ORIGINAL MEANING AND CONSTITUTIONAL REDEMPTION

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One of the many benefits of having one's ideas analyzed by a group of intelligent and able commentators[1] is that they improve the work by showing the author which parts of the argument need to be clarified, which parts need to be adjusted, and which parts are really central to one's views. With gratitude for their careful attentions, I take this opportunity to clarify, adjust and foreground parts of my argument in *Abortion and Original Meaning*.[2]

In *Abortion and Original Meaning* I argued that fidelity to the Constitution requires fidelity to the original meaning of the constitutional text and to its underlying principles. I also argued that each generation makes the Constitution their constitution by calling upon its text and principles and arguing about what they mean in their own time. These claims are part of a larger argument about what makes our constitutional system legitimate and what functions a constitution like America's serves and should serve. In this response, I argue that a key element of constitutional interpretation is our attitude of attachment to the constitutional project and our beliefs about its ultimate trajectory. This is the question of our faith in the constitutional system, which is also, as I shall explain, a faith in its redemption

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1. Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus A Thought Or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007); Dawn Johnsen, *The Progressive Political Potency of "Text and Principle"*, 24 CONST. COMMENT. 417 (2007); Ethan Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007); John O. McGinnis and Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007).

2. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

through history. Hence my theory of text and principle is also a theory of redemptive constitutionalism.

I. WHY ORIGINAL MEANING?

In *Abortion and Original Meaning* I argued that the choice between originalism and living constitutionalism is a false one, and that I regard myself both as an originalist and as a living constitutionalist. That may seem strange to some readers, who have grown accustomed to thinking that living constitutionalism is just a form of non-originalism. However what we call "non-originalism" depends on what we think originalism entails.[3] Given any particular version of originalism, non-originalism means only that we reject that originalist's view of what fidelity to the Constitution requires. Now I argue that fidelity to the Constitution means fidelity to the original meaning of the Constitution's text and to the principles that underlie the text. From my perspective, then, a non-originalist is a person who argues that we do not have to be faithful to the original meaning of the Constitution's text or to its underlying principles. But living constitutionalists need not be non-originalists of that sort, and, in my view, they should not be.

Several of the commentators objected that I did not provide an argument for interpreting the Constitution according to its original meaning, or indeed, for any form of originalism at all. In fact, I did make such an argument, but it was stated so briefly that it may have passed notice.[4] Therefore I now offer a more extended argument for adhering to the original meaning of the text.

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3. Mitch Berman correctly sees this point. Berman, *supra* note 1, at 383 n.37. He assumes, incorrectly, that I seek to "contrast[] originalism to living constitutionalism," *id.*, identifying the latter with nonoriginalism, when in fact I mean to do the opposite. There are certainly forms of living constitutionalism that are non-originalist, but I believe that the best versions of living constitutionalism are also originalist in my sense.

4. The argument was premised on two simple assumptions:

> [First,] we have a written Constitution that is also enforceable law. [Second,] [w]e 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 those 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. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes.

Balkin, *supra* note 2, at 303-04.

A. THE ARGUMENT FROM A WRITTEN CONSTITUTION

The American Constitution is a written constitution, and it is enforceable law. Both of these facts are worthy of note. Americans did not have to choose a written constitution. The most obvious model in 1787 would have been the British Constitution, which consisted largely of customary practices and precedents. In addition, the American Constitution did not have to be enforceable law. It could have been just be a political statement of principles, like the Declaration of Independence. But if we consider our written Constitution to be law, then we should interpret and apply it as we do other kinds of laws, and, in particular, statutes. This has two consequences.

First, generally speaking, once statutes are legitimately enacted by those authorized to enact them, the statutes continue to bind us as laws until they are amended or repealed. That is so even though the people who originally had authority to create the laws are long dead and gone. That is why even statutes passed many generations ago are still law today. I do not argue that this is necessary to the conception of law. One could have a legal system with a generally recognized metarule that all statutes expire after fifty year's time. (Presumably, the metarule would not apply to itself). But we do not have such a metarule for statutes in the United States.[5]

Second, we normally try to interpret the statutory terms according to the concepts the words referred to when the statutes were first enacted.[6] We do this to preserve legal meaning over time. Why is it important to preserve meaning over time? It follows from the assumption that law continues in force over time until it is amended or repealed. If the law states a directive, rule, or norm that continues in force over time, we must preserve the meaning to preserve the directive, rule, or norm that the law

5. Although Judge Guido Calabresi famously suggested that we should adopt special interpretive rules for older, outmoded statutes. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

6. Here, just as in debates about constitutional interpretation, we should distinguish the original meaning of words from their original expected application. Textualists, purposivists and intentionalists alike all begin with the original meaning of statutory words as best they can determine it. They disagree among themselves about how and whether to recognize gaps, ambiguities or vagueness in statutory language. They also disagree about what to do in the case of gaps, ambiguities or vagueness. William Eskridge's dynamic theory of statutory interpretation, for example, allows interpretations different from what the original legislature might have expected or endorsed because of changing circumstances. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 5, 52–57 (1994).

states. Suppose we did not follow this practice. Then, if the commonly accepted meaning of the words changes over time, the legal effect of the statute will change as well, and it will change not because of any conscious act of lawmaking by anyone in particular, but merely because of changes in how language assigns concepts to words.[7]

Let me give a simple example. Article IV section 4, the Guarantee Clause, states that "The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."[8] In 1787 the words "domestic Violence" generally meant riots or disturbances within a state (as opposed to foreign attack); today the words primarily refer to assaults and batteries by intimates or by persons living in the same household. If we used the contemporary meaning of the Guarantee Clause rather than its original meaning, the import of the Clause would be completely altered. Moreover it would be altered not due to any change in public values, but simply because linguistic usage had changed. Moreover, today the word "Republican"—the word is capitalized in the original text—refers both to representative government and to the Republican Party, founded in 1856. If we were bound by contemporary meaning rather than original meaning,

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7. This argument is hardly original with me. James Madison himself made an early version:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased enquirers into the history of its origin and adoption.

Letter from Madison to Henry Lee (June 25, 1824), *in* 9 THE WRITINGS OF JAMES MADISON 191–92 (Gaillard Hunt ed., 1910). For modern versions, each with a slightly different emphasis, see RANDY BARNETT, RESTORING THE LOST CONSTITUTION, 100–07 (2004) (emphasizing lock-in function of writings); Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258 (Robert P. George ed., 1996) (arguing that "it makes no sense to give any person or body lawmaking power unless it is assumed that the law they make is the law they intended to make"); Steven Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 117 (1989) ("Present-oriented interpretation . . . makes law substantially the product of historical accident.").

8. U.S. CONST. art. IV, § 4 (The capitalization is as in the original).

one could argue that the Constitution guarantees each state a "Republican Form of Government,"—that is, a government controlled by Republicans.[9]

Here is a less fanciful example: Article I, section 8, cl. 3 grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[10] Note that the Constitution uses the same word in the same clause—"commerce"—to describe how Congress might regulate interactions "with foreign nations, and among the several states, and with the Indian tribes."[11] When the Constitution was enacted, the word "commerce" meant more than purely commercial activity. It meant "intercourse"—that is, interactions, exchanges, and movements back and forth, including, for example, conversation.[12] The Commerce Clause gave the federal government the power to regulate a wide range of interactions with the Indian tries and foreign nations.[13] Thus, the early Congresses passed a series of Trade and Intercourse Acts beginning in 1790, which not only required licenses for trade with Indians, but also punished "any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians."[14] These crimes did not necessarily involve economic activity; they could involve assault, murder, or rape. (Note that even

9. I have often supposed this was the underlying basis of Bush v. Gore, 531 U.S. 98 (2000).

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (the word "commerce" "must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003) (expanding on Marshall's argument). *But see* Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) (responding to Prakash's argument and arguing that the same word could mean three different things in juxtaposition).

12. *Gibbons*, 22 U.S. (9 Wheat.) at 189–90; *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107–08 (2005) (the Commerce Clause gives Congress powers to regulate "all forms of intercourse in the affairs of life, whether or not narrowly economic . . . if a given problem genuinely spills across state or national lines.")

13. *See* AMAR, *supra* note 12, at 107–08 (arguing that under the original meaning of "Commerce" the Constitution gives Congress the power "to deal with noneconomic international incidents" and "nonmercantile interactions and altercations that might arise among states.").

14. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (expired). Congress passed new versions repeatedly during the antebellum era, with changing provisions: Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (repealed 1796); Act of May 19, 1796, ch. 30, 1 Stat. 469 (expired 1799); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (expired 1802); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (repealed 1834); Act of June 30, 1834, ch. 161, 4 Stat. 729. The current version of the Trade and Intercourse Acts is 25 U.S.C. § 177 (2005), which now covers only purchases and grants of land from Indian tribes.

if the point of regulating these crimes was because of their likely effects on trade with the Indian tribes, the activities regulated were themselves not economic.). If we adopted the contemporary meaning of "commerce," Congress might have reduced power in its dealings with Indian tribes and foreign governments not because of any change in public views about national power, but simply because of changes in linguistic usage.

That change in meaning would also matter for regulation of "commerce . . . among the several states." Despite the early example of the Trade and Intercourse Acts, the Supreme Court has argued that Congress may not regulate non-economic activities (like crime) because of their cumulative impacts on commerce.[15] For example, in 2000, the Court struck down portions of the Violence Against Women Act in *United States v. Morrison*;[16] it rejected the government's argument that the cumulative impact of violence against women hindered their ability to participate in the public life of the national economy because such violence, no matter how much it affected women's economic choices, was not itself economic activity.[17] As this example shows, that construction of "commerce" may not be consistent with the Constitution's original meaning. The proper question in *Morrison* was not whether Congress could regulate crime to prevent deleterious effects on commerce—it did so from the very founding of the country in the Trade and Intercourse Acts. Rather, the question was whether the problem of violence against women was a problem "among the several states"—for example, because it featured significant spillover effects between states that individual states could not adequately handle on their own.[18]

B. THE COMPATIBILITY OF ORIGINAL MEANING AND LIVING CONSTITUTIONALISM

In fact, I think that the argument for contemporary meaning rests on a subtle confusion. When living constitutionalists argue that we should look to today's meaning rather than original

15. United States v. Lopez, 514 U.S. 549, 551, 560–61, 564–67 (1995); United States v. Morrison, 529 U.S. 598, 610–13 (2000).

16. 529 U.S. 598.

17. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

18. In addition, the statute might also have been constitutional under Congress's section 5 power to enforce the equal citizenship guarantees of the Fourteenth Amendment.

meaning, they usually do not have in mind the rule-like clauses of the Constitution, which they are normally happy to apply according to their original meanings. Rather, they are usually thinking of the abstract or vague phrases of the Constitution: "due process," "equal protection," "cruel and unusual punishments," and "freedom of speech." What living constitutionalists really object to is being limited by the original *expected application* of these abstract terms and vague clauses. They are right to object, for reasons I have given in my article, and I agree with them that the original expected application is not binding on later generations. But this is not an objection to being bound by original *meaning*.

My argument for the preservation of legal meaning over time applies whether the constitutional text states a relatively concrete rule or an abstract principle or standard. If the original meaning of the text requires "equal protection," then we enforce equal protection today because the text continues to require it, just as the text continues to require that the President must be 35 years old. How we apply the principles of equal protection, however, may well be different from what people expected in 1868 based in part on our contemporary understandings. That is the difference between applying rules and applying principles or standards in changed circumstances, and it is consistent with the preservation of the original meaning of enacted laws over time.[19]

Living constitutionalists often object to original meaning because it binds present generations to the dead hand of the past. They worry that a written constitution enacted long ago limits the kind of laws that Congress can pass—including many important federal labor, environmental, and civil rights laws—and it allows both the states and the federal government to violate a panoply of rights that Americans regard as constitutionally protected. They worry that the dead hand of the past wrongfully limits contemporary democracy and allows majorities to run roughshod over important rights.

19. One might object: Can principles really exist apart from their expected applications? Not only is this possible, it is precisely what makes them *principles* rather than a laundry list of concrete expectations. Principles are norms that are indeterminate in scope, that usually do not determine the scope of their own extension, and that can be balanced against other competing considerations. Although the persuasive power of principles may originate from how we expect they will apply when we argue for them, their jurisdiction, scope, and regulatory scene can shift over time. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

Here again it is important to distinguish between original expected application and original meaning. Many constitutional provisions are stated in relatively precise rules. There are only two Houses of Congress, each state gets two Senators, the President can veto legislation when it is presented to him, the President cannot be elected to more than two full terms, and the President serves only four years in each term and not as many as he (or the Congress) desires. In addition, when no candidate for President wins a majority of the electoral college, the election is thrown into the House of Representatives where each state gets one vote, while in similar circumstances the Vice-Presidency is determined by the Senate.

All of these provisions were also passed long ago and they continue to limit what contemporary majorities can do. They also represent the dead hand of the past. Indeed, they are a far more powerful dead hand because of the relative precision of their language.

When living constitutionalists complain about the dead hand of the past, they are generally not complaining about these structural provisions, even though these rules limit contemporary expressions of popular will, and in some cases, can have very bad effects.[20] Most living constitutionalists accept these structural clauses as stating relatively precise rules that we must follow today, even if we think them unjust or unwise. Rather, objections to the dead hand of the past tend to concern the interpretation of the abstract and vague clauses in the Reconstruction Amendments and the Bill of Rights that I mentioned earlier. That means that the dead hand objection in practice is not primarily directed against original meaning—it is directed against original expected application. Once that distinction is accepted, living constitutionalists have very little reason to object to being originalists as well.

Living constitutionalists might also worry that fidelity to original meaning prevents them from making arguments from constitutional structure that are not tied to a particular piece of text. However, fidelity to text and principle does not prohibit such structural arguments, which are invoked by originalists and non-originalists alike. I noted in *Abortion and Original Meaning* that the Constitution contains a structural principle of democ-

20. For a bill of particulars, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

racy that is not tied to any particular part of the text but must be inferred from the logic and general purposes of the Constitution's plan of government. Ironically, the principle of democracy—in particular deference to majority will—is the structural principle most often invoked by originalists who object to living constitutionalism. The proper question is not whether structural arguments not tied to specific texts are permissible, but what kinds of structural arguments we can make consistent with the text.

In addition, living constitutionalists might worry that text and principle cannot account for governmental innovations like the administrative state or independent federal agencies like the Federal Reserve Bank. I disagree. The constitutional text provides a relatively open-ended framework for governance on which later generations must build, creating new institutions and practices to implement constitutional values and carry out governmental functions. Much of the practical day-to-day operations of the United States government comes from what Keith Whittington has called constitutional construction—the creation and maintenance of new institutions and practices by the three branches and by the states.[21] One of the earliest constitutional controversies was over such a constitutional construction—the creation of a public/private institution to help manage the federal government's fiscal resources—the Bank of the United States.

The Constitution does not prohibit such constitutional constructions; indeed, it presumes that they will occur, and it places only fairly general limits on their design and implementation. The accumulation of these constructions over time, as one innovation builds on another, produces a sort of institutional evolution; it has a path dependence that drives constitutional development forward in ways that no one in 1787 would have predicted. That evolution is part of what we mean by a living Constitution. But, once again, the path of institutional evolution does not become unconstitutional merely because it is contrary to the Founders' concrete expectations.

Although the method of text and principle can make sense of a wide range of admirable features of our present constitu-

21. KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999) (offering creation of the Federal Reserve System as an example of constitutional construction by the political branches).

tional culture, it does not always guarantee "happy endings,"[22] at least from my own perspective. To give only one example, I believe that the same history that shows that the Fourteenth Amendment established an anti-subordination principle also shows that the Second Amendment protected an individual right that applies to the states as well as the federal government.[23] This is certainly not my preferred policy result, and it may have very bad consequences, depending on how the Second Amendment's guarantees are worked out. This is not an isolated example. I also think that our current method of electing Presidents is particularly poorly designed, although there may be awkward workarounds. Nevertheless, the point of constitutional interpretation is fidelity, and the test of a theory of constitutional interpretation is whether you are willing to accept the consequences of your preferred theory of interpretation, whether you like them or not. No theory of constitutional interpretation that actually seeks to interpret the document always produces happy endings. Constitutions are by nature imperfect, born of political compromise and short-sightedness; they leave many injustices unremedied or facilitate injustices of their own. Rather, one adopts a theory with the goal of being faithful to the document, and with the hope that the document, so interpreted, offers sufficient possibilities for redemption to make itself worthy of respect over time. One cannot know all the consequences of a theory when one adopts it; rather one learns those consequences over time, and either adjusts the theory of interpretation or learns to accept the consequences that come with it. Choosing an interpretive theory, like interpreting a Constitution, is an act of faith, and the importance of faith in constitutional interpretation is the theme to which I now turn.

II. FAITH AND LIVING CONSTITUTIONALISM

Beyond the arguments I have just offered for adhering to the original meaning of the Constitutional text lie deeper issues:

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22. The phrase is Sanford Levinson's. Sanford Levinson, *Why I Do Not Teach Marbury (Except To Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 560–61 (2003); *See* Sanford Levinson, *Bush v. Gore and the French Revolution*, 65 LAW & CONTEMP. PROBS. 7, 11 (2002).

23. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks of Sen. Howard) (listing "the right to keep and bear arms" as one of the "personal rights guaranteed and secured by the first eight amendments of the Constitution" that were privileges or immunities of citizens of the United States); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 259 (1998).

the legitimacy of the Constitution and faith in the constitutional project. These are Ethan Leib's major concern. He rejects my claim to be both a living constitutionalist and an originalist. Leib concedes that the method of text and principle might offer living constitutionalists most if not all of the results that they believe the Constitution rightly understood requires.[24] Still, he argues, something is missing in my theory which prevents it from being a genuine form of living constitutionalism.

Leib argues that, unlike originalists, living constitutionalists do not necessarily have faith in the Constitution or in the constitutional project; rather they live in perpetual anxiety that the Constitution will fail the nation and therefore not deserve its legitimacy. "Living constitutionalism's core animating anxiety is that the Constitution (and most especially its original meaning) may not be binding."[25] "[P]essimism and anxiety" about the document, Leib suggests, "underwrite[] living constitutionalism itself."[26]

The Constitution, Leib explains "is only our Constitution because it is suffused with and supported by contemporary assent."[27] However, "living constitutionalists do not pledge faith . . . *before* interpretation gets off the ground."[28] "Without an effort to tether the contemporary generation's consent to the document and its principles, it might ultimately be legitimate to abandon it altogether. That threat is very real for the living constitutionalist, who can revere and venerate the document only when it is unmoored from its original meaning."[29] Scratch a living constitutionalist, Leib seems to be saying, and you will find a constitutional skeptic—one who distrusts the Constitution and will break from it unless we can make it to conform to what is just (or, what may be a very different thing, what is acceptable to the present).

Leib's version of living constitutionalism denies that the document can be binding on us before we know whether the Constitution generates results that make it legitimate in the eyes of the present generation. Hence, we cannot pledge faith in the Constitution until we are sure that it will give us more or less what we want. "Our civic life," he explains, cannot "requir[e]

24. Leib, *supra* note 1, at 354, 367-69.
25. *Id.* at 354.
26. *Id.* at 359 n.19.
27. *Id.* at 360.
28. *Id.*
29. *Id.*

adherence to our governing document just because it happens to exist and happens to help constitute us as a people. The document and our life under it always stands in need of moral, practical, and political justification . . . at the very moment when we ask for the meaning of the document."[30] Leib is nothing if not candid on this point: The "purported lack of fidelity (and actual lack of faith from time to time), disrespect for the document, and too substantial delegation to the judiciary go a long way in explaining why living constitutionalism is unattractive to so many."[31] If that is what living constitutionalism is, one can easily see why.

Leib correctly understands that constitutional interpretation is deeply connected to questions of faith and legitimacy. The Constitution has been used to perpetrate great injustices in the past, and it may still permit very great injustices; therefore we must not turn it into an object of idolatry.[32] Even so, I think Leib does not describe the proper relationship between interpretative fidelity and faith in the Constitution. Interpretive fidelity cannot be premised, as Leib seems to suggest, on a basic distrust of the Constitution and continuing doubts about its legitimacy. Interpretive fidelity, and in particular fidelity to a written Constitution, requires attitudes about the document and the constitutional project that are the opposite of the qualities that Leib offers us.

Interpreting the Constitution as members of a political community governed by the Constitution presupposes a desire to be faithful to it. If we do not seek to be faithful to the Constitution, we may be trying to improve the Constitution, but we are not trying to interpret it.[33] But to be faithful to the Constitution, we cannot view it with perpetual distrust, much less perpetual anxiety. Quite the contrary: we must put ourselves on the side of the Constitution, so to speak. We must seek to defend it from those who would abuse it or misuse it, even—and perhaps especially—if our views about what the Constitution says are not the views of the majority or of the powerful. Above all, to be faithful

30. *Id.* at 363.

31. *Id.* at 362.

32. I regard these themes as central to my work. *See* Jack M. Balkin, *Agreements with Hell and Other Objects of our Faith*, 65 FORDHAM L. REV. 1703 (1997) [hereinafter Balkin, *Agreements with Hell*]; Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553 (2003) [hereinafter Balkin, *Idolatry and Faith*].

33. Balkin, *Agreements with Hell*, *supra* note 32, at 1705 ("To claim to interpret the Constitution is already to claim to be faithful to it. . . . When we say that fidelity is not important to us, we are no longer interpreting the Constitution, we are criticizing it.").

to the Constitution, we must see ourselves as continuing a constitutional project that stretches back to the past and forward to the future. Perpetual anxiety and suspicion toward that project may be an important political or intellectual activity. But it is not interpretation.

All constitutions are imperfect, in part because of the circumstances of their origin and the compromises necessary to bring them into being. All constitutions are "Agreements with Hell," to use William Lloyd Garrison's famous phrase.[34] Precisely for that reason, fidelity to the document requires a leap of faith in the document and the institutions of government based on the document. To interpret the document faithfully, we must buy into the constitutional project and make it our own project.

As I have explained in previous work, buying in too easily or in the wrong way to this project leads to ideological effects and to idolatry.[35] I think that Leib is worried about these issues as well, and correctly so. Yet I believe that living constitutionalism can avoid those dangers by being unstintingly honest—both about the Constitution's failings and about its resources for redemption.

The faith that constitutional interpretation requires is not blind faith. It is not idolatry, or a belief that our Constitution is the best and wisest constitution ever crafted by human hands. Rather, constitutional interpretation requires faith that even if some aspects of the document and its associated institutions are far from perfect, the latter are good enough to justify the benefits of political union (and the use of force to compel obedience to the law), and that the system of constitutional government can and will become still better over time. What if we do not believe that the Constitution currently meets even the minimum standards of justice required for legitimacy? Then constitutional interpretation requires the faith that, if we commit ourselves to the constitutional project, the Constitution will, in time, measure up to the appropriate standards.[36]

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34. The phrase comes from a resolution Garrison introduced before the Massachusetts Anti-Slavery Society in 1843, arguing that the Union should be disbanded: "That the compact which exists between the North and South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled." WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963).

35. Balkin, *Agreements with Hell*, *supra* note 32, at 1704, 1729–36; Balkin, *Idolatry and Faith*, *supra* note 32, at 558–65.

36. These points are developed in Jack M. Balkin, *Respect Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004) [hereinafter Balkin,

In short, interpretive fidelity requires faith in the redeemability of the Constitution over time. That faith is threefold: faith in the possibilities contained in the document, faith in the institutions that grow up around the document, and finally, faith in the American people who will ultimately determine the interpretation and direction of the document and its associated institutions. All three forms of faith are necessary. We must believe that the text has sufficient adaptability to remedy the injustices of the present and the challenges of the future, that our political institutions are not incorrigible, and that our nation is able to learn from its mistakes and improve itself over time. These elements of faith are not limited to faith in the U.S. Constitution; they are key elements of faith in constitutional democracy generally. If we do not believe these things, debates over interpretation are pretty much pointless; it is time to start over and engage in very different kinds of political activity.[37]

The connections between interpretive fidelity and faith are clear in the etymology of the word "fidelity," whose Latin root, "fides," means trust or faith. To have fidelity to a person or a thing is to believe in them, in what they are now or what they could be in time. Moreover, fidelity is a two way street—we are faithful to others because we expect (or hope) that they will be faithful to us and not betray us. We believe this even though we do not know whether this will turn out to be the case; that is what makes our attitude faith rather than mere prediction based on reasonable evidence. Thus, to have faith in an institution like the Constitution is to believe that over time the Constitution will

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Respect Worthy].

