state universities to favor students with higher grades and test scores; it must allow states to impose age and vision restrictions on drivers. What it prohibits is unjustified discrimination, and justification can certainly be assessed by modern standards as easily—perhaps more easily—as by those of 1868. (It may be, as originalists frequently claim, that judges are not especially good at figuring out what modern societal values are, but why then should they be considered good at figuring out what those values were over a hundred years ago?)

It also, I believe, does a better job of fulfilling the purpose that the ratifiers had in mind for the Equal Protection Clause. The clause was adopted in the wake of the Civil War, and it was clearly intended to stop states from discriminating against the newly freed slaves. But it was intended to do more than that. The drafters considered and rejected language that would have prohibited only discrimination based on race, and they considered and rejected language that would have prohibited only discrimination with respect to particular rights. Their purpose seems to have been more general; it seems to have been to stop states from discriminating in ways that a national majority found unjustified.

So the key question is whether this purpose is better served by a fixed or flexible range of applications. The answer is that only a flexible one can ensure the continued priority of national values. A ban on only those forms of discrimination that the ratifiers thought were unjustified will soon lose fit. The discriminatory practices the ratifiers focused on will lose their practical significance, and new ones will take their place. If equal protection is to continue to protect, it must be able to meet the challenge of new discrimination.

Employing current standards to assess justification does just that. It allows an emerging national consensus to override discrimination that was accepted in the past. By so doing, it ensures that vulnerable minorities will continue to be protected against treatment that local majorities find acceptable but national majorities do not. Since the words of the Equal Protection Clause do not limit its application to particular issues or forms of discrimination, it makes sense to assume that this form of protection was what the drafters and ratifiers intended. In this case, then, there is no conflict between originalism and the living Constitution.

Recognizing and Respecting Constitutional Structure

Michael S. Greve*

At a meta-theoretical level, I agree with much of what Kim Roosevelt and Jack Balkin have said. In particular, the distinction between original meaning and original expected application is quite helpful. I also agree that the distinction between “living constitutionalism” and “originalism” has been overstated. On the one hand, in a way we are all originalists now because everybody concedes the text and the structure of the Constitution have to count for something. (I mean the entire text, and I mean the Constitution, not a few hand-picked clauses in the Bill of Rights. I will come back to that.) On the other hand, originalists plainly need some theory of constitutional change—not just a theory of precedent, but a theory of substantive constitutional change. So where does the disagreement come in?

If you want to think seriously about constitutional change, you must think seriously about constitutionalism. I do not mean constitutionalism in the simple sense of fidelity (although that is part of the picture) but in a more fundamental sense: Why do we have a written constitution? What is it supposed to do, and how is it supposed to work? Progressives deserve real credit for rehabilitating that question. But my answer differs.

A constitution—our Constitution, at any rate—is not a promise. Nor is it a contract (although it has elements of a contract). Rather, the Constitution is an exercise in equilibrium selection.¹ A Constitution cannot be like a zoning code: it has to be open in some fundamental sense. But neither can a Constitution be read as an invitation to do whatever we please: on that understanding, why have a constitution in the first place? The point of a constitution, then, is to constrain the outcomes within a range that will generally be perceived as fair, reasonable, and acceptable. This may sound drearily familiar, but it has important implications. I mention three.

First, the constitutional objective of ensuring *acceptable* outcomes may not seem terribly demanding, nor even attractive. An entire industry, of which I am a part, stands ready to demonstrate that the outputs of our political system are irredeemably stupid and craven, while much needed work remains unattended. Much of that is true, much of the time. But dissatisfaction with policy outcomes is in some measure a result of what statisticians call “range restriction.” Small variances loom large when the outliers have already been removed—in other words, when the Constitution has done the intended work of blocking outcomes that are not simply lousy (no constitution can do that) but horrid and oppressive. We mope about our politics because we can afford to take an awful lot for granted.

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¹ See Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992).

Second, equilibrium selection implies that the constitutional structure matters more than constitutional rights.² While I could crank out a catalogue of rights that would please me, I recognize that Cass Sunstein would no sooner wish to live in my republic than I would live in his. To move beyond the rights revolution (to borrow a phrase),³ one has to move beyond the rights to the structure.

Every dictatorship has Bill of Rights. Most of those bills of goods are much better than ours, from a Progressive perspective. For example, President Franklin Delano Roosevelt's "Unfinished Revolution" contained a right to rest and leisure.⁴ No such right is recognized in American constitutional law, at least not yet. It is, however, an article of the Chinese Constitution, as well as international human rights conventions, to the comfort of inmates of the Laogai.⁵

Third, and most important, the constitutionalist perspective pushes one into questions of stability. What exactly keeps the outcomes within an acceptable range? What makes a constitution stable?

The pluralists' answer was that interest group democracy would render politics stable. Robert Dahl was the principal proponent of that view in political theory; its principal legal theorist was John Hart Ely.⁶ On their view, the Constitution *per se* cannot ensure political stability. It mostly helps to decide what interest groups should get advantages and disadvantages in the political process. With that baseline in place, the Constitution should empower interest groups and government, at least until they run up against some barrier in the Bill of Rights.

We have come to doubt the pluralist enterprise and now think of interest groups not as beneficent but as rent-seeking factions. Modern Progressives, having digested the public choice lesson, tie constitutional construction not to interest groups but to social movements as manifestations of supposedly authentic, deliberative democratic politics. I cannot do justice to the many variations on this theme. But they all frighten me.

Perhaps, my apprehension has to do with the fact that I was born and raised in a country whose history of political "movements" has been very unhappy. But neither the fact that American movements have been more restrained and public-spirited, nor even the injunction that only "progressive" movements should count for purposes of constitutional theory, comforts me much. Jack Balkin celebrates the "Second Wave" of feminism, whose principal achievement was abortion rights.⁷ Putting aside the question of whether that was really an advance for women's equality, the pro-lifers' case is that the genius of "equal protection" in the United States has been to extend that principle to heretofore excluded groups of individuals—blacks at first, then other racial minorities, then women, then (perhaps) homosexuals, now the unborn. So who exactly are the "progressives"?

² It is fair to say, I think, that this emphasis distinguishes my perspective from that of most Progressives. It also distinguishes me from rights-centered libertarian theorists. See, e.g., RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003); and (arguably) RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

³ CASS SUNSTEIN, *BEYOND THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

⁴ CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER*, at 10-16 (2004).

⁵ Zhonghua Renmin Gongheguo Zianfa, ch. 1, art. 43 (1982); U.N. Declaration of Universal Rights, art. 24 (1948).

⁶ ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

⁷ Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* (forthcoming 2007).

The abortion debate does not strike me as the most attractive display of American politics. Rather, it illustrates what the critics of interest group politics—William Riker, James Buchanan—perceived as its real danger: the descent into demagoguery.⁸ Do we really want to stake constitutional legitimacy on that kind of politics?

Our real constitutional problem, I think, is not democracy. It is stability, or the lack thereof.

The constitutional solution to this problem is too familiar to warrant elaboration: ambition must be made to counteract ambition. *Political* competition and churning is the recipe for *constitutional* stability. The judicial task, I believe, is to protect that general institutional framework. As I have argued elsewhere, the principle of the New Deal Constitution was “cartels at every level.”⁹ I would turn that paradigm upside down and have the Court act as a political antitrust agency of sorts.

Does that make me a radical? Not quite. First, self-enforcing norms—the constitutional structure, not courts and their parchment—must do most of the work in keeping the Constitution stable. Second, in the small realm where the competitive game collapses and governmental conspiracies threaten to take hold, I am still an Easterbrookian at heart.¹⁰ Most of the time, competition-reinforcing courts have no idea what they are doing. One wants to be humble about the enterprise, especially because the costs of false positives are much higher than the cost of false negatives.¹¹

Still, when intergovernmental conspiracies are clearly afoot, the Court should intervene. Let me give you a few examples of how I think this cashes out. (I do not necessarily quarrel with the results in the cases; my only point is to illustrate the considerations that should drive the analysis.)

First, in *Saenz v. Roe*,¹² the Supreme Court held that residency restrictions with respect to welfare benefits are unconstitutional. Welfare benefits, the argument runs, are constitutionally protected rights, so that residency requirements operate like an entry restriction. In one of the dissents, Justice Thomas argued on originalist grounds that this cannot be right. Justice Greve would go to the constitutional structure first and then try to understand the right in light of the structure. What the structure is supposed to do is to keep political competition open. Welfare benefits operate substantially like a taxpayer-provided public good. From that perspective, it has to be okay to restrict access to that good to local residents or those who have been there for a while.

Second, consider *Gonzales v. Raich*,¹³ the medical marijuana case from California. What struck me both about the government’s brief and about the ultimate disposition of the case was how little it mattered whether marijuana actually crossed state lines. Suppose you had a state scheme that was carefully calculated to keep medical marijuana inside the state: in that case, I think an interstate commerce predicate for the

⁸ WILLIAM H. RIKER, *LIBERALISM VERSUS POPULISM: A PRIMER* (1982); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975).

