WHO IS TO BE MASTER: ACCOUNTING FOR HOW THE SUPREME COURT READS THE AMERICAN CONSTITUTION

FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION. By Lawrence Lessig.* New York, N.Y.: Oxford University Press. 2019. Pp. xii, 581. $29.95 (hardcover).

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> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."
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> Lewis Carroll, *Through the Looking-Glass*

American students of the American Constitution can now view the end of Larry Lessig's presidential ambitions with bittersweet regret.[2] With his decision to end the campaign, Lessig has been freed to publish his magisterial account of how the Constitution has been applied by the Supreme Court. While Lessig entertained presidential ambitions, the publication of *Fidelity and Constraint* would perhaps have given his rivals political ammunition in its original claims, although those claims would have needed to be wrenched out of context to be of such use.

Fidelity and Constraint is big and bold in scope, ambition,

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1. Independent scholar. I am grateful to Mark Tushnet, Laura Litten and Stewart Schoder for comments on an earlier draft of this Review. I am particularly grateful to Larry Lessig for graciously saving me from error on several points.

2. *See* Tom McCarthy, *Larry Lessig Drops Presidential Run: Democrats "Won't Let Me Be a Candidate*," THE GUARDIAN (Nov. 2, 2015), https://www.theguardian.com/us-news/2015/nov/02/larry-lessig-quits-presidential-campaign-democratic-party-video.

richness, range, and depth.[3] The enthusiastic judgments on the dustcover aren't far off. The criticisms offered here reflect my judgment of the importance of the contribution that Lessig has made to our constitutional scholarship. *Fidelity and Constraint* is an enormous achievement.

Lessig undertakes four important missions. First, he redescribes much of the history of the development of our constitutional doctrine, on the one hand, and the role of the Supreme Court, on the other. He offers a creative reinterpretation of many of the cases in the constitutional canon. (pp. 290–301) Working through key decisions of our constitutional canon and history from *Marbury v. Madison*,[4] the *Slaughterhouse Cases*,[5] *Plessy v. Ferguson*,[6] *Schechter Poultry v. United States*,[7] and *Wickard v. Filburn*,[8] among others, and through the more recent cases extending democratic and personal rights, like *Brown v. Board of Education*,[9] *Lawrence v. Texas*,[10] *NFIB v. Sebelius*,[11] and *Obergefell v. Hodges*.[12] Lessig offers a comprehensive reinterpretation of that history.

There's no simple way to summarize Lessig's historical account. It describes the interplay of fidelity to, and constraint by, meaning and role and demonstrates the two-step process that translates the historical meaning of the constitutional text into the

3. The editing and production of the book is good; the index is complete with respect to subjects (a little less so with respect to authors) and only a little idiosyncratic—*National Federation of Independent Business v. Sebelius* appears only through the references to the Affordable Care Act and Obamacare. Finally, the delay in publication and Lessig's skills as a digital maven have permitted the creation of a cloud penumbra for *Fidelity & Constraint*. Associated with the book, at least in some conceptual way, are at least a couple of websites that address some of the history and literature that relates to Lessig's earlier articles and claims and provide permanent links to certain materials cited in *Fidelity and Constraint*. This would not have been easily possible in 1997 and is not unfortunately, even today, common. https://medium.com/responding-to-fidelity/latest; *see also* https://fidelity.lessig.org (including permanent links to certain materials cited in *Fidelity and Constraint*). The sites appear to be maintained by the author rather than Oxford University Press, and it is natural to wonder whether in the modern, digital world that's a function better performed by the publisher. In any case, the sites provide a very useful accompaniment to the book itself.

4. 5 U.S. 137 (1803).
5. 83 U.S. 36 (1873).
6. 163 U.S. 537 (1896).
7. 295 U.S. 495 (1935).
8. 317 U.S. 111 (1942).
9. 347 U.S. 483 (1954).
10. 539 U.S. 558 (2003).
11. 567 U.S. 519 (2012).
12. 135 S. Ct. 2584 (2015).

context of contemporary constitutional cases. In one-step originalism, the judge or constitutional interpreter simply determines what the meaning of a constitutional text was when adopted; in Lessig's words, she asks those who adopted the provision how they would decide the case (p. 64).[13] In what Lessig styles two-step originalism, the linguistic understandings are also determined, but a second step is added, the determination of how those historic understandings should be brought forward and translated into the modern context of the contemporary constitutional case (pp. 66–67).[14] Lessig thus uses this account to show the power of his theoretical account of constitutional decision. Lessig tells his story to challenge the traditional account that opposes the textual constraint championed by the Right and the flexibility demonstrated in the Living Constitution, for example, by the Left (p. 5).[15] Lessig's account emphasizes the creative translations made by the Right and the constraints accepted by the Left (p. 5). Traditionally, of course, the Right has been associated with a conservative, constrained application of the Constitution, and the Left with a flexible, Living Constitution. Assessing the power of this narrative redescription is one of the important challenges for a reader (pp. 439–440). In general, I find Lessig's account persuasive.

Second, Lessig reconceptualizes our understanding of the nature of constitutional interpretation and decision. Lessig builds on his rich earlier work introducing his fundamental concepts of fidelity to meaning, social meaning, contested and uncontested beliefs, constraint, translation, and two-step originalism.[16] Most simply, fidelity to meaning is the goal (and requirement) that

13. Lessig glosses over the distinction between linguistic understandings and expected applications originalism, but this is a modest and relatively unimportant conflation.

14. Although I follow Lessig in referring to this method as two-step originalism, as explained below, I question whether this method should be characterized as a form of originalism.

15. *See, e.g.,* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) (describing the need for an interpreter of the Constitution to introduce extra-constitutional sources of interpretation); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44–47 (Amy Gutmann ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION].

16. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, *Understanding Changed Readings*]; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) [hereinafter Lessig, *Regulation of Social Meaning*].

courts look to the meaning of the constitutional text as they apply the Constitution to decide constitutional controversies. Lessig also employs the critical concept of fidelity to role, introduced and refined later (pp. 17–18).[17] Again, most simply, fidelity to role is the goal and requirement that courts recognize and respect their judicial role and how that role is perceived in deciding constitutional controversies. While this work reprises his earlier published work, it is both enriched by the deeper historical analysis of *Fidelity and Constraint* and fundamentally changed by the introduction of the concept of fidelity to role. His conceptual account, unlike many descriptions of our constitutional practice, is infused with an awareness of the contingency of the constitutional decisional process and a recognition that it could have been different (p. 5).[18]

Lessig argues that constitutional adjudication is determined by the two-step originalism that translates the meaning of the historical constitutional texts into the context of contemporary constitutional controversies. Lessig's account of the changing context is not simply a matter of changing technologies in our world; it is a story of changing social knowledge. Our world changes as what we understand or, as Lessig astutely acknowledges, what we think we understand, changes (pp. 153–157). The changing social knowledge and social meaning both creates the requirement for translation and provides the tools by which to make the translation. Translation is informed and constrained by meaning and the institutional role of the courts in our Republic.

Third, as a corollary to these two projects, Lessig juxtaposes his account with that of Bruce Ackerman.[19] Lessig fundamentally revises Ackerman's account and articulates an alternative that captures much of Ackerman's anti-formal insight without endorsing Ackerman's more radical theoretical claims about the

17. Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 174–80 (1995) [hereinafter Lessig, *Translating Federalism*] (introducing the "Frankfurter Constraint"); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009) (introducing the concept of fidelity to the judicial role).

18. If it had been different, of course, then we, too, would be different. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE].

19. *See* 1–3 BRUCE ACKERMAN, WE THE PEOPLE (1991–2014) [hereinafter ACKERMAN, WE THE PEOPLE].

history of constitutional amendments (pp. 431–440). On Lessig's theory, our normal processes of adjudication and the determination of the constitutional meanings, through translations, account for much of the constitutional change (pp. 63–67).

Fourth, and perhaps most importantly of all, Lessig defends a normative assessment of this history and process of constitutional adjudication and doctrinal development (pp. 458–459). Lessig's judgment is measured—as he puts it, there are no Herculeses in his story (pp. 422, 452, 458).[20] On balance, the history of our constitutional jurisprudence is a part of our history we can and should be proud of, on the basis that the Court has generally, but not uniformly, advanced equal rights and expanded democracy within the constraints of its role.

This Review defends three theses and sketches a fourth. First, Lessig's historical account is creative and brilliant. It's one that constitutional scholars will have to engage going forward. Second, his reconceptualization of constitutional adjudication and constitutional decision is brilliant and exciting. It is even more brilliant and exciting than Lessig himself understands. Lessig remains enmeshed in the conceptual web of our traditional thinking about some of these questions. The Review suggests how we might cut him free of some of these constraints. Third, the Review explains why Lessig is headed in the right direction in his critique and restatement of Ackerman's history and theory. There is more flux in our normal constitutional practice than Ackerman recognizes and more importance accorded the constitutional text. Fourth, with respect to Lessig's normative account, the Review simply describes an alternative stance that suggests that the normative project of justification is out of place in the kind of project Lessig has undertaken. It's like a judgment about the merits or value of an entire culture popping up in the middle of an ethnographic study.

Lessig's account has generated a great deal of enthusiasm; Jack Balkin's blog *Balkinization* featured *Fidelity and Constraint* in a symposium last summer.[21] This book was Lessig's first, but he continued to work on it for a score of years (p. 461). Much of the

20. *But see* RONALD DWORKIN, LAW'S EMPIRE 354–99 (1986) [hereinafter DWORKIN, LAW'S EMPIRE] (describing Justice Hercules).

21. *See Balkinization* at https://balkin.blogspot.com/2019/08.

analysis tracks his earlier published argument, but there are some important refinements, developments, and retrenchment (p. 463 n.2).[22] My focus is generally on the argument and claims in *Fidelity and Constraint.* Lessig styles this historical account as a matter of how the Court has *read* the Constitution, but this metaphorical description of constitutional adjudication as reading is perhaps a little misleading. Of that, more later.

Still, there are some puzzles and questions raised by Lessig's work. Most immediate is the significance of the substantial gestation period for the work. It is apparently largely explained by Lessig's insistence that he work through the complex puzzles in our constitutional practice that he so brilliantly unravels. *Fidelity and Constraint* instantiates the earlier theory more fully within Lessig's historical narrative. With his methodical scholarship, he implicitly calls into question the current conventional pace of scholarly production within the legal academy.[23] Second, the organization of the work and its method, despite Lessig's express attention to methodological issues, raises important questions. Lessig characterizes his account as both a work of constitutional theory and of historical constitutional ethnography (pp. 2–4, 5, 422). Lessig leads us through what it was like to face (and decide) the central constitutional cases of our history and to understand that history and evolution. Yet the flavor and aspirations of the work are nevertheless fundamentally normative (pp. 6, 458–459). Lessig also implicitly characterizes his theory as normative in his comparison with Ackerman's own normative theory. Ultimately, Lessig expresses pessimism about

22. Lessig, *Fidelity in Translation*, *supra* note 16; Lessig, *Understanding Changed Readings*, *supra* note 16; Lessig, *Translating Federalism*, *supra* note 17. Foremost among these, I think, are the expansion and refinement of the concept of fidelity to role and the richer historical account. The Gadamer of the 1990s has been replaced with Donald Davidson in the new millennium. *Compare* Lessig, *Fidelity in Translation*, *supra* note 16, at 1196 (discussing the contribution of Gadamer's hermeneutics to our understanding of translation) *with* p. 4 (discussing Davidson's principle of charity).