37. That might be the case if the real source of the Constitution's illegitimacy is not in its open-ended clauses but rather in features that are not easily susceptible to later constitutional construction or statutory work-arounds. Like Leib, I have been deeply influenced by my friend Sanford Levinson's work on constitutional faith. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). In 1988, Levinson was willing to sign the Constitution of the United States out of the belief that the constitutional conversation would develop into institutions that would respect human rights. *Id.* at 193. By 2006, Levinson has given up his constitutional faith, and it is instructive to consider why. Levinson does not think the problem is with the open-ended clauses of the Constitution—the ones that most people fight about most of the time. Indeed, he thinks that the Constitution contains sufficient resources to provide whatever citizens might want for the protection of human rights. Rather, Levinson objects to the "hard-wired" features of the Constitutional system embodied in determinate rules—like the Presidential veto, equal suffrage in the Senate, and the electoral college. These, he argues, are the real reason why we should abandon our Constitution. *See* LEVINSON, *supra* note 20. The irony is obvious. Most living constitutionalists do not quibble about these features of the Constitution or see them as the objects of aspirational interpretation. Rather, they spend most of their time worried about the contemporary meaning of the open-ended provisions like the Equal Protection Clause.

not let us down and betray our trust, that the Constitution can and eventually will live up to our hopes for it. This faith is not simply faith in the magical powers of constitutional texts, but a faith in the redeemability of political institutions and of a people over time. That faith, I think, is the very essence of living constitutionalism.

Conversely, to be "faithless" means both to lack faith and to betray. The two often go together. If we do not believe in an institution, we are less likely to feel we must play by its rules. If we lack faith in other people, we expect them to let us down or even betray us, and so it may be wise to protect our interests at their expense. Sometimes, of course, lack of faith in other people—or in institutions—may be a self-fulfilling prophecy. The institutions fail, the people betray us, because we and others were unwilling to believe in them. To interpret the Constitution in good faith as a member of the political community, one must buy into the constitutional project. Constitutional interpretation cannot be premised on the attitude that we will only be faithful to the Constitution to the extent that we think it will say what we approve of. This is both a question of interpretive attitude and a question of procedural fairness to others in the community whom we expect to obey the Constitution and the law. If I do not commit myself to playing by the rules of the game, why should I expect other people in my community to do so, and what justifies my criticism of other people if I think they have twisted or warped the Constitution to their own ends? I can certainly argue that what they have done is unjust or hypocritical. But I can hardly oppose their actions on the grounds that they have failed to abide by principles of faithful interpretation that I refuse to abide by.

I do not accept Leib's description of living constitutionalism because it lacks features that I have always associated with living constitutionalism—an abiding faith in the American constitutional project and in the redemption of the Constitution through history. Leib incorrectly describes these features as distrust, pessimism, and anxiety about the Constitution. He does this, I think, because he is trying to capture the aspirational elements of living constitutionalism, but he describes them in the wrong way.

Aspirationalism does not begin with unqualified acceptance of the Constitution's legitimacy. It does not assume that the Constitution is perfectly fine just as it is. Rather, it starts with the assumption that the Constitution exists, and always has existed, in a fallen condition. It is a collection of moral and political compromises placed in an imperfect document and situated in

imperfect political institutions. Nevertheless, this document and these institutions form part of a project stretching throughout history, a project that contains resources for its own redemption. Aspirationalism holds that the Constitution contains commitments that we have only partially lived up to, promises that have yet to be fulfilled. The point of aspirationalism is not to overlook the Constitution's faults or its promises—but to take both with the utmost seriousness.[38] To see the Constitution as aspiring to greater justice and moral legitimacy we must first recognize the past and present evils in our political institutions that the Constitution has supported and still supports. There can be no redemption without the recognition of sin. At the same time, we must recognize those elements in the Constitution—both in the document itself and in its associated institutions—that make this redemption possible. I argue that we can find many of these redemptive elements in the Constitution's basic structure and in its text and underlying principles. I argue, in short, that one reason why our Constitution is redeemable is that parts of it were designed to be redeemable—it contains language that can be adapted to changing times and circumstances and it contains moral and political principles that demand the continual improvement of our institutions. This, too, I regard as the very essence of living constitutionalism.

III. ORIGINAL MEANING AND ORIGINAL EXPECTED APPLICATION

Mitch Berman is puzzled that I emphasize the distinction between original meaning and original expected application. Most originalists, he correctly points out, long abandoned original intention in favor of some form of original meaning originalism. These originalists recognize that the original meaning of the text is not always limited to the concrete expectations of the framers; the framers could be mistaken about some applications and changed circumstances might lead to different results. Only Justice Scalia, Berman, argues, seems to assume that fidelity to original meaning requires fidelity to original expectations. If so,

38. Balkin, *Agreements With Hell*, *supra* note 32, at 1716–17, 1719–20. *See also* Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1113 (2005) (arguing that progressive accounts of history "commit themselves to a narrative of improvement that blinds them to both the threats and possibilities of today. By cutting themselves loose from the aspects of the past that appear disastrous, progressives also fail to see that some of the historical forces they think have been overcome in fact still operate.").

Berman asks, why do I pay so much attention to Scalia's form of originalism, and why do I assert that many originalists still conflate original meaning with original expected application?[39]

Scalia's views are important for two reasons. First, not to put too fine a point on it, Scalia has more votes on the Supreme Court than either Berman or I do. Second, he is the most prominent and public popularizer of original meaning originalism—"the proverbial 500-pound gorilla in the interpretive debate," as Vasan Kesavan and Michael Stokes Paulsen once put it.[40] Original meaning originalism is on the map today in large part because of Scalia's efforts,[41] and so it is particularly important to pay attention to how he imagines the methodology should work in practice.

Beyond Scalia's arguments, however, is the larger community of original meaning originalists. There has been important theoretical work done on originalism since the 1980s which goes beyond Scalia's initial formulation.[42] My article, which is a contribution to both originalism and living constitutionalism, attempts to move that analysis along, making salient the logical consequences of the turn to original meaning. Berman correctly notes that because original meaning is logically distinct from original expected application, originalists are not bound by original expectations; but because they are not logically bound by expected applications, he assumes that originalists are not strongly guided by them in practice. My claim is that although the two concepts are distinct in theory, the turn to original meaning, particularly among conservative originalists, has not emphasized the distinction, in part because the distinction is not salient to the reasons why conservatives moved from original intention to original meaning in the first place. Quite the contrary: conser-

39. Berman, *supra* note 1, at 384-90.

40. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1140 (2003).

41. *Id.*

42. *E.g.*, BARNETT, *supra* note 7; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115 (Amy Gutmann ed., 1997); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Kesavan & Paulsen, *supra* note 40; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989).

vative originalist practices of argument tend to conflate original meaning and original expected applications. To explain why that is so, a little history may be in order.

Contemporary originalism arose from efforts by conservative legal scholars and politicians to combat what they saw as overreaching by liberal judicial decisions in the Warren and Burger Courts, what is sometimes referred to as liberal judicial activism.[43] In the early 1980s conservative lawyers like Attorney General Edwin Meese argued for a return to a jurisprudence of "original intention"[44] that would push courts back toward the proper path and show appropriate respect for democratic decisionmaking. The argument for fidelity to original intention arose out of more general conservative political and social movements that sought to correct the perceived excesses of liberal policies.[45]

But even as the theory was announced by Meese and others, lawyers and legal scholars began refining it. Originalist theorists quickly moved from original intention to original understanding, and then to original meaning, in order to respond to difficulties with the original formulation.[46] The first problem was that

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43. *See* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); Robert C. Post & Reva B. Siegel, *The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004).

44. *See* Edwin Meese III, Address before the American Bar Association, *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (Paul G. Castle ed., 1986); Edwin Meese III, Address before the D.C. Chapter of the Federalist Society Lawyers Division, *in* OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 91 (1987); Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 25–26 (1985) [hereinafter Meese, *Construing the Constitution*]. Meese sometimes used the terms "original intention" and "original meaning" interchangeably. *See, e.g.*, Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986) ("It has been and will continue to be the policy of this administration to press for a jurisprudence of original intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.").

45. Post & Siegel, *supra* note 43; Whittington, *supra* note 43; Barry Friedman, Originalism and Judicial Activism (2007) (unpublished manuscript).

Before Meese, Raoul Berger had advocated interpretation according to original intention. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). Berger's originalism, however, did not arise from political objections to contemporary liberalism but from his positivism, formalism and hostility to natural rights jurisprudence. O'NEILL, *supra* note 43, at 112–13. Berger saw in both the *Lochner* era Court and in the later Warren and Burger Courts natural law and moral ideals overriding constitutional limitations and judicial restraint. *Id.*

46. For accounts of the shift from original intentions to original meaning, see Kesavan & Paulsen, *supra* note 40, at 1137–40; BARNETT, *supra* note 7, at 90–91. *See also* O'NEILL, *supra* note 43, at 158 ("Originalists responded tactically by de-emphasizing the

"original intention" seemed to focus on the intentions of the persons who drafted the document, but surely it was the ratifiers' views that counted because only they had the authority to make the proposed Constitution law. "Original understanding" better captured a focus on the authorizing audience for the text as opposed to the text's drafters. The second, and more important problem was the charge of psychologism. Critics argued that we cannot identify the law with the psychological states of particular historical actors—whether framers or ratifiers—because they may not have all shared the same mental states, because their intentions might be unknowable, and because they may have had no intentions about states of affairs that did not or could not obtain when they lived.[47] In 1985 H. Jefferson Powell added another criticism: the generation that framed the Constitution did not believe that looking to framers' intentions was an appropriate interpretive strategy; they believed that purpose and intention should be derived from the public words of the text.[48]

Original meaning originalism sought to address these problems by focusing not on the mental states of framers or ratifiers but on the general and publicly shared meanings of the text at the time of enactment.[49] Spurred on by Justice Scalia and members of the Reagan Justice Department,[50] conservative lawyers and academics began to work out the details of the new theory.[51]

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word *intent*, though of course not the jurisprudential approach associated with it.") (emphasis in original).

47. For early and influential discussions, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983). For a response defending original intention originalism, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 244 (1988).

48. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

49. Scholars have offered various formulations over the years. *See, e.g.*, Calabresi & Prakash, *supra* note 42, at 552 (meaning of the Constitution and other legal writings like statutes, contracts, wills and judicial opinions "depends on their text, as they were objectively understood by the people who enacted or ratified them."); Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) (defining "originalist textualism" as "a method which searches for the ordinary public meanings that the Constitution's words, read in linguistic, structural, and historical context, had at the time of those words' origin." (citing Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U.L. REV. 21, 22 (1988))); Kesavan & Paulsen, *supra* note 40, at 1131 (originalist textualism requires "faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.").

50. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A

Original intention originalism offered conservative lawyers, judges and legal scholars a jurisprudential account of why liberal judicial activism from the 1960's forward had been illegitimate. It was widely assumed that many, if not most, of these liberal decisions were inconsistent with the Framers' intentions; this fact,

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SOURCEBOOK, *supra* note 44, at 101; OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, supra note 44, at 14 ("Our fundamental law is the text of the Constitution as ratified, not the subjective intent or purpose of any individual or group in adopting the provision at issue."); OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3–6 (1988). For a discussion, see Nelson, *supra* note 42, at 555 (2003).

51. Robert Bork's *The Tempting of America* represents a transitional document between original understanding and original meaning. One of his research assistants was Stephen Calabresi, who would later help champion the new textualism. *See* ROBERT BORK, THE TEMPTING OF AMERICA, at xvii (1990). Thus the work contains pronouncements that endorse original meaning originalism, see, e.g., *id.* at 144–45, while Bork's substantive views in the book reflect his previous attachment to the philosophy of original intention and original understanding. Kesavan & Paulsen, *supra* note 40, at 1141 & n.96; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (offering positivist and majoritarian justifications for originalism); Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) ("I wish to demonstrate that original intent is the only legitimate basis for constitutional decisionmaking.").

Bork argued that judges were bound by the principles intended by the framers, a formula that allowed judges to take into account technological changes and to apply the document to conditions unforeseen by the framers. *Id.* at 826. Although this did not mean that "judges will invariably decide cases the way the Framers would if they were here today . . . many cases will be decided that way." *Id.* He argued that the framers' principles should be discovered and applied "by choosing no level of generality higher than that which the interpretations of the words, structure, and history of the Constitution fairly support." *Id.* at 828. Hence the Equal Protection Clause could not protect homosexuals because "equality on matters such as sexual orientation was not under discussion." *Id.* In essence, Bork claimed that the scope of constitutional principles was defined by the framers' original expected application, but that such principles, once defined, could be applied to circumstances that the framers did not foresee, such as "apply[ing] the first amendment's Free Press Clause to the electronic media," or "the Commerce Clause to state regulations of interstate trucking." *Id.* at 826. At the same time, Bork argued that sufficient reliance had grown up around the construction of the administrative and regulatory state that courts had to retain New Deal Commerce Clause decisions that were inconsistent with the Framers' intentions; the same might be true of many other features of current doctrine. Philip Lacovara, A Talk with Judge Robert H. Bork, DISTRICT LAWYER, May/June 1985, at 29, 32; *Nomination of Judge Robert H. Bork: Hearings before the Senate Committee on the Judiciary*, 100th Cong. 112–13, 264–65, 292–93, 465 (1987), *reprinted in* 14 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1987, at 292–93, 444–45, 472–73, 645 (Roy M. Mersky & J. Myron Jacobstein eds., 1989) [hereinafter HEARINGS AND REPORTS] (testimony of Robert H. Bork from Sept. 15, 1987 – Sept. 19, 1987).

Bork gives no evidence in *The Tempting of America* that the change in terminology from original intentions of the framers to original understanding to original meaning would require a shift in his previous substantive positions. This conflation of original meaning and what I would call adherence to original expected application is hardly unique to Bork, although his example suggests why the conflation would occur.

and not mere political disagreement with the substance of these decisions, explained why they were illegitimate.[52] Adherence to original intentions would restrain judges and restore democracy.

The turn to original meaning was designed to preserve these basic insights, not to undermine them. To be sure, it brought some changes. First, original meaning originalism might cause scholars to look to new kinds of historical evidence—for example, dictionaries—and to look to other historical evidence differently than before—for example, as evidence of what a reasonable and well-informed person living at the time of enactment would have understood the constitutional text to mean.[53] Second,

52. Meese, *Construing the Constitution*, *supra* note 44, at 29; Edwin Meese III, *Dialogue: A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 930–33 (1996); WHITTINGTON, *supra* note 42, at 599; O'NEILL, *supra* note 43, at 133–60. The Office of Legal Policy's ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, *supra* note 44, listed several examples of recent cases that employed "non-interpretive jurisprudence," *id.* at 58–64, including Mapp v. Ohio, 367 U.S. 643 (1961) (announcing the exclusionary rule); Engel v. Vitale, 370 U.S. 421 (1962) (striking down practice of nondenominational school prayer in public schools); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional prohibition on use of contraceptives by married couples); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring specific procedures governing police interrogation of all criminal suspects); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding features of the 1965 Voting Rights Act on grounds of Congress's authority to interpret the Fourteenth Amendment); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that constitutional right to travel prevented denial of welfare benefits to those who did not meet one-year residency requirement); Perez v. United States, 402 U.S. 146 (1971) (upholding federal crime of "loan sharking" under Commerce Clause); Furman v. Georgia, 408 U.S. 238 (1972) (striking down then-existing capital punishment statutes under Eighth Amendment); Roe v. Wade, 410 U.S. 113 (1973); and Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (holding that public school students had a constitutional "right to receive ideas" in public school libraries). The Sourcebook cautioned, however, that "[t]he ultimate results reached in these cases do not necessarily differ from the meaning, but the analysis in each case is both illegitimate and representative of the jurisprudence advocated by non-interpretivists today." ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, *supra* at 44.

53. *See* Kesavan & Paulsen, *supra* note 40, at 1143–49. Gary Lawson's version of original meaning originalism is particularly worthy of note because he takes this premise further that most contemporary originalists. He argues that originalism "is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398. Lawson's "ideal observer" approach to original meaning gives him a different focus than other originalists; it means, for example, that the political statements and decisions of early politicians are not necessarily trustworthy guides to original meaning. In particular, "members of Congress, even those who participated in the drafting and ratification of the Constitution, are not disinterested observers. They are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution." *Id.* Hence, early Congressional acts were "postenactment legislative history that ranks fairly low down on the hierarchy of reliable evidence concerning original meaning" and "whatever evidence can be gleaned from early stat-

adherents of original meaning insisted that the theory was perfectly consistent with applying constitutional guarantees to new technologies.[54] Finally, although originalists often tied their critique of the Warren and Burger Courts to calls for judicial restraint, advocates of original meaning did not oppose courts striking down some laws—for example, laws that trenched on state sovereignty—where text, history, and structure supported it. This evolution in views on judicial restraint became particularly important as conservative judges began to dominate the federal courts.[55]

Nevertheless, the turn to original meaning was not designed to drive a wedge between the text's public meaning and how the framing generation would have expected the text would be applied.[56] That distinction, which I call the distinction between original meaning and original expected application, was not particularly salient in the move to original meaning. Original meaning originalism sought to put originalism on a stronger theoretical footing, not to undo the conservative critique of liberal judicial activism. Far from it: conservative lawyers and judges in the midst of a powerful social movement would hardly have turned to a theory of interpretation that they believed would subvert most of their settled views about constitutional law. They assumed that original meaning originalism, like the jurisprudence of original intention, would discipline courts and prevent them from new adventures.[57] As Caleb Nelson put it,"our

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utes—and there is evidence in both directions—is minimally relevant." *Id.*

54. *See* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, *supra* note 44, at 24–25.

55. WHITTINGTON, *supra* note 42, at 167–168.

56. For example, The Reagan Justice Department's *Guidelines on Constitutional Litigation* explained that in cases involving the Constitution's vague or abstract clauses, lawyers should look to the intended scope of a constitutional provision:

> [T]erms such as "equal protection" or "free exercise" are less easy to define, making a more detailed inquiry into the historical context or other evidence of the intent of those responsible for drafting or ratifying the provision not only useful, but necessary to discover the values and principles embodied in those terms. While there is no mechanistic formula for discovering underlying values and principles and applying them to particular issues, a genuine attempt is required to discover those values and principles and their intended scope from particular constitutional provisions (alone or in concert with other provisions), and then to apply them in a manner consistent with the original meaning.

GUIDELINES ON CONSTITUTIONAL LITIGATION, *supra* note 50, at 5. To assist lawyers in discovering these values and principles, the *Guidelines* included a helpful bibliography "of sources available for gleaning historical evidence of the Founders' intentions." *Id.* at 11.

57. As Justice Scalia explained at his confirmation hearings, there was "not a big difference" between the two ideas. *Nomination of Judge Antonin Scalia: Hearings before the Senate Committee on the Judiciary*, 99th Cong. (1986), *reprinted in* 13 HEARINGS AND

views of 'original meaning' and 'original intention' will tend to converge in practice even if the two concepts remain distinct in theory."[58]

That is where my argument comes in. Scholars like Ronald Dworkin,[59] Randy Barnett,[60] Mark Greenberg, and Harry Litman[61] have pointed out that the move to original meaning had an unintended consequence. Fidelity to original meaning did not require following what the framing generation thought the consequences of adopting the words would be. That is especially so when the text employs abstract principles. *Abortion and Original Meaning* demonstrates this with respect to one issue that few people believed was consistent with originalism of any sort: the abortion right. However, as I have argued, the abortion right (although not the logic of *Roe v. Wade*[62] itself) is consistent with the original meaning of the Fourteenth Amendment. Indeed, for that matter, so are the results in *Romer v. Evans*[63] and *Lawrence v. Texas*.[64] Once we understand the logical consequences of moving from original intention and original understanding to original meaning, we see that original meaning originalism—or at least the version I offer here—is actually a form of living constitutionalism.

Although Berman is correct that most originalists have adopted some form of original meaning originalism, it does not follow that they all have adopted a form of original meaning that sharply distinguishes between original meaning and original expected application. Today's original meaning originalists often view original expected applications as very strong evidence of original meaning, even (or perhaps especially) when the text points to abstract principles or standards. That is why I argued that today's originalists often conflate the two ideas in practice.

REPORTS, *supra* note 51, at 89, 142 (testimony of Antonin Scalia on Aug. 5, 1986).

58. Nelson, *supra* note 42, at 558.

59. Dworkin, *supra* note 42, at 115, 116, 119; RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 13, 291–92 (1996); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1255–58 (1997); Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1803–08 (1997).

60. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L REV. 611 (1999).

61. Greenberg & Litman, *supra* note 42.

62. 410 U.S. 113 (1973).

63. 517 U. S. 620 (1996).

64. 539 U.S. 558 (2003). In my view both laws would violate the principle against class and caste legislation. *See* Balkin, *supra* note 2, at 322-28.

Rather than try to offer a survey of contemporary originalists to prove this point, let me offer two illustrative examples. The first is Michael McConnell's well-known originalist defense of *Brown v. Board of Education* in 1995.[65] Before McConnell's article, most people accepted Alexander Bickel's conclusion that the framers of the Fourteenth Amendment did not intend to prohibit segregated public schools.[66] In fact, there was considerable opposition to desegregated schools throughout the country at the time of the Amendment.[67] However, McConnell showed that in the years following the ratification of the Fourteenth Amendment, many of the Congressmen and Senators who proposed the Fourteenth Amendment argued for desegregation of schools in proposed federal legislation (what eventually became the Civil Rights Act of 1875).[68] Moreover, they supported this legislation on constitutional grounds, because they believed that segregated public schools violated the Fourteenth Amendment.

Although scholars have pointed out various problems with the argument,[69] my goal here is not to dispute McConnell's conclusions. My point, rather, is that his research, while admirable, is completely unnecessary once we accept the distinction between original meaning and original expected application. For an original meaning originalist—at least one of my persuasion—*Brown* is a supremely easy case. The Equal Protection Clause prohibits class legislation and caste legislation.[70] Segregation of public schools, like segregation of public facilities generally, was designed to single out a particular group for special burdens and disabilities, subordinate them and send a message about their inferiority. Therefore it violates the Equal Protection Clause. That is true whether or not the generation of 1868 believed or ex-

65. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) [hereinafter McConnell, *Originalism and the Desegregation Decisions*]; Michael W. McConnell , *The Originalist Justification for Brown: a Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995) [hereinafter McConnell, *Originalist Justification for Brown*].

66. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

67. McConnell, *Originalist Justification for Brown*, *supra* note 65, at 1938–39 ("school desegregation was deeply unpopular among whites, in both North and South, and school segregation was very commonly practiced."); Earl M. Maltz, *Originalism And The Desegregation Decisions—A Response To Professor McConnell*, 13 CONST. COMMENT. 223, 228–29 (1996); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885–94 (1995).

68. McConnell, *Originalism and the Desegregation Decisions*, *supra* note 65, at 953. The Civil Rights Act of 1875 was struck down in the *Civil Rights Cases*, 109 U.S. 3 (1883).

69. Maltz, *supra* note 67, 224–228; Klarman, *supra* note 67, 1901–1928.

70. *See* Balkin, *supra* note 2, at 313–16.

pected that segregation violated the principle against class and caste legislation. What matters is the original meaning of the text and its underlying principles, not how people expected the text would be applied.

If that is so, all McConnell had to do was explain that the text of the Equal Protection Clause enacted the principles against class legislation and caste legislation and then apply these principles to the case of segregated schools in 1954. In the alternative, he could have used the Privileges or Immunities Clause, which guaranteed civil equality for citizens. By 1954, McConnell argued, it was generally accepted that education was a civil right.[71] Hence segregated public schools violated the Privileges or Immunities Clause. In fact, because the Fourteenth Amendment's Due Process Clause also contains an anti-class legislation principle,[72] segregation of public schools also probably violates the Due Process Clause. Under my original meaning approach, the case for *Brown* is overdetermined by three different clauses of the Fourteenth Amendment!

It takes about two paragraphs to explain this.[73] So why did McConnell take dozens of pages? The answer is that he assumed that the best way to prove the original meaning of the Fourteenth Amendment was to show how the Congress that proposed it would have interpreted and applied it. That is, he thought that the best evidence of original meaning was evidence of original expected application. Equally interesting is that McConnell did not use evidence of original expected application by the *ratifiers* of the Amendment—whom McConnell conceded probably strongly supported school segregation.[74] Rather, he used evidence of original expected application by the *framers*—Republican supporters of the Fourteenth Amendment in Congress. Ironically, McConnell made his case for *original meaning*

71. McConnell, *Originalism and the Desegregation Decisions*, *supra* note 65, at 1103–04. McConnell, *Originalist Justification for Brown*, *supra* note 65, at 1951.

72. Balkin, *supra* note 2, at 314–15 & n.53; *See* James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 337–38 (1999); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 258–59 & n. 58 (1997); Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer For Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1376 (1990).