⁹ Michael S. Greve, *How to Think About Constitutional Change Part 1: The Progressive Vision*, AMERICAN ENTERPRISE INSTITUTE FEDERALIST OUTLOOK, at 23-1, Jun. 7, 2005, available at : http://www.aei.org/publications/pubID.22622/pub_detail.asp; Michael S. Greve, *How to Think About Constitutional Change Part 2: Originalism, Pragmatism, and the Constitution*, AMERICAN ENTERPRISE INSTITUTE FEDERALIST OUTLOOK, at 23-2, Aug. 2, 2005, available at: http://www.aei.org/publications/filter.all.pubID.22942/pub_detail.asp.

¹⁰ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

¹¹ Michael McConnell, *Federalism: Evaluating the Founders Design*, 54 U. CHI. L. REV. 1484, 1487 (1987).

¹² 526 U.S. 489 (1999).

¹³ 545 U.S. 1 (2005).

federal law would look highly suspect. Most likely, the federal law serves no other purpose than to stamp out state competition on the medical marijuana margin. I would ask that question directly. And if the answer is “yes,” the purported Commerce Clause justification should be rejected.

Third, the Public Corporation Accountability Oversight Board (affectionately known as “Peek-a-Boo”), a fabulous institution brought to you by the Sarbanes-Oxley Act, monitors and enforces the governance and audit procedures of public corporations. It has its own regulatory authority. It has its own criminal enforcement authority. (Mess with Peek-a-Boo, and you go to jail.) For good measure, PCAOB has its own taxing authority. It funds itself—as well as its presumed overseer, the SEC¹⁴—by sending letters: “Dear CEO, we need more money. Please remit check.” PCAOB members are appointed, not by the President or even the head of the SEC but by the SEC as a collective. They are harder to remove than even the independent prosecutor of *Morrison v. Olson* fame.¹⁵ In pending litigation, the Department of Justice contends that this is all perfectly fine.

Having observed the litigation up-close, I can report that the Justice Department’s conduct to date has been consistent with its constitutional credo (“Whatever we can get away with”). But the larger point is structural: You can have a long and difficult discussion about the true scope of the delegation doctrine, the definition of “inferior officers,” and the like. But if one winds up with a constitutional construction that permits this type of agency, combining as it does all the rival powers of government, something is wrong with the construction.

Fourth, the Compact Clause provides that no state shall make any agreement or compact with any other state without the consent of the Congress. In 1998, the so-called Master Settlement Agreement settled tobacco litigation among 46 states and the big tobacco producers. By its terms, the MSA created a nationwide tobacco cartel and divided the surplus profits among the states, the trial lawyers, and the producers.¹⁶ Initially, the states asked Congress for its imprimatur. Congress refused. The states and their business partners went ahead on their own.

For each participating state, the MSA conditions the receipt of billions of dollars on the “diligent enforcement” of its provisions. If that is not a compact requiring congressional consent, nothing is. (Full disclosure: I serve as an advisor to the Competitive Enterprise Institute, counsel to plaintiffs who are challenging the MSA on Compact Clause and other grounds in a pending case.)¹⁷ Nonetheless, attacks on the MSA have run up against a Supreme Court precedent to the effect that *no* compact shall require the consent of the Congress unless it is already preempted under some other existing laws.¹⁸ (The MSA violates even that stricture, but never mind.)

We have here a splendid example of a larger phenomenon: while the Supreme Court has been very creative in finding new applications of original meaning, the structure of the Constitution has in many respects dropped from sight. The Compact Clause case I just mentioned features a devastating dissent: If the Compact Clause

¹⁴ Peter J. Wallison, *Rein in the Public Company Accounting Oversight Board*, AMERICAN ENTERPRISE INSTITUTE FINANCIAL SERVICES OUTLOOK, Feb. 1, 2005, available at: http://www.aei.org/publications/pubID.21833/pub_detail.asp.

¹⁵ 487 U.S. 654 (1988).

¹⁶ Michael Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003); *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

¹⁷ *A.B. Coker, Inc. v. Foti*, 05-1372 (W.D. La. 2006).

¹⁸ *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

vitiates only already-preempted laws, Justice White asked, it is empty. And if it is empty, why is it there? The majority's response, in substance, was that constitutional formalities must not get in the way of creative (and as it were collusive) state cooperation. That same attitude also accounts for the PCAOB mess. In the post-Blue Dress world, the realization sunk in that we would have been better off, had we listened to Justice Scalia in *Morrison v. Olson*. That case, alas, contained essentially no response to Scalia's lone dissent and, for good measure, overruled *Humphrey's Executor* in a half paragraph. Its true holding was: "Shut up, he explained."

Finally, an equally splendid constitutional motto, and perhaps a fine epitaph for its author (Justice O'Connor), is this: "We decline to embark on the constitutional course." The pronouncement appears in a unanimous decision in *Hyatt v. Tax Franchise Board*,¹⁹ which held that the Full Faith and Credit Clause, as it relates to public acts, is right up there with the Compact Clause: it is unenforceable. The full sentence reads as follows: "We decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." As it happens, balancing sovereign interests is what the clause explicitly demands. Again, one can have a long and difficult discussion as to what "full faith and credit" means, but it cannot mean nothing. Lest you think this is some kind of bauble: in the context of gay marriage and familial relations that have to do with it, the clause matters a lot. Or it would, if it were enforceable.

The cavalier displacement of explicit constitutional provisions, I believe, is rooted in a single, overriding objective—to wipe out the norms that protect political competition as a means of ensuring constitutional stability. (What could the Compact Clause possibly aim at if not intergovernmental collusion?) I am working on a book to explain that no-longer-obvious point. Suffice it here to say this: explicit constitutional provisions should come with a presumption that they mean *something*. When the Supreme Court nullifies them *ex cathedra*, constitutional construction has lost its moorings.

I cheerfully concede that the Constitution is open to competing constructions. Its structural provisions attract constituencies. That is how the Constitution gets beyond parchment and comes to *constitute* a living, breathing polity. When the provisions bite the dust, then so does a piece of constitutional politics. That is the direct corollary of a seemingly unconnected phenomenon—the attempt by "movements" or their academic patrons to monopolize the surviving clauses in the name of progress. That is not constitutional politics; it is its polar opposite. Ultimately, the only question that matters in that framework is: whose side are you on?²⁰

I am all in favor of constitutional commitment. But its true measure, I think, is an insistence on the difference between the Constitution and political commitment.

¹⁹ 538 U.S. 488, 499 (2003).

²⁰ If you are on the wrong side, you will be "tested by following." *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) (O'Connor, J., concurring).

Fidelity and Legitimacy

Frank I. Michelman*

The title for our panel conjoins two Big Ideas: (1) fidelity to the Constitution over time, and (2) the legitimacy of government in our country. What is the best way to understand the connection between these ideas? Intuitively, one sets the two terms into the frame of a means-end relationship. We position legitimacy of government as the end and constitutional fidelity as a means to that end. We hope to clarify or improve our understandings of one or both of these terms by considering them thus in relation to each other—fidelity : legitimacy :: means : end.

Start with fidelity. The notion of fidelity to the Constitution over time invites questioning on two levels. First, we can ask about the point or the value, if any, of holding public officials faithful to a centuries-old written instrument that is in theory open to formal amendment but in practice can be amended only freakishly and extremely rarely.¹ Then, depending on our answer, we can ask about the correspondingly apt conception of what it is that we really aim to be faithful to. Should we be thinking in terms of fidelity to ancestors? Fidelity to the Constitution's wise authors? Fidelity to an American nation, conceived as a constitutionally self-determining body that exists and acts and retains its identity over time? Fidelity to certain high, unchanging principles of justice, right, and political prudence, for which the Constitution stands as a token? Or what?

With those questions pending, some notion of legitimacy might enter the picture. We might take the establishment and maintenance of a benign condition called legitimacy to be an overridingly important aim for our country, and that might cast some light on our questions about the modalities of constitutional fidelity. If legitimacy is our controlling aim, won't that tell us something about how constitutional fidelity is best understood? Won't some understandings of fidelity be more conducive than others to this legitimacy at which we aim? Maybe (although I doubt it) we would even find that one understanding of fidelity trumps all competitors in conduciveness to legitimacy. Without some more specific notion of what this legitimacy is that we supposedly care so much about, we cannot hope to get very far.

According to my understanding, concerns about the legitimacy of government arise, in our political culture, out of five beliefs: (1) government is, in crucial and indispensable part, a process of making and enforcing laws. (2) Laws coerce. (3) Coercion is very strongly presumptively disfavored and it always has to be justified. (4) We live in conditions of frequent, deep, intractable, and not unreasonable disagreement about the merits of particular laws—including, often enough, disagreement about whether those laws are in or out of tune with justice, right, and decency. (5) The maintenance in society of a general practice and condition of social ordering by law (or call it the

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¹ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (1996); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741-42 (2007).

rule of law), in which people are expected by and large to comply with the law in general, including specific laws with which they intensely disagree, is a project of supreme moral and prudential importance.

When you mix all that together, one thing you get is the conclusion that it must be justifiable to enforce, and to support the enforcement of, some laws that really are unjust and bad. Someone over here—say he is an abortion protester told by the police that he may not approach closer than one hundred feet to a clinic entrance—is asking you why you think it is just hunky-dory to restrain him this way, and you find you cannot honestly and satisfyingly respond that the law being enforced against him is perfectly okay. You can't because, possibly, you don't really think it is, or you are not sure, or you know that he is convinced otherwise, on grounds that are not weak or disreputable or ones you can bat away with killer arguments.