23. Indeed, reading many other creative and imaginative contemporary works from the legal academy, it is hard not to wonder what they might look like if their authors had made the additional, sustained intellectual investment evident in *Fidelity and Constraint*. *See, e.g.*, DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2019) (emphasizing the impact of meritocracy on the self-consciousness of both more and less successful individuals, but without taking much account of the conceptual contributions of Hegelian and Marxist theory or examining the nature of merit incorporated without much analysis into meritocratic practice—and Markovits' own account).

the state of the Court and our Constitution (pp. 458–459).

In a work as rich and sweeping as *Fidelity and Constraint*, it is helpful to reflect on who and what do not figure in the story and who and what, while present, remain in the shadows. Larry Tribe, Richard Epstein, Philip Bobbitt, and Cass Sunstein make cameo appearances only to be left hovering in the shadows. Sunstein's principal contribution to debates about constitutional theory has been as a contemporary defender of a Thayerite minimalist approach to constitutional adjudication.[24] Lessig implicitly rejects Sunstein's minimalist precepts.[25] Minimalist decisions and opinions leave open questions of what the constitutional law is and what constitutional rights persons have in cases related or collateral to that before the Court. While Sunstein focuses on the benefits such an approach provides, in reducing the scope of disagreement and conflict between majority and dissenting opinions, judicial minimalism also imposes obvious costs on persons whose rights remain uncertain.[26] Lessig rejects minimalism, as an independent decisional precept, as a description of the Court's practice (pp. 394–401). Minimalist decisions will sometimes arise from fidelity to meaning[27] or from fidelity to role.[28] But a minimalist stance will never be appropriate

24. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) [hereinafter SUNSTEIN, LEGAL REASONING]. For Lessig, however, it is Sunstein's work with respect to social meaning that is important (p. 552 n.2).

25. We can see this in Lessig's discussion of the cases that Sunstein identifies, where he believes a more minimal approach to decision would have served the Court and the Republic well. Thus, for example, in his analysis of *Roe v. Wade*, Lessig does not explore or even identify the potentially lost opportunity of an incompletely theorized decision of the case (pp. 394–401). *See also* SUNSTEIN, LEGAL REASONING, *supra* note 24, at 36–41 (discussing the alternative of incompletely theorized opinions in *Dred Scott*, *Brown v. Board of Education*, and *Roe v. Wade*).

26. *See, e.g.*, Naim v. Naim, 350 U.S. 891 (1955) (per curiam) (declining substantive review of an anti-miscegenation law).

27. If, for example, a constitutional provision were to be read narrowly under its original understanding, then the provision ought to be interpreted and applied narrowly under the principle of maintaining fidelity to meaning; but there ought not to be a corollary principle always to choose the narrowest reading or level of generality. For a contrary view, see Michael H. v. Gerald D., 491 U.S. 110, 121–24 (plurality opinion) (1989); SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 134–42 (arguing that the Court should apply constitutional provisions at the level of their least generality).

28. Fidelity to role is a particularly rich source of minimal decisions because it asks the Court to recognize the limits of its institutional competence and the limits on its ability to mandate behavior that is not generally supported within the community. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008). Rosenberg's description of the Court's limits as an agent of social change can be

as an independent matter; the pervasive role Sunstein embraces for incompletely theorized decisions does not figure in Lessig's account of what the court should do (except as such incompletely theorized decisions may be proper in light of the considerations of role).[29] But Lessig does not make this distinction or reject judicial minimalism expressly.

Lessig discusses the role and aspirations of what he terms holistic theories (p. 4). (I'll refer to them as unified theories.) By this, he means comprehensive, formal, unified theories that purport to account for all of the data with respect to our constitutional decisional practice. Sometimes he describes his own theory as aspiring to this standard. Lessig does not engage Bobbitt's or other pluralist accounts; those theories eschew a comprehensive, unified theory for an account that describes the factors and arguments that figure in the decision of constitutional controversies.[30] This omission gives rise to a more substantial concern with Lessig's account.[31] Although Lessig ultimately defends a pluralist theory, he has not worked through the issues inherent in such accounts and the significance of the absence of a decisional algorithm in such accounts. As a result, he does not seem to understand the implications for his own theory. He sees only its methodological limitations (p. 4). In so doing, he mistakes a virtue for a flaw. I will explain below why Lessig has a pluralist theory and why he therefore cannot be an originalist.

A review can only selectively engage Lessig's important themes. First, I explore Lessig's concepts of fidelity to meaning and fidelity of role. In so doing, I analyze Lessig's concept of translation and his philosophical premises about the meaning and

restated in Lessig's terms of the role of the Court and incorporated into Lessig's account of the demands of fidelity to role.

29. Lessig's concept of fidelity and constraint with respect to role should perhaps be understood as a conceptual abstraction of Sunstein's judicial minimalism. Both are driven principally by prudential concerns. Arguing against such an account is Lessig's failure to engage the concept of judicial minimalism. Indeed, judicial activism is employed only very simply as a concept that figures in his account only tangentially (pp. 153, 163, 267, 278, 393). Finally, one could imagine a sophisticated refinement of Lessig's concept of fidelity to role that suggests Sunsteinian minimalism when the Court confronts a constitutional case implicating elements of social knowledge that are changing rapidly. Such caution would reduce the likelihood of pairs of cases like *Bowers* and *Lawrence* arising. But Lessig doesn't appear to make such a move and the Court's ability to recognize instances of social knowledge in rapid flux on which such a refinement is predicated is hardly clear.

30. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18.

31. *See id.*; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

import of constitutional language. I consider Lessig's account of who is the master of the constitutional text and how that mastery is achieved and exercised. I also evaluate the adequacy of the metaphor of reading. Second, I articulate the nature of Lessig's project of constitutional ethnography. I explore Lessig's methodology and his accounts of the role of theory in accounting for constitutional law and practice. Third, having described Lessig's methodological stance, I examine how his account departs from Ackerman's radical account of constitutional flux and why the two seemingly similar methodologies yield such different assessments of originalism and textualism. Fourth, and finally, I discuss Lessig's normative assessment of our constitutional practice and the possibility of justification. There is much with which I engage only impressionistically, including Lessig's contribution to the debate over originalism[32] and his rich historical analysis.