73. Charles Black did it more elegantly in about eleven pages. And he did it roughly contemporaneous with *Brown*. *See* Charles Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

74. McConnell, *Originalist Justification for Brown*, *supra* note 65, at 1938–39.

by making a case based on the *original intentions* of the framers.[75]

My second example of how original meaning and original expected applications run together in practice comes from this very symposium. John McGinnis and Michael Rappaport argue that a "strong dichotomy between original expected applications and original meaning" is "improbabl[e]."[76] "[W]hile the original meaning may not be defined by the expected applications," McGinnis and Rappaport explain, "these applications will often be some of the best evidence of what that meaning is."[77] This is true, they argue, even "when a constitutional provision is best understood as adopting a general understanding or principle." because "verbal formulations often do not tell us which particular variation of a principle was intended."[78] Hence, even if the Equal Protection Clause enacts "an anticaste principle, . . . it may not clearly indicate the version of the principle that was adopted—to what extent, and under what circumstances, the principle allowed distinctions between different groups. The expected applications will help us determine which version of the principle was adopted."[79] Put in more concrete terms, we should not assume that the anticaste principle applies to legislation that burdens women or homosexuals if the generation that produced the Fourteenth Amendment would not have applied the princi-

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75. One reason he did so is that McConnell believed that the Fourteenth and Fifteenth Amendments were different from ordinary amendments. The views of Congress mattered more than the views of the ratifiers, so that even if "school desegregation was deeply unpopular" among the ratifiers, it was the understandings of Congress that counted. McConnell, *Originalist Justification for Brown*, *supra* note 65, at 1939 ("these were not ordinary times. This was a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular opinion."). As McConnell explained in his original article:

> [F]ar more than other amendments, the Fourteenth Amendment was a congressional creation. The states and the people exercised little control. The state ratification debates did not dwell on the details of the proposed Amendment, and—an important point—the margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling: it is Congress that effectively exercised the amendatory power.

McConnell, *Originalism and the Desegregation Decisions*, *supra* note 65, at 1109.

76. McGinnis & Rappaport, *supra* note 1, at 378.

77. *Id.*

78. *Id.* at 379.

79. *Id.* This resembles the argument made in the Reagan Justice Department's 1988 GUIDELINES ON CONSTITUTIONAL LITIGATION, *supra* note 50.

ple to these groups. Thus, McGinnis and Rappaport argue that we should use original expected application to define the scope of constitutional principles so that they produce results that conform to the original expected application. This, they believe, is necessary to ensure fidelity to original meaning where the text points to an abstract principle. But to adopt this method is essentially to reinstitute a new form of expectations originalism under the guise of original meaning.

McGinnis and Rappaport's point is that without the constraining force of original expected applications, original meaning originalism will not provide the necessary constraint against interpretive changes by unelected judges. It will not do what the turn to originalism in the 1980's was designed to do—limit liberal judicial activism. As they explain, "discarding expected applications in favor of abstract principles, as influenced by social movements, transfers tremendous power from the enacters of the Constitution to future interpreters. A Constitution that was established to place limits on future government actors would not delegate power so generously."[80]

This begs the question of what abstract provisions in a constitution are designed to do—are they designed only to limit future generations, or are they also designed to delegate the articulation and implementation of important constitutional principles to the future? I shall return to this important question when I consider McGinnis and Rappaport's theory of supermajority rules. For the moment, however, my argument is addressed to Berman's claim that originalists, and particularly conservative originalists, abandoned original expected applications when they turned to original meaning originalism. McGinnis and Rappaport suggest that this is not so; indeed, using original expected application to limit the scope of constitutional principles is particularly important especially with respect to the cultural and moral issues that divide liberals and conservatives today.

Where subsequent experience shows that the framers' generation was clearly mistaken "as a factual matter"[81]—for example, about whether certain deposits were gold, McGinnis and Rappaport agree that we are not bound by original expected applications of the text. But where we think that the framers were mistaken *morally*, a different presumption should apply, and original meaning should stay close to original expected applica-

80. McGinnis & Rappaport, *supra* note 1, at 378.
81. *Id.* at 379.

tion: "[W]here a legal provision purports to incorporate moral or policy beliefs and those beliefs are open to several interpretations, one is much less justified in concluding that the expected applications of people at the time were mistakes."[82] Quite the contrary: "It is more likely that later interpreters are mistaken about the content of the provision that was adopted than that interpreters at the time were mistaken about the meaning of the provisions they wrote."[83]

McGinnis and Rappaport are not worried only about runaway judges. They are also concerned that later generations will assume the authority to determine the meaning of the Constitution's abstract guarantees for themselves. "[D]iscarding expected applications in favor of abstract principles, as influenced by social movements, transfers tremendous power from the enacters of the Constitution to future interpreters."[84] "[I]t is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if social movement[s] have such substantial discretion to apply constitutional provisions as they see fit."[85] "[W]hy," they ask, "would one adopt a fixed constitution if it can be changed so easily by social movements?"[86] Put another way, McGinnis and Rappaport object to discarding reliance on expected applications because it makes original meaning originalism a form of living constitutionalism.

IV. ORIGINAL MEANING AND DELEGATION TO THE FUTURE

A. DO SUPERMAJORITY RULES PRECLUDE DELEGATION TO THE FUTURE?

McGinnis and Rappaport criticize the text and principle approach by invoking their own defense of originalism based on supermajority rules. The argument goes something like this: The best justification of original meaning originalism is not democracy, or the rule of law, or judicial restraint. It is that originalism leads to superior consequences.[87] Construing the Constitution according to its original meaning leads to superior consequences

82. *Id.*
83. *Id.*
84. *Id.* at 378.
85. *Id.* at 381.
86. *Id.*
87. *Id.* at 371, 374; McGinnis & Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U.L. REV. 383 (2007).

because the Constitution was passed according to an supermajority rule. A supermajority rule leads to superior consequences because it requires the concurrence of many different people with many different viewpoints.

In order to take advantage of the superior consequences of supermajority rules, we must preserve their meaning over time. That means applying them according to the rules of interpretation in place at the time they were adopted.[88] McGinnis and Rappaport do not offer any evidence of what rules of interpretation people in 1868 would have used. Nevertheless, they assume that the people who adopt supermajority rules are likely to be risk averse and they would not have agreed to delegate the application of these rules to future generations.[89] Hence it follows that there can be no strong divergence between original meaning and original expected application.

McGinnis and Rappaport's assumptions are not borne out historically either in the American experience or in the experience of other nations. Contrary to their assumptions, constitutional framers and ratifiers very often use open-ended language that quite deliberately delegates questions of application to future interpreters, and they did so in 1868. Precisely because supermajority rules must appeal to a broad range of people, framers will use abstract and general language to paper over disagreements that would emerge if more specific language were chosen. In the alternative, constitutional framers will remain silent about particular issues to avoid destroying a supermajority coalition.

The 1787 Constitution contains many artful silences and decisions by its framers to agree to disagree. These ambiguities were necessary to its ratification, and as soon as the ink was dry on the document its framers and ratifiers began disagreeing about many of its central features, including most prominently, the scope of powers given to the new federal government. For example, James Madison and Alexander Hamilton, both of whom attended the Federal Convention—and who co-authored the Federalist Papers!—immediately began to disagree about Congress' ability to charter a national bank.

88. McGinnis & Rappaport, *supra* note 1, at 374.
89. *Id.* at 372, 380.

B. DID THE FRAMERS OF THE FOURTEENTH AMENDMENT DELEGATE TO THE FUTURE?

This feature of constitutional drafting is particularly important in understanding the Fourteenth Amendment, the source of many of the most important contemporary disputes about constitutional rights. The framers of section 1 of the Fourteenth Amendment deliberately chose a text with fairly abstract principles and vague standards that would delegate most issues to the future while choosing much more determinate rules for sections 2 through 4 of the same amendment. This difference in language is not accidental; it is characteristic of how and why people draft constitutions that large numbers of people with very different views must agree to.

The Fourteenth Amendment was simultaneously a new addition to the Constitution, a campaign proposal for the 1866 elections and an armistice to be imposed on the defeated South. Sections 2 through 4 of the Amendment, written mostly in determinate rules, formed the major terms of the armistice, and were the subject of the most vigorous debate. They offered a new formula for apportionment for the House of Representatives, rules securing the payment of Union debt and the nonrecognition of Confederate debt, and restrictions on the eligibility of former rebels for national political office. Section 1, by contrast, was a general statement of principles that established a new theory of citizenship designed to secure basic rights for the freedmen, while Section 5 empowered Congress to pass new civil rights legislation enforcing these principles.

Congress chose general phrases in Section 1 because of the conflicting interests and values of moderates and radicals within the Republican Party and because of concerns about how more specific guarantees of rights for blacks would play in the 1866 elections and the ratification campaign. The Fourteenth Amendment served as the Republican's platform for the elections of 1866, and "[l]ike all American party platforms, the Republican Platform for 1866 had to be sufficiently ambiguous and broad to attract quite divergent segments of the nation's electorate."[90] Moderates and radicals chose open-ended "language capable of growth"[91] that papered over their differences and allowed them to present a unified front that would appeal to a

90. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 143 (1988).

91. Bickel, *supra* note 66, 59–63.

wide range of constituencies. Moderates could report to their constituents that phrases like "privileges or immunities" and "equal protection" did not require integrated facilities and did not threaten laws against interracial marriage; radicals could point to the broad guarantees of equal citizenship to push for future reforms.[92] By deliberately using language containing broad principles, specific applications would be left to future generations to work out.[93]

McGinnis and Rappaport's assumption that supermajority rules lead to risk averse adopters who demand fidelity to original expected applications has it almost exactly backwards. Supermajority requirements make it so easy to scuttle a proposed amendment that rights guarantees are likely to be framed in broad abstract terms that different parties can read according to their own understandings and expectations. Supermajority rules, in short, are sometimes more likely to produce delegations to the future—whether through silences or vague abstractions—than rules that require only simple majority support.

C. WHY DO CONSTITUTIONS HAVE ABSTRACT RIGHTS GUARANTEES?

For the moment, however, let me put aside these political considerations, and the particular context of the ratification of the Fourteenth Amendment. McGinnis and Rappaport assume that supermajority rules would lead constitutional drafters and adopters to choose provisions (and interpretive rules) that delegate as little as possible to the future. I disagree. In fact, there are several reasons why constitution drafters might deliberately choose (and adopters support) open-ended standards in a Constitution that requires supermajorities to amend. These reasons flow from the purposes for having constitutions in the first place.

Justice Scalia has argued that a constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away," because societies may not progress, or mature, but rather "rot."[94]

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92. *Id.*; *See also* CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (Remarks of Rep. Stevens) (describing the Fourteenth Amendment as a "mutual concession" and compromise "among men as intelligent, as determined, and as independent as myself, who, not agreeing with me, do not choose to yield their opinions to mine.").

93. NELSON, *supra* note 90, at 143–45.

94. Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 42, at 3, 40. Thus, Scalia argues that we should look to the

If he is right, then it would be puzzling why so many constitutions—not only the U.S. Constitution, but also most post-World War II constitutions—would contain abstract and relatively open-ended rights guarantees. Of course, this incongruity is why expectation originalists argue that we must interpret these provisions, despite their apparent language, to prevent them from being open-ended.[95] Nevertheless, if this feature of constitutional language occurs repeatedly in constitutions in different times and places, we might conclude one of two things. Either constitutional drafters and ratifiers are not as risk averse as McGinnis and Rappaport assume they are, or, they think that the best results come from using abstract principles and standards and leaving difficult issues of application for later generations to decide.

Implicit in Scalia's theory of constitutions as preventing rot is a narrative of decline: because the future may be tempted to stray from the hard won victories of the past, later generations must be held to the concrete practices and expectations of earlier generations, who, at least by comparison, are more noble and moral.

Something important is missing in this vision, precisely because it cannot explain why constitution makers—not only the Founding Fathers, but most constitution makers in the two centuries that followed them—would have drafted broad and abstract guarantees of rights and liberties. The widespread adoption of these open-ended rights provisions suggests that Scalia is incorrect about the goals of constitutionalism. The "whole purpose" of constitutions cannot be simply to forestall political judgment by later generations on important issues of justice, to preserve past practices of social custom or judgments of political morality, or to freeze existing assessments of rights in time. When we view these open-ended rights provisions together with the more rule-like structural features of constitutions, we can see that they serve a somewhat different goal. They are designed to *channel* and *discipline* future political judgment, not forestall it.

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original expected application of the Cruel and Unusual Punishments Clause because we need protection against "the moral perceptions of a future, more brutal generation." Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 42, at 129, 145 [hereinafter Scalia, *Response*].

95. *See* McGinnis & Rappaport, *supra* note 1, at 378–81 (arguing for reading abstract principles close to original expected applications); Scalia, *Response*, *supra* note 42, at 129, 135 (arguing against reading the Bill of Rights as aspirational); *id* at 145 (arguing for reading the 8th Amendment according to original expected application).

There is an important difference between blocking future judgment and disciplining it, between freezing certain results in place and creating channels for future development. In the latter case, we do not necessarily assume that later generations will be either more noble or less noble than existing ones.[96] Rather, we seek to structure future political decision making so that it is most likely to adapt itself to changing circumstances in ways that promote fairness, justice, political stability and other goods of political union.[97] Even if—like America's own Founders—we are optimistic that later generations will progress morally, later generations will still need such disciplining features, and these features may even assist them in achieving progress.

Channeling political judgment, as opposed to freezing moral expectations in time, inevitably delegates important questions of justice and fairness to the future. This is most obvious in the case of the structural provisions of constitutions, which set ground rules for everyday politics and for later state building activities. But it is also true of rights-based provisions; the latter not only serve structural goals (think about rights of jury service and political participation) but also shape the tradition of future discussion and mobilization about rights.

Structural and rights-protecting features of constitutions channel future judgments about political morality in several ways. First, structural and rights-based provisions help prevent dominant or concentrated majorities from oppressing diffuse or politically weaker minorities. Federalism and separation of powers are good examples; so too are guarantees of equality and liberty. These elements may range from relatively concrete rules to more general and abstract principles and standards. Rights provisions may have to be open-ended because we do not know what kinds of majorities and minorities will develop over time or what kinds of rights future minorities will need to avoid oppression. Although freedom of political expression and suffrage are central protectors of minority rights, they may not always be sufficient—by definition, minorities are not majorities. In any case,

96. In any case, the framers of the American Constitution were optimists who believed in Enlightenment values of human progress, although they well understood the recurrent temptations of power, selfishness, and avarice in the political struggles of history.

97. For a good discussion, on which the next few paragraphs are based, see CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 12–20 (2001); Christopher L. Eisgruber, *Should Constitutional Judges Be Philosophers?*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 5, 19–21 (Scott Hershovitz, ed., 2006) [hereinafter Eisgruber, *Should Constitutional Judges Be Philosophers?*].

the American Constitution as drafted did not guarantee suffrage as a positive right, and even the Constitution as amended still merely limits certain kinds of restrictions on suffrage.

Other constitutional features—like the system of checks and balances and guarantees of equal treatment, due process, and legal and political accountability—help preserve political stability and keep the enterprise of governance going when people disagree strongly about what is just or unjust. Finally, supermajority requirements on adopting and amending constitutions have an important admonitory function. Rather than preventing the exercise of political judgment, it forces majorities to think hard about the consequences of what they want to do because they and their descendants will have to live with what they put in place for a long time.[98] This keeps majorities from focusing on short-term consequences—that might threaten political stability or have undesirable path-dependent effects—over long term consequences. It also creates a sort of temporal veil of ignorance. It encourages existing majorities to imagine themselves as potential minorities in the future. It also encourages them to imagine that their descendants may be part of different groups or regions or have different sets of interests and allegiances.

Because constitutions are not designed primarily to prevent moral rot but rather to shape, channel, and discipline future political judgment, it makes perfect sense that constitutions regularly contain open-ended rights provisions. We need not and should not assume that the scope of these provisions must stay close to original expected applications to do their work. Protection of basic rights and basic guarantees of justice may be particularly difficult because new situations continuously arise that the adopting generation cannot foresee. Moreover, our judgments of what is just and unjust are often dependent on surrounding factual assumptions about social, economic and political life. If those assumptions change, so too will our judgments. The changes may become quite significant over time if constitutional language lasts many years.

Thus, constitution makers may reasonably decide that it is better to adopt language that shapes the future discourse of debates about rights without trying to fully determine everything in advance. In drafting constitutional rights provisions, constitution makers may not do much more than provide a constitutional

98. Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. Rev. 893, 951–53 (1990).

grammar and vocabulary, a set of basic principles and textual commitments, and a practice of constitutional argument in which people reason about their rights. That is more or less what the American constitutional tradition has produced. In this tradition, the concrete judgments of the framing generation are quite important—in part because they set the tradition in motion and they explain the larger purposes behind guarantees of liberty and equality—but they are not decisive. Later generations have something to add to the understanding of these guarantees through the ways that they understand and apply the textual commitments and principles of earlier generations.[99] A central lesson of constitutional design is that the present cannot control everything that the future may do, and it should not try. Rather it should try to set up a system that both disciplines and nourishes the future without conclusively determining its shape.

D. BASIC LAW, HIGHER LAW AND OUR LAW

Finally, McGinnis and Rappaport's argument against delegation to the future fails to mesh with other important functions of the American Constitution. A successful constitution like America's must serve many different and overlapping functions. For convenience, I divide them into three categories: A constitution like America's must simultaneously work as *basic law*, as *higher law*, and as *our law*.

By *basic law* I mean that the Constitution sets up a basic framework of government that promotes political stability and allocates rights, duties, powers, and responsibilities. A constitution also serves as basic law in the sense that it is foundational law (or supreme law) that trumps other law to the contrary. To

99. We might look to original expected applications as a floor for rights that protect the equality and liberty of individuals and minorities. This is the point of Jed Rubenfeld's constitutional theory, which has both a descriptive and a normative claim. Rubenfeld's descriptive claim is that the American constitutional tradition has continued to uphold certain paradigm cases of rights and equality protections although these protections have sometimes greatly expanded. His normative claim is that this should be so, because maintaining paradigm cases is part of what it means to make a normative commitment. JED RUBENFELD, REVOLUTION BY JUDICIARY (2005) [hereinafter RUBENFELD, REVOLUTION BY JUDICIARY]; JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001) [hereinafter RUBENFELD, FREEDOM AND TIME].

Our previous analysis suggests why Rubenfeld's descriptive and normative claims make considerable sense. Even if the moral and political judgment of future generations progresses rather than rots or decays, future generations might retain these paradigm cases as central examples of what they see themselves as committed to. Maintaining those central examples establishes that they have these commitments and helps ground and channel the development of their commitments over time.

operate effectively as basic law, a constitution does not have to be just. But it must preserve political stability and channel political and legal decisionmaking so that the governmental system can sustain itself over time.

The American Constitution is far more than basic law in this sense. Americans also view their Constitution as a source of important values, including justice, equality, democracy, and human rights. They view the Constitution's guarantees as objects of aspiration; the Constitution either offers or refers to a standard that stands above ordinary law, criticizes it, restrains it, and holds it to account. Fidelity to the Constitution requires that we aspire to something better and more just than the political, social and legal arrangements we currently maintain. Hence the Constitution trumps ordinary law not simply because it is legally or procedurally prior to it, but because it represents important values that should trump ordinary law, supervise quotidian acts of governmental power, and hold both law and power to account. Thus, we say that the Constitution is not merely basic law, it is also *higher law*; that is, it is a source of inspiration and aspiration, a repository of values and principles. People sometimes use the terms "basic law" and "higher law" interchangeably; for example, the German Basic Law strongly protects human dignity, and Bruce Ackerman has famously argued that constitutional amendment outside of Article V is an example of "higher lawmaking."[100] I want to separate the two expressions because they point at different constitutional functions. The German Basic Law is both basic law and higher law in my sense, and constitutional amendments—whether inside or outside of Article V—might involve the creation of both new basic law and new higher law.

Finally, it is not enough that the Constitution serve as basic law—a framework for governance, or as higher law—a source of aspirational standards and values. It must also be *our law*. The people who live under it—the American people—must understand the Constitution as their law—not the law of Turkey, or the law of France or the law of South Africa. The South African Constitution may be widely admired as an example of contemporary constitution-making; but it is not our law. The Constitution works as our law when we identify with it and are attached to it, whether or not we consent to it in any official or legal sense. The Constitution works as our law when we view it as our

100. 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

achievement and the product of our efforts as a people, which simultaneously involves a collective identification with those who came before us and those who will come after us.

Viewing the Constitution as "our law" has a curious consequence: it helps us imagine ourselves as part of a collective subject persisting over time, the collective subject—We the People—whose law the Constitution is and to whom the Constitution belongs. Many features of a political culture can cause people to think of themselves as a collective subject that persists over time; but, at least in the United States, our Constitution also performs this function. Thinking of the Constitution as our law—the law of We the American people—involves a narrative conception that appeals to collective memory—to a stock of stories, symbols and understandings that bind people together and make them a people. Put another way, viewing the Constitution as "our constitution" is a *constitutional story*—a constitutive narrative through which people imagine themselves as a people, with shared memories, goals, aspirations, values, duties, and ambitions.

Viewing the Constitution as *our* Constitution simultaneously constitutes us as the people to whom our Constitution belongs. It is a "constitution" of We the People. It accepts and endorses a constitutional story about who Americans are and what America is—we are the people who broke away from Great Britain and who created and ratified the Constitution to secure our liberty, and so too will be our successors. Viewing the Constitution as our Constitution constructs a collective subject with a collective destiny that engages in collective activities. It binds together people living in different times and different places as a single people. It allows us to see the hopes, desires, actions, ambitions, and achievements of people who lived long ago as our hopes, desires, actions, ambitions, and achievements.

The success of this constitutional story is central to the present generation's attachment to the Constitution as their Constitution—even though they never consented to it or voted for it—and therefore to the Constitution's sociological legitimacy. Attachment is a different attitude than consent. We consent to something we have a choice in; but we can become attached to something that we live with or live in over time.[101]

101. Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 Widener L. Symp. J. 167 (1999).

The method of text and principle, I believe, serves the multiple functions of a constitution—as basic law, higher law, and our law—far better than other forms of originalism. An originalism that strongly distrusts delegation to future generations and demands that open-ended provisions must be closely connected to original expected application is defective in all three respects. That kind of originalism makes the most sense if we think of the Constitution only as basic law. It tries to turn open-ended principles and standards into something more concrete and rule-like, something whose effects will hopefully be more predictable and (in many cases) more constraining. But that is not the only way that constitutions could serve as basic law. As I argued previously, constitutions can also channel and give incentives for political stability and adaptation rather than merely block and constrain decisionmaking. In fact, the former is a far better way to understand the basic law function of a constitution.

Even if tying constitutional principles closely to original expected application works tolerably well as basic law, it fails utterly as higher law and as "our law." The idea of higher law views the Constitution as a repository of ideals morally superior to ordinary law and toward which ordinary law should aspire. It makes the Constitution an object of political and moral aspiration and offers a potential for redemption. Thus the higher law function of constitutionalism has a temporal dimension: the higher law is a set of principles that critiques present political arrangements and that we must try to realize over time.

The very notion of aspiration presumes the opposite of Scalia's narrative of decline.[102] It presupposes that each generation should strive to do better than the previous ones did. The idea of redemption assumes that the political arrangements of the past have features that must be redeemed.

Aspirationalism is Janus-faced. It recognizes that a constitution always exists in a fallen condition, that it inevitably contains compromises with evil and injustice. At the same time, it maintains that the constitution and the constitutional tradition contain elements and resources that can assist in their eventual redemption. Implicit in this notion of aspiration is the willingness to gamble on the future. It requires faith in future generations entrusted with working out and developing the Constitution's guarantees over time. Constitutional redemption requires faith

102. Not surprisingly, Scalia himself has little tolerance for the notion that constitutional guarantees could be aspirational. Scalia, *Response*, *supra* note 94, at 134–36.

in the constitutional tradition's ability to grow and improve, without any guarantees of success. Far from a fear that future guarantees will rot, an aspirational Constitution requires a steadfast belief that the evils of the present can and will be recognized and remedied, if not in our day then in the days to come.

Finally, a constitutional theory that distrusts delegation to the future fails as "our law." The Constitution is our law when we feel attachment to it and when we feel that we have a stake in it even if we did not consent to it officially. The Constitution is our law when we feel that it reflects our values sufficiently well that we can identify with it as ours; or, because we feel we have a say in what the Constitution means, we have faith that it could and will come to reflect our values better over time.[103] Thus, the idea of the Constitution as our law also has a temporal dimension. It requires an identification between ourselves, those who lived in the past and those who will live in the future. And it requires faith that the Constitution is either good enough as it is to deserve our respect and attachment or that it eventually will be redeemed.

For the Constitution to be "our law" it must do two things simultaneously. First, it must connect past generations to present ones through a process of narrative identification. It must allow us to see ourselves as part of a larger political project that stretches back to the present and forward to the future. The Constitution succeeds as our law when we can identify ourselves with those who framed and adopted it—we when are able to see ourselves as part of them and them as part of us. Second, the Constitution must allow us to identify our present principles and commitments with the principles of those who lived before us. Constitutional traditions achieve this by encouraging people in the present to call upon the past—and the struggles and commitments of the past—as their past and as their struggles and commitments. This understanding of the past frames our present situation and explains how we should go forward into the future. This identification between past and present allows us to say that we are continuing the work of those who came before us when we apply the Constitution's text and principles in light of our current circumstances.

Doing this necessarily requires delegation to the future, because each generation must see itself as given the task of apply-

103. For a more extensive discussion, see Jack M. Balkin, *Respect-Worthy*, supra note 36, at 498–501.

ing constitutional principles in its own time. We understand our present situation and the possibilities and needs of the future through the trajectory of our interpretation of the meaning of the past—both the principles we committed ourselves to achieving and the evils we promised ourselves we would not permit again. When we in the present perform this task, we carry forward the imagined political project that metaphorically connects us to those who came before us. Their principles are our principles, and, the Constitution they left us is our Constitution, reflecting not only their past commitments but also our present ones.