So then what can your justification be for coercing him, if not the perfectly good and plain merits of the law in question? That is where legitimacy comes in. To call a law legitimate is to announce a judgment that you and I are justified in demanding everyone's compliance with that law, without our having to prove, or even claim or believe in, the genuine first-order merits of that law as right, fair, good, just, efficient, prudent, and so on.

But then what is there about the law that we can point to in defense of its legitimacy—of the moral probity of connivance in its coercive enforcement—if we can't point to the substantive merits of the law? Every American knows an answer. We can point to the Constitution. We say: this law you complain against was enacted in conformity with the democratic arrangements for enacting laws laid down by the Constitution, and moreover its constitutionality vis-a-vis the guarantees of the Bill of Rights has been officially confirmed, or it would be if the question were raised before the relevant officials;² and that actual or predicted official judgment of constitutionality suffices to justify society's demand for your compliance with this particular law, whatever you (or we, for that matter) may think about its rightness or wrongness. That is what we call the rule of law, and the rule of law (my discussion assumes we all believe, see item 5 in the list of beliefs above) is held to be transcendently important.

The next point to note is this: If you plan on responding in that way—"it's constitutional"—to complaints of coercion by unjust laws, you had better stand ready to justify the Constitution against charges that it has no claim to the kind of legitimating magic you will then be claiming for it. (I mean, here is a constitution. It's not the one you are familiar with. It is new, I just now drafted it and I am about to ratify it, summon it into legal force, before your very eyes. SHAZAM! Now the new Constitution is in force. Let me read it to you, it is short. It reads: "The law shall be whatever Frank says." So now when someone complains about the injustice of the clinic protection law, you can answer (assuming the facts will support you): "But that's the law, Frank said so, so it is."³)

I assume you see the point. Not everything that might call itself a constitution or that has the formal look of one can be considered legitimation-worthy, as I shall say, meaning capable of casting a mantle of legitimacy (justified enforceability) over whatever so-called laws pass muster under its provisions. There will have to be something

² Anticipating a contribution from Robin West, I hasten to point out that I did not say the relevant officials have to be judges. They might be members of legislative bodies.

³ Apologies to Fred Schauer. See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 147, 152-53 (Sanford Levinson ed., 1995).

flattering that we can say about any given constitution, by way of explaining why compliance with that constitution should be allowed to work such a redemptive magic on laws including some—maybe quite a few, for many of us, including some quite important—that we cannot bring ourselves to deny are bad and wrong.

But what that necessary, flattering constitutional attribute is—what sort of attribute it is—is not so clear. People can and do have differing ideas about the necessary properties or features of a legitimation-worthy constitution, and those differing ideas apparently can connect with differing conceptions of constitutional fidelity. I'm now going to present some of these possible combinations in rather stark form. The starkness may make all of these models seem implausible, as in fact I think each is taken pure. None of these, then, is to be treated as a model offering itself for adoption. Rather, you should treat them as constructions that might help you organize your own thinking about what constitutional fidelity would be at its best.

There will be four models: the rightness model, the posterity model, the wisdom model, and the we-the-people model.

In the rightness model, the controlling idea is that there is only one possible attribute of a constitution that can make it legitimation-worthy, and that is, it has got to be right in substance, in content. A legitimation-worthy constitution simply is one that says what a constitution needs to say, provides what a constitution needs to provide—in the way both of procedurally democratic governmental institutions and substantive constraints (negative and positive) on the exercise of government powers—in order that laws made and issued pursuant to that constitution can justifiably be enforced with no further questions asked about the rightness of those laws.

You might think that anyone wedded to a rightness model of constitutional legitimation-worthiness would need to have already in hand a more or less definite idea of the proper content of a legitimation-worthy constitution: first regarding institutional arrangements for governance and lawmaking—say, they would need to be genuinely democratic arrangements—and then regarding substantive limits and substantive positive demands on lawmaking, the constitution's bill of rights. Perhaps not: We'll notice soon how one might think that rightness is the key to constitutional legitimation-worthiness, without oneself pretending to know what makes a constitution right or not. For now, though, let us suppose that you do believe you know what is the necessary sort of content for a legitimation-worthy constitution.

If that is your state of mind, and if you also take governmental legitimacy to be an overridingly important aim, then it seems that you, as a constitutional interpreter, will have no choice but to construe the Constitution accordingly. You will have to construe it, even bend it where necessary, to make it compatible with those ideas you hold about rightness for a legitimation-worthy constitution. Constitutional fidelity for you becomes, in effect, fidelity to a set of ideas—ideas about what makes for rightness and decency in democratic government. Constitutional fidelity now means fidelity to a set of fixed, high principles of rightness in politics, for which the Constitution presumably is meant to stand. One might think here of Ronald Dworkin's advocacy of what he calls a "moral reading" of the Constitution.⁴

Next on my list is the posterity model. According to it, what makes a constitution legitimation-worthy is its authorship, but in this particular way: We understand ourselves, as present-day citizens of the United States, to be the posterity of the framers,

⁴ See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1995).

and we further understand that posterity owes allegiance to forbears. Forbears direct, posterity follows. Parents bring up children, children obey parents. Constitutional fidelity, then, means fidelity to the folks who bequeathed us our Constitution; it means fidelity to the fathers, the framers. Without belaboring the point, I expect you see how such a view ties directly into a strongly originalist style of constitutional interpretation. You may not find the posterity model, as presented, very attractive or persuasive. (Doubtless you can tell that I do not.) It does not follow, though, that all forms of originalism must be rejected, as we are about to see.

We notice next a more appealing variant on authorship as the key to a constitution's legitimation-worthiness. This is the wisdom model in my list. According to it, we owe allegiance to the framers, meaning to their understandings or intentions regarding what they wrote down in the constitutional instrument. We owe this, however, not because the framers stand to us as fathers to children. We owe it, rather, because they were men of superior political wisdom, dedication, and public spirit; or, better, because not only the circumstances in which they gathered but the pressures and constraints of crafting a constitution for the ages, obdurate to amendment, were and are especially conducive to getting things right.⁵ In that respect, the framers' situation renders them likelier than we as ordinary voters and lawmakers can reasonably hope to be to converge on what a legitimation-worthy constitution truly needs to say. Accordingly, we should take what they gave us and be thankful.

On that view, the fidelity most conducive to legitimacy-via-constitutionality would be fidelity to the structures, rules and standards the framers devised, regardless of any doubts we may feel today about their choices. This suggestion—which interestingly finds partial support in important work by liberals like Lawrence Sager⁶—might give us a way to square the idea that rightness is the sole key to constitutional legitimation-worthiness with opposition to a moral-reading or “living constitution” approach to constitutional fidelity. (I don't mean such opposition necessarily follows from the wisdom model. Sager, for example, reasons that framers under the pressures that he describes would opt for open-ended, abstract formulations designed to invite moral readings from future judges.) Before saying anything more about this way of thinking, I need to get on the table my fourth, we-the-people model.

In the we-the-people model, the essential, indispensable feature of a legitimation-worthy constitution for the United States is that it be self-given by the people of this country, an authentic product of American popular sovereignty. Constitutional fidelity then means fidelity to the political fellowship of the American people, understood as a communion-in-self-government that spans the generations.

This American popular fellowship is, you understand, a very different fellowship-in-sovereignty from the small, single-generation group we call the framers (or groups, if we add the authors of the Reconstruction amendments). There remains, nevertheless, an important similarity between the posterity and wisdom models of constitutional legitimation-worthiness and the we-the-people model. All these models connect to what John Hart Ely called an “interpretive” (as opposed to “non-interpretive”)

⁵ John McGinnis, Remarks at the ACS–Vanderbilt Law Sch. Conference: Keeping Faith with the Constitution in Changing Times (October 6–7, 2006). See also John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

⁶ See Lawrence Sager, *The Birth Logic of a Democratic Constitution*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 110-44 (John Ferejohn et al. eds., 2000); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003).

approach to determinations of constitutional law. In the sight of all these models—by contrast to a simple rightness model—constitutional law originates strictly and only from past, political events of constitutional lawmaking.