I. FIDELITY TO MEANING AND THE CONSTRAINT OF ROLE

Lessig's twin paired concepts of fidelity and constraint to meaning and role in constitutional adjudication purport to offer a complete description of the constitutional decisional practice of the Court (pp. 4–5). More precisely, Lessig's account is locally complete; he acknowledges that our practice may change and render his account inaccurate or incomplete (p. 4). These two pairs of concepts therefore form the core of Lessig's account of constitutional adjudication and the determination of constitutional concepts. Lessig expressly acknowledges the historical contingency of the argumentative and decisional process he describes and the sources from which it arises (pp. 5, 420). As a constitutional ethnographer, Lessig believes that we can better understand our constitutional practice if we know its provenance. He also acknowledges the limited context in which this process operates (p. 458). Lessig offers a rich account of our constitutional decisional practice because the demands of fidelity

32. I've elsewhere offered my don't-care conclusions about this debate and endorsed a therapeutic strategy to pursue a strategy of transcendence rather than partisan victory. *See* André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL RTS. J. 101, 117–31 (2017) [hereinafter LeDuc, *Striding Out of Babel*] (arguing that the debate over originalism has degenerated into an unproductive stalemate).

and role provide often-incommensurable arguments for decision. There's no algorithm to determine when the limitations of the Court's role trump the demands of fidelity to meaning (pp. 455–456, 457–459). I am not sure that Lessig ever describes the interaction in these terms or describes it expressly in dialectical terms. Instead, the Court must exercise judgment to reconcile the competing, inconsistent demands. While Lessig doesn't say much about how judgment works, even acknowledging its place goes further than many other constitutional theorists do.

A. FIDELITY TO MEANING THROUGH TRANSLATION

Before turning to Lessig's account of fidelity and constraint in constitutional adjudication, I introduce Lessig's seven central concepts of fidelity, contested and uncontested social meanings, translation, one-step and two-step originalism, and role. Any account of fidelity must begin with a notion of what it is to which we are being faithful (pp. 16–17). For Lessig, it is the meaning of the constitutional text. The first element of this fidelity is a determination of what counts as the determinative text. The text of the Constitution obviously qualifies. What about the text of precedent? Lessig doesn't address this question expressly. Classically, originalism draws a sharp distinction between constitutional text and precedent.[33] But Lessig's introduction of the concept of fidelity to role raises the possibility that precedential text, seen through the prism of role, may acquire significance, too. That's because role requires the Court to be deferential toward its own holdings and reasoning (even if it is not bound by them in the same way as lower courts) (pp. 400–401). That deference reflects the Court's commitment to the rule of law and demonstrates that constitutional decision is not merely a matter of personal conviction. So if role requires precedent be respected, then the text of such precedent—and the meaning of such text—becomes privileged, too, in a way similar to the constitutional text itself.

The second element of fidelity is a determination of the relevant meaning. It's not the semantic or linguistic meaning at the center of much of the traditional originalism or the New

33. SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 140 (characterizing respect for precedent as a pragmatic exception to originalism); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical As It Sounds*, 22 CONST. COMM. 257 (2005) [hereinafter Barnett, *Trumping Precedent*].

Originalism.[34] With his work on fidelity and translation in the 1990s, Lessig also outlined an account of social meaning as a critical, but overlooked, determinant of our constitutional law.[35] The term "social meaning" may appear a redundant barbarism and the associated concept misleading or confused. After all, *all* of our meaning is social—except for those who cling to the possibility of, and perhaps still speak, a private language.[36] Like the concepts of fidelity and translation, social meaning plays an important role in Lessig's account, too.[37] The relevant meaning of the Constitution for Lessig to which fidelity is required is a practical force or meaning, not a merely semantic or linguistic meaning.[38] While Lessig, in his terminology, styles social meaning a form of meaning, it may appear that it is really more like *social knowledge*.[39] Indeed, as Lessig develops his central account of contested and uncontested commitments and issues and foregrounded and backgrounded commitments and issues, he writes of "social understanding" (p. 149).[40]

34. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 486–88 (2013) (assuming a traditional, referential account of linguistic meaning as the foundation of the communicative content of legal texts).

35. Lessig, *The Regulation of Social Meaning*, *supra* note 16, at 946–49.

36. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 258–79 (G.E.M. Anscombe trans., 1953); SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982) (controversial reconstruction of Wittgenstein's private language argument not closely tethered to Wittgenstein's own argument); G. P. BAKER & P. M. S. HACKER, SCEPTICISM, RULES AND LANGUAGE (1985).

37. *But see* Jack M. Balkin, *Translating the Constitution*, 118 Mich. L. Rev. 977 (2020) [hereinafter Balkin, *Translating the Constitution*] (book review).

38. Meaning is a polysemic term; it refers to a number of things. *See generally* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Judicial Interpretation*, 82 U. CHI. L. REV. 1235 (2015); Gilbert Harman, *Three Levels of Meanings*, *in* REASONING, MEANING AND MIND 155 (1999) (distinguishing the way that thoughts have meaning, communication has meaning, and shared social practices constitute frameworks within which acts and sayings have meaning). It is not clear that Lessig's concept of social meaning satisfies any of Harman's definitions.

39. The difference is fundamental; most simply, meaning is a linguistic matter; it's about language, and knowledge is not so limited. Knowledge is about everything that can be known, although statements of knowledge are made linguistically.