A theory of interpretation that refuses to allow this delegation does not allow the Constitution to be ours because it does not allow us to see our present day values in the Constitution as the application or fulfillment of past principles and commitments. If people feel that the Constitution's principles are not their principles, but simply imposed on them as a straitjacket from an alien past, the Constitution is not theirs, and it offers them little hope that it will come to be theirs in the future.

E. DO SUPERMAJORITY PROCEDURES PRODUCE BETTER RULES?

Finally, let me say a few words about McGinnis and Rappaport's more general project of grounding original meaning in the nature and superior consequences of supermajority rules. I think that the basic idea is quite intriguing, but I have a few doubts about the current version of the argument.[104]

To begin with, McGinnis and Rappaport claim that constitutional entrenchments based on supermajority rules are likely to have better consequences. Better than what? Entrenching legislation passed by simple majorities, presumably. If so, does that mean that increasing the supermajority requirements also increases the chance that the rules are optimal? For example, would a seven-eighths majority produce better rules than a three-fourths majority? What about unanimity? McGinnis and Rappaport have not considered the possibility that some supermajority procedures might produce better or worse conse-

104. See also Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. COLLOQUY 113 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/7/ (noting a series of difficulties with McGinnis and Rappaport's supermajority justification); Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 153–54 (2006) (offering various problems with supermajority rules).

quences than others, and that some supermajority rules—like a seven-eighths rule or a unanimity rule—might actually produce results inferior to simple majorities.

This is important because the U.S. Constitution has actually used different rules for different parts of the Constitution. Individual provisions of the 1787 Constitution required simple majorities in the Philadelphia Convention; the whole Constitution came into effect after simple majorities in any nine states. Later amendments under Article V require concurrence of two thirds of each House of Congress plus three quarters of the states then in the Union. One major anomaly is the Fourteenth Amendment—the Amendment whose provisions are most often at stake in civil rights litigation. It was passed by a rump Congress with less than full representation—Southern Congressmen and Senators were excluded—and Congress refused to readmit Confederate states unless they agreed to ratify the new amendment.[105] McGinnis and Rappaport need to explain whether all three of these adoption rules are equally good for the purposes of their argument, and why that should be so.

Second, supermajority rules may not produce rules with superior consequences precisely because so many different people need to agree on common language. Supermajority procedures produce two opposite effects. One is the temporal veil of ignorance I mentioned earlier. Because supermajority rules are hard to change later on, people will write try to write rules for conditions they may not be able to predict, and without knowing how their successors will be situated. The second effect is rent-seeking due to threatened hold-ups. Organized groups will exercise a veto power unless they can get lock-ins that satisfy their interests. Some of these lock-ins may benefit everyone in the

105. My colleagues Bruce Ackerman and Akhil Amar disagree about whether the adoption of the Fourteenth Amendment was legal or illegal. *Compare* 2 ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, 99–119, 207–34 (1998), *with* AMAR, *supra* note 12, 364–80. Note, however, that even if we assume that the Reconstruction Congress's decisions were perfectly legal, the Fourteenth Amendment was adopted according to what was in effect a different rule, because the degree of political support necessary for ratification was far less than Article V would normally require.

As Ackerman points out, had the Southern states been seated, the 14th Amendment would have required 162 votes (out of 243) in the House and 48 votes (out of 71) in the Senate. The measure received only 120 votes in the House and 33 in the Senate. ACKERMAN, *supra*, at 174. CONG. GLOBE, 39th Cong., 1st Sess., 3149 (1866) (House vote: yea 120, nays 82, not voting 32); *id.* at 3042 (Senate vote: yea 33, nay 11, absent 5). Sixty-one Southern Representatives and twenty-two Southern Senators were excluded. ACKERMAN, *supra*, at 456–57 n.26. Hence if Southern votes had counted, the Fourteenth Amendment was adopted by *less than a majority* of the full House and Senate.

long run, while others do not, and still others prove unworkable or cause enormous problems later on. When William Lloyd Garrison famously argued that the United States Constitution was "a covenant with death, and an agreement with hell," he meant that the Framers in the North had been forced by those in the South to agree to provisions that recognized and protected slavery. These provisions, including the infamous three-fifths clause and the electoral college, gave the slave states extra political power that allowed them to pass legislation protecting slaveholding interests.

In fact, we can generalize Garrison's point: All constitutions are agreements with hell. They always require very serious compromises with evil, injustice, or, at the very least, inefficiency, in order to meet the present day demands of stakeholders who want to lock in their particular advantages, however evil, unjust, or inefficient that lock-in might be. It is true that people with other interests will oppose them if those lock-ins damage their interests sufficiently. But they will not act as a check if the proposed rules do not threaten their particular concerns. Because slaves, women, Indians, immigrants, and working men without property were not represented at the bargaining table in the creation of the U.S. Constitution, even a Constitution that required supermajority acceptance would not reflect their distinctive objections to the evil, unjust, and inefficient lock-ins put in place. More generally, if the rules for drafting and adopting the Constitution are themselves unfair and undemocratic, some groups will be able to lock-in advantages that are evil, unjust or inefficient that a fair supermajority process would not have produced. Hence, McGinnis and Rappaport's argument must be not that *any* supermajority process produces superior rules, but that *a sufficiently fair* process does. They need to give an account of why the process that produced the U.S. Constitution was sufficiently fair to generate the benefits they claim.

It is quite true, as Akhil Amar has pointed out, that the ratification process between 1787 and 1791 was perhaps the most democratic that had ever existed up to that point.[106] But that does not mean that it was sufficiently fair from today's perspective, or, more to the point, from the perspective of the minimum degree of fairness required by McGinnis and Rappaport's theory. The various lock-ins for slaveholders—including the Electoral College and the three-fifths rule—suggest some of the

106. AMAR, *supra* note 12, at 16–18.

problems that later emerged. Strong evidence that supermajority procedures did not have their desired effect comes from the fact that the political system almost fell apart only a decade later as a result of the deadlocked election of 1800[107]—the framers had failed to account for the rise of political parties. And the best piece of evidence that supermajority procedures did not produce anything close to optimal rules is that the political system actually did fail in 1860, leading to a bloody civil war and the deaths of half a million soldiers. The Civil War is the major counterexample to McGinnis and Rappaport's thesis, and if they want to develop their ideas in the future they need to take account of it.

McGinnis and Rappaport argue that the Fourteenth, Fifteenth and Nineteenth Amendments cured any defects in the original system. Would that it were so. The Fifteenth Amendment was effectively a dead letter for years until the success of later social movements, the civil rights revolution and the passage of the Voting Rights Act. Similarly, the Fourteenth Amendment was quickly transformed from a potential guarantee of equal citizenship for blacks into a device for protecting corporations and entrenched economic interests; here again, it would take the work of later social movements to reinterpret the Fourteenth Amendment so that it protected the civil rights of blacks and later women. What cured defects in the original system—to the extent they have been cured—was not the interpretation of these amendments consistent with original expected application. Rather, it was the work of social movements who rejected these overly limited interpretations of the Constitution. Moreover, McGinnis and Rappaport's argument about blacks and women says nothing about the long term effects of political malapportionment prior to *Reynolds v. Sims*[108] or the continuing political malapportionment in the Senate or the electoral college.[109]

Third, and finally, new supermajority rules may not produce superior results if the status quo is particularly dangerous or unworkable. Supermajority rules may not eliminate evil, unjust, or inefficient lock-ins if the parties who oppose them are effectively over a barrel and need political agreement so much—for example, to prevent financial collapse, foreign invasion, or civil war—that they are willing to compromise their scruples away. This

107. BRUCE A. ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS (2005).
108. Reynolds v. Sims, 377 U.S. 533 (1964).
109. See LEVINSON, *supra* note 20, at 49–62.

well describes the conditions at the time of the Founding. Economic conditions were very bad following the Revolution, and the mercantile classes in the North were eager to reach a deal that would preserve their interests. The Framers were deeply concerned about insurrections. There had almost been a military coup at Newburgh, New York, in 1783; and Shay's rebellion in western Massachusetts had finally been put down only months before the Framers met in Philadelphia. For many members of the founding generation, almost any deal would have been better than the status quo. The United States was a weak power with a small population and long borders that were difficult to defend. It was potentially easy pickings for the great colonial powers of Europe. (Indeed, the country was successfully invaded by Great Britain and its capital city set aflame less than thirty years later in 1814.). Threats from inside and outside the country may have led the ratifiers to take what they could get, rather than hold out for the best possible set of rules judged either by contemporary standards or the standards of the time. At the close of the Philadelphia convention, Benjamin Franklin famously stated that he would sign the Constitution "with all its Faults" because it was the best that the country could probably have produced under the circumstances.[110]

V. ORIGINAL MEANING AND PRECEDENT

One interesting consequence of the differences between my view of original meaning and McGinnis and Rappaport's involves the status of non-originalist precedents. In fact, we largely agree on this question, but because we disagree about how to understand and apply original meaning, we arrive at very different places.

McGinnis, Rappaport, and I agree that a system of precedent was assumed by the constitutional structure, although practices of precedent—what constitutes a precedent (as opposed to dictum), what force precedents should have, and so on, may have changed over time.[111] This fact presents no special problems for me, because I allow a fair amount of subsequent constitu-

110. The Debates in the Federal Convention of 1787 reported by James Madison, (Sep. 17, 1787) *in* The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/debates/917.htm; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 641–43 (Max Farrand, ed., Rev. ed. 1937); Benjamin Franklin's Speech at the Conclusion of the Constitutional Convention (Sep. 17, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION 3–4 (Bernard Bailyn ed., 1993).

111. McGinnis & Rappaport, *supra* note 1, at 376.

tional construction to implement constitutional text and principle. However, it does create a problem for McGinnis and Rappaport because they believe that the practice of precedent is justified by the combination of original meaning and interpretive rules in place at the time of the founding.[112] If the interpretive expectations about precedent in place in 1787 differed markedly from those we have today, it is not clear why McGinnis and Rappaport could accept our existing practices. They offer two possible examples of practices at the founding that do not obtain today: One is that precedents could be modified by statute; a second is that precedents should be followed only when they resolved ambiguities, but not to preserve clear errors.[113]

Because McGinnis and Rappaport's argument for originalism calls for following original interpretive rules and practices, legislatures should be able to displace decisions like *Brown v. Board of Education* by statute. Moreover, where decisions—like *Loving v. Virginia*, *Craig v. Boren*, *Bolling v. Sharpe*, or *Reynolds v. Sims*—are clearly inconsistent with original meaning (that is, McGinnis and Rappaport's version of original meaning, not mine), these precedents should deserve no special respect and may be overturned. That is not, however, what McGinnis and Rappaport say: Instead, they suggest that "modern precedent rules, as authorized by federal common law and influenced by the structure of the Constitution, might establish stronger protections for some precedent."[114] They need to say a bit more about why this would be legitimate under their theory.

Like all originalists, McGinnis and Rappaport must consider under what conditions they would retain precedents that are inconsistent with original meaning as they define it. What gives this question particular importance for McGinnis and Rappaport, however, is that, unlike me, they want to maintain a fairly strong connection between original meaning and original expected application. They do not offer a full-scale theory of precedent; however, their brief remarks suggest a test much stricter than that of originalists like Justice Scalia, who will maintain non-originalist precedents where there has been considerable public reliance. McGinnis and Rappaport argue that "[w]here it is clear that a precedent has been widely and deeply accepted so that overturning it would lead to a constitutional

112. *Id.* at 376.
113. *Id.* at 376–78.
114. *Id.* at 376.

amendment, a strong argument exists for the Court to continue to adhere to the precedent, even if it represents a clear error."[115] In other words, we should keep non-originalist precedents if overturning them would lead to a constitutional amendment that overturned the new decision.[116] They offer the example of the 1970's sex equality cases. They assert that "had the Supreme Court not interpreted the Equal Protection Clause to provide equal rights to women, such rights almost certainly would have been adopted by constitutional amendment."[117]

I am unsure whether this example is a good one; as Justice Brennan pointed out to the other Justices when they were considering *Frontiero v. Richardson*,[118] the drive for the ERA had stalled before the Court began applying heightened scrutiny to sex classifications.[119] Certainly there is no guarantee that the ERA would have passed but for the Supreme Court's sex equality decisions. Moreover, the test they offer does not ask whether an amendment would have passed but for the Court's anticipatory interventions. Instead, the test is whether if the Court's sex equality cases were overruled today, the country would enact the

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115. *Id.*

116. McGinnis and Rappaport's position follows from their views about supermajority rules. They argue that original meaning should control interpretation because supermajority rules have superior consequences: to enjoy the benefits of these rules we must interpret and apply these rules according to the interpretive expectations of the generation that created them. But if we allow judges to displace these rules with doctrines that were not even created by a majority, we lose their superior benefits. *See* McGinnis & Rappaport, *supra* note 87, at 390 ("[t]he doctrines fabricated by the Supreme Court justices are likely to lead to worse consequences than doctrines that flow from the original meaning of the Constitution.")

117. McGinnis & Rappaport, *supra* note 1, at 376.

118. 411 U.S. 677 (1973) (plurality opinion).

119. On March 6, 1973, Brennan wrote Powell explaining that waiting for the ERA—which was unlikely to gain the necessary ratification by three quarters of the states—would be a waste of time:

> [W]e cannot count on the Equal Rights Amendment to make the Equal Protection issue go away. Eleven states have now voted against ratification (Arkansas, Connecticut, Illinois, Louisiana, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Utah, and Virginia). And within the next month or two, at least two, and probably four, more states (Arizona, Mississippi, Missouri, and Georgia) are expected to vote against ratification. Since rejection in 13 states is sufficient to kill the Amendment it looks like a lost cause. Although rejections may be rescinded at any time before March 1979, the trend is rather to rescind ratification in some states that have approved it. I therefore don't see that we gain anything by awaiting what is at best an uncertain outcome.

Letter from William J. Brennan to Lewis F. Powell, Jr. (March 6, 1973), (Justice Harry Blackmun Papers, Box 163, Folder 9; on file with The Library of Congress). Brennan added that "whether or not the Equal Rights Amendment eventually is ratified, we cannot ignore the fact that Congress and the legislatures of more than half the States have already determined that classifications based upon sex are inherently suspect." *Id.* Brennan emphasized this point in his *Frontiero* plurality opinion. 411 U.S. at 687–88.

ERA. It might, but then again it might not, especially if people today viewed the consequences as fully equal deployment of women in military combat, unisex bathrooms and same-sex marriage. McGinnis and Rappaport do not tell us what degree of confidence we need to have that such an amendment would pass today. If they would require "almost certain[ty],"[120] virtually nothing would pass the test because the supermajority rules in Article V make it so easy for a minority to block an amendment. A determined minority only need win more than a third of one house of Congress or a majority in one house of 13 state legislatures. It is easy to imagine political forces in contemporary America that would still oppose a general, abstract guarantee of sex equality like that contained in the ERA.

I do not know whether McGinnis and Rappaport mean their remarks to offer necessary or sufficient conditions for retaining nonoriginalist precedents. If they are offering a necessary condition, their test—whether reversing a nonoriginalist decision would lead to constitutional amendment reinstating that decision—offers a very high hurdle to meet. That becomes particularly important if, like McGinnis and Rappaport, one has a fairly narrow conception of what is consistent with original meaning. McGinnis and Rappaport acknowledge that it is very difficult to amend the Constitution today, partly because it has proved so successful, and partly because the Supreme Court has repeatedly revised it inconsistent with original meaning.[121] Even taking the latter feature into account, I seriously doubt that the country would today pass an amendment to secure the right of blacks and whites to marry (*Loving*), the right of married couples to use contraceptives (*Griswold*), the right of people to advocate law breaking (*Brandenburg*), or the right of people to use profane language on their clothing (*Cohen*). And that doesn't even scratch the surface of a multitude of doctrines relating to criminal procedure, executive power, or procedural due process.

The problem is that Article V's supermajority rules require more than widespread consensus—they also require considerable political mobilization. It is quite hard to get people mobilized over reversing particular decisions that don't directly affect their values or interests. It has happened before—the Eleventh Amendment overturned *Chisholm v. Georgia*[122]—but that was in

120. McGinnis & Rappaport, *supra* note 1, at 376.
121. McGinnis & Rappaport, *supra* note 87, at 393.
122. 2 U.S. (2 Dall.) 419 (1793); Scalia, *Response*, *supra* note 94, at 148.

a very different world in which suffrage and rights of political participation were quite limited by today's standards.[123] If the Court overturned *Loving v. Virginia*[124] or *Brandenburg v. Ohio*[125] or *Cohen v. California*[126] or even *Griswold v. Connecticut*[127] today, it is not at all clear that these decisions could be reinstated by Article V amendment. Decisions that affect very important structural matters or that have strong symbolic impact are more likely to get enough of the populace aroused (although they can also generate significant countermobilizations that might ultimately block an amendment); decisions that lie in the interstices of doctrine—the sort of decisions that law professors care about most—are far less likely to generate sufficient public mobilization to meet McGinnis and Rappaport's test.

Thus, if McGinnis and Rappaport are offering a necessary condition, they seem to be committed to overturning much of the work of the civil rights revolution and significant parts of the New Deal—including the powers of the modern Presidency—because it is very unlikely that most of these accomplishments would be reinstated by constitutional amendment. It is important to recognize that this would not mean only striking down decisions that limit certain laws; it also strips the federal government of its power to pass legislation (and issue administrative regulations) protecting civil rights, the environment, workplace safety, and the rights of workers. One cannot know the exact contours of the change because McGinnis and Rappaport's criteria for overturning nonoriginalist precedents are inherently speculative. At the very least, McGinnis and Rappaport owe us a more detailed account of what parts of our current constitutional structure would survive their test.[128]

Another, less drastic solution for McGinnis and Rappaport would take advantage of the fact that precedent was an expected function of courts in 1787. Hence the Constitution—which was approved by a supermajority rule—already accounted for the

123. A second example would be Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), but that took more than an amendment—it took a civil war. Moreover, as noted previously, the debate over the Fourteenth Amendment focused on the terms of the armistice that would be imposed on the defeated South.

124. 388 U.S. 1 (1967).

125. 395 U.S. 444 (1969).

126. 403 U.S. 15 (1971).

127. 381 U.S. 479 (1965).

128. If McGinnis and Rappaport are merely offering a sufficient condition, on the other hand, we need far more information about which nonoriginalist precedents should survive. As with Scalia's position, which I criticized in *Abortion and Original Meaning*, *supra* note 2, the plausibility of their version of originalism will turn on this question.

fact that some precedents would be inconsistent with original meaning, and that sometimes the costs of overturning such precedents would be too great. This would allow them to retain a wide range of nonoriginalist precedents when, in their view, reliance was significant, producing a position that in practice would be much closer to Scalia's. Moreover, it would have the additional advantage that keeping nonoriginalist precedents under these circumstances would not be a "pragmatic exception"[129] to the theory of originalism—as it is for Scalia—but would rather be built into the theory of original meaning.

I can see two potential problems with this approach. First, it would still face many of the same difficulties as Scalia's "pragmatic exception." McGinnis and Rappaport would still view some of the most admirable achievements of American constitutional law as mistakes, only now they would be mistakes that can survive because of the originalist commitment to judicial precedent. Nevertheless, it is not clear why they should not read these precedents very narrowly and refuse to extend them further. Moreover, under Scalia's view almost any mistake—even *Roe v. Wade* and *Lawrence v. Texas*—could be retained if we wait long enough and enough people come to depend on it. We depart from the object of fidelity—the Constitution's original meaning—whenever the departure becomes widely accepted and reliance grows up around it. Scalia's pragmatic exception to original meaning has the likely consequence that in each generation more and more of positive constitutional law falls into the category of mistakes, and less and less is faithful to original meaning. That is to say, it is a theory of originalism that makes the claimed object of fidelity increasingly irrelevant to constitutional law as it is actually practiced. It produces a theory of constitutional fidelity that makes the grudging acceptance of infidelity—if it is sufficiently widespread—both possible and inevitable. If McGinnis and Rappaport want to build non-originalist precedents into their theory, they need to explain how they would avoid these problems.

Second, this solution tends to undermine McGinnis and Rappaport's argument that we should interpret the Constitution according to its original meaning because supermajority rules produce better consequences than ordinary legislation. Judicial decisions that are inconsistent with original meaning deviate from rules created under supermajority procedures; they come

129. Scalia, *Response*, *supra* note 94, at 140.

from unelected judges who do not even represent a majority, much less a supermajority. Hence if we accumulate non-originalist precedents because of reliance, we will increasingly lose the benefits of supermajority rules. I do not think it is sufficient to respond that this expected loss is already factored into the original choice of a common law system at the founding. The founding generation could not know which or how many non-originalist precedents would later emerge and generate significant reliance, and some judicial mistakes can be far more costly than others. In any case, McGinnis and Rappaport need to work out the details of their theory and give specific applications before we can conclude that it offers a superior alternative to Scalia's approach.

The great irony of all this is that, on the most basic issues of the role of precedent, McGinnis and Rappaport and I do not really disagree very much. We all think that precedents inconsistent with original meaning deserve no special respect, we just disagree about what original meaning requires. I also agree with McGinnis and Rappaport that a common law style system of precedents is implicit in the constitutional framework. Over time, judges will articulate and implement the Constitution through doctrine. Indeed, not only judges—the political branches also participate in constitutional construction by creating new institutions and practices, and by passing legislation that articulates and enforces constitutional principles. It does not follow, however, that we should retain precedents and constructions that are markedly inconsistent with the Constitution's text and its underlying principles.

The Constitution's text and its underlying principles should be the object of fidelity in constitutional interpretation. That is what we should remain faithful to; and that is what remains constant over time; even though the implementations, institutions and constructions built around it may change markedly as the years pass. A system of precedent should serve the Constitution, and not the other way around. It should implement and articulate the Constitution's textual commitments and great principles, not displace them. How we treat precedents should flow from our theory of constitutional fidelity rather than being an add-on or a offsetting device to reconcile decisions that we would be too politically embarrassed to disown.

We should retain decisions of the civil rights era like *Brown*, *Loving*, *Craig*, *Brandenburg v. Ohio*, and *Cohen v. California*, and the New Deal decisions like *United States v. Darby* and

Wickard v. Filburn, not because they are mistakes that we are stuck with, but because they are good interpretations of text and principle. We do not keep them because they are unfaithful but practically necessary or widely accepted. We keep them because they *are* faithful; we keep them because they are reasonable if occasionally imperfect implementations of constitutional text and principle.

This marks the real difference between my views on precedent and McGinnis and Rappaport's. McGinnis and Rappaport are worried that social movements will "spin the constitutional text as they choose with no limits except their ability to persuade the Court that their gloss should be adopted."[130] They then add: "Precedent, by contrast, at least limits the departures from the Constitution to those that have already occurred and does so based on widely held values of stability and continuity."[131] They do not see the irony of this juxtaposition. *Brown, Loving, Craig,* and the New Deal decisions became precedents in the first place because political and social movements demanded change and argued for different interpretations of the Constitution. Once these precedents were adopted and established, they served "widely held values of stability and continuity." McGinnis and Rappaport's attitude toward social movements seems to be that we should resist their interpretations until they persuade courts to accept them, at which point we should work to preserve them if enough people rely on them. They accept the work of the social movements of the past, while distrusting any social movements in the future. They do this because they do not see any legitimate connection between the creation of new constitutional doctrine and the work of political and social mobilizations. They see only raw passion and base politics rather than the processes of constitutional redemption at work.

I shall have more to say about social movements later on in this essay. For the moment, let me posit that we should judge the work of social movements not by the power of their political influence, but by the quality of the constitutional interpretations they offer. Social and political mobilizations play an important role in shaping Americans' views about the meaning of their constitutional commitments, and this may lead to changes in constitutional doctrine. However, these doctrines are correct—if they are correct—not because political movements have sup-

130. McGinnis & Rappaport, *supra* note 1, at 376.
131. *Id.*

ported them, but because they are good implementations of text and principle. If, for example, political and social movements persuaded judges that Jim Crow laws were perfectly acceptable—which, in fact, they did once before at the turn of the 19th century—that would not make the new doctrines good implementations of text and principle. On the other hand, social movements sometimes succeed because they correctly see that the world has changed and that we must implement constitutional principles differently than we had before. When constitutional doctrine responds to their arguments, we should value these new decisions not because they are precedents, and not because social movements supported them, but because these decisions better implement constitutional text and principle in changing times.