But of course there are implicative differences among these models. Bruce Ackerman (whom I assume everyone will recognize as a chief sponsor of the model I have labeled “we-the-people”) is not Antonin Scalia. For Justice Scalia, legitimation-worthy constitutional interpretation is “clause-bound” (to use another Ely-ism). It fixates on the original understanding of clauses laid down by the framers of the Constitution including its formal amendments. In the we-the-people model, one rather scans the entire political and legal history of the United States to learn what principles and commitments the American people, at moments of high and sustained political excitation, have effectively willed into the status of higher law for this country. One ponders, say, the Social Security Act, and the New Deal more generally; one ponders the great Civil Rights Acts of the 1960s and the quite remarkable judicial decisions upholding them;⁷ one ponders the line of judicial decisions effectively implementing the formally side-tracked ERA⁸ and probes into the politics surrounding this entire episode;⁹ one ponders the Bork and other confirmation hearings; one ponders the combined higher-law-making significance of all of the above and more. Anyone familiar with Ackerman’s scholarship will see immediately its affiliation with the we-the-people model of constitutional fidelity. Cass Sunstein’s work on New-Deal era “constitutive commitments” is also sympathetic, I believe, in a somewhat different way,¹⁰ as is Reva Siegel’s work on the history of our constitutional law of sex discrimination and on social-movement-based constitutional politics more generally; and so perhaps is Ronald Dworkin’s notion of law as integrity when the demand for “fit” is given its due along with that for moral excellence.¹¹

I have now described several quite different approaches to constitutional interpretation, positing for each a corresponding notion of constitutional fidelity—each of those in turn corresponding to a different idea about what feature of a constitution makes it legitimation-worthy. Roughly, here is what we have:

1. A constitution is legitimation-worthy because or insofar as it says the right things for a legitimation-worthy constitution. Therefore, considering the paramount importance of legitimacy, interpreters should strive and even strain to make our Constitution say the right things. Fidelity runs to right ideas.
2. Our Constitution is legitimation-worthy because its authors were who they were—our fathers, or a group of matchlessly wise or advantageously situated framers. Therefore interpreters should strain to make the Constitution mean what its authors understood it to mean, whether concretely or in principle or both. Fidelity runs to authors, or maybe to rightness by way of trusted authors.

⁷ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁸ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Virginia*, 518 U.S. 515 (1996).

⁹ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change*, 94 CALIF. L. REV. 1323 (2006).

¹⁰ See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62-63 (2004).

¹¹ See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

3. Our Constitution is legitimation-worthy insofar as it is a true rendition of the detectably manifested higher lawmaking will of an American fellowship-in-sovereignty spanning the generations. Therefore, interpreters should work at finding out the sum total of the meaning of that will, and then make constitutional law conform to that. Fidelity runs to the American public, intergenerationally constructed.

As I have said, all these models are open to obvious worries and objections if taken pure. Confronting them all may nevertheless help one figure out how best to understand an ideal of fidelity to the constitution. Doing so, many (like me) will find it very hard to grasp how a Constitution can be deemed legitimation-worthy in a liberal democracy—how it can thus be ceded the moral authority of a law of laws—if it is not right, or at any rate right enough. Many in the same group will (like me) find it equally hard to understand how a constitution can be ceded such authority in a democracy if it is not ours, a product of which every citizen can plausibly regard himself as one of a national company of contributing authors—a function, we must note, for which Article V seems to many no longer serviceable by the straight-face test.¹² For those caught in this pickle, what I have dubbed the posterity model can joyfully be set aside, but rightness and we-the-people will both retain unrelinquishable claims, and wisdom at least an arguable one.

¹² See Levinson, *supra* note 1; Ackerman, *supra* note 1.

Constitutional Fidelity and Democratic Legitimacy

Robin West*

There is a familiar question suggested by the title of this panel: “How can constitutional deliberation, understood as a judicial practice, be both faithful to an historical text and a set of practices across time, and at the same time be democratically legitimate? What must constitutionalism be, in order for it to be both faithful to text and history, and not at odds with democratic ideals?” This familiar albeit difficult question that has consumed thoughtful legal scholars of at least the last half century, may have obscured what may be a deeper question also suggested by the panel’s title; a question that goes not to the legitimacy of constitutional fidelity, but rather, to the importance of constitutional fidelity to the quality of our democracy. Would greater constitutional fidelity among our elected representatives enhance the legitimacy, or better yet the quality, of our ordinary, democratic, do-it-by-voting politics? Alternatively, would it improve the quality of at least our political deliberation, either in Congress or in public discourse? Would a more constitutionally attentive congressional branch, and a more constitutionally responsible voting public, enhance the quality of our politics?

Let me quickly rehearse two answers to these questions—one familiar, one less so—and raise some problems with each. I will then suggest an alternative way of thinking about the question. The first, and most conventional answer is this: “No, our political life would not be improved, or further legitimated, by greater constitutional fidelity on the part of either the public or on the part of our elected representatives.” Why? Basically, according to the conventional answer, because we’ve worked out a division of labor, and that conventional division of labor assigns issues of “constitutionalism” to the Courts, and matters of “public policy” to legislatures. Legislatures, both state and federal, according to this conventional answer, make political choices, based on their own or their constituents’ preferences, passions, prejudices, whims, cares and woes. Those choices can be based on good reasons, bad reasons or no reasons; it matters not one whit. Their decisions—their power—are then justified, by the bald fact of representation. Their exercise of will, so to speak, is justified, because it is a proxy for our will. The Court then does the work of deciding the constitutionality of congressional actions. Its decisions are justified not by will, but rather, primarily (and here arguments split, but for these purposes take your pick) either by the authority of the Constitution, or by its embodiment of decent ideals of justice, and secondarily by the Court’s exercise of its distinctive virtues: its capacity for reasoned elaboration; its intelligence, its judiciousness, its foresightedness, its sense of fairness, its fidelity to history or text, its profound and generational understanding of the meaning, content, and reach of liberty and equality, and above

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all, by its own demonstrated commitment, across time, to those political ideals. Congress—the political branch—acts, on whim, or otherwise. Courts, though, reason, and they do so by reference to the guiding light of our highest political ideas.

The legislated branch, according to this conventional answer, constitutionally speaking, can behave irresponsibly, because the judiciary is charged with the obligation of aligning law with constitutional mandate. So, according to the conventional answer, if Congress, responding to and representing passion, whimsy, woes, fears or fury, decides to give the President the power to lock up American citizens without recourse to trials, or to allow him to direct military interrogators to ignore the Geneva Conventions, or they decide to prolong Terry Schiavo's life, or to outlaw contraception, or to mandate the Lord's Prayer in public schools—oh well, so goes the conventional answer, that's just Congress being Congress. The Court's job is to apply sweet judicial reason, Constitutional constraints, and its understanding of liberty, equality and so forth to all of this, and to right the apple cart. The Court will ensure, through the exercise of reason that the product of Congressional action aligns with constitutionalism. Congress, in other words, *acts* and the Court *reasons*. The result is constitutional fidelity and democratic legitimacy both. We need not worry, then, if our politics are constitutionally irresponsible. The Constitution, after all, is law, which the Court ascertains and applies.

This conventional answer, as Bradley Thayer predicted a hundred years ago,¹ increasingly seems to be not only misguided, but even destructive, and for at least two reasons. First, it rests on a debased, denuded view of politics, and therefore, to the considerable degree that constitutional ideas really do matter, it actually debases politics. *Politics*, and not just adjudication, ought to be reasoned, deliberate, intelligent, forward-looking, respectful of the past, and mindful of equality and liberty. Legislators ought to possess and exercise precisely the virtues we ask of judges. Our politics, and not just our law, should be ennobling; it should be as Aristotle thought it was: the highest form of ethical decision-making by and over the affairs of civic equals. The division of labor on the conventional account virtually guarantees it won't be. The greater and wider and stronger the moral context, or richness, of the Constitution's grand phrases, furthermore, the worse the problem becomes. Dworkin's mythical judge Hercules,² deciding cases by the light of omniscience and perfect moral knowledge, is just the limiting case, he casts in sharp relief, albeit unintentionally, precisely what is wrong with the conventional answer he was created to justify. Hercules, as Dworkin has described him, has the virtues of the quintessential Aristotelean political actor: he is wise, philosophically astute, mindful of history, and dedicated above all else to promoting liberty and equality. But—he's a judge. By contrast, the Dworkinian *legislator*, as Dworkin tells us again and again, just does whatever he wants. Dworkin's judge is truly political in the highest sense. The legislator, by contrast, is infantile. There is a problem when our most enduring, most conventional account of constitutionalism effectively casts our politics as a sandlot brawl.

There is a second problem with the conventional account, however, that an increasing number of "popular constitutionalists" have begun to elaborate. The problem is one of "underenforcement" of constitutional guarantees. To summarize a large and growing body of scholarship, the suggestion is that there may be constitutional values,

¹ JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in LEGAL ESSAYS 21 (1908).

² RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (2005).

arguments, and even entire constitutional clauses that are slighted by the conventional allocation of labor. Some constitutional provisions, including some that go to liberty and equality, might be best understood as aimed at protecting all citizens or even majorities of citizens, against empowered minorities with entrenched power, rather than the other way around. If that's right, then those provisions might best be explicated, interpreted, recognized, and enforced through representative, legislative, political, majoritarian decision-making. Part of the Fourteenth Amendment, furthermore, might be of this nature: the Privileges and Immunities Clause, the Citizenship Clause, perhaps even the Equal Protection Clause, might all be best understood as imposing upon the Congress various duties to affirmatively act so as to protect the positive rights, liberties, and the privileges and immunities of all citizens against various sorts of dangers.³ The Court, for both institutional and jurisprudential reasons, might be constitutively incapable of seeing some meanings that are clearly there: Courts, by design, are best situated to respond to constitutional clauses protecting the rights of minorities or individuals against overly intrusive state action, and are not well situated to protect the citizenry generally against a failure of the state to act. If so, we are not enjoying the fruits of even our enumerated text, much less the unenumerated one. The conventional allocation of labor might have cramped our understanding of the Constitution's meaning, and specifically, our understanding of the moral content, and meaning, of the Reconstruction Amendments. For these and other reasons, a number of scholars have argued some measure of a re-shuffling of the allocation of labor suggested by the conventional understanding.