40. One question is how Lessig's notion of the constitutional meaning and social meaning relates to the notion of expected application that modern semantic meaning and semantic meaning understanding originalists reject so categorically. SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 144 (endorsing an originalism based upon the original understanding of the constitutional text, not its expected application); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) [hereinafter BORK, THE TEMPTING OF AMERICA]. Lessig asserts that while a one-step originalism looks to the expected application of the constitutional text, his two-step originalism, including translation, does not (p. 484 n.61). *See also* Balkin, *Translating the*

Lessig's distinction between contested and uncontested beliefs also requires explanation. The distinction is not between whether beliefs are contested or uncontested in fact within a community at a particular time, or the degree to which beliefs are contested (pp. 145–146). Lessig doesn't deny that these distinctions can be made, only that they are important in constitutional argument and decision. The distinction imbeds a normative notion of whether reasonable persons could contest the belief. If a reasonable person could contest a belief, then it is contested; if not, not (pp. 145–146). Thus, implicit in the concept is the notion of the reasonable person. Lessig articulates his notion of the reasonable person in the judicial context, and then only briefly. Lessig's reasonable person concept is idiosyncratic in an important way (pp. 153–154). The reasonable person concept is widely employed in Anglo-American law.[41] What Lessig emphasizes in his notion of the reasonable person, however, is what she believes, not what she does (p. 145). While Lessig's theory may not require that judges have the extraordinary faculties of a Lamont Cranston, his concept will at the very least make the constitutional determinations harder than the usual legal questions with respect to the reasonable person. It is particularly more difficult with respect to what Lessig terms backgrounded beliefs.[42] For Lessig, a particular kind of reasonable person, the normal judge, also figures in his analysis (p. 154). The normal judge accepts in her adjudication what the reasonable person knows as uncontested beliefs. Lessig characterizes this aspect of judicial reasoning not as a matter of what the judge knows, but as a matter of how judges are "well-socialized" (pp. 152–153).

The distinction between contested and uncontested beliefs

Constitution, *supra* note 37, at 979–80 (seemingly endorsing this analysis). The introduction of the step of translation moves us away from decisions based solely upon what the relevant constitutional enactors expected.

41. While the notion of the reasonable person is not uncontroversial as a conceptual matter, the reasonable person is customarily invoked in the common and statutory law as a standard for behavior, not belief. *See, e.g.*, John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q.R. 563 (2015) (arguing that the reasonableness of the reasonable person cannot be reduced to legal standards); John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273 (2001) (arguing that the reasonable person is a person justified in her conduct).

42. That is because background beliefs, whether contested or uncontested, are not under active discussion and debate within the community (pp. 146–49) (including the wonderful example of a contested backgrounded concept, the button-down shirt).

plays at least two roles in Lessig's analysis. First, if a belief is uncontested, then the Court may rely upon it without proof or defense, or even much discussion (pp. 407–417).[43] This reliance relates to framing the constitutional questions and to incorporating premises and assumptions in the reasoning to a decision in the case (pp. 338–346). [44] Second, if a belief is contested, how the Court responds is more complex. With respect to contested beliefs, paradoxically, the Court is charged with playing a more active role through translation (pp. 381–387). In this case, the Court must translate the meaning of the original constitutional text into the new context in which social understanding no longer treats the relevant social meanings as foundational and uncontested.

Lessig's concept of constitutional translation is another of his most celebrated contributions to the analysis of constitutional adjudication.[45] Translation is the step that takes traditional one-step originalism to the two-step method Lessig endorses (pp. 63–64). First, the original meaning of the constitutional text is determined. Second, that meaning is translated into the context of a case being adjudicated. Lessig tacitly suggests that this procedure shows how originalists can reject flogging as an unconstitutional cruel and unusual punishment under the Eighth Amendment. Famously, as Lessig notes, Justice Scalia rejected flogging without being able to explain how he could do so consistent with his originalism.[46] More precisely, how could he do so without also being committed to the proposition that the

43. Lessig argues that the recognition that same-sex sexual relationships could no longer be condemned as a matter of uncontested normative judgment, opened the way to characterizing legislation criminalizing same-sex sexual relations or prohibiting same-sex marriages as discriminatory.

44. Lessig offers the unhappy example of the role of nineteenth century scientific theory in support of America's legal and constitutional racism.

45. Lessig, *Fidelity in Translation*, *supra* note 16. Lessig analyzes his concept of constitutional translation in the context of an extensive analysis of linguistic translation of fiction and other works more generally (pp. 49–67). Still, some readers are unpersuaded that Lessig's concept counts as translation. Balkin, *Translating the Constitution*, *supra* note 37, at 981 (characterizing the practice Lessig defends as "creative paraphrase").

46. *See* p. 64; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) ("I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality."); *see also* André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JURIS. REV. 263, 282–85 (2015) [hereinafter LeDuc, *Ontological Foundations*] (arguing that originalists like Justice Scalia are unable to make do with the austere semantic or linguistic meanings of the constitutional text).

Eighth Amendment prohibits capital punishment?[47]

According to Lessig, when we introduce translation, the original prohibition of cruel and unusual punishments is mapped into our current social meanings and understandings. In that context, the current uncontested understanding is that flogging is cruel and unusual. Like the use of stocks or human branding, flogging assaults the fundamental dignity of the convicted criminal.[48] Thus, with the benefit of modern social knowledge, the Eighth Amendment prohibits flogging. By contrast, the current understanding of the status of capital punishment as cruel and unusual punishment is not uncontested.[49] Lessig's account of translation and two-step originalism puts a great deal of weight on determining which social knowledge and understandings are contested and which uncontested.[50] That's not a question that can be answered simply by what people do; it requires sorting people first (into reasonable and not), and then looking at what they believe.

The concept of contested and uncontested beliefs is central to Lessig's account of translation, but he expresses concern that its continued application is threatened by the erosion of shared, uncontested beliefs (p. 458). Sometimes an uncontested belief becomes contested; in that case, as in the example of beliefs about racial or sexual equality, the result is that the Court backs away from a settled distinction in the law. Lessig argues that the repudiation of *Plessy* should be understood as flowing from the Court's recognition that traditional scientific and other racist doctrines were no longer accepted as uncontested (pp. 357–363). He also argues that the Court's shifting jurisprudence on sexual equality issues can be traced to previously uncontested views about the inherent intellectual and other, non-physical differences

47. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 46 (mocking the suggestion that the Eighth Amendment prohibits capital punishment, on the basis of the criminal law of the eighteenth century and the original understanding of the constitutional text).