Conversely, because precedent's purpose is to serve constitutional text and principle, we should not preserve precedents that are outmoded and deeply unjust and unworkable. Experience has taught me that precedents are much more flexible over time than most people imagine when they are first announced. Courts are often able to come up with new distinctions within doctrine that reshape its direction and its effects over time. Even so, we should not retain precedents that are not reasonable implementations of text and principle. Citizens should feel free to oppose these precedents and press for their reversal through lawful means. Courts have a different institutional role from citizens. They must strive to maintain rule of law values of predictability and non-arbitrariness; therefore, they should be considerably more forgiving in assessing what constitutes a reasonable implementation of text and principle. This will require them to maintain many legal positions they would reject if presented in a case of first impression. Nevertheless, courts should not hesitate to modify or overturn precedents, even precedents of long standing, that they are convinced are no longer reasonable implementations of the Constitution.

These views distinguish me from those non-originalists who would support a strong theory of stare decisis, even (and especially) for precedents that they believe are non-originalist.[132] I

132. David Strauss, for example, has argued that "the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by 'we the people,'" simultaneously "best explains, and best justifies, American constitutional law today." David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996). Although an approach that makes precedent central allows us to reject "morally unacceptable traditions," we "should be very careful

have two objections to this approach. First, many of the precedents that non-originalists fear are not consistent with original meaning are actually consistent with it. By conceding that decisions they admire have no basis in the Constitution's text and principles, non-originalists face an unnecessary difficulty in justifying the legitimacy of these decisions. They must rely on a theory of super-strong protection for precedents that they concede are not faithful to the constitutional text.

This over-reliance on precedent leads to my second objection: Non-originalists will find it very difficult to explain why they seek to overturn other precedents that they don't like. If we must preserve *Roe v. Wade*[133]—because it was decided in 1973 and was continuously reaffirmed—why not *Washington v. Davis*[134], which was decided only three years later? If *Roe* is a "superprecedent" in 2007, thirty-four years after it was decided, why wasn't *Plessy v. Ferguson* a "superprecedent" in 1954, some fifty-eight years after it was decided?

Stare decisis seems to me a particularly weak and defensive justification for non-originalists; one argues that we should respect precedents because one is not willing to assert that the cases are faithful to the Constitution. This makes it very difficult for non-originalists to argue that we should overturn other precedents that either were not faithful implementations of the Constitution when decided or have proved themselves to be bad implementations over time.

In the alternative, one might argue that the development of doctrine through precedent simply is the standard of fidelity to the Constitution—that the common law system of precedent is constitutive of constitutional fidelity. But this makes it difficult for non-originalists to deny the equal fidelity of precedents they

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about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time." *Id.* at 891, 895. Indeed, Strauss has argued provocatively that adding text to the Constitution through Article V amendment is generally "either unnecessary or ineffective." David A. Strauss, *The Irrelevance of Constitutional Amendment*, 114 HARV. L. REV. 1457, 1468 (2001). On the other side of this debate is Michael Stokes Paulsen, who argues that reliance on precedent is "intrinsically corrupting" and essentially incompatible with a theory of original meaning. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005). McGinnis and Rappaport and I fall somewhere between these two positions: we assume that some common law development of constitutional doctrine was implicit in creating a system of federal courts (and state courts) that would construe the meaning of the Constitution.

133. 410 U.S. 113 (1973).

134. 426 U.S. 229 (1976).

do not like that were produced by the same common law process of development.

To my mind, originalists like Justice Scalia and the non-originalists he criticizes find themselves in much the same situation. Both feel it necessary to argue for respecting (what they mistakenly regard as) non-originalist precedents. And they face a symmetrical difficulty. By accepting some nonoriginalist precedents as a "pragmatic exception" to originalism,[135] Scalia makes it more difficult to explain why he does not accord the same respect to others, like *Roe v. Wade*, that he despises but that have been repeatedly sustained for many years. His criteria of reliance threaten to become ad hoc and a reflection of his politics. By relying so heavily on stare decisis to defend precedents they (incorrectly) concede are unfaithful to the Constitution's original meaning, non-originalists make it difficult to explain why they do not support other precedents of equal vintage. Their criteria of support also threaten to become ad hoc and a reflection of their politics.

There is something a little strange about living constitutionalism becoming so dependent on a strong theory of precedent. In part, this happened because living constitutionalists in the present generation have found themselves on the defensive against conservative social movement energies. (One of the ironies of McGinnis and Rappaport's suspicion of social movements is that many of the conservative decisions of the recent past are the result of decades of social movement organization by the Right.) Like most social movements before them, these conservative mobilizations have called for a return to the Constitution's text and to the principles of the founding generation, even if their notions of what that entails are disputable.[136] Faced with incessant demands for constitutional revolution, living constitutionalists have resorted to arguing for preserving the status quo, and for respecting older precedents created in politically more liberal times. But earlier social and political movements helped produce the doctrinal changes they now defend; those movements would not have succeeded if courts had applied so strong a theory of precedent. Arguments for respecting precedent make the most sense when directed at persons who do not share your constitutional views, but in that case they are a modus vivendi, not an independent criterion of constitutional fidelity. The best argu-

135. Scalia, *Response*, *supra* note 42, at 140.
136. *See* Post & Siegel, *supra* note 43, at 558–68.

ment for decisions living constitutionalists admire is not that they are settled precedents; it is that they are faithful implementations of the Constitution's textual commitments and underlying principles.

VI. THE RELATIONSHIPS BETWEEN TEXT AND PRINCIPLE

Randy Barnett, Mitch Berman and Ethan Leib raise important questions about the relationship between text and principles.

A. CONSISTENCY WITH THE TEXT, ARTICULATION AND SUPPLEMENTATION

Barnett is concerned that recourse to underlying principles will displace the text.[137] In one passage of *Abortion and Original Meaning*, I noted that "[w]hen the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command."[138] Read in isolation, one might worry that this implies that when the text is not rule-like, concrete, and specific—i.e., when it states a standard or an abstract principle—the principles underlying the text could override the text. That is not Barnett's view, nor is it mine.

Fidelity to text and principle means that we try to figure out whether a text states a relatively concrete and determinate rule or a relatively vague standard or abstract principle. When it states a rule, we apply the rule because that is what the text requires; and when it states a principle, we apply the principle because that is also what the text requires. In each case we apply the text to new circumstances, but the way we apply the text is different because of the kind of legal norm the text provides. Changes in circumstances cannot alter the minimum age for the President or the number of Houses of Congress, because the text states a clear and determinate rule. But changes in circumstances can alter how we apply the Equal Protection Clause because here the text states a standard or an abstract principle. Note, however—and here Barnett is also correct—when we apply or implement a standard or principle, we must make sure that the application or implementation remains consistent with the constitutional text.

137. Barnett, *supra* note 1, at 412.
138. Balkin, *supra* note 2, at 305.

It may sometimes be difficult to know whether a given interpretation of a principle contradicts the constitutional text or merely articulates it. Barnett gives us an easy case where we could tell the difference: he supposes that one principle underlying the Second Amendment's right to bear arms is the promotion of public safety.[139] One can promote public safety in many ways, however, including confiscating all privately held arms from the citizenry. Nevertheless, that would contradict the textual grant of a right to bear arms and so it is not a permissible application of the underlying principle.[140] When we argue from principles underlying the text, we must always return to the text to check our arguments.

However, to the extent that the text is vague, it may not offer very much of a check. Suppose, for example, that a legislature agrees that the right to bear arms protects the principle of public safety and the individual's right to possess weapons. Nevertheless, it insists that these principles are perfectly consistent with imposing reasonable regulations on the sale, purchase, possession, and use of firearms, and even with banning the private ownership of particularly dangerous weapons. Does this implementation of the principles behind the text contradict the textual grant of "the right to bear arms" or does it merely articulate it? In close cases, it may be difficult to tell. If we think the legislature's implementation is unreasonable, we will say that it contradicts the text. But if we think the implementation is reasonable, we will say that it merely articulates it, even if we do not think it is the best implementation.

Indeed, precisely because the constitutional text may be vague as to some questions, figuring out how to implement underlying principles properly may be the best guide to what the text requires of us. In other words, in some cases—perhaps the most controversial cases—our judgments of whether an implementation of a constitutional principle contradicts the constitutional text will depend largely on (1) whether we think we have correctly identified the proper principle, (2) whether we have correctly identified the principle's appropriate scope and reach, and (3) whether we think the particular application at issue is a reasonable implementation of the principle.

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139. Barnett, *supra* note 1, at 412–13.

140. *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (striking down general ban on private possession of handguns for self-defense.).

Moreover, a particular text may enact more than one constitutional principle, and these principles may sometimes conflict. Suppose for example, that we discover that the Free Speech Clause protects both the principle of democratic deliberation and the principle of individual self-expression. These principles may not conflict in a wide range of cases, but they may in some cases. Here are two examples: In the first, Congress seeks to limit campaign contributions to preserve democratic deliberation and prevent corruption of democratic self-government. The democracy principle may conflict with the self-expression principle if we think that the latter includes the right to make campaign contributions of any size. In the second example, Congress seeks to ban indecent art that has no relationship to democratic deliberation. The self-expression principle will conflict with the democracy principle if we think that the latter protects only speech related to democratic deliberation and leaves other expression to the democratic political process. The text of the Free Speech Clause will not resolve this conflict for us—it says that Congress can make no law that abridges the freedom of speech, but we must figure out the contours of the "freedom of speech." We can resolve the conflict by preferring one principle over the other or by interpreting their scope and reach so that they do not conflict. The text may give us considerable help in some situations, but in many other cases, perhaps most cases, it will not. That is why we so often need recourse to other modalities of constitutional argument—including history, structure, precedent, consequences, and ethos, to help us out.

The example of structural argument suggests another qualification. Just as a some texts point to multiple principles, there are some constitutional principles that are not tied to any particular text. We infer them from the interaction of many different texts—for example, the principle of separation of powers, the principle of checks and balances, and the principle of democracy. Indeed, in some cases, we infer constitutional principles from the structure and logic of the system of government that the text brings into being.

For example, the principle of checks and balances is advanced by specific institutional instantiations in the Constitutional text. The President may veto legislation, the Senate must advise and consent to the appointment of federal judges and senior Executive officers, and so on. But the principle of checking and balancing power—like the principle of separation of powers—extends beyond these specific instantiations and may apply

to situations not specifically mentioned in the text. Can the President exit from treaties without Congressional consent? Can Congress limit the President's ability to remove officers in independent administrative agencies, like the Federal Communications Commission or the Federal Reserve Bank? No matter which way we decide these questions, we will be extending one principle or the other to cases the text does not contemplate or provide for. In these situations, it is not clear whether the application of the principle *contradicts* the text or merely *supplements* it.[141] Once again, the text may not be of much help, and we must turn to the other modalities to resolve the question.

Finally, consider the First Amendment, which by its language refers only to Congress. From early on, however, courts assumed that the First Amendment (including both the speech and religion clauses) applied to all three branches of government.[142] The argument was based on structural principles: otherwise executive and judicial officials might undermine the guarantees of free speech and press (not to mention free exercise). Does this structural argument supplement the constitutional text or contradict it? We cannot look to the text to decide this question; rather the conclusion must follow from our sense of the proper scope of the free speech principle in light of structural assumptions about how the constitutional system should function.

We should not think of "text and principle" as a simple model where individual principles sit beneath specific clauses or texts. Rather, constitutional principles play multiple roles, with multiple relationships to the text. They undergird, they articulate, they supplement; they give unity to the entire Constitution and preserve its logic and its stability over time.

To sum up: Although underlying principles cannot contradict texts, there are many possible relationships between text and principle. A text can point to more than one principle, and these principles can conflict. Some principles derive from the interaction of multiple texts, and some principles emerge from the

141. I do not pretend that the distinction between contradiction and supplementation is always clear in practice. As a deconstructionist, I am well aware that supplements can be "dangerous," and can sometimes either undermine or prove more important than the thing they supplement. At the same time, a deconstructionist would also note that supplements cannot easily be discarded; what appears to be merely a supplement can also prove central or crucial to the thing it supplements.

142. *See* Magill v. Brown, 16 F. Cas. 408, 427 (C.C.E.D. Pa. 1833) (No. 8,952) (holding that the First Amendment "wholly prohibits the action of the legislative or judicial power on the Union on the subject matter of a religious establishment, or any restraint on the free exercise of religion.")

structure and logic of the constitutional system. Although principles may not contradict constitutional texts, they may articulate or supplement them. Because the text is sometimes vague or silent, we need to use principles in constitutional argument, and we need to supplement and implement text and principles with other modalities of constitutional argument.

I do not believe that Barnett would disagree much with what I have just said. Nor would most originalists or living constitutionalists for that matter. I raise the issue because the relationship between text and principle is more complicated than his brief remarks might seem to suggest. And that complexity matters particularly for the example of the Fourteenth Amendment, which is the major focus of *Abortion and Original Meaning*.

One thing that concerns Barnett is my frequent reference to the "equal citizenship" principle behind the Fourteenth Amendment. He is right that I see this principle as central to understanding the Amendment. But he objects that "there is no free floating 'Equal Citizenship Clause' in the Fourteenth Amendment. Section 1 contains four moving parts that must carefully be considered and applied in light of their underlying principles."[143] Barnett worries that talking about a general principle of equal citizenship may lead us to interpretations that contradict one of the multiple clauses in section 1 of the Fourteenth Amendment. Once again, he is correct that interpretations employing the principle should not contradict the original meaning of the text. But I would insist that the Fourteenth Amendment's provisions read together also have a structural logic to them. A general principle of equal citizenship emerges from their interaction. In other words, just as the principle of separation of powers and checks and balances emerges from different parts of the Constitution, so too the principle of equal citizenship emerges from the various clauses of section 1 of the Fourteenth Amendment. That conclusion is strengthened, I might add, when we read the Amendment together with other parts of the Constitution, including the Bill of Rights, the Thirteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments. (We could also add the Bill of Attainder, Titles of Nobility, and Privileges and Immunities Clauses from the 1787 Constitution.)

At this point readers may wonder whether I mean to resurrect Justice Douglas much mocked "penumbras and emana-

143. Barnett, *supra* note 1, at 414.

tions" that were the basis of decision in *Griswold v. Connecticut*.[144] I do not, but the reason is not because Douglas dared to make a structural argument using the text of the Bill of Rights.[145] Rather, it is because he made the wrong structural argument. The Fourteenth Amendment was designed to articulate a "new birth of freedom"[146] and a new theory of citizenship that guaranteed basic rights and equality before the law. That political theory built on previous features of the Constitution—some structural, and some explicitly rights-protecting—and it in turn was built upon by later additions. Considering these features together makes perfect sense. The case for a principle of equal citizenship in the Constitution is, I would submit, as strong as the case for almost any other structural principle in the Constitution.

Again, none of this is necessarily inconsistent with Barnett's basic point. We still must decide whether any purported applications of the equal citizenship principle contradict specific clauses of the Fourteenth Amendment. But when we view the amendment's provisions together (and supplemented by later Amendments like the Fifteenth and the Nineteenth, which correct limitations in the original section 2), we may decide that a particular interpretation does not contradict the individual clauses but articulates or supplements them in constitutionally appropriate ways.

B. MUST ALL CONSTITUTIONAL PRINCIPLES HAVE BEEN INTENDED BY THE ADOPTERS?

Mitch Berman raises a different concern about the relationship of text and principle. He reads me as saying that the only principles we can derive from the text are those specifically intended by the persons who created the text. Hence he calls it the method of "text and *original* principle."[147] If this is what the method of text and principle requires, he believes, living constitutionalists should reject it and remain non-originalists.

Berman argues that my approach can only employ principles that "the framers and ratifiers actually 'sought to endorse'"[148] By contrast, Berman argues that a non-originalist living

144. 381 U.S. 479 (1965).

145. For a better attempt see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). *See also* AMAR, *supra* note 23.

146. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* 7 COLLECTED WORKS OF ABRAHAM LINCOLN 22–23 (Roy P. Basler ed., 1953).

147. Berman, *supra* note 1, at 393–94.

148. *Id.* at 392 (quoting Balkin, *supra* note 2, at 303).

constitutionalism "would permit interpreters to eschew [those principles] . . . in favor of" principles "that the text can bear [and] that better suit[] our contemporary needs and moral values."[149]

Because both Berman and Leib[150] attribute the former position to me (and both view it as a major concern) I should make clear aspects of my argument that I did not emphasize in *Abortion and Original Meaning*, in part because of the specific goals of that piece. I do not believe that the principles underlying the Constitution may include only those "the framers and ratifiers actually 'sought to endorse.'" Nevertheless, I think it is very important to look to history to derive underlying principles, even (and perhaps especially) principles that nobody in particular intended.

In *Abortion and Original Meaning* I spent considerable time trying to show that the particular principles I relied on—the principles prohibiting caste legislation, subordinating legislation, and arbitrary and unjust distinctions—had a strong pedigree in the history of the Fourteenth Amendment. I did this in part to rebut the widespread assumption that the principles on which reproductive rights are grounded have no basis in our Constitution's text and history or in the purposes behind the Fourteenth Amendment.[151] But, as I shall now argue, neither living constitutionalism nor original meaning orignalism requires that all constitutional principles must have been specifically intended by some group of framers or ratifiers.

Berman argues that the Constitution needs "new" underlying principles—particularly in the context of debates about rights.[152] That may stem from his assumption that whatever underlying principles we find through historical investigation will have to be stated at a fairly low level of generality and will be closely tied to the expected applications of the persons who framed or ratified clause. For example, Berman questions whether agnostics or atheists would be protected by the Free Exercise Clause if we discovered that the clause was originally intended to prevent discrimination among religious believers.[153] I

149. *Id.*

150. Leib, *supra* note 1, at 354–56.

151. I also sought to rebut a similar assumption about the antisubordination literature. Balkin, *supra* note 2, at 292.

152. Berman, *supra* note 1, at 393–94.

153. *Id.* at 392. Indeed, given the demographics of the country at the time of the Founding, the original intention might have been narrower still: to protect against dis-

think this conflates deriving principles from *original expected application* with deriving principles from *original meaning*. It is tied to an old and familiar debate about the level of generality at which we should construe the framers' and ratifiers' purposes. As I shall argue presently, that debate is still beholden to the theory of original intention or original understanding. But if what matters to us is the original meaning of the text, then the principles underlying the constitutional text should be as general as the text itself.

Therefore I suspect that many of the cases where Berman thinks we would need a "new" principle actually involve nothing more than contemporary applications of underlying principles stated at the appropriate level of generality. For example, I think that the principle against class legislation might protect homosexuals from discrimination even if nobody knew there were such things as homosexuals in 1868, or, if they knew what homosexuals were, would have opposed the extension of the principle to that social group. One does not need a "new" principle for this case; rather one needs to apply the class legislation principle correctly to present-day circumstances given present-day understandings.

The framers and ratifiers may have stated a wide variety of principles at various levels of scope and generality, or they may have stated no principles at all that have come down to us. The appropriate question, however, is what principles are incorporated in the text the framers and ratifiers made into law. Thus, for me the key issue is encapsulated in Berman's suggestion that constitutional principles must be ones "that the text can bear."[154] We want to make sure that in our eagerness to articulate new principles we do not wind up with a play on words. The reason why we look to history—where it is available—is to act as a check on our assumptions about what "the text can bear." We use history to see whether the issues or problems that concerned the framing generation are structurally or analogically similar to ones we face today. If so, then we can have somewhat more con-

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crimination among various Christian sects, perhaps extended to all religions within the Judeo-Christian tradition. It is worth noting, however, that of the state constitutions in force at the time of the founding, only Delaware's and Maryland's explicitly limited protection to Christians, while five others restricted their protections to believers in God. See Michael W. McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 HARV. L. REV. 1409, 1455 n.237, 1457 n.242 (1990) (collecting state constitutional provisions).

154. *Id.* at 384.

fidence that the principles we articulate are principles that the text embodies.

The reason we must avoid a play on words, then, is not simply because we think law should preserve meaning over time. It is because the Constitution must serve as "our law"—it must not be merely the law of our current generation, but a law that connects our present political commitments with the commitments of previous generations. We must be able to see ourselves as embarked on a common project that begins in the past and that we carry forward into the future. The fact that we share a common text certainly helps connect past to present. But shared political commitments over time involve more than common texts; looking to history helps us articulate a narrative that allows us to view ourselves as continuing the aspirations and commitments of the past in present-day circumstances.

Berman and I do not really disagree that the principles underlying the Constitution do not have to have been specifically intended by anyone. That is most obvious in the case of structural principles that are not necessarily tied to a specific piece of text but that we infer from the interaction of various parts of the Constitution and from the structure and logic of the constitutional system. Some of these structural principles were surely recognized and promoted by various framers and ratifiers. But others could not be, in part because they were not salient to the persons who wrote and ratified the document, and in part because some important structural issues only arose as the constitutional system developed over time. The generation that produced the 1787 Constitution was quite talented, but they were not fortune tellers; they put in place a document that they themselves understood to be a great experiment in self-governance, and they could only offer their best guesses as to how things would operate in practice. Sometimes one only figures out how a machine or a system or any other complex structure works—and should work—by watching it operate over time. Charles Black once famously argued that even if there had been no Free Speech Clause in the Constitution, the Constitution's structure and its commitment to representative government demanded protection of at least speech on topics related to public governance.[155] That would be so whether or not any framers or ratifiers of the 1787 Constitution specifically believed that a principle of

155. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39–45 (1969).

free expression undergirded the Constitution prior to the adoption of the Bill of Rights.

In addition, the Constitution was not drafted at a single time. Currently its various amendments stretch over two hundred years. New amendments may alter the relationships between other parts of the Constitution, sometimes in expected ways, but sometimes in quite unexpected ways.[156] The Reconstruction Amendments altered the relationships between the federal government and the states, and between the federal courts and state legislatures, in ways that did not become clear for generations. Subsequent constitutional constructions can have path dependent effects on how the constitutional system operates. Four good examples are the creation of the party system—which the framers originally opposed—the creation of the federal civil service in the 19th century, the rise of the administrative state in the first half of the 20th century, and the development of permanent standing armies and naval forces stationed around the world in the second half of the 20th century.

For all of these reasons, structural principles might emerge from the constitutional system that no single person or generation intended. We should always look to history to see how the generation that produced a constitutional text expected that the constitutional system would operate in light of the text. But this does not exhaust all of the structural ideas behind the Constitution. We must look to other generations as well as the founding generation to understand how constitutional structures should work (and how they might fail to work).

Of course, in his remarks, Berman is not particularly thinking about structural constitutional arguments. He is thinking about the Equal Protection Clause. This is a case where constitutional principles involve rights as opposed to structures, and where the principles are more closely connected to particular texts rather than derived from the logic of the Constitution as a whole. Even though the relationship of text to principle is different, my basic answer is still the same: The principles underlying the text do not have to be specifically intended by anyone in particular. At the same time history remains quite important to discovering those principles.

156. What is true for structural principles may also be true for principles underlying particular texts. The Fifteenth and Nineteenth Amendments may alter our understanding of the principles underlying the Fourteenth Amendment.

When we interpret a written Constitution, we work on the assumption that the persons who had the authority to make the constitutional text law were trying to achieve something in choosing some words over others. The goal of interpretation is to try to find out what that achievement is. The text that the framers and ratifiers produced contains rules, standards, and principles. (Standards need not be principles—and often are not—but for purposes of this discussion I shall consider them together).[157] When the text states a determinate rule—for example, that there are two and only two houses of Congress—we apply that rule because the language chosen requires it. When the text states a standard—say that searches must not be "unreasonable"—we apply the standard because the language chosen requires it. Finally, when the text states a principle—say "equal protection of the laws"—we apply the principle because the language chosen requires it. Our basic interpretive obligation is the same for standards and principles as it is for rules.

It is usually easier to know when we have applied a rule correctly than a principle (or a standard), but we cannot shirk the difficulty by pretending that an abstract principle is actually a determinate rule. One might view my critique of original expected application in just this way: people who want to use original expected application to secure the meaning of constitutional principles are trying to turn a principle or standard into something that is more like a rule—a rule that says that, where possible, we should apply the identifiable sets of expected applications we find in history. People might try to convert a principle into a rule because they dislike uncertainty and want constraint. The desire for certainty and constraint is entirely understandable, but we cannot achieve them in so easy a fashion. Not, at least, if we want to be faithful to the text.

When we are dealing with abstract principles in the text, history becomes important in at least two ways. First, we need to look to history to know what kind of legal norm the text enacts—whether it offers a rule, a moral or legal principle, or a

157. "Congressmen must be mature adults" states a standard but not necessarily a principle, although we can sometimes explain or justify the standards we use in terms of principles. Doctrinal tests may include a series of standards that decision makers must balance—like the relative burdens to the parties in a petition for an injunction, or the noncommercial nature of a challenged fair use—but the factors need not be principles. Finally, we might use the behavior of a paragon as a standard for conduct, i.e., that one should behave like the paragon. Once again we can turn this standard into a set of principles by generalizing from the paragon's behavior.

standard.[158] The words of the text may employ a generally recognized term of art, which in turn enacts a rule, principle, or standard. And assuming that the text employs a standard, it may employ a historical standard: e.g., the practices of common law courts up to 1787, or a traditional standard: e.g., the evolving practices of custom or of the common law.