I. OUR POLITICAL CONSTITUTION

So, let me turn to the less conventional answer to the question posed above: would the quality and legitimacy of representative politics be enhanced by greater constitutional fidelity on the part of our elected representatives? Contra the conventional view, perhaps the answer is yes: the democratic "legitimacy" of our politics might be enhanced by legislative as well as popular fidelity to constitutionalism. The quality of our politics might be enhanced, and the more progressive and egalitarian interpretations of various clauses of the Constitution, notably the Reconstruction Amendments, might likewise be realized, were they subjected to legislative rather than judicial interpretation and enforcement. That, at any rate, is the suggestion now being urged by various popular and legislative constitutionalists. To put my cards on the table, I think it's an important and serious claim. Were conscientious legislators to take the Constitution seriously, it might enhance the quality of political deliberation, and it might result in a more egalitarian, as well as more robust and meaningful, set of constitutional commitments. We should consider not only the possible understandings of the Constitution that a future Court might embrace, but more ambitiously, perhaps,

³ See, e.g., Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, (2006); LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES* (2004); Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 39 (1994) (construing the Equal Protection Clause as a "charter of positive liberty"); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 (1969) ("[The] injunction against 'denying' the 'equal protection of the laws' is not so clearly void of a requirement that the quiescent state must 'act' (i.e., cease denying protection) in certain circumstances"); see also JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 205-06 (1951).

the possible understandings of constitutionalism that might one day guide serious legislative politics. The “legislated constitution,” or the political constitution, or popular constitutionalism, remain unexplored possibilities for progressive politics, worthy of serious consideration.

II. THE POLITICAL CONSTITUTION: A SKEPTICAL VIEW

Is this, though, a fool’s errand? Maybe the problem with our current politics is not the *adjudicated* constitution, but rather constitutionalism itself. Bluntly—maybe the Constitution is a part of the problem, and not part of the solution. If so, it won’t cure the problem to simply shift responsibility for interpreting or enforcing it from court to congress. There are (at least) four substantial grounds for skepticism.

The first doubt goes to substance. Clearly, whether or not constitutional fidelity in politics would improve its quality depends on the content of the Constitution. We are accustomed to assuming a Constitution of great, if not absolute, moral value. Imagine, though, something more ambiguous. Imagine for a moment a Beardian Constitution—that is, a Constitution that more fits the description Charles Beard, a hundred years ago,⁴ provided of our own: one that mandates, basically, the protection of accumulated wealth and property, and then accompanied by a legitimating and highly distracting gauze of civil rights and liberties. In other words, imagine momentarily a Machiavellian Constitution that gives the masses their carnivals—their religious freedoms, their ten Commandments, their menorahs, crèches, and their right to be free of those menorahs, crèches, and commandments, their home or private schooling in German or any other language of their choosing, their contraception, their abortions, their non-hetero, non-reproductive, and non-marital sex. Meanwhile, the protection of privilege and wealth continues unimpeded by significant egalitarian politics. If that’s the content, then from a progressive perspective, perhaps its better that only one branch, rather than two, fetishizes it. The problem, on this skeptical view of the Constitution’s moral content, is not the allocation of labor propounded by the conventional view, but rather, the Constitution itself. You don’t cure that disease by spreading it.

The second basis for skepticism is methodological. Constitutionalism itself, regardless of its content, imposes what might be an undue narrativity on political judgments, whether on or off the Court. When we constrain, or guide, political struggle by constitutionalism, we are per force required to re-tell, yet again, the constitutional story in the redemptive way that Bob Gordon identifies: a constitutional story that leads us to a happy ending by re-conceptualizing our beginnings.⁵ This narrative compulsion is mightily constraining, as Dworkin’s metaphor of the chain novel,⁶ with respect to judicial constitutional story telling, was intended to show. It also, though, might not be all that uplifting a story. Note—the constitutional narrative that has been told outside both the Courts and the legislative branch of at least the last half century has been one of hyper-individualistic, anti-communitarian, sometimes paranoid isolationists: private border patrollers, militias, tax-protesters, constitutional party members, and gun enthusiasts of varying stripes, all of whom invoke constitutional rhetoric so as to minimize government, shrink public space and life, and neutralize communal obligation. Its not clear that the elaboration of

⁴ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Courier Dover Publications 2004) (1913).

⁵ Robert W. Gordon, Remarks at the ACS–Vanderbilt Law Sch. Conference: Keeping Faith with the Constitution in Changing Times (Oct. 6–7, 2006).

⁶ RONALD DWORKIN, *How Law is Like Literature*, in *A MATTER OF PRINCIPLE* 146–66 (1985).

this narrative with progressive input through political deliberation is going to transform that extra-judicial, popular constitutional narrative into something all that fundamentally different.

The third reason for skepticism goes to the effect of constitutionalism on our national, and nationalist, self-identity. Constitutionalism, whether adjudicative or legislative, encourages an unattractive American chauvinism, or at least exceptionalism, which should make us wary of extending or underscoring its reach. There's a difference, and it's a moral difference, between me insisting on my constitutional rights, due me as an American, and me insisting on my human rights, due me as a human being. Constitutional projects valorize our American identity. If we were an insular and discrete community, that valorization of group identity might well be morally unproblematic; it might be a commendable vehicle for equality and moral progress within communal borders. But we are not insular, and our footprint these days outside our borders is large and destructive. Given that, I don't believe we should predicate something as precious as rights on our Americanism. Better, I think, to look to human rights, rather than constitutional rights, for our moral compass—those rights which, if they exist, are shared with the world's inhabitants.

Finally, constitutional politics, no less than constitutional law, is traumatic rather than ordinary. Constitutional politics and discourse works, when they work, because it is identitarian—it is a means by which we recognize, acknowledge, and build on a shared American identity. Constitutionalism recapitulates who we are. But if that's right, we should watch out. Identity politics are not always a good thing, as the experience of the last thirty years has amply shown. Families, tribes, nations, and neighborhoods build communal ties, yes, and communal ties are good and essential. Families, tribes and nations also though build barricades and walls to keep out immigrants and outsiders, and surveillance and missile defense systems to protect the home front. Remember the truth of Marty Lederman's cautionary description.⁷ There is indeed a constitutional vision behind the Bush-Yoo renovations of our legal structure. It is a constitutional vision with the protection of our American identity and our American way of life, and American lives, at its core.

III. THE PROMISE OF THE LEGISLATED CONSTITUTION

So, those are the doubts. Their strength notwithstanding, I would urge us to extend our reach. We do need to theorize, acknowledge, and to some degree embrace, constitutional politics,⁸ as articulated by legislators and popular discourse, no less than constitutional law, as articulated by Hercules and his colleagues on the Bench. Why? The speakers over the last two days have provided the seeds of the basic arguments; but let me just recapitulate them, so as to highlight their relevance with respect to legislative, rather than exclusively adjudicative constitutionalism. The first reason is purely pragmatic, and suggested by Marty Lederman's defense of his own originalist project. If we don't do this work, we basically cede the field of popular, as well as legislative, constitutional deliberation, interpretation, and application to others: to advocates of a free executive hand in waging war, to the radical individualists' crafting of

⁷ Martin S. Lederman, Remarks at the ACS–Vanderbilt Law Sch. Conference: Keeping Faith with the Constitution in Changing Times (Oct. 6–7, 2006).

⁸ *Id.* (arguing that originalism, or more broadly, the original meaning of the Constitution, should matter to progressives as well as to conservatives interested in infusing politics with constitutional values).

Second Amendment rights, to rights of the unborn that endanger women's lives and equality, to the Taxpayers' Party's claims regarding our obligations to both government and to the weakest among us, and so forth. We cannot afford to do that. Political progressives need to participate in constitutional conversations wherever they occur and in whatever modality, originalist and otherwise, if for no other reason, to ensure that multiple, complex, nuanced interpretations of our constitutional past are out there. Our history, including our constitutional history, is far more complex than that. Popular constitutionalism outside the Courts has informed feminist advances, labor struggles, abolitionist movements, civil rights movements for the disabled and the aged as well as for African Americans and women. We need to build on and develop our understanding of these progressive constitutional moments off the courts—not reject them as aberrations or anomalies produced in the wake of an otherwise relentlessly regressive, albeit legitimating, constitutional history.

The second reason, though, that progressives should engage with the project of popular and legislative constitutionalism goes to the moral quality of our political choices. As Peggy Davis,⁹ Rebecca Brown,¹⁰ Frank Michelman¹¹ have all argued, over the past two days, in various ways, at least parts of the Constitution, and at least parts of our constitutional history, contain a moral core, or a moral vision, that can and should guide legal deliberation. There are, they tell us, moments of profound moral growth in our constitutional history, and those moments are reflected in the document's text. If they are right to so urge—and I think they are—then surely, we need to embrace and magnify that meaning in our politics, and not just in our law. The Constitution, read capaciously, directs the conscientious legislator toward a politics of inclusion and equal regard for the rights and interests of all. There may well be, as suggested above, a thematic privileging of privilege in the Constitution's deference to property, wealth, contract, to say nothing of a deference to the values and political power of the rural heartland. There is as well, though, a counterpunctual theme with a categorical moral imperative: our politics, no less than our law, must treat all equally. The concerns of each of us are the burden of all.