48. LeDuc, *Ontological Foundations*, *supra* note 46, at 310–11 (describing Dworkin's argument).

49. Evidence that this issue is not uncontested comes from the criminal laws of twenty-nine states imposing capital punishment for certain crimes. *Capital Punishment in the United States*, WIKIPEDIA, *at* https://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States.

50. Lessig recognizes this burden and devotes substantial effort to articulating how this mission is to be accomplished (pp. 145–48). But substantial questions likely remain, at least for originalists.

between sexes becoming contestable, with a natural extension of traditional constitutional limitations on discrimination to sex-based distinctions in the law (pp. 381–388). Thus, on Lessig's telling, this was the shift with respect to the long-understood inherent differences, first between African-Americans and whites, and later between men and women, which opened the way for an expansion of the right to be free from racial and sexual discrimination, respectively, in many instances. While this was a good thing in Lessig's normative world, the expansion of contestability is not always positive.[51]

Translation is neither simple interpretation [52] nor construction.[53] Like interpretation and construction, translation is a linguistic practice. It is a mapping of one set of linguistic expressions onto another set of linguistic expressions in another context (pp. 56–57). Done properly, translation is an isomorphism that preserves social meaning.[54] To put it another way, social meanings are invariant under translation. The scope of the adjustments that may be made in translation is not altogether clear; consider the question of how to treat dollar amounts in the Constitution.[55] For example, the right to a jury trial is provided for suits at law when the amount exceeds twenty dollars.[56] While this provision, at least with respect to the threshold amount, is seemingly unambiguous, there is not much historical guidance with respect to the requirement.[57] Should a contemporary court applying Lessig's account of translation and seeking to maintain fidelity to meaning make an appropriate inflation adjustment to this amount? Lessig doesn't expressly address this seemingly simple case, and it's not entirely clear what his theory would require.

51. *See infra* Part I, *Lessig's Historical Dialectics of Fidelity and Constraint, Meaning and Role*.

52. In response to Sanford Levinson's criticism, Lessig characterizes translation as interpretation. *See* Lawrence Lessig, *Translation in the* Wild, MEDIUM (May 28, 2019), https://medium.com/responding-to-fidelity/translation-in-the-wild-cb297642bd24.

53. Unlike construction, translation is not predicated on an under-determined or indeterminate constitutional text. *See* Lawrence B. Solum, *Originalism and Constitutional Construction,* 82 FORDHAM L. REV. 453, 469–72 (2013) (describing the scope and sources of the "construction zone"); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95 (2010).

54. *See* LeDuc, *Ontological Foundations*, *supra* note 46, at 284 (treating translation as simply interpretation).

55. *See, e.g.*, U.S. CONST. amend. VII.

56. *Id.*

57. *See generally* Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665 (2005).

As a matter of semantic meaning, twenty dollars has a determinate meaning, at least in the absence of formal currency revaluations. There's little evidence that the provision's constitutional pragmatics add to its linguistic force. The value of twenty dollars has varied substantially over time and its value has declined substantially in the intervening couple of centuries.[58] While it's clear that twenty dollars today is not the equivalent of twenty dollars in 1789, it's not clear what the equivalent is.[59] The recognition of this lack of equivalence would appear uncontested.[60] Even if the modern equivalent were clear, it's not certain that adjustment should be made, however. There is at least an argument that the fixed dollar amount was chosen with the intent that the right to a jury trial would expand as the value of twenty dollars declined.[61] So the introduction of concepts of social meaning and translation creates complexity for even the simplest cases.

Lessig readily acknowledge that wrestling with these complexities is part of the task that constitutional judges must accept (pp. 60–63). It may, however, be questioned whether, or at least how much, Lessig's concepts of translation, social meaning, and two-step originalism add to the description of our constitutional interpretative and decisional practice. At the end of the day, linguistic meaning doesn't take us beyond recognizing an interpretative and decisional problem. Extraneous (non-textual) sources, whether as a matter of social understandings or otherwise, must give the courts guidance as to how to apply the

58. *Id.* at 1673.

59. *Id.*

60. Whether such knowledge is backgrounded or foregrounded knowledge at any given time may depend upon the experience of inflation at the time.

61. But this argument is far from dispositive, in part because the experience of inflation was so very different in the eighteenth century. As Thomas Piketty has remarked, the wealth of the landed gentry in Jane Austen's *Pride and Prejudice* is specified in fixed numbers of pounds, precisely because inflation in the United Kingdom in the eighteenth and nineteenth centuries was so limited. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 134 (Arthur Goldhammer trans., 2014). While the United States had encountered more serious inflation under the Articles of Confederation, part of the promise of the stronger powers of the national government under the Constitution (including the taxing power) was a stronger, more stable currency. So the notion that inflation was expected and its effects intended is uncertain. *See generally* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15–39 (2005) (describing the fiscal crisis of the 1780s arising from the absence of a federal taxing power under the Articles). Of course, as inflationary expectations have changed over time, on Lessig's account our social understandings of the force of fixed dollar thresholds in legal contexts may evolve, too.

provision. Lessig's approach may strike originalists as too open-ended and non-originalists as needlessly formalistic.[62] Lessig may welcome this Solomonic resolution of the controversy between originalist and non-originalist stances on the interpretation of the Twenty Dollars Clause.

Lessig's theory of translation, in any case, is more generally controversial.[63] Controversy surrounds the nature of translation itself,[64] the nature of social meaning and understanding, and the determination whether a given claim is contested or uncontested.[65] It's unlikely that many traditional originalists or New Originalists will be persuaded by Lessig's reliance upon uncontested social meanings as the key to determine how translation is to be done. Part of the reason is the unstated premises in the originalist position.[66] A more important reason, however, is what originalism wants to accomplish: making constitutional adjudication highly formal and discrediting much of the late twentieth century jurisprudence expanding civil rights and civil liberties.[67] Lessig's theory of translation and two-step originalism does not share—or accomplish—this mission.