In fact, it is even possible that the same text employs rules, principles, and standards, including standards of several different kinds. My discussion of the Privileges or Immunities Clause[159] suggests that this clause is a very complicated text. It combines a determinate rule (incorporate the individual rights provisions of the existing Constitution plus any that are later adopted) plus a principle of equality (protect basic rights of citizenship equally as between citizens) plus a traditional standard (protect basic rights of citizenship as the American people come to understand them over time).

History is important precisely because it may not be obvious what kind of norm the text requires. Amending the U.S. Constitution—not to mention the adoption of the 1787 Constitution itself—requires the cooperation of a very large number of people who are geographically dispersed; hence idiosyncratic meanings are very unlikely, and without convincing evidence to the contrary we may assume that the words of a Constitution should be understood in their ordinary, everyday sense.[160] But our ordinary, everyday sense today may not be the ordinary, everyday sense of the time of adoption, and so history may be relevant. The Privileges or Immunities Clause is a case where knowing the history helps us understand why the framers of the Fourteenth Amendment chose the particular words they did.

Second, when the text employs standards or principles, we face an additional question. What standards or principles does the text require? In one sense the answer is quite simple. If the words say that states may not deny "equal protection of the laws," the principle is that states must not deny the equal protection of the laws. But what does *that* mean? To answer this question, we will have to cash out the principle of "equal protection of the laws" in terms of subsidiary principles. I have called these

158. As Keith Whittington explains, the original meaning of the legal text is always an empirical question in this sense. Keith Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 213–14 (2000).

159. Balkin, *supra* note 2, at 313–14, 328–33.

160. *See* Eisgruber, *Should Constitutional Judges Be Philosophers?*, *supra* note 97, at 11.

subsidiary principles *underlying* principles but perhaps an equally helpful way to think of them is as aids or heuristics that help flesh out the textual commitment to moral or legal principle that we find in the text. Underlying principles are not identical with the words of the text—they do not *constitute* the text, as the words "equal protection of the laws" do. They underlie the text because they both support the text and explain the point of the text.[161]

Here again history can help us. We can look to contemporaneous statements of principle and to the aspirations of supporters and advocates of the text. We can also look to the general evils or problems that the generation that produced the text sought to address. This evidence helps us construct principles that help us explain the textual commitment to "equal protection of the laws." I use the term "construct" advisedly; we cannot always simply plug in the statements of various framers and ratifiers as the relevant principles. Their statements may merely be statements about their expected applications of the text.

The principles underlying the text should be at roughly the same level of generality as the text (understood to include any generally recognized terms of art). If the text uses general language, the underlying principles that support and explain the text should as well. The reason is simple. As I noted before, because the Constitution required the cooperation of a very large number of people widely dispersed geographically, we must assume that its words were to be used and understood in their ordinary sense. Absent strong evidence to the contrary, we assume that people choose general language if they want to endorse general principles, and more specific language if they want to commit themselves to narrower principles. Generally speaking, the best way to commit yourself to abstract principles and open ended standards is to put abstract principles and open-ended standards in the text; the best way to prevent that sort of commitment is to avoid using that sort of language.

There has been a very long debate in American constitutional theory about the proper level of generality at which to construe the framers' and ratifiers' purposes, presumably on the

161. Compare this account with what I have said about (some) structural principles: the latter do not necessarily explain the text but rather follow from the structure of government the text brings into being. These structural principles "underlie" the constitutional text in a different way than principles that are tethered to a particular text that points to a principle or a set of principles.

grounds that these purposes are somehow controlling.[162] This debate asks the wrong question if it focuses on psychology and not on what the text enacts. The proper level of generality for the constitutional principles in the text is the one we find in the text itself.

For example, people have long debated whether the Equal Protection Clause prohibits only racial classifications—because a primary object of the Amendment was to secure equal citizenship for blacks—or whether it protects other groups—say women and homosexuals—from state discrimination. I regard this as an easy question. Obviously the Framers of the Fourteenth Amendment sought to give the freedmen equality. But if the Fourteenth Amendment's framers had wanted to institute a principle that banned all racial classifications—and no more—they could have said so. They would have chosen different words than they did. Indeed, if you look at the Fifteenth Amendment, you can see that they knew exactly how to ban certain classifications based on race and prior condition of servitude. However, they did not do this in the case of the Fourteenth Amendment. They sought to establish principles of equal citizenship, which they saw as something both more and less than a total ban on racial classifications. In fact, the Committee of Fifteen that drafted the Fourteenth Amendment rejected the colorblindness principle when it was offered to them.[163] Instead the framers of the Fourteenth Amendment used the very general language of "equal protection of the laws" and "privileges or immunities of citizens of the United States." Any underlying principles we associate with those texts must be as general as the words themselves. Racial classifications are prohibited by the text of the Fourteenth Amendment to the extent that such classifications violate the principles behind the text, in this case, the principles

162. *See, e.g.*, Bruce A. Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73–80 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065–67 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983); Raoul Berger, *A Response to D.A.J. Richards' Defense of Freewheeling Constitutional Adjudication*, 59 IND. L.J. 339, 370–72 (1983); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090–92 (1981); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498–500 (1981).

163. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 82–87 (1992); BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 82–85, 106–07 (1914).

guaranteeing equal citizenship, and prohibiting class and caste legislation.

Or to give another example: a person supporting the Fourteenth Amendment may have stated that the purpose of the Amendment was to constitutionalize the Civil Rights Act of 1866.[164] Even if many people made this claim, it does not follow that the Equal Protection Clause (or section 1 of the Fourteenth Amendment) is limited to this function. The words chosen are "equal protection of the laws," which are stated at a much higher level of generality. Unless we have strong evidence that the term "equal protection of the laws" was a generally recognized term of art that was equivalent to the terms of the 1866 Civil Rights Act, we should reject this statement of principle as a candidate for the principle underlying the text. To be sure, the principles we construct should probably protect as much as the 1866 Civil Rights Act protects.[165] But the language of the Equal Protection Clause suggests that these principles should protect far more than that. It is entirely correct to say that one of the purposes of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866. But we should not say that this purpose was the principle underlying the words chosen.

The examples I just gave are fairly easy ones. In practice it may be difficult to know whether a principle is at roughly the same level of generality as the text. First, talking about comparable levels of generality offers a metaphor, not a mathematical formula. Second, our initial assumptions about the generality of a standard may be altered by historical knowledge about how language was used at the time, for example, whether the text uses commonly accepted terms of art. As a result, there will usually be a kind of reflective equilibrium between our assessment of the generality of the text's language and our assessment of the historical evidence of the context that produced it. There will of-

164. *See* BERGER, *supra* note 45 (using such statements to argue that scope of Fourteenth Amendment was limited to protecting the rights guaranteed by the Civil Rights Act.).

165. Jed Rubenfeld has made this point in terms of constitutional commitments. RUBENFELD, REVOLUTION BY JUDICIARY, *supra* note 99; RUBENFELD, FREEDOM AND TIME, *supra* note 99. Rubenfeld argues that when people create constitutional texts, they commit themselves and those who come after them to certain principles. When they do so in abstract language, we should read them as committing to results in a certain set of basic or paradigm cases and to general principles to be worked out later on. However the principles are worked out, they must still account for the earlier, paradigm cases. This could be an absolute requirement—as Rubenfeld suggests—but it might also merely be a rule of thumb that helps ensure that there is a continuity of commitment that allows different generations to identify with each other over time.

ten be controversy when we use history to discern underlying principles. Nevertheless, we must do the best we can with what we have.

In *Abortion and Original Meaning*, I attempted to identify several principles that I claim underlie the Fourteenth Amendment's Equal Protection Clause. I argued that the text of the Equal Protection Clause prohibits class legislation, caste legislation, "special" or "partial" legislation, and arbitrary and unreasonable distinctions between persons or citizens. Each of these principles, I claim, are at roughly the same level of generality as the words of the clause, and although they overlap, each has a slightly different focus. My evidence for these principles comes from the public explanations that the people who drafted the Fourteenth Amendment gave for what they were trying to do. I noted previously that we cannot necessarily identify these statements of purpose with the principles underlying the text if these statements of purpose are relatively concrete and the text is quite general. However, in the case of the Fourteenth Amendment, the persons who drafted and supported the Amendment spoke about their purposes in quite general terms and they repeatedly and deliberately used very abstract language to explain their goals.[166] They matched their explanations to the text's level of generality. They spoke about equal citizenship, about ending caste and class legislation, about equality before the law, and about protecting basic rights of citizenship. People defending the Amendment stated their goals in terms of very general principles, and that helps explain why they chose such general language in the first place. Moreover, evidence of their concrete historical expectations also helps us understand why they made these general statements of principle.[167]

166. Balkin, *supra* note 2, at 313–16.

167. I give pride of place to Senator Jacob Howard's speech explaining the Fourteenth Amendment's provisions for several reasons. One is that it is the official public introduction of the Amendment before the Senate. Howard was a member of the Committee of Fifteen that drafted the bill, and he was also the floor manager of the Amendment, who was given the specific task of explaining its underlying purposes to Congress. His speech was also reported in the press, and portions were even reprinted on the front page of the *New York Times* on May 24, 1866, the day after the speech. *See* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. (forthcoming 2007) (abstract *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=963487); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 128, 250 n.281 (1986). As early as 1954 William Crosskey had pointed to coverage of Howard's speech in both the *New York Times* and the *New York Herald*. William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 102–03 (1954).

Not every part of the Constitution offers such a rich historical record. The First Amendment's Speech Clause lacks the same degree and type of evidence that we have for the Fourteenth Amendment. We have evidence about official legal protection for speech in 1791 which is not very speech protective. We have evidence of historical practices of speech protection which run contrary to the law on the books and are far more libertarian.[168] And we have some general statements of principle by the generation that produced the First Amendment. Nevertheless, in comparison to the Fourteenth Amendment, the historical record is far sparser. History gives us relatively little help in determining what principle or principles underlie the words "freedom of speech." And for some clauses and portions of the Constitution, the historical record is sparser still.

Nevertheless, our task is the same: we must still try to figure out what principle or principles the text enacts using whatever sources and forms of reasoning are available to us. Where the history is available, as in the case of the Fourteenth Amendment, we should certainly use it. But we do not look to history because we are bound by the original or intended purposes of either the framers or the ratifiers. We look to history because we want to know what standard or principle the text they produced enacts. If we faced a piece of constitutional text where historical evidence of purpose was completely lacking, we could not do what I have tried to do with the Fourteenth Amendment. We would be

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Equally important, however, is the fact that Howard makes the case for the words of the text in terms of very general principles that explain why the very general words of the text were used. That is, the principles he offers as the reasons for the text tend to be stated at pretty much the same level of generality as the text itself. Senator Howard's speech is not a conclusive statement of the principles underlying the Fourteenth Amendment; it is one piece of evidence, although, given the context in which it was offered, a fairly powerful piece of evidence.

168. Leonard Levy's work emphasized the speech restrictive features of law at the founding, criticizing the previous portrait offered by Zachariah Chaffee. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (rev. ed. of LEONARD W. LEVY, LEGACY OF SUPPRESSION (1960)); ZACHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941). Levy's critics have pointed out that actual practices were far more equivocal. *See* David A. Anderson, *Levy vs. Levy*, 84 MICH. L. REV. 777 (1986); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985); Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L .REV. 455 (1983). Philip Kurland and Thomas Emerson noted that the historical evidence is mixed and that it is difficult to draw any firm conclusions from it. Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225 (1985); Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977).

thrown back on other resources. We would try to figure out the underlying principles by reasoning from the text and from other parts of the Constitution, from any historical context we could discover, from structural considerations, from later interpretations of the text, and from considerations of justice and political morality. Our conclusions would no doubt be subject to dispute and uncertainty, but that is hardly unusual in constitutional interpretation even when we have a very rich historical record.

These considerations help resolve one possible difference between Berman and myself. I have used historical investigation to offer a series of principles underlying the Fourteenth Amendment's text, principles that I claim have roughly the same level of generality as the text. But the text does not say "no class legislation;" it says "equal protection of the laws." That means that the principles I find in history do not exhaust the meaning of the clause.[169] They are particular attempts, situated in history, for figuring out what principles the clause enacts. If you like, you can think of them as heuristics, aids to understanding the text and its principled commitments. Given the history, my best guess is that a commitment to equal protection of the laws includes a commitment against class legislation, caste legislation, arbitrary and unreasonable distinctions, and special or partial laws. But it follows from my arguments that there could be other constitutional principles embodied by the Equal Protection Clause that no particular person living in 1868 intended but that we come to recognize through our country's historical experience. That is, although we may use history to recognize these principles, they need not have been originally intended principles.

Moreover, even if the facts of history do not change, and even if we uncover no new historical sources, what history means to us and the way it appears to us continually do change, because we ourselves are moving through history and continually see what happened in the past through new perspectives. (Indeed, the source materials we think relevant may change based on those changing perspectives). We inevitably recognize and conceptualize what happened in the past from the standpoint of our own cultural memories and experiences. These are always changing—new things happen to us or become salient to us while older events and memories are reinterpreted or forgotten. Hence, elements of the past always look salient to us in ever new ways, even if specific source materials do not change.

169. I am indebted to Ronald Dworkin for this formulation.

History seems freshly (and differently) relevant as time passes not because the facts of history have altered, but because what facts are important to us and what they mean to us change as we and our country go through various crises, conflicts, controversies, and transformations. We see the problems and the difficulties, the fears and the commitments, the goals and the aspirations of people in the past in terms of our present controversies and experiences. So the past always seems relevant to us, in ways that may differ markedly from how previous generations apprehended our common history. History always looks new to us because we ourselves are constantly changing; our perspectives are constantly shifting under our feet. We are always moving through history and viewing the past from ever new perspectives, in light of contemporaneous events that are themselves ever receding before us.

I suspect that many living constitutionalists are suspicious of any form of originalism because they worry that the past offers insufficient resources for vindicating our values in the present. Ethan Leib's account of the "anxiety of living constitutionalism" reflects this concern—the fear that the past is really against us, and that the aspirations and principles of those who lived in the past are insufficient to do justice in the present, because they were created by people who were very unjust to each other, and who held many views—about social equality, for example—that we today would think outmoded, wrongheaded and reactionary.

But when we enter into an appropriate spirit of charity toward the past, when we see it as striving or aspiring to the goals of the Preamble—for example—we get a very different view of the resources of history.[170] Viewed sympathetically as people at-

170. I have tried to explain the project of interpretive charity toward the past in this way:

> When the Constitution speaks in grand general phrases like "equal protection," or "due process," it speaks to generations long after those who drafted it. It asks those future generations to look beyond the compromises and hesitancies that are inevitable in any age, and to do justice in their own time. We must regard the grand phrases of due process and equal protection as promises that we have made to ourselves as a people. They are promises, made in times of injustice, that respond to injustice, albeit haltingly and imperfectly. They are promises that cannot always be carried out fully in their own era; but they are promises that we nevertheless pledge ourselves to as a people so that someday they may redeemed by future generations. In this way our Constitution becomes more than a collection of rules and doctrines: it becomes a document of redemption.
>
> Just as we may see the concrete practices of justice of those who framed and ratified the Constitution as compromised and imperfect, so we must recognize that others will someday see our own attempts at justice as equally flawed and deficient. That is why we owe it to previous generations to understand and apply their constitutional aspirations in their best light. We must carry on the work

tempting a feat of political change unheard of in prior human history, the 1787 framers were putting in place the most democratic constitution of their time; the radical Republicans of 1868 were casting aside a system of chattel slavery and replacing it with a new system premised on the foundation of free and equal citizens. Their larger principles, expressed in the abstract language they chose, offer resources for articulating our present concerns, if we are willing to view these aspirations with sympathetic eyes, and in a spirit of magnanimity. We should understand these great principles as promising their eventual redemption in history, and we should understand our role as helping to move that redemption forward.[171] When we engage in a project of redemptive constitutionalism, their principles truly are our principles, their project is our project, and their Constitution is our Constitution. That is how one exorcizes what Ethan Leib calls the anxiety of living constitutionalism. We must replace it with an optimistic and vibrant constitutionalism that is not ashamed of the past and seeks to build on its best attributes rather than to flee from it.

> that they could only begin. If we read this document as fulfilling their best aspirations rather than chaining us to their worst fears, we do them greater honor than any slavish adherence to their concrete practices could; and perhaps, if we are fortunate, we may merit an equal charity from the generations that come after us.

Jack M. Balkin, *Judgment of the Court*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST FAMOUS CIVIL RIGHTS OPINION 77, 81 (Jack M. Balkin ed., 2001).

171. Compare Abraham Lincoln's speech on the *Dred Scott* decision in the Lincoln Douglas debates, in which he treats the Declaration of Independence with similar charity:

> Chief Justice Taney [and] Judge Douglas argue that the authors of [the Declaration] did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, or ever afterwards, actually place all white people on an equality with one or another. . . . . I think the authors of that notable instrument . . . did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois, the Lincoln Douglas Debates (June 26, 1857), in 1 ABRAHAM LINCOLN, SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN DOUGLAS DEBATES 398–99 (1832-1858) (Library of America ed. 1989).

Earlier I noted that constitutional protection of homosexuals might be justified on the Fourteenth Amendment's prohibition on class legislation. The historical materials I drew upon to establish that the Fourteenth Amendment prohibited class legislation have been known to legal historians for many years. But the idea that they might say something about the struggle of homosexuals for equal rights was not obvious to most people in 1940 or 1960. It becomes possible to see this in the history only after one lives in a world in which homosexuals assert themselves, demand equal civil rights, and claim that they are being unfairly singled out for special burdens and discriminations by society. Indeed, understanding that this is what the gay rights movement is doing is the product of an imaginative interaction between past memories and present meanings.

Berman thinks that it may be particularly important to living constitutionalism that we can find "new" principles underlying the Constitutional text that nobody thought of before. He imagines that principles that underlie the text will be much more specific than the general words of the text, that new situations will always arise that nobody recognized as problems before, and so we will always need a stable of "new" principles as time passes. Berman worries that we may need new principles to protect atheists under the Free Exercise Clause, or women or homosexuals—or some new social group as yet undefined—under the Equal Protection Clause. But if underlying principles must be stated at the same level of generality as the text itself, and if our understanding of the relevant principles—and of the relevant history—is always changing as we move through history, these concerns may be greatly overstated. So, for example, as genetic engineering develops and as the possibility of genetic discrimination becomes increasingly salient to us, what the history of the Fourteenth Amendment means to us will also change as we move forward in history. It is perfectly plausible that some day the Equal Protection Clause—and its prohibition on class legislation—might limit the state's ability to engage in genetic discrimination; to impose special burdens on people who share a common genetic marker, even if they correspond to no social group that existed in 1868.[172] Indeed, I think that day is already here.

172. *See* Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843 (2007); VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (forthcoming 2008).

There are other reasons why principles that the framers and adopters did not think of can nevertheless be consistent with the text. First, the text might point to the possibility of new principles. The Fourteenth Amendment's Privileges or Immunities Clause and the Ninth Amendment's reservation of unenumerated rights are declaratory texts. They contemplate the protection of rights that the American people come to regard as fundamental, even if they were not specifically recognized as protected in 1868 (or 1791). Assuming that these rights involve substantive constitutional principles, those principles were not specifically intended when these texts were adopted.

Second, if subsequent amendments incorporate previous textual language by reference or duplicate the same language in a new context the original text may come to stand for principles that no one expected at the time it was originally enacted.[173]

Consider the Due Process Clauses of the Fifth and Fourteenth Amendments. "Due process of law" was a generally recognized term of art in both 1791 and 1868, but its scope changed over the years. In 1791 the Fifth Amendment's Due Process Clause included both a guarantee of fair procedures and a guarantee against the destruction of vested rights by the government. By the time of the Fourteenth Amendment, the term "due process of law" also included the idea that laws should be fair and impartial and not class legislation.[174] Thus the principles embodied in the Fourteenth Amendment's Due Process Clause overlapped with those in the new Equal Protection Clause. Although the 1791 version of the Due Process Clause was adopted before the antebellum conception of due process became generally accepted, I would argue that it is a principle that the text can bear. The best evidence for that is that the principle against class legislation fits the language of the identical wording in the Fourteenth Amendment. If that is so, then Chief Justice Warren was not far off the mark in *Bolling v. Sharpe*[175] when he commented that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."[176] That means, among other things, that the federal

173. This is the central claim of AMAR, *supra* note 23.

174. *See* Ely, *supra* note 72, at 337–38; Saunders, *supra* note 72, at 257–58 & n.58; Yudof, *supra* note 72, at 1376 ("The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted. . . . It was part-and-parcel of the presumed fairness of governmental processes, of due process of law.").

175. 347 U.S. 497 (1954).

176. *Id.* at 499.

government is bound by the obligation of fair and impartial laws and the prohibition against class legislation. There are several other textual and structural arguments for the federal government's obligation to provide equal protection of the laws—in fact so many that the result is over-determined;[177] but this one is a particularly straightforward textual argument.

The Second Amendment offers a final example of how an old text might bear new principles. There is considerable dispute whether in 1791 the amendment protected an individual right of self-defense or only a collective right of republican citizens to band together in militias to overthrow a tyrannical government. I happen to think the evidence points toward a right that included both the right to participate in militias and an individual right of self defense. Even assuming that this was not the case, by the time the Fourteenth Amendment was ratified, people generally assumed that the right to bear arms included an individual right of self-defense. That right was one of the individual rights incorporated into the Fourteenth Amendment.[178] Thus, even if an individual right of self-defense was not intended in 1791, it is a principle that the text can bear today.

VII. CONSTITUTIONAL INTERPRETATION AND SOCIAL MOVEMENTS

Several of the commentators worry about the possibility that the Constitution will be hijacked by powerful social movements or political parties who will produce constitutional doctrines and practices that are unfaithful to the Constitution.[179] For this reason they are particularly concerned about two aspects of my argument. The first is my claim that the citizen's, not the judge's perspective, should be the standard case of constitutional interpretation. The second is my claim that the method of text and principle helps explain why the work of previous political

177. *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766–73 (1999) (pointing to the Citizenship Clause of the Fourteenth Amendment, the federal Title of Nobility Clause, the federal Bill of Attainder Clause, and the Fifth Amendment Due Process Clause); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995) (arguing from the Bill of Attainder Clause); Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State,"* 10 CONST. COMMENT. 87 (1993) (offering a structural argument based on the Privileges or Immunities Clause).

178. AMAR, *supra* note 23, at 216–18, 220–23, 261–66.

179. Berman, *supra* note 1, at 393–94; McGinnis & Rappaport, *supra* note 1, at 376–81.

and social movements of which Americans are most proud—for example, the civil rights movement and the women's movement—has been faithful to the Constitution.

Together, the commentators raise two basic objections. The first objection is that political and social movements do not use the method of text and principle.[180] The second is that it is dangerous to adopt a constitutional theory that incorporates and justifies the work of political and social movements.[181]

A. DO SOCIAL MOVEMENTS MAKE ARGUMENTS FROM CONSTITUTIONAL TEXT AND PRINCIPLE?

Mitch Berman argues that many social movements have not made claims based on constitutional text and principle.[182] Instead they often make claims based on simple policy grounds, and they reject constitutional arguments offered by their opponents. For example, the labor movement in the 1930's argued that the federal government had the power to guarantee collective bargaining rights and regulate wages and working conditions; their opponents argued that the federal government lacked power under the Commerce Clause and was restricted by the Due Process Clause. Second, even if social movements claim that they are being faithful to constitutional text and principle, they are likely to get the history wrong because "social movements do not view their task as maintaining fidelity to the past."[183] Their use of arguments from constitutional text and principle may be merely rhetorical. Social movements are primarily interested in social change, not constitutional fidelity.

These criticisms are historically inaccurate. Social movements in the United States have regularly drawn on the constitutional text and its underlying principles to justify social change.[184] The American political tradition has featured a strong belief in emancipatory rights consciousness based on foundational texts, including the Declaration of Independence and the U.S. Consti-

180. Berman, *supra* note 1, at 393–94.

181. Berman, *supra* note 1, at 394; McGinnis & Rappaport, *supra* note 1, at 376–81.

182. Berman, *supra* note 1, at 393–94.

183. *Id.* at 393.

184. Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All,"* 74 J. AM. HIST. 1013, 1014 (1987) ("Constitutional rights consciousness suggests a faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups."); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (discussing why textual arguments have been so important to citizens and social movements throughout history).

tution.[185] This "emancipatory vision of natural rights, rooted in the subversive and utopian messages that people read into constitutional texts 'has justified continued struggle by groups in the face of (presumably temporary) judicial and political defeats.'"[186] As Reva Siegel has pointed out in her studies of the women's movement, throughout our history ordinary citizens have called on the text of the Constitution as a foundation and source of their rights, claiming that the text has meaning that differs from official understandings.[187] Precisely because the Constitution views We the People as its authors, ordinary citizens have assumed the right to claim the Constitution as their Constitution and its meanings as their meanings. They have felt authorized to insist that legal officials must conform existing law to the Constitution's true meaning.