The third reason goes to the quality of our constitutionalism. Erwin Chemerinsky is surely right that progressives need to articulate a “constitutional vision,” if we are ever to guide constitutional interpretation in a progressive direction.¹² But I would add to his argument that we need to articulate a constitutional vision for our *politics*, not just for our law. After many years—decades, if not centuries—of relying on Judge Hercules, we ought to now be able to see that the reliance was misplaced. Constitutional law of various forms might come from our courts, but constitutional vision—our understanding of the Constitution's moral content, and how that content might improve our shared political life—must come from elsewhere. It cannot come from Courts. Constitutional vision must come from the people.

So, what might that vision be? Let me sketch out one possibility, obviously among others, of a Constitution that might in fact guide legislative deliberation in both a

⁹ Peggy Cooper Davis, *Constitutional Interpretation as Structured Choice*, ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 31.

¹⁰ Rebecca L. Brown, *Self-Government, Change, and Justice*, ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 83.

¹¹ Frank I. Michelman, *Fidelity and Legitimacy*, ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 69.

¹² Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-first Century*, ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 25.

moral and egalitarian direction. For reasons noted by Peggy Davis,¹³ the touchstone for what I would call the “political constitution” of the 21st century—by which I mean the constitution that truly could enhance the quality of our political life, if we would only attend to it—lies in the anti-slavery language, history, and meaning of the Reconstruction Amendments. The responsible legislator who attends to the Constitution brought into being through those Amendments, will respect not only the autonomy, liberty, and dignity of all, but also the humanity, the mortality, the needs, the vulnerabilities and the dependencies of all persons affected by political choice. The Reconstruction Amendments recognized not only the newly gained freedom of the emancipated slaves, but also their needs: their need for equal protection of law, their need for compensation, or reparations, their needs for land, for affirmative assistance. The Amendments, to their everlasting credit, recognized those needs, not as the special needs of a special group, but as the unequally neglected needs of a group of equal citizens, thus calling for focused attention that required a legislated response: a Ku Klux Klan Act; a Civil Rights Act. They required a legislated response to the human needs of equal citizens.

What is the lesson for our day? One lesson and I believe it has been a neglected lesson, is just this: the Reconstruction Constitution requires of the conscientious legislator a universalist and other-regarding and communitarian regard for the well-being, as well as the autonomy, of all others. That affirmative, legislative obligation to take action so as to protect the well-being of others, is a part of what it means to treat one’s co-citizens as equal, as free, and as fully human as oneself. We need to unearth and expand upon that mandate. It is importantly true that some such aspirational goal was a part of the Reconstruction era, however fleeting, and is reflected in the language of the Reconstruction Amendments, however opaquely. It is also true that that constitutional aspiration—and not just the wealth protective provisions, and not just the original compromise—is a part of who we are.

That Reconstruction, anti-slavery, abolitionist Constitution—a Constitution that I have imagined as a moral guide for the conscientious legislator of the twenty first century—was clearly not the Beardian document quickly sketched above and deplored by skeptics: the Reconstruction Constitution was not aimed at protecting the wealth of a few, through legitimating the liberties of all, or otherwise. Nor, however, was the Reconstruction Constitution the Constitution that guided the Courts of the 20th century. Rather, the Reconstruction Constitution articulated an as yet unheard mandate for the conscientious legislator—not the conscientious judge—of the era, to wit, to use law in such a way as to protect the citizenship, the equality, the liberty, the dignity, the privileges, immunities, and the worth, of all citizens, both black and white. No 20th-century court, including its most liberal interpreters, ever read the Constitution as imposing any such obligations on legislators.

Lastly, the Reconstruction Constitution, should we embrace it as a guide to egalitarian and moral legislation, would not hamstring or infantilize political self-governance. It is not, in short, an authoritarian document. It demands only that the legislator respect the equality of all humanity; that he or she attend to human need, and that she do so with full awareness of the mortality and vulnerability of equals. Beyond that, it exercises no authority over political choices whatsoever. It elevates, rather than usurps, moral judgment to the people. It does not tie us unduly to the dead hand of the past. It does not unduly trumpet American exceptionalism. It does indeed direct

¹³ Davis, *supra* note 9.

our moral focus to one lesson of our history: that our humanity renders us vulnerable, needy, and dependent on others, and that we all share that human condition, equally, and that we form a union in part to address those shared vulnerabilities. It directs us to understand the other as of equal worth and value as our precious selves. Beyond that, it has literally nothing to teach, nothing to tell, and nothing to command. Beyond that, it leaves the project of governance to the governed.

How do we keep faith with that Constitutional vision? The way to express fidelity toward a constitutional vision that insists only on equality, equal compassion, and self-governance, is through the profoundly respectful, and deeply ennobling, but utterly ordinary practice of politics, and not through adjudicative process. One way to express fidelity with a text that directs us to give equal protection of the law to all, and to respect the privileges and immunities of all co-citizens, and otherwise, to self-govern, might be to constantly ask, and re-ask ourselves a sort of quintessentially Rawlsian, or liberal, question, as we go about this work of self-governance: What would an ideally conscientious, morally responsible legislator—not judge—do? Not what would Jesus do, or what would Hercules do, but what would the morally responsible legislator do? How should the lawmaking power be exercised in a nation of equal citizens? How can law be used, so as to protect all, and to enhance the lives of all; how can it be used to weave a mantle of citizenship? We express our fidelity toward those parts of our constitutional history and those parts of our constitutional text that speak to our politics, by engaging in political work.¹⁴ That Constitutional vision—a constitutional vision that ennobles rather than denigrates the political work of civic equals—I believe, is a “lost Constitution” that to my mind would actually be worth retrieving.

¹⁴ Barry Friedman, *The Constitution: Change and Interpretation*, *ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS*, Fall 2007, at 9.

Self-Government, Change, and Justice

Rebecca L. Brown*

Poached or scrambled? Sometimes people speak as if the choice of approaches to constitutional interpretation is just that, a simple choice based solely on taste. I like dynamic, you like originalist. Public debates in the political arena often appear to take this form when the issue of the day involves the strengths and weaknesses of a Supreme Court nominee or a recent decision, for example. But the antinomy is misleading. In fact, the choice of constitutional methodology is a secondary, not a primary, decision, and it is not a matter of taste, but of reason. The choice will necessarily follow from a prior commitment about a matter no less profound than what gives the Constitution its power over our polity. In order to make claims about how we should interpret the Constitution, we must first have a theory about why the Constitution should be binding on us in the first place.

It is not obvious why the Constitution should bind us. We are a society deeply committed to a principle of self-government, usually as expressed by decisions reached by some form of direct or indirect majority rule. Yet the Constitution, by its own terms, purports to set forth the supreme law of the land, assuming priority over any ordinary law, even if that law has the support of a large majority of the people or its representatives. And a mere majority of the people is insufficient to change the text of the Constitution. Thus, we begin with something of a tension: we are a society committed to self-government, but we have a Constitution that all agree can constrain our ability to set policy in accord with majority rule. Because the Constitution holds itself out as authoritative on us, and purports to impair our ability to govern ourselves as we collectively see fit, it must be justified in some way that is consistent with our deep commitment to self-government.

That is why a conference devoted to the methods of maintaining fidelity to the meaning of our Constitution over time must also address the question of how the Constitution comes to bind us, or, in other words, its democratic legitimacy. This question essentially asks us to reconcile our commitment to a constitution with our commitment to self-government. Once we have a plausible theory for why and how our Constitution can purport to constrain our ability to govern ourselves, then the manner in which we read the document will follow. If we wish to battle over interpretation, then, and do so honestly, we must engage our adversaries in the arena of the Constitution's claim to legitimacy in a democracy. This essay is a step toward that goal.

I do not here seek to defend the claim that any theory of constitutionalism must be reconciled with a commitment to self-government. I take that as a given under the "small c" constitution that lies at the core of our political identity as a nation.

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Assuming that this is a requirement for any theory of constitutional legitimacy, I will consider one very prevalent such theory and evaluate its consistency with our polity's commitment to self-government, following with consideration of an alternative. This popular contender for supplying the democratic authority of the Constitution, both in the public eye and to some extent in academia as well,¹ is what I will call the Process theory for the binding authority of the Constitution. I will ask two questions of the theory: first, whether the theory offers a plausible justification for why the Constitution binds us, and second, whether this justification adequately comports with our society's commitment to self-government.

The Process theory, in essence, goes like this. The text of the Constitution was voted on by the people according to procedures that satisfied the most enlightened standards of democratic participation at the time. The resulting enactment, therefore, has democratic legitimacy as bearing the stamp of its adopters, "We the People."

This theory emphasizes the process by which the Constitution became law. Self-referentially, that process met the standards that the document itself prescribed, which gave the document the status it claimed for itself then and forever, until amended in accord with its own provisions. Thus understood, the Constitution is law in much the same way that a statute of Congress is law. It should be understood as a set of rules, like a code, to be followed by future generations as a command from those who validly enacted it. If subsequent generations want to change something, just as if subsequent Congresses want to change a statute, they should go through the required process for amendment, which in the case of the Constitution requires supermajority support.