Understanding Lessig's conceptual commitments with respect to the nature of constitutional meaning and the truth of propositions of constitutional law requires a brief digression into classical modern Anglophone analytic philosophy of language. This philosophy, which figures largely tacitly in Lessig's account,

62. Two-step originalism, with its reliance upon developing social knowledge that includes not just technological and scientific knowledge, but normative propositions, permits constitutional doctrine to change in ways that originalists traditionally reject. Looking to the meaning of the text—seemingly ignoring developments in the way that we think about the dignity and rights of persons and the nature of democracy, for example—may seem an unduly crabbed constitutional method for many critics of originalism.

63. *See, e.g.*, Balkin, *Translating the Constitution*, *supra* note 37, at 981 ("[T]he practice [Lessig] describes is closer to 'creative paraphrase' than the translation of literary texts.").

64. *See, e.g.*, Lawrence Solum, *Fidelity, Translation, and Originalism: Thoughts on Lessig's "Fidelity and Constraint,"* BALKANIZATION (June 27, 2019), https://balkin.blogspot.com/2019/06/fidelity-translation-and-originalism.html. (characterizing Lessig's use of the term "translation" as a metaphor for interpretation and criticizing the concept of meaning employed in the account) [hereinafter Solum, *Fidelity*].

65. *Id.* (asking whether translation is constrained to preserve the original linguistic understanding of the constitutional text).

66. *See* LeDuc, *Ontological Foundations*, *supra* note 46, at 269–74 (describing the realist originalist commitment to a Constitution-in-the-world).

67. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 15; BORK, THE TEMPTING OF AMERICA, *supra* note 40; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–603 (2004).

occasionally made express in his discussion of meaning, closely links the concepts of meaning and truth (p. 4).[68] As an approximation, at least, the meaning of a sentence determines its truth conditions.[69] Donald Davidson is the philosopher of language that Lessig references most often—for the principle of charity and the notion of translation (pp. 2, 4, 422). Davidson generally endorses a holistic account of truth and meaning. His account of meaning and truth, at least in this respect, follows Quine's holistic account of language.[70] It is less clear that Lessig adopts such a holistic stance; he appears to believe, for example, that propositions of constitutional law represent the Constitution-in-the-world.[71] They are true if they represent the Constitution that is, not the Constitution that's not.[72] It is a little puzzling, then, that Lessig repeatedly invokes Davidson. Lessig, by contrast, doesn't endorse a holistic account of legal and constitutional truth. He often seems to write as it there is a simple correspondence between propositions about the Constitution and the positivist constitutional text adopted (pp. 225–226).[73]

It's therefore important to understand Lessig's tacit account of the truth of propositions of constitutional law and the truth

68. *See generally* David Lewis, *General Semantics*, *in* SEMANTICS OF NATURAL LANGUAGE 169 (Donald Davidson & Gilbert Harman eds., 1972), *reprinted in* 1 DAVID LEWIS, PHILOSOPHICAL PAPERS 189 (1983) (asserting the relationship of meaning and truth conditions). Much Anglophone analytic philosophy rarely engages Hegel. *But see* Robert B. Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, *in* PRAGMATISM, LAW, AND LANGUAGE 19, 19–20 (Graham Hubbs & Douglas Lind eds., 2014) [hereinafter Brandom, *Hegelian Model*]; ROBERT D. BRANDOM, A SPIRIT OF TRUST: A READING OF HEGEL'S *PHENOMENOLOGY* 661–63 (2019) [hereinafter BRANDOM, A SPIRIT OF TRUST] (offering an account of adjudication as a matter of concept formation in an inferentialist, non-representational account of language); ROBERT B. PIPPIN, HEGEL ON SELF-CONSCIOUSNESS: DESIRE AND DEATH IN THE *PHENOMENOLOGY OF SPIRIT* (2011).

69. *See* Lewis, *supra* note 68, at 193–94.

70. WILLARD V.O. QUINE, WORD AND OBJECT (1960); Donald Davidson, *True to the Facts*, 66 J. PHIL. 748 (1969); DONALD DAVIDSON, *A Coherence Theory of Truth and Knowledge, in* SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 137 (2001).

71. We see this indirectly, for example, when Lessig analogizes his project to that of Dworkin, who was expressly and aggressively realist (p. 2). *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996). We also see it when Lessig briefly describes an account of meaning and truth (p. 225) (describing the replacement of natural law theories with legal positivism).

72. *See* ARISTOTLE, METAPHYSICS 1011b25 ("To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.") *quoted at* https://plato.stanford.edu/entries/truth-correspondence/#1.

73. *See generally* LeDuc, *Ontological Foundations*, *supra* note 46, at 274–85 (arguing that many contemporary constitutional theorists endorse a representational account of constitutional language and a correspondence theory of truth).

conditions of such propositions. The premise that there is an authoritative linguistic meaning of the constitutional text grounds Lessig's concept of the Court's duty and practice of maintaining a fidelity to meaning in its constitutional decision-making. From that starting point, Lessig casts his account of changed social meanings in terms of the shared, uncontested assertion of the truth of certain non-constitutional propositions (p. 415).[74] It's not clear, however, that truth means anything more than generally accepted beliefs within a relevant community at a particular time.[75]