The importance of the constitutional text as the launching pad for arguments about rights in the American political tradition comes from historical contingency, not logical necessity. It emerged from several different features of our history: the tradition of common law evolution in which new rights claims were viewed as naturally emerging out of older customs and commitments, the American belief in natural rights as a source of inspiration and aspiration, and the influence of Protestantism and its assertion that ordinary believers have authority to decide what the Bible and other sacred texts mean for themselves.[188]

Not only have social movements regularly called upon the constitutional text, they have also called upon the enduring political principles of the generations that went before them, particularly the founding generation.[189] Woman suffragists, for example, invoked the Revolutionary slogan of "no taxation without representation" to explain why women deserved the vote.[190] Martin Luther King described the work of the founding generation as a "promissory note"[191] that had to be made good in

185. Hartog, *supra* note 184, at 1016.

186. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1356 (1995) (quoting Hartog, *supra* note 184, at 1016).

187. Siegel, *supra* note 184, 322–23.

188. *See* Hartog, *supra* note 184, at 1016–17 ("An American emancipatory tradition of constitutional meaning must be rooted in the subversive and disruptive and utopian messages that people read into constitutional texts and drew from diverse and contradictory sources, including English common law, liberalism, Enlightenment philosophy, post-Reformation theology, and the medieval peasant's vision of self-ownership and freedom.")

189. *See* Siegel, *supra* note 184, at 337.

190. *Id.*

191. Martin Luther King, Jr., I Have a Dream, *in* A TESTAMENT OF HOPE: THE

the present, arguing that the struggle for civil rights was "a dream deeply rooted in the American dream."[192] The dream in King's famous speech was "that one day this nation will rise up and live out the true meaning of its creed" enunciated in the Declaration of Independence.[193] NRA president Charleton Heston identified today's gun owners with the founding generation and its commitment to liberty.[194] And Christian conservatives have invoked both the founding era's commitments to religious liberty and to belief in Divine providence as the basis of free government.[195]

It is hardly surprising that social movements have so often made arguments based on the Constitution's text and what they regard as its enduring underlying principles. As I noted previously, the Constitution's success and its legitimacy stem from the fact that the Constitution is not only basic law but also higher law. To be successful as higher law, the Constitution must include aspirational elements that people can use to critique existing features of social life. Social movements naturally look for these aspirational elements in the constitutional text to support their claims for change. When they look to the Constitution in this way, they naturally adopt the rhetorical tropes of restoration and redemption that are characteristic of our history.

Perhaps even more important, for the Constitution to be successful and legitimate, it must be not only basic law and higher law, it must also be "our law." To be successful and legitimate, ordinary citizens must see the Constitution as something that belongs to them and that they are attached to, even if they did not formally consent to it.

First, this means that citizens must be able to interpret the document for themselves so that it speaks to their current ideals

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ESSENTIAL WRITINGS OF DR. MARTIN LUTHER KING, JR. 217, 217 (James M. Washington, ed., 1986).

192. *Id.* at 219.

193. *Id.*

194. Charleton Heston, NRA Keynote Address (May 2, 1999), *available at* http://www.varmintal.com/heston4.htm ("The Founding Fathers guaranteed this freedom, because they knew no tyranny can ever arise among a people endowed with the right to keep and bear arms. That's why you and your descendants need never fear fascism, state-run faith, refugee camps, brain-washing, ethnic cleansing, or especially submission to the wanton will of criminals.")

195. *See, e.g.*, DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION AND RELIGION (3d. ed. 2004); CBN.COM, *Faith of our Fathers: God and the American Revolution*, http://www.cbn.com/spirituallife/churchandministry/churchhistory/faith_fathers.aspx; David Brody, *Finding God's Signature in Washington*, http://www.cbn.com/cbnnews/cwn/070204washington.aspx.

and concerns. Because the Constitution is theirs, they can speak truth to power: they can criticize officials for failing to live up to what the Constitution means, rightly interpreted.

Second, the notion that the Constitution must be "our" Constitution refers not only to the current generation but to a transgenerational "we." It requires that citizens must be able to see themselves as part of a larger political project that extends over time and of which they form a part. The Constitution's text, which each generation inherits and must expound, is the most obvious embodiment of this larger common political project. The fact that Americans see ourselves as part of a transgenerational "We the People" naturally leads people to identify with people in the past, and with their hopes, struggles, principles and commitments in order to make sense of current controversies and the direction of legal and political change. Social movements thus make appeals to the continuing commitments of the past in order to explain what is legitimate or illegitimate about current conditions. They do so not only because this helps them make sense of the present in terms of the past, but also because these commitments are part of what they hold in common with other members of the political community they are trying to persuade. Thus, when the suffragists used the slogan "no taxation without representation," they understood their fight for the vote as justified by the principles of the Revolution; and they were trying to persuade their contemporaries—including men who already had the vote—to live up to their common commitments and principles.

When Berman views social movement arguments for restoration and redemption as nothing more than rhetorical tropes, he misses how this way of talking and thinking contributes to social movements' self-understanding as engaged in an enterprise that is larger than themselves and their current concerns, an enterprise that unites past, present and future generations, and an enterprise that therefore deserves to command the respect and agreement of other members of a political community that claims to be organized under the Constitution. This rhetoric is not just rhetoric, it is *just* rhetoric—appropriate rhetoric for the American constitutional enterprise, a way of talking and thinking that leads people to see the Constitution's fate and future as something that concerns them and therefore enhances the success and the legitimacy of the constitutional project.[196] Precisely

196. Robert Post and Reva Siegel call this legitimacy-enforcing relationship between

because people feel they can make claims on the Constitution as *their* Constitution, even in the face of official pronouncements to the contrary, they are invested in the Constitution and in the project of its development, restoration, and redemption. That is why the rhetoric of text and principle is so familiar in the history of so many American social and political movements, and that is why the rhetoric of text and principle supports the success and the legitimacy of the Constitution, even for generations that are increasingly distant from the founding generation.

The rhetoric of text and principle is at work both in social movements that claim that the Constitution protects basic rights and structures and in movements that claim that the Constitution merely permits reform rather than requires it. Examples of the latter include the early Republican Party, which claimed that Congress could ban slavery in the territories, and the early 20th century labor movement, which argued that the federal government should pass labor legislation that protected fair working conditions and guaranteed the right of collective bargaining. In each case opponents objected that what these movements proposed was forbidden by the Constitution. Supporters of these movements responded that the Constitution was flexible enough to allow democratic majorities to protect important rights and create new institutions.

In fact, both social movements and their opponents—who are often social movements themselves—routinely invoke a common rhetoric of text and principle against each other; that is strong evidence of the pervasive importance of text and principle in American political history. Both sides of the struggle over the New Deal invoked text and principle. It was not a contest between an old guard that believed in the Constitution's textual commitments and New Dealers who did not. Rather, Franklin Roosevelt's argument was the opponents of his New Deal had badly misconstrued the Constitution. Rightly understood, the Constitution's text and abiding principles permitted the federal government to act in the public interest. The Constitution, Roosevelt famously declared, was "a layman's document, not a lawyer's contract,"[197] and as such it "used generality, implication and

ordinary citizens and their Constitution "democratic constitutionalism," Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 2007)

197. Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C., September 17th, 1937, in John Woolley and Gerhard Peters, The American Presidency Project [online], available at http://www.presidency.ucsb.edu/ws/?pid=15459.

statement of mere objectives, as intentional phrases which flexible statesmanship of the future, within the Constitution, could adapt to time and circumstance."[198]

Nevertheless, one might object that even if social and political movements often use the rhetoric of text and principle, they often get the text and the principles wrong. When people talk about constitutional principles, they don't offer the detailed historical analysis I tried to give in *Abortion and Original Meaning*. Instead, they tend to talk loosely about "what the framers intended" our "what our founding fathers fought for." They offer fairly general claims about liberty, equality and democratic government. Members of social and political movements are not professional historians, and they tend to use—or reimagine—history to suit their own often parochial ends. Moreover, even if members of social and political movements say they are invested in the Constitution and seek to promote what the Constitution truly means, some of them may be insincere. They may simply use constitutional discourse to promote what they think is good or what serves their own interests.

To the extent this is true, however, it does not pose a particular problem for my theory of constitutional interpretation. Social groups are usually composed of people with different interests, motivations, and understandings. The important question is whether we can understand the work of social movements as consistent with constitutional fidelity. To do this we must engage in interpretive charity and a sympathetic reconstruction of their claims. That means, among other things, that if social movements make arguments to the public premised on their and the public's common commitment to the Constitution, we should try to see whether social movement arguments make sense in the terms in which they are offered.

Moreover, to engage in a sympathetic reconstruction, there will inevitably have to be a division of labor between laypersons who call on the Constitution and legal professionals who bring their claims before judges and other legal decisionmakers. Lawyers will have to translate and reconstruct social movement arguments in ways that judges and other legal decisionmakers can recognize as legal arguments. Put another way, lawyers and judges translate claims of constitutional politics into claims about constitutional law.[199]

198. *Id.*

199. This is a somewhat different sense of translation than Larry Lessig offered in his

In fact lawyers and judges do more than merely passively translate, for popular and professional understandings of the Constitution mutually influence each other. Famous decisions like *Brown v. Board of Education*[200] and *Miranda v. Arizona*,[201] and well-known legal doctrines like the diversity rationale in affirmative action[202] or the doctrine of one-person-one-vote[203] influence popular understandings of the Constitution. No doubt popular understandings of the Constitution build on what ordinary citizens recognize in the work of lawyers and judges; they in turn criticize and reshape these ideas in the popular imagination, and these revisions in turn may eventually influence professional understandings. Thus, when we speak about social movement constitutional interpretations, we actually refer to a complex set of interactions. They involve, on the one hand, ordinary individuals and legal professionals who represent them or who are otherwise sympathetic to them; and, on the other hand, the other members of the general public and other legal professionals whom the first group seeks to persuade or convince. The work of social movements occurs in many different places and before many different publics; social movement interpretations may combine popular and professionally mediated claims that, in turn, may influence each other.

What this means in practice is that lawyers and judges play an important role in articulating and vindicating social movement claims about the Constitution. When ordinary individuals argue (for example) that the exclusion of women from public life violates the Constitution, it will probably fall to lawyers to explain in greater detail how these claims are consistent with constitutional text and principle in ways that are persuasive to courts. To do this, lawyers will probably make more detailed historical and textual arguments than most nonlawyers could make,

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work on constitutional interpretation. Lawrence Lessig, *Fidelity in Interpretation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997). Lessig was interested in how to translate the concrete expectations of the framers into decisions related to present circumstances. My interest here is how popular claims about the Constitution—which may not clearly respect a clear division between law and politics—must be translated into forms of constitutional discourse that judges and legal decision makers would recognize as plausible legal arguments.

200. 347 U.S. 483 (1954).

201. 384 U.S. 436 (1966).

202. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313–15 (1978) (opinion of Powell, J.).

203. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

as well as draw on all the familiar modalities of constitutional argument. There is nothing particularly unusual about this process of translation; it occurs regularly in the legal representation of individual and group clients. It is true that most citizens are not very good historians, but they are not very good doctrinalists either. Rather, they make claims on the Constitution in the way that citizens make such claims, and lawyers try as best they can to translate these concerns into existing legal forms. Inevitably something will be lost in the translation from politics to law, but that is the cost of a system that tries to take citizens' claims about the Constitution seriously.

In *Abortion and Original Meaning*, I offered a history of the Fourteenth Amendment that explains why some of the claims of the women's movement and the pro-choice movement are consistent with the original meaning of the Constitution and its underlying principles. I do not expect that most members of these social movements would make exactly the kind of arguments I offer; these are, by and large, arguments made by legal professionals for legal professionals. Nevertheless, I do assert that, sympathetically understood, these movements have made claims on the Constitution that have a basis in text and principle.

B. SHOULD JUDGES PAY ATTENTION TO SOCIAL MOVEMENT INTERPRETATIONS OF THE CONSTITUTION?

Suppose that I am right that lawyers and judges translate constitutional politics into constitutional law, that they turn social movement claims into legal arguments that might persuade legal decisionmakers about how to interpret the Constitution. This leads to the second objection: the text and principle approach creates real dangers for constitutional fidelity because it seeks to incorporate the work of social and political movements. If judges adopt the text and principle approach, this will make it easier for them to respond to the claims of social movements who do not respect what the Constitution really means. This will lead judges to undermine important constitutional structures, deny important constitutional rights and create new rights that have no basis in the Constitution.[204] Moreover, if the text and

204. McGinnis & Rappaport, *supra* note 1, at 376 ("Balkin would allow social movements to spin the constitutional text as they choose with no limits except their ability to persuade the Court that their gloss should be adopted."); Berman, *supra* note 1, at 394 ("that judicial interpretation may follow and endorse nonoriginalist but popularly accepted constitutional interpretations is, I take it, at least part of what it means for judicial interpretation to be "parasitic" upon extrajudicial interpretation.").

principle approach actually *requires* judges to respond to social movement interpretations, matters will be even worse. Judges who feel bound to listen to social movements will be even more likely to stray from what the Constitution requires.[205]

These objections, I think, rest on a misunderstanding. Nothing in my argument obligates judges to pay any attention to social movements at all, much less adopt social movements' claims.[206] There are two basic reasons for this. First, judges' professional conception of themselves as deciding cases according to law—the law/politics distinction—makes it very important that judges not understand themselves as being unduly influenced by, much less taking orders from, social movements or other political factions.[207] Judges of course have opinions about social movements and about whether their claims are laudable or pernicious. But their job is to decide the legal cases that come before them, not to take instruction from the various protesters who regularly congregate outside their courtrooms.[208] Second, even if we assumed that judges had some duty to listen to social movements, there are simply too many social movements at any one time, and their demands often point in different directions.[209] If judges had obligations to follow or even respond to social movement claims, how would they know which ones to pay attention to? For example, which social movement should judges

205. Berman, *supra* note 1, at 394 ("Balkin provides no reason why judicial interpretation should not follow [a movement that persuades the general public to accept its constitutional interpretations], least of all that judicial resistance to a successful extrajudicial interpretation not predicated on historical fidelity is categorically mandated."); *id.* at 394 (Courts cannot "refuse to sanction" a successful social movement's new constitutional interpretations "on the grounds that that understanding lacks historical fidelity and therefore legitimacy" either because this misunderstands "what social movements are *for* " or because it rests on "an unrealistic sense of how long courts might (or should) stand against successful popular mobilizations."); McGinnis & Rappaport, *supra* note 1, at 377 ("Balkin . . . confus[es] pride and propriety. Even if we assume that the decisions he lists are generally deemed to be achievements and sources of pride, that does not make them either legal or proper."); *id.* at 378 ("discarding expected applications in favor of abstract principles, as influenced by social movements, transfers tremendous power from the enacters of the Constitution to future interpreters. A Constitution that was established to place limits on future government actors would not delegate power so generously.").

206. *See* Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 29 (2005) ("the notion that judges are not supposed to take instruction from social movements—or 'factions,' as they might have been called by the founding generation—seems to be one of the basic assumptions of American constitutionalism.").

207. *Id.*

208. *See, e.g.*, William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 Suffolk U. L. Rev. 751, 752, 768–69 (1986) (noting that judges may be influenced by public opinion but they are not supposed to take direction from politics).

209. *Id.*

have paid attention to in the late 1950's and early 1960's: the civil rights movement or the countermobilization that sought to reverse *Brown v. Board of Education* and preserve White Supremacy? Historically we know that social movements have influenced judicial interpretations, but it is not because judges have any obligations to listen to them.

My arguments about social movements involve claims of positive constitutional theory and normative constitutional theory. Positive constitutional theory studies how the constitutional system works and develops over time: how government and political institutions influence and interact with each other, and how features of politics and institutional structure influence the creation and development of constitutional doctrine. Normative constitutional theory focuses not on what people actually do but what they should do.[210] One branch of normative constitutional theory concerns constitutional design, and another concerns constitutional interpretation and construction.

My positive claim is that social and political mobilizations have shaped the development of our Constitution. My normative claim is that some, but not all of these changes are worthy objects of pride that demonstrate the best features of the American constitutional tradition. Our theory of constitutional interpretation should be able to explain why the latter changes are faithful to the Constitution rather than being deviations or mistakes from constitutional fidelity that we must preserve for prudential reasons.

Much of my previous work on constitutional change has been positive constitutional theory.[211] In accord with much of the political science literature, I have argued that the Supreme Court's constitutional doctrines tend to stay in touch with the dominant forces in American political life. I tried to offer accounts of how judicial practices are influenced by political parties and social movements. For example, parties and social

210. Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1537 (2004); Barry Friedman, *The Importance Of Being Positive: The Nature And Function Of Judicial Review*, 72 U. CIN. L. REV. 1257, 1257–58 (2004); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 312, 317–18 (2002).

211. The arguments in the following two paragraphs draw on Jack M. Balkin & Sanford Levinson, *From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Jack M. Balkin, *How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

movements influence judicial decisionmaking through partisan entrenchment in the judiciary, replacing old judges with newer ones whose good faith beliefs about the Constitution more closely match those of the party or social movement that secured their appointment. Political parties and social movements also influence judicial doctrine by changing public opinion, and particularly elite opinion. Gradually they convert views that may be initially considered "off-the-wall" into the political mainstream and eventually make them part of constitutional common sense. Judges are influenced by changes in constitutional culture because they live in this culture—not to mention the changing political culture of the nation—and absorb its assumptions and presuppositions. Moreover, not all judges need be equally influenced for these effects to occur. The Supreme Court is a multimember body whose decisions in the most contested cases are determined by its median or swing Justices. New judicial appointments can change the median Justice while leaving most of the other Justices (and their preexisting views) in place. Moreover median or swing Justices are more likely to be responsive to changes in political culture than Justices at the extreme ends of the political spectrum. Lower court judges in turn are bound by the decisions of the Supreme Court, and precisely because there are so many of them, a predictably large number retire and are replaced during each Presidential election cycle.

In short, judicial interpretations of the Constitution can change in one of two ways: One can change the culture in which the judges decide cases or one can change the judges. In addition, constitutional constructions by the political branches—like the creation of the administrative state—demographic shifts, technological changes, and long term alterations in public mores shape the terrain in which judges decide cases and create constitutional doctrine.

McGinnis and Rappaport are worried that if people accept my normative theory, judicial decisions will be easily influenced by social and political mobilizations that will misrepresent the true meaning of the Constitution. This concern seems to misunderstand the real causes of social influence on the judiciary, as well as the sources of judicial restraint. It seems to assume that interpretive theories are a major factor in why constitutional doctrines change over time. This greatly overstates the importance of theories of constitutional interpretation in explaining the product of courts. (That is particularly true of the U.S. Supreme Court, a multi-member body whose members may have

very different theories of interpretation, or no theory at all.). Generally speaking, judges have responded to changing social and political mobilizations for the institutional reasons I have identified above, and they have done so regardless of their normative interpretive theories. Until the end of the nineteenth century, virtually every federal judge and Justice understood themselves to be what we would now call an originalist.[212] This, however, did not stop courts from responding to changing political and social mobilizations, and these tendencies continued after living constitutionalism came into vogue.

I do not claim that the choice of interpretive theories has no effect on judicial behavior. After all, shared basic assumptions about interpretation are part of the shared legal culture that helps constrain judicial practice. Moreover, as I will discuss in a moment, the choice of normative theories may be important because different theories may offer different normative justifications for decisions. My point is that theories of interpretation are not a significant *causal explanation* for why doctrines have changed as they have. Although law professors might want to think it so, the choice between originalism and living constitutionalism has not been the major reason why judicial doctrines changed as they did during the twentieth century. If McGinnis and Rappaport are worried about runaway social movements leading judges astray, theories of constitutional interpretation will not prevent this baleful occurrence. As I have explained previously, theories of constitutional interpretation simply cannot be expected to do most of the work of constraining judicial behavior. Those constraints come from institutional features of the judicial system; and their primary effect is to keep the work of courts roughly in sync with the views of the dominant political coalition.

Courts—and in particular, the U.S. Supreme Court—tend to respond to political and social mobilizations when these mobilizations become so powerful that they start to dominate the national political process. When that happens, the courts' work will tend to cooperate with these dominant forces. If that happens, I guarantee that it won't be because those courts adopted my or anyone else's views on constitutional interpretation. At most courts can act as a drag on changes that threaten to happen very

212. Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 Stud. Am. Pol. Dev. 191 (1997).

quickly, but they will eventually come around because of the appointments process and long term changes in constitutional culture. Although it will probably be cold comfort to McGinnis and Rappaport, if most courts adopted my interpretive theory of text and principle tomorrow, it would probably only have a marginal effect on the outcomes of cases in the long run, because other institutional forces would still do most of the work of judicial constraint. All of this, of course, leads to the obvious question of why we care about interpretive theory, to which I now turn.

C. WHAT'S A THEORY OF CONSTITUTIONAL INTERPRETATION FOR, ANYWAY?

One of the reasons I have spent so much time thinking about the practices of constitutional change is that I do not think that one can usefully engage in normative constitutional theory without paying at least some attention to what positive constitutional theory teaches us. To put it simply: ought implies can. We should not expect from judges—or from the constitutional system for that matter—practices of constitutional decisionmaking that they simply cannot provide. And we cannot adopt a theory of constitutional interpretation that the actual system of constitutional law could never be faithful to. We know that constitutional law and doctrine have changed markedly in many different areas over time. We also know that constitutional doctrine responds to the work of social movements and political parties and tends to reflect the vector sum of the dominant political forces of the time. A theory of constitutional interpretation that cannot account for these features of our system of constitutional decisionmaking will be inadequate to the task. Hence normative theories of constitutional interpretation must do different work than most law professors currently think they do.

The most important function of theories of constitutional interpretation is not to constrain judges in difficult and contested cases. Constraint mostly comes from other institutional features of our political system.[213] Rather, normative theories about constitutional interpretation are important because they help us understand and express claims about the legitimacy or illegitimacy of our current constitutional arrangements, precedents, and

213. Hardly anyone ever litigates the "hard-wired" features of the constitutional text where interpretive theories would have the least to contribute; they focus instead on other issues, where the constitutional text is more open-ended, and where history suggests theories of interpretation offer the least constraint over how constitutional law develops in practice.

practices. Call these the Constitution-in-practice. In a constitutional culture like our own, many different people have ideas about what they think our Constitution stands for. Theories about how to interpret the Constitution offer us a language to defend and criticize parts of the Constitution-in-practice with the hope of moving it closer to our ideals of what the Constitution should be.

Citizens' ability to make claims on the Constitution and to demand that existing arrangements conform to their views is important to maintaining its legitimacy over time and to serving as "our law"—that is, as a common object of fidelity and attachment. The Constitution maintains its legitimacy to the extent that people with very different commitments can reasonably view it as sufficiently worthy of their respect and obedience so that all of them can enjoy the benefits of the rule of law, social cooperation, and political union.[214] Different citizens, from their varying perspectives, must be able to see that the constitutional system, understood in its best light, is sufficiently just that they can accept it as theirs, or—if it is not currently sufficiently just—they must be able to have faith that it could become so in time.[215]

The Constitution-in-practice, however, may fall well short of these standards. And things may get worse, not better, over time. Therefore citizens must have ways to critique our existing arrangements, to talk back to courts and other political actors, and to persuade their fellow citizens about what the Constitution requires.[216] They need tools to help identify what features of existing arrangements are sufficiently faithful to the Constitution and what features are not faithful.

Theories of constitutional interpretation form part of this tool kit. They offer platforms, concepts, and languages for legitimation, critique, persuasion, dissent, and mobilization that might promote eventual constitutional reform. These activities—legitimation, critique, persuasion, dissent, and mobilization—are central parts of our shared (and perpetually contested) constitutional culture. They matter both to the legal profession and to

214. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 364-65 (2003); Balkin, *Respect Worthy*, *supra* note 36, at 492.

215. I focus on the question of justice here, but people must also believe that government institutions under the Constitution are sufficiently efficacious to secure the benefits that come from political union. If people believe that the constitutional system can no longer guarantee the rule of law, enforce social cooperation, or protect their rights, the system also loses legitimacy.

216. Balkin, *Respect Worthy*, *supra* note 36, at 502–05.

the political life of our nation. No doubt lawyers, judges, and legal academics will probably develop more sophisticated and complicated theories about interpreting the Constitution than most ordinary citizens. But citizens in a democracy must also have their own understandings and opinions about what makes constitutional claims—and existing arrangements—faithful or faithless to the Constitution.

Thus, theories of constitutional interpretation serve two basic tasks—and the method of text and principle helps us perform both of them. First, interpretive theories should let us explain why valuable features of our existing constitutional arrangements are faithful to the constitutional project correctly understood. There are many ways that American constitutionalism might have evolved, depending on political, social, and economic contingencies. One goal of theories of constitutional interpretation is to explain and justify our existing forms of development in hindsight.

Second, precisely because the Constitution-in-practice responds to mobilizations, social movements, and political parties may have promoted unjust and unconstitutional policies that become widely accepted and part of the Constitution-in-practice. (Think, for example, about the construction of Jim Crow as a constitutional regime that lasted for the better part of a century.). Therefore theories of constitutional interpretation should let us produce viable critiques of existing practices in the name of a deeper constitutional fidelity.