Let me point out a few salient features of a theory that views the Constitution this way. The first thing to notice is that it has accomplished our first objective: to provide a reason why the Constitution should bind us even if we disagree with it. It suggests that we are bound by the Constitution because of a relationship of ruler to ruled. The people of the founding generation claimed for themselves the authority to issue a set of commands, in a sovereign capacity, to subsequent generations who are bound to follow as subjects. The founding generation's right to govern subsequent generations, on this theory, derives from the democratic process by which it laid its claim to power.

Notice also that this theory gives rise to significant implications for how to interpret the Constitution. This theory hangs the democratic legitimacy of the Constitution on the democratic process by which it came into being. It follows that if the very legitimacy of the Constitution depends on the circumstances of its original ratification, then only the exact text that was voted on, and the meaning that the text carried for those who voted for it, enjoy that legitimacy. Any departure from this focus on original understanding would necessarily compromise the legitimacy of the Constitution, on this account. The all-important democratic pedigree, providing the foundation for the authority to issue binding commands, extends only to the precise object of the democratic process that took place in 1787.

This, indeed, is a commonly urged justification for textualism and originalism in the interpretation of the Constitution. The hallmarks of these interpretative theories is that they carry forward only the commands that are legitimated by the Constitution's democratic provenance. It is essential to this theory that change be

¹ By way of illustration, it is worth noting that Professor John McGinnis has ably set forth a version of this theory. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

resisted, because change necessarily undermines the basis of the Constitution's legitimacy thus conceived. Consistent with this view, Justice Scalia, in his standard argument promoting originalism, urges, both as a normative matter and as a matter of democratic theory, that the Constitution should be understood as a bulwark *against* change. Change is the enemy of constitutionalism, he quips, because we cannot assume that societies will evolve rather than simply rot.² The resistance to change is not, however, just an inclination or taste—it is an essential, indeed definitional, component of this theory of legitimacy.

Now that we have examined the legitimating theory for the Constitution based on its democratic provenance, and have explored its ramifications for interpretation, it is time to ask the second question: is the Process theory consistent with the American commitment to self-government? At a superficial level, the answer is “yes,” because the Constitution was ratified by a vote of the people. But this does not fully answer the question.

The Process theory faces significant obstacles in its own consistency with democratic tenets. Principal among these is its commitment to resist constitutional change, intrinsic to its coherence as an argument for constitutional legitimacy. The conception of the Constitution as a vehicle committed to the avoidance of change casts the founding document as a device intended to keep future generations from exercising their right to govern themselves, unless they can meet the significant obstacle of supermajority support for an amendment. Thus, there is a profound tension between this theory of the Constitution and America's belief in an inalienable right to self-governance. While the founders democratically participated in their own acts of self-government, those later subject to their commands did not, and cannot so participate by the usual principle of majority rule. The tension can be resolved, if at all, only if somehow the command-givers of earlier times can be understood as vicarious representatives of the later subjects, such that governance by the forebears fulfills their posterity's need for their own *self*-governance. If not, then the founding generation has simply assumed a power over future generations that depends on sovereign status rather than on self-rule—not a source of power that is generally considered democratically legitimate.

To summarize, the challenge here is to understand how a theory, justifying the Constitution by virtue of its formation in the crucible of a democratic process, maintains its legitimacy through future generations who did not participate in that process. One possibility is that the founders in some sense can be said to stand in the shoes of future generations and thus prospectively exercise the right to self-government on behalf of their successors. By this view, their employment of a democratic process once satisfies the need for democratic participation in the future. This is not an incoherent position. It is, after all, similar to the way in which we view ourselves as bound by statutes passed even by Congresses who legislated before we were born.

The circumstances of this particular application of the Process theory of constitutional legitimacy, however, make it more problematic than the statute analogy. The problem is that the principles defining who must participate in the formation of constitutive policy in order to be considered “democratic” have radically changed since the time of the ratification of the Constitution. Today there would be universal agreement that in order to form any kind of constitutive enactment such as the Constitution, a more inclusive participation would be essential to democratic legitimacy. That is not to say that there was anything invalid about the formation of the Constitution in its

² ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40-41 (1997).

own time. The issue, though, is whether the process that would be considered invalid by current understandings of democratic legitimacy can serve to legitimate the future binding force of a document *on the ground that it was democratically enacted and thereby vicariously satisfies the future generations' need for self-rule*. Even at a high level of abstraction, there would seem to be little promise in claiming that those who ratified the Constitution somehow could be validly viewed as representatives of the “self” in self-government for those who live today. And yet, if the founders cannot be understood to have represented the “self” of their progeny, their participation cannot be viewed as legitimating for all time. This lack of representative authority, then, combines with the Process theory’s resistance to change over time and a supermajority requirement for amendment, to stall this approach in its tracks.

It is the combination of these three effects that makes it difficult to argue that the Process theory supplies the democratic legitimacy in the Constitution that we have been seeking. A process, standing alone, even when enlightened and inclusive by the standards of its own time, simply cannot sustain the weight that this argument asks it to bear. This makes sense when one presses the role of process with a hypothetical: if a supermajority, following all democratic procedures of participation and inclusion, voted to adopt a despotic form of government, would that make such a regime democratically legitimate to impose on future generations?

I would suggest a negative answer, and I venture a suggestion of what is missing from this account. It is not simply the old “dead hand of the past” argument, which implies hyperbolically that prior generations can never bind subsequent generations. Rather, I think what is missing from the Process theory is any requirement about the *substance* of the document handed down. The argument from process, leading to originalism, does not concern itself with *what* was handed down, only *that* it was done.

Surely, democratic legitimacy requires more. In order to gain democratic legitimacy, a constitution must create the conditions under which future generations can continually exercise their right to self-government. Our Constitution, properly understood, passes this test, but not because it was voted on by some of the people two and a quarter centuries ago. Rather, it passes the test because it sets the stage for the policymaking and judgments that are the stuff of which self-government is made.

The core of the act of self-governance is the ability to make the moral and political judgments for oneself and for one’s society, including participating in the determination of what justice requires. These are the defining elements of any society, and they change over time. It is up to each generation to develop and live out its moral commitments. A constitution must enable that fulfillment of the inalienable right to self-governance, or it fails the test of democratic legitimacy. That is why democratic adoption procedures cannot legitimate either a despotic government or a static constitution for future generations, as both of these stifle the opportunities for self-governance down the line.

Our Constitution can boast democratic legitimacy precisely because it commits us to the cause of self-government and justice, its capacious and abstract terms permitting each generation to accept constitutionalism and still conform to its own conceptions of the demands of justice, viewed in light of its history and circumstances. This ability to implement society’s understanding of the core issues of political morality preserves the commitment to self-government and thus satisfies the demands of democratic legitimacy. Even the more arid structural provisions contribute to this process by making possible the exercise of self-government with a stable structure and peaceful transfer of power. If each generation had to decide for itself how old the president

must be or how many senators from each state, there would be little opportunity for the building of a society that fulfills the moral commitments of its current members. So the less capacious provisions can be tolerated as part of an edifice that supports the continued application of the more capacious ones.

It is evident that, like the Process theory discussed earlier, this theory—call it the Substance theory—has implications for interpretation. For this theory, the key to democratic legitimacy is the Constitution's ability to provide a structure within which the polity can continue to exercise its right to self-government, including giving voice to its own commitments of political morality. Thus, it is imperative that the rights-bearing terms of the Constitution be interpreted in a way that can change and expand with the values of each generation. Not only is a dynamic constitutionalism defensible, therefore, it is absolutely essential in order for the Constitution to maintain its democratic legitimacy under the Substance theory.³

There lies the stark contrast between the two models of interpretation, each with its underlying theory. Originalism is the product of a theory that puts great significance on the process by which the Constitution was adopted and depends on the sustaining of a static meaning for the Constitution's terms. This approach claims a democratic legitimacy of a nominal kind, but cannot claim to sustain a polity in its exercise of its right to true democratic participation in the values that shape it over time. The dynamic approach to constitutional interpretation, in contrast, does not place great importance on the procedural source of the Constitution, but rather emphasizes its substance. As long as the Constitution is read to permit the society's exercise of its own right to self-determination, then it contributes to the democratic legitimacy of constitutionalism itself.

³ A non-trivial question arises, of course, as to who may speak for the changing values of society over time, and a theory is needed to defend the entrusting of judges with this role in the interpretation of the Constitution. Launching such a theory is beyond the project that I undertake in this essay.

Constitutional Interpretation: Reclaiming the High Road

William P. Marshall*

Thirty years ago the nation seriously considered whether the Constitution set forth a fundamental right to education, whether it protected the poor from discrimination, and whether access to justice was an essential constitutional concern. Times have changed. Such notions are virtually off the table in today's constitutional jurisprudence, no matter how powerful their ideals might continue to resonate.

Today, rather, the legal culture seriously considers (or has accepted) the contentions that Congress does not have the power to protect wetlands or endangered species and that it cannot remedy state discrimination against the elderly or disabled. It accepts claims that local governments have limited ability to protect against flooding or other environmental damage or to open up lands for public use. It limits the ability of government to protect persons from discrimination based on sexual orientation because of a newly heightened right of freedom of association. At the same time it indicates that the fates of other individual rights may not be as robust—the right to choose is under attack, free exercise is gone, and free speech has been transformed from a vehicle to protect the disenfranchised and the politically weak to a doctrine that primarily preserves the power of entrenched corporate and political interests. The position that presidential power should be unlimited and unchecked, an argument once regulated to the fringe, has moved center stage in the legal debates over the most important and far-reaching political issues of our time—the unprecedented expansion of executive power advanced by the Bush Administration.

These changes did not happen by accident. Thirty years ago, conservatives decided that if the governing legal climate was not hospitable to their political agenda, they would usurp the terms of the debate. To their credit they did just that. Some of what they did was formal. In a series of Department of Justice memoranda written under the direction of Attorney General Edwin Meese during the Reagan Administration, for example, the conservatives set forth their desired changes in constitutional interpretation and proposed a roadmap of how to get there.¹

Some of what they did was informal. Recognizing that changes in legal culture are often interrelated with those of the political culture, they engaged in a concerted effort to change the political perceptions surrounding judicial decision-making. The decisions that they opposed were stridently condemned as exercises in “judicial activism,” or judges legislating from the bench. Moreover, for favorable political effect, these attacks were waged in populist terms with conservatives claiming that the decisions they opposed were the results of the actions of “judicial elites” imposing their views upon the public. Conservative judges, on the other hand, were described as “strict constructionists” beholden only to the rule of law.

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¹ Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *IND. L.J.* 363 (2003).

I have taken some time elsewhere in demonstrating the substantive inaccuracies contained in the conservative attack, particularly in their uses of the term “judicial activism;” and I will not repeat all of those points here. But some of the highlights are worth reiterating.²

For example, one of the interesting features of the conservatives’ judicial activism attack is how their use of the term has changed depending upon political exigency. Originally, conservatives defined judicial activism as the failure of the courts to defer to the decisions of elected officials; i.e. being counter-majoritarian. This definition, however, proved unsatisfactory after Republican presidents succeeded in appointing movement conservative justices and judges to the federal courts. At that point, the federal judiciary, now in conservative control, began striking down federal legislation at a record pace. In such circumstances, the principle of deference to elected officials began to fall by the wayside as the mainstay of the non-activist judge. No longer was counter-majoritarianism to be considered the hallmark of judicial activism. (Of course, at this point the conservatives also should have dropped their populist condemnations of the actions of elitist judges because, after all, popular actions were now being invalidated by the conservatives’ own judges. Apparently, however, the pull of the populist rhetoric against liberal elites was too strong for the conservatives to abandon merely because of the inconvenience of facts.)

For similar reasons, the conservatives abandoned their previous claims that judicial activism was defined in part by failure to adhere to judicial precedent. The conservatives themselves were too busy trying to overturn precedents in order to be able to sustain this attack. Indeed, since much of the central thrust of the conservative agenda has been overruling cases such as *Roe v. Wade*³ and *Lemon v. Kurtzman*,⁴ any effort by them to decry overturning precedent as judicial activism would have been particularly ill-advised.

The conservatives, to be sure, have continued to claim that one of the hallmarks of judicial activism is expanding federal court jurisdiction in order to allow plaintiffs to attack government action. But their application of judicial restraint in this area has been selective. After the conservatives obtained Supreme Court control they followed through in cutting back on this form of so-called judicial activism by limiting federal court access by certain kinds of plaintiffs. Minority plaintiffs, for example, were limited in their ability to challenge discriminatory zoning regulations; prisoners were not allowed to contest their lack of access to law books (unless they could show that such access would lead to successful appeals); and access to those questioning executive branch action on establishment clause grounds was severely restricted. Yet, at the very same time, plaintiffs advancing conservative causes were not turned back on jurisdictional grounds. When white plaintiffs challenged affirmative action programs and race conscious redistricting, the conservatives suddenly found the federal courthouse doors to be wide open. Again, actual allegiance to principle was not foremost in the conservatives’ agenda.

² William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002).

³ 410 U.S. 113 (1973) (holding that the constitutional right to privacy encompasses a right to an abortion).

⁴ 403 U.S. 602 (1971) (holding that, under the Establishment Clause, governmental action must have 1) a primarily secular purpose; 2) a primarily secular effect and 3) avoid excessive entanglement with religion).

But the careful observer at this point probably thinks that I am missing the point. The real test of activism, according to the conservatives, (at least as they now state their case) is whether a judge properly adheres to principles of originalism. Actually, of course, originalism as a method of constitutional interpretation of course has its problems. To begin with, one might question whether the framers themselves would have wanted subsequent generations to be rigidly bound by an 18th century framework. Would the framer's original intent would have been that the Constitution should be bound by original intent?⁵ Moreover, it is not like original understanding is easily determinable in any event. After all, Patrick Henry and James Madison did not agree on much.

But originalism, even with its jurisprudential flaws, has become the conservative mantra. And occasionally, they actually follow it. Thus conservatives frequently raise Justice Scalia's opinion in the *Kyllo*⁶ case, holding that the scan of a person's home from outside the house with a thermal imaging device constitutes an illegal search, as an example of the conservatives steadfastly applying their legal methodology even when it leads to results to which they do not subscribe. But the overall conservative record on this score is more complex, and the only true rule governing the conservative's application of so-called originalism is that they will always apply it, no matter where it leads—except of course when they don't.

So in the Eleventh Amendment cases when their desired results are not supported by text, they rely on history. And in the state affirmative action cases, when their desired results are not supported by history, they rely on text. And in the takings cases, when their desired results cannot be supported by text or history they rely, as in *Lucas v. South Carolina Coastal Council*,⁷ on something they call "constitutional culture." Or in *Employment Division v. Smith*,⁸ when they again cannot find text or history to support their claims, they cite something they call "hybrid rights," although I, for one, would be delighted to see what Madison, Jefferson, or Gouverneur Morris wrote about hybrids. And with respect to their claims of unconstrained presidential power, they ignore the fact that the Revolutionary War was waged in no small part over concerns about chief executives being too powerful, and they ignore landmark Supreme Court cases, including those stemming from the early 18th century, holding that presidents do not have an inherent power to ignore laws passed by Congress.⁹ Finally, and perhaps most tellingly, they ignore originalism completely when it conflicts with one of their major political initiatives—the dismantling of federal efforts to promote affirmative action. Although there is absolutely no originalist argument in the world that supports their position, they somehow still conclude that federal affirmative action is unconstitutional. The fact that the equal protection clause does not apply to the federal government is of no matter; the fact that the Reconstruction Congress provided special aid to blacks is of no concern.

The rule is clear. Originalism is fine as long as it does not interfere with the conservatives' political agenda. Or maybe better stated, the conservative mantra is that all non-originalism should be harshly condemned as judicial activism except when done

⁵ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

⁶ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁷ 505 U.S. 1003 (1992) (holding that a regulation that deprives an owner of all economically beneficial uses of land constitutes a taking under the Fifth Amendment and requires compensation).

⁸ 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not mandate religious exemptions from neutral laws of general applicability).

⁹ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

in service of conservative goals. Originalism, in the conservatives' hands, in short, is a doctrine only of convenience and not of principle.

But exposing originalism as nothing more than a result-driven jurisprudence is not the end of the story. The conservatives are on to something in their realization that the exercise of judicial power must be grounded in sound legal theory and not in ad hoc decision-making. (Where they go wrong, as we have seen, is that their so-called theory of judicial constraint—originalism—is both in its substance and in its application, only a rhetorical device to justify their own particular brand of ad hoc decision-making.)

Some progressives, meanwhile, have played into the conservative gambit by also avoiding theories that require judicial constraint. Instead, in a move that is both legally and rhetorically ill-advised, they have contended that the constitution is a “living” document that appears to justify whatever results these progressives believe are appropriate. We can do better.

I believe we need to return to decision-making that is driven by high jurisprudential principles and not ad hoc results. We need to make clear that we are not simply in favor of giving judges unfettered discretion to insert their personal or political preferences in any decision they make. This is not just because the Supreme Court is currently dominated by those with whom we may not share policy preferences. It is because a result-oriented jurisprudence, whether one that is liberal, conservative, or middle-of-the-road, is not the proper way to decide cases. Constitutional law is not a political spoil to be awarded to whatever party holds the White House during a Supreme Court vacancy.

The good news, of course, is that if we adhere to the enduring principles set forth in the Constitution, progressive results will inevitably follow. The Constitution is a progressive document. It is based on principles of freedom, equality, and democracy. It explicitly promotes democratic representation while simultaneously protecting minority rights.¹⁰ It even has a provision, the Sixteenth Amendment, which fosters economic redistribution.

The Constitution, however, is not a document that guarantees progressive results in all cases. Nor should it be. It is inevitable that a court truly wrangling with numerous questions of constitutional law will reach some results that progressives (or anyone else for that matter) will not like as a political matter. But that is a far better alternative than the mode of decision-making that we see practiced by conservatives today, where their judicial and legislative agendas are simply flip-sides of each other and legal theory has more to do with sloganeering than actual practice. In short, we need to return to judicial decision-making that is perceived as legitimate because it actually is.

¹⁰ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).



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