This second criterion is particularly important: It is not enough to have a theory of constitutional interpretation that explains why everything that has happened is perfectly fine. Such a theory will be nothing more than an apology for the actual; it will abdicate our political and moral responsibilities to be faithful to and to continue the constitutional project.

We need more than a theory that explains why many of the changes in our constitutional practices have been faithful to the American constitutional project. We also need a theory of constitutional interpretation for dark times—that is, times when our views of what the Constitution really means have been submerged and disrespected by the dominant forces in society. During such times citizens and members of oppositional social movements must obey positive law, but they do not have to accept it as correct or faithful to the Constitution. They can protest it in the name of the Constitution and work to change people's minds. But to do this, citizens need normative leverage to chal-

lenge the existing practices of constitutional law so that they can restore or redeem the Constitution's promises. Citizens need a way of grounding their claims about the Constitution that is independent from the Constitution-in-practice. Interpretive theories make it possible for people to pledge faith in the Constitution even though the Constitution-in-practice falls short of what they think the Constitution is and should become.

Above all, citizens need a theory of interpretation for dark times because the present is always dark times for somebody's vision of the Constitution. Often it is dark times for both sides of an ongoing national controversy like abortion or gay rights. For example, although I argue that the most faithful interpretation of the Constitution protects women's rights to abortion, I know that many of my fellow citizens disagree with me. For them, the continued enforcement of abortion rights makes a mockery of the Constitution, just as for me the limitation or undermining of these rights flies in the face of the Constitution's guarantees of equal citizenship and fundamental rights. Each of us, in our own way, needs ways of talking about the Constitution that do not take existing arrangements as presumptively legitimate, that do not require us to bow down to the idol of the Constitution-in-practice.

You will notice that the first task I set for an interpretive theory—legitimation—presumes the standpoint of someone who seeks an attractive normative account of the existing constitutional order as it has developed through the play of political and social forces. The second task—critique—presumes the standpoint of a constitutional dissenter. Both of these standpoints are necessary to a successful constitutional theory. Moreover, these two perspectives actually depend on each other. It is precisely because people in the past were dissatisfied with the constitutional order of their day, and mobilized to change people's minds about what the Constitution really means that they succeeded in establishing changes in constitutional culture and constitutional doctrine. These changes have become part of the established order that we now try to explain and legitimate. Conversely, present-day constitutional dissent usually begins with the assumption that at least some of these changes in the constitutional order are justifiable, and what the dissenter is doing is following in the footsteps of the successful and honored political mobilizations of the past. Today's constitutional dissenter hopes to create part of the dominant constitutional vision

of the future, the Constitution-in-practice that future interpreters will seek to defend and legitimate.

The theory of text and principle can serve both of these functions of legitimacy. It is a constitutional bulwark that can legitimate the best in the many transformations our constitutional system has undergone, and it is a constitutional refuge for dark times. It allows people to recognize that valued aspects of the Constitution-in-practice have kept faith with the Constitution despite the manifold changes in American life since the founding; yet it also preserves a powerful position from which people can critique features of our existing practices. It creates a space for aspirational claims and for constitutional dissent. It allows people to understand their present situation in terms of the Constitution's abiding commitments, it lets people critique the Constitution-in-practice through a return to first principles, and it helps people mobilize and persuade others by appealing to common values, symbols, and commitments. The central idea that we should be faithful to the Constitution's text and underlying principles is both intelligible and plausible to ordinary citizens, while its legal implications are sufficiently complex for constitutional lawyers and theorists to articulate and expand in theoretically satisfying ways.[217]

If the Constitution is to be "our" Constitution, we must be able to see ourselves as part of a project that unites past and present generations and projects outward into the future. We must be able to see our principles and commitments as the principles and commitments of those who came before us and of those who will come after us. The Constitutional text is the perhaps most conspicuous embodiment of the constitutional project that binds past with present and stretches out into the future. And the language of restoration and redemption of constitutional principles well captures the sense of fidelity to the constitutional project over time. Hence it is not surprising that successful social and political movements have looked to the constitutional text and to enduring principles as a ground for their normative critique of present day arrangements.

Originalism and textualism, in their various forms, have been central methods for the legitimation and critique of regimes and practices of belief. And not only in America. I would

217. In Bruce Ackerman's terms, it is a constitutional theory that can make sense both from the perspective of ordinary observation and scientific policymaking. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10–15 (1977).

venture to say that in almost every creedal community—every community that organizes itself around a set of practices and beliefs inherited from the past—a return to origins and to basic principles is a standard method for urging reform, even radical reform.[218]

In a creedal tradition organized around a central (or sacred) document, each generation—situated as it is and facing the problems that it faces—places glosses on the document, and these glosses are bequeathed to the future as what the document means. Later generations, finding these interpretations inadequate to their time, try to remove some of these glosses and return to the original, redeeming its promise, but what they actually do is preserve some of the older readings while adding newer glosses atop them. The history of creedal texts is the history of continuous glossing and stripping away of glosses; and continuous claims of return, restoration, and redemption that are, from the perspective of later generations, yet more readings and rereadings that must someday be critiqued, judged, and possibly undone.

I do not claim that this is true as a matter of logical necessity. I do claim it is characteristic of the American constitutional tradition, and indeed, of many other traditions as well. Repeatedly, constitutional dissenters and insurgent movements have turned to the constitutional text and to the great deeds and commitments of the past—including most particularly of the founding generation—as a justification for their assault on the status quo.

My friend and colleague Bruce Ackerman has famously denounced what he calls the "myth of rediscovery"[219] in American constitutional law—the notion that we can justify major transformations like the New Deal as a return to original principles and commitments. In fact, Ackerman argues, American constitutional development features a succession of generations engaged in acts of constitution-making that displace and build on older ones.

I agree with Ackerman that the history of American constitutional development has been one of continuous change, but I disagree that the "myth of rediscovery" is a myth in the pejora-

218. H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986); Solum, *supra* note 42, at 1626–27.

219. ACKERMAN, *supra* note 100, at 43, 62; Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488, 491 (1989).

tive sense that Ackerman means to convey—a false story that obfuscates the truth about social life. Rather, myths are stories that reveal deep verities about the human condition. So it is with our life as a constitutional community. The tropes of fidelity to text and principle, and of their restoration and redemption in history are not simply fables we tell ourselves. These tropes allow us to see the Constitution as a transgenerational project that connects different generations and identifies them as a single people stretched out over time. The notion that we, like those before us, are faithful to the Constitution's text and underlying principles, and that our job is to restore and redeem them in time, allows the Constitution to achieve simultaneously the multiple functions that a constitution like America's must perform—a basic framework for politics and law making; an honored source of values and aspirations; and a cherished object of fidelity and attachment that symbolically binds different generations to each other and allows them to identify with each other over time. In short, fidelity to text and principle allows Americans to see the Constitution simultaneously and successfully as basic law, as higher law, and as our law.

VIII. THE TWO RIGHTS TO ABORTION

Most of the comments on *Abortion and Original Meaning* focused on the first third of the paper, on my theory of text and principle. However, Mitchell Berman and Dawn Johnsen also offered some criticisms of the second part of the paper, which made the substantive case for the abortion right.

A. DO STATES HAVE A COMPELLING INTEREST IN BANNING ALL ABORTIONS?

Berman points out that states might legally prohibit abortion even if the right to abortion is consistent with the Constitution's original meaning, and even if the unborn are not persons with their own independent constitutional rights. Legislatures might argue that protection of unborn life is a compelling state interest and preventing abortions is narrowly tailored to vindicate that interest. Berman asks why I did not address this objection. The reason, as he notes, is that I had already offered a response to the argument in my edited collection, *What Roe v. Wade Should Have Said.*[220] My goal in *Abortion and Original*

220. WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL

Meaning was narrower: to refute the claim that the abortion right has no basis in the Constitution's original meaning. Nevertheless, I will offer a slightly different version of my argument here; the reason why a total ban on abortions is unconstitutional flows from the justifications for the abortion right itself.

The basic idea is this: Historically, legislatures have never treated abortions the same way they do murder, usually offering lesser penalties and generally exempting women from responsibility for the crime. Since the sexual revolution in the 1960s, laws that have sought to ban abortion in the United States have come with a variety of exemptions, and pro-life proposals to reverse *Roe* and ban abortion almost always include at least some of them. The Georgia law in *Doe v. Bolton* (based on the Model Penal Code) exempted abortions in cases of incest, statutory or forcible rape, and fetal defect.[221] The 1857 Texas law struck down in *Roe v. Wade* did not punish women who self-aborted—for example by ingesting abortifacents.[222] Perhaps the most common exemption in new proposals for criminalizing abortion is the decision to punish the doctor who performs the abortion but not the woman who seeks the abortion.

Politicians (and legislatures, when they actually pass almost total bans) offer these exemptions because it has become very difficult to get a majority of the population to support abortion laws that ban all abortions except where the mother's life is in danger and that punish the mother as well as the doctor. In 2004 South Dakota passed a law that banned all abortions except those necessary to save the mother's life, but punished only abortion providers. It was subsequently repealed by a state-wide referendum.

These exemptions are not accidental. They reflect the way that citizens and government officials reason about abortion, about the value of unborn life and, above all, about women's sexual responsibility for getting pregnant and their obligations to mother. Abortion regulation is about protecting unborn life, but

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EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 47–52 (Jack M. Balkin ed., 2005)

221. Doe v. Bolton, 410 U.S. 179, 182–185, 202–205 (citing GA. CODE ANN. §§ 26-1201, 26-1202, 26-1203 (1968)).

222. Roe v. Wade, 410 U.S. 113, 117–19 (1973) (citing Act of Feb. 9, 1854, ch. 49, § 1, 1854 Tex. Gen. Laws 58, 58, *reprinted in* 3 H. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1502 (1898)). The statute was revised in 1857 and was substantially the same thereafter. *See id.* at 119 (citing Texas Penal Code of 1857, c. 7, Arts 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev. Stat., c. 8, Arts. 536-541 (1879); Texas Rev. Crim. Stat., Arts. 1071-1076 (1911)).

it is also about regulating women's sexual freedom and preserving what abortion opponents see as the values and the responsibilities of motherhood. "Family values" is more than a catchword in abortion debates—the exemptions in abortion laws show that alongside the question of when life begins are background notions of women's proper roles and their expected duties within families.

The history of abortion regulation in America suggests that the interest in protecting unborn life is not as compelling to states as they may claim. This interest in unborn life can be and often is sacrificed for other purposes that are not compelling; moreover, abortion laws may also be supported by purposes that are constitutionally illegitimate.

When the state says that it has an interest so important that the interest trumps a fundamental constitutional right, courts should demand a demonstration that there is a very close fit between that interest and the means chosen to achieve it—in doctrinal terms, that the state meets the requirement of narrow tailoring. A statute can fail this test if it is either over- or underinclusive, or there are other ways of achieving the states' interest that are less burdensome on the constitutional right.

The reason for the narrow tailoring requirement is that it is often difficult to tell why the state is doing what is doing. So if the means chosen don't match the ends asserted, that might mean one of two things—first that the purpose isn't all that compelling, and second that there are other purposes behind the asserted purpose.

A bad fit between means and ends may mean that the state doesn't think that the interest is as important as it claims it is, because it is willing to trade it off for other goals so easily. Remember, the state has already represented that the interest is so strong that it must trump a fundamental constitutional right. It greatly undermines that claim if the state trades off the interest for policies that aren't all that compelling.

A second possibility is that the state is not being candid about its purposes. A bad fit between the state's asserted purpose and the means chosen to achieve it may suggest that the real purpose behind the law is different than the state is asserting. It may be a purpose that is not particularly compelling, or it may even be an illegitimate or invidious purpose.

The narrow tailoring inquiry may be especially important in the context of abortion. First, courts may not be able to say ob-

jectively whether protecting unborn life is a compelling interest or merely an important interest. What they can do, however, is ask whether the state treats protection of unborn life as a compelling interest by looking at the way that the state writes and enforces its abortion laws. In addition, because the abortion right is based on sex equality, we need some way of knowing whether stereotypical judgments about women's proper roles have entered into the legislature's calculus of reasons. Looking at the poor fit between means and ends helps us to see if this is the case.

None of this assumes that laws must only have one purpose or that laws cannot engage in compromises between different values. That happens all the time. Rather, the issue is how important is the one particular purpose that the state claims is so compelling that it must trump a fundamental constitutional right. We judge how important that interest is by asking what other interests the state is willing to sacrifice it for. If those purposes aren't very important—or even illegitimate—that suggests that the compelling purpose isn't that compelling. Just as we know people by the company they keep, we know the importance of purposes by the kinds of purposes for which the state will compromise them.

Incest exemptions are a good example. They undermine the claim that the state has a compelling interest in the protection of unborn life because they permit the destruction of a fetus if the pregnancy violates a social taboo. People generally try to avoid that conclusion in two ways. First, they note that incest may occur through forced or statutory rape. But not all incest does; and if that is the real concern, it is met by a rape exception. Second, people may offer a public health justification. However, although children produced from incestuous relations may have a higher risk of certain genetic defects, it is only a risk, not a certainty. Most such children are perfectly healthy and may be more genetically healthy than many children born to parents unrelated by blood. In any case, if the state is willing to allow abortions of all fetuses produced by incest on the grounds that they may have a greater risk of certain defects, it cannot be claiming that it has a compelling interest in unborn life in general. It is willing to trade off that interest to prevent the mere risk of a certain number of genetic defects in an otherwise healthy population.

Exemptions for rape also undermine the claim that the state has a compelling interest in unborn life. In addition, the rape ex-

emption suggests that abortion laws—at least those in the real world—are also about controlling female sexuality and judging when women should be held responsible for the consequences of their sexual activity.

A fetus conceived from rape is no less human and no less valuable than one conceived through consensual intercourse between adults. What justifies the tradeoff of the state's asserted compelling interest? Presumably, it is a judgment about maternal responsibility for sex. Women who are the victims of statutory or forcible rape are not responsible for engaging in sexual intercourse that led to their pregnancy, and for that reason they should have a right to avoid motherhood. But the flip side of that theory is that adult women who engage in sex are deemed responsible for the pregnancies that result, even if they are due to contraceptive failure, and even if the sex was the result of coercion that falls short of the legal definition of rape in the relevant jurisdiction.

This judgment of responsibility assumes that women should not be able to exercise their sexuality as freely as men do, and that, unlike men, they have natural and moral obligations to devote themselves to the production and care of children whenever they become pregnant for any reason short of being raped. The rape exemption—and the lack of an exemption for anything short of rape—reveals a deeper set of understandings about the duties of motherhood and what women are for. Women who have sex and become pregnant are supposed to be mothers; their natural and moral obligation is motherhood and they must devote their lives to the production and care of children. Bans on abortion prevent them from shirking that responsibility. The state does not have a compelling interest in imposing that theory of responsibility on women. In fact, it is constitutionally illegitimate for the state to impose that duty of sacrifice and that theory of motherhood on pregnant women, for it is directly contrary to the theory of sex equality underlying the abortion right. If the prohibition on sex equality means anything, it means that although individuals may embrace and value their decision to become mothers, the state may not assume that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[223] This is the assumption of stereotypical judgments of "separate spheres" for men and women that modern sex equality law rejects.

223. Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

Finally, the decision to punish the doctors who perform abortions but not the women who seek them makes little sense if the goal of abortion bans is to protect unborn life. Probably the best way to discourage contract killings is to impose harsh penalties on people who solicit murder for hire. Moreover, criminalizing medically safe abortions by licensed doctors while exempting self-abortions will predictably increase the number of attempted self-abortions; criminalizing access to abortions while holding women harmless if they seek illegal abortions will predictably increase the number of unsafe abortions performed illegally. This will do little to protect fetal life and it may endanger pregnant women as well.[224]

The exemption of women from criminal penalties for abortion makes more sense against the background of a social story in which women are not really responsible for the choice to abort. Instead, women are victims of emotion; they make bad decisions in a crisis, they are prone to panic, and they are easily manipulated by unscrupulous doctors, who apparently have nothing better to do than trick women into having abortions that they would not have if they were thinking properly. This background story is deeply tied to stereotypical views about women's decisional capacities—the very same stereotypes that usually justify heightened scrutiny for sex discrimination under the Equal Protection Clause.[225]

The point of these arguments is not to deny that states do not want to protect unborn life or that their interest is unimportant. It is rather, to show that their interest is not a compelling interest that can trump a fundamental constitutional right. Moreover, history shows that abortion bans are not only about protecting unborn life; they are also about controlling women's sexuality and affirming particular views about motherhood and women's social roles. The latter purposes violate the Constitution's guarantees of sex equality and equal citizenship.

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224. Texas' exemption for women who self-abort without the assistance of a doctor probably is the least sensible of all, but the most likely reason was that the 1857 statute was not originally about protecting fetal life but rather regulating the medical profession.

225. Reva Siegel points out that legislation that doubts women's capacities to make informed decisions about abortion invokes traditional stereotypes about women's roles that raise sex equality concerns. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991; Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815 (2007).

B. THE TWO RIGHTS TO ABORTION

In *Abortion and Original Meaning*, I argued that there were two rights to abortion. The first right is a woman's right not to be forced to bear children at risk to her life and health. This right continues throughout the pregnancy. The second right is a woman's right to decide whether or not to become a mother and assume the obligations of parenthood. This right only requires that women have a reasonable time to decide whether to become mothers and have a fair and realistic opportunity to make that choice. Therefore, states could limit the second right after a certain point in the pregnancy.

Dawn Johnsen points out, I think correctly, that the second right is not simply about maternal responsibilities after pregnancy. It also concerns "the physical intrusion that abortion bans inflict on women's bodily integrity."[226] A focus on motherhood "would protect against a government effort to force women to adopt children in need of homes, or possibly even to take in foster children in need of emergency care."[227] However, if we focus only on the obligations of parenting after birth, we will fail to take into account "the physical and psychological harms inflicted on women by government mandated pregnancy and childbearing, including the significant health risks that accompany even 'normal' pregnancies."[228]

In fact, the second right—the right to avoid compulsory motherhood—actually involves at least three different kinds of protections:

> (1) The government may not force women to undergo the psychological and physical stresses of pregnancy to bear a child.
>
> (2) The government may not force women to produce offspring in the world who carry the mother's DNA and bear a permanent biological tie to the mother.
>
> (3) The government may not impose social and legal obligations of duty and self-sacrifice that come with motherhood.

226. Johnsen, *supra* note 1, at 423.
227. *Id.*
228. *Id.*

These three concerns usually travel together, and the second right to abortion protects them all.[229] Nevertheless, the second right is premised on a background of social expectations and technological possibilities. Given existing technology, if women become pregnant through intercourse and do not wish to remain pregnant, they must terminate the life of the fetus they carry. Existing social norms, fairly or unfairly, demand more of mothers than they do of fathers. Finally, the current economic structure of wage work is geared toward those who are not primary caregivers of small children. If technology, social norms, or economic structures changed sufficiently, these three aspects of the second right to abortion might come apart, and the nature of the right might be very different. We do not, however, live in such a world, at least not yet. Nevertheless, Johnsen is correct that what I am calling the second right to abortion combines several different protections for women; the differences between them may become salient as social and technological contexts change.

Johnsen's other concern is that the two rights formulation does not adequately address "the literally hundreds of state laws that impose a myriad of obstacles and restrictions on women and abortion providers."[230] That is where legislatures now direct most of their efforts. I did not address the question of abortion regulations short of total bans in *Abortion and Original Meaning* for two reasons. First, as I noted before, my focus was the narrower question whether the abortion right is consistent with the Constitution's original meaning; and second, I had already addressed the issue in *What Roe v. Wade Should Have Said.* Nevertheless, let me say a few words about how we should think about abortion regulations under a text and principle approach.

When the state merely regulates abortion rather than imposing a general ban, it can violate the first and second rights to abortion. If the state burdens the right to terminate pregnancies that endanger life and health it violates the first right, and if it burdens the right to choose not to become a mother it violates the second right. These two rights flow from the Fourteenth Amendment's guarantees of sex equality and equal citizenship, which govern the state even where it stops short of complete criminalization of abortion.

229. The first right to abortion—which prevents the government from forcing women to sacrifice life or health to bear children—also has these three aspects.

230. *Id.* at 424.

Legislatures and politicians who oppose abortion may hope to restrict as many abortions as possible by limiting access to abortion or imposing burdensome regulations on abortion providers. Nevertheless, the state may not attempt to achieve through the regulation of abortion providers and pregnant women what it may not constitutionally do through an outright ban. Courts must subject these restrictions to scrutiny to see whether they respect equal citizenship and treat pregnant women fairly.

In particular, the Fourteenth Amendment's prohibition on class and caste legislation applies both to regulations directed at abortion providers and to restrictions directed at pregnant women themselves. States have legitimate and important interests in promoting professional medical standards, in protecting maternal health, and in protecting unborn life. But they may not impose special and burdensome regulations on abortion providers in order to shut them down. And they may not impose special and burdensome restrictions on pregnant women in order to discourage them from exercising their constitutional right to choose abortion.

When legislatures single out abortion providers for special burdens that are not related to facts that distinguish abortion from other medical procedures, they engage in class legislation that violates the Fourteenth Amendment. By attempting to limit access to abortion providers, these laws compel women to become mothers through indirect means.[231]

Legislatures also violate the prohibition on class legislation when they impose special burdens on pregnant women who seek abortions that are not related to the differences between abortion and other surgery that women choose. They violate the prohibition on class legislation when they assume that pregnant women lack decisionmaking capabilities to choose abortion in ways that legislatures do not assume about women's choices for other surgical procedures. When legislatures assume that only women who are misinformed, emotionally distraught, or mentally confused would choose abortion—as opposed to other sur-

231. Tuscon Woman's Clinic v. Eden, 379 F.3d 531, 548 (9th Cir. 2004), connects abortion clinic regulation to sex equality concerns based on the Supreme Court's decision in Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736–39 (2003). *Hibbs* may have altered the prevailing constitutional assumption in Geduldig v. Aiello, 417 U.S. 484 (1974), that legislation directed against pregnant women is not sex discrimination. For a discussion, see Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

geries—they enforce gender stereotypes about women's ability to make decisions that are contrary to their traditional family roles.[232]

Individual cases will present different fact patterns. Not all regulations of abortion providers are unreasonable or attempts to eliminate abortion; some restrictions may survive constitutional scrutiny while others will not. Nevertheless the same underlying principles that apply to the abortion right also implicate what states may do in regulating abortion providers and restricting pregnant women's access to abortion.

IX. CONCLUSION: REDEMPTIVE CONSTITUTIONALISM

On the surface, the theory of text and principle seems to rely on nothing more than straightforward claims about what makes a text binding law over time. But I hope I have shown in this response that the theory is about far more. The American Constitution is simultaneously a text, a set of political institutions, a source of values and aspirations, a repository of cultural memory, and a transgenerational political project. Lincoln famously spoke of our constitutional system as a government of the people, by the people, and for the people. But if the Constitution belongs to the American people, it also helps constitute them as a people that persists over time. It does so by constituting a common project, a common past, and a common destiny. Its legitimacy comes from the fact that it can do this successfully—that it can serve simultaneously as basic law, as higher law, and as our law.

Textual theories generally assume that the Constitution is binding law because We the People agreed to it. But the generation that ratified the original Constitution is long dead. Later

232. In Gonzales v. Carhart (*Carhart II*), 127 S. Ct. 1610 (2007), the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 against a facial challenge. Justice Kennedy's majority opinion argued that governments could ban abortions using intact dilation and extraction (D&E) because, given "the bond of love the mother has for her child" *id.* at 1634, some women might regret the decision to abort if they did not know of the nature of the procedure. *Id.* Banning the procedure will cause some women not to have abortions they might later regret, and will force doctors to "find different and less shocking methods to abort the fetus in the second trimester." *Id.* Kennedy's assumption that the state might ban certain types of abortions because some women might later regret them seems to resurrect traditional paternalist attitudes about women's capacity to make decisions about sex and reproduction. One might think that the proper remedy for lack of information would be to inform the woman and then let her decide if she wants to undergo the intact D&E procedure.

generations do not consent to the Constitution; we live with it and in it. The Constitution is a culture we inhabit, an ocean we swim in, a set of institutions we grow up with. It is a project started by others that we make our own by defending it, interpreting it, arguing about it, putting ourselves on its side. Then we become part of the same We the People who wrote and ratified it. Then the Constitution becomes our Constitution, and we become the people to whom it belongs.

We can accept the Constitution as our own if it secures our rights and defends our values sufficiently that it is worthy of our respect and allegiance, if it is more than just a covenant with death and an agreement with hell. If the Constitution-in-practice is sufficiently efficacious and just, we can support the constitutional system and expect that everyone else in the political community should do so as well. But this judgment is not a simple quid pro quo. It requires an attitude of attachment to and faith in the constitutional project. The Constitution-in-practice will not always respect our most cherished values. It will not always protect our rights. We will often live in dark times. Rather, the Constitution is ours if we are able to have faith that over time it will come to respect our rights and our values. The Constitution is ours if we can trust in its future and in what future generations will do to realize its promises. The Constitution is ours if we can believe in its redemption.