One of Lessig's most puzzling comments on truth in constitutional practice relates to Ackerman's theory.[76] He suggests that Ackerman's claims will not be accepted by most lawyers, despite their truth. His comment seems to suggest that our beliefs about the Constitution are immune to the demonstration of inconsistent new truths. The most obvious possible interpretation of Lessig's claim would be to conclude that the conventional wisdom to which most lawyers subscribe is just wrong. That is a hard claim to establish, in the absence of any suggestion by the Court that such extra-constitutional amendments would be valid and the established political practice of seeking to make changes to the Constitution through the processes of Article V (even if there are the kinds of procedural irregularities that Ackerman describes with respect to the adoption of the Reconstruction Amendments). Another possibility is that Lessig doesn't really mean to characterize Ackerman's theoretical accounts of constitutional moments and the amendment of the Constitution through the exercise of popular sovereignty as true; instead, he means merely to commend them strongly. Arguing against such a strategy of evasion is the fact that Lessig believes that a substantial part of

74. "'We now understand that' is a clause with a truth value" (p. 415). Lessig would have put this more precisely if he had attributed the assertion of a truth value to this clause, with such assertion being true or false based upon not just the truth or falsity of the proposition to which the clause is prefaced but also the state of our collective knowledge. It's not entirely clear whether Lessig believes that this clause could be said to be true if asserted of a false commonplace or proposition of accepted wisdom.

75. *See* pp. 151–55 (describing the changing economic understanding (knowledge) about the role of monopoly and labor economics and its implications for constitutional jurisprudence).

76. *See* pp. 14, 469 n.15 (asserting that most lawyers reject Ackerman's argument that the Constitution can be amended outside the processes of Article V despite the brilliance "and *truth*" of Ackerman's argument) (emphasis added).

Ackerman's arguments are right and his claims about constitutional flux true.[77] Another possibility would be to acknowledge that our beliefs about the Constitution are simply inconsistent. As a descriptive matter this is surely true for most of us. But it's not generally endorsed as a normative claim. As a matter of our rationality, we think that new true beliefs have to be woven as consistently as possible into our system of beliefs—not simply ignored.[78]

A final, subtler interpretation would be to read the commitment as *true in part*. The relevant part is what Lessig himself takes away from Ackerman's theory, without the characterization of the New Deal as a constitutional moment. Lessig himself, after all, really treats Ackerman's claim as true in part and false in part.[79] If we read Lessig that way, then we still have a puzzle, but we have a smaller puzzle. We can perhaps solve the balance of the puzzle by treating the beliefs of most lawyers with respect to the Founding and Reconstruction as wrong. Because our practice of accepting the Constitution and Reconstruction Amendments as law is so settled, practicing lawyers have perhaps not examined the history of the adoption of such law closely—and have assumed underlying dimensions of procedural legality that were not present. Admittedly, we should be cautious in making such a judgment, as in the case of treating the beliefs of most lawyers as mistaken on the broader reading of Lessig's claim. But in this context, the imputed false beliefs appear practically immaterial. When we speak of truth, in the vernacular, we don't always define the scope of our truth and falsity claims precisely.

The philosophy of language also figures in Lessig's heuristic metaphor of *reading* the Constitution, reflected even in the title of his work. His conventional foundational assumptions about the nature of language and text inform his fundamental formulation of, if not conceptualization of, constitutional adjudication as a matter of reading. Note at the outset that the notion of reading that Lessig invokes is unlike any ordinary reading. When the Court reads the Constitution, what they read becomes what

77. *See* pp. 434–37 (endorsing Ackerman's account of the Founding and Reconstruction).

78. *See* GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 1 (1986).

79. This reading is also consistent with Lessig's reference to the truth "in" Ackerman's account—but leaves the introductory signal "despite" puzzling.

others must read, too. (I wish I could *read* my bank statement that way.) The Court's act of reading is not simply a matter of the authors (whoever we take them to be) of the Constitution communicating with the Court. When the Court reads the Constitution, in the sense Lessig intends, it is a performative act.[80] The Court's reading of the Constitution determines the Constitution's meaning, subject to subsequent limitations, reinterpretations, retranslations, overrulings, and, of course, amendment. While those aren't unimportant constraints, as Brandom and Lessig each point out, it is also a power that very few readers have (pp. 416–417).[81]

The differing performative character between ordinary reading and the Court's reading of the Constitution may suggest that the use here of the term of reading may be at least a little misleading. At the same time, I would have to concede that an alternative locution does not come easily to mind. Lessig doesn't focus on the performative role of the Court's moves in the language-embodied constitutional practice, except in the specific context of the construction of social meaning. There he acknowledges that what the Court says and what the legislature says in enacting legislation shape social meaning.[82]

It may be that Lessig's expression of the nature of constitutional adjudication does not do justice to his conceptualization of the process. Despite Lessig's repeated use of the metaphor of reading, his dialectical account of the Court's judgment facing the incommensurable demands of fidelity to meaning and fidelity to role doesn't look like reading at all. The more charitable interpretation is that Lessig has not recognized how innovative his account is, and his language has not caught up with his conceptual account.

Lessig proclaims himself an originalist (p. 465 n.3),[83] but he

80. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989).

81. As Lessig remarks with respect to the tacit constraints on judges, "you [a Supreme Court justice] can insist on something crazy all you want, but if you insist too loudly or too frequently, the political types will swat you like a gnat." *See* Brandom, *Hegelian Model*, *supra* note 68, at 30–38, 32 ("In offering a . . . justification for a decision presents . . . a reconstruction because some prior decisions are treated as practically irrelevant . . ."); *see also* BRANDOM, A SPIRIT OF TRUST, *supra* note 68, at 661–63.

82. Lessig, *Regulation of Social Meaning*, *supra* note 16, at 945–47.

83. "[T]his book documents a practice that evokes a discipline that is within the family of originalist theories" (465 n.3). This is a remarkably complex and nuanced profession of faith!

recognizes that his two-step originalist methodology won't be accepted as originalist by many other originalists.[84] The reasons for Lessig's exclusion are first, fundamentally, that he does not privilege the original understanding or meanings. Second, the introduction of social meaning rather than semantic or linguistic meaning is inconsistent with canonical forms of originalism. Lessig is not much interested in the nuances of the debate *over* originalism, expressly disclaiming any interest in the debates raging *within* the originalist camp (pp. 465–466).[85] That lack of interest is important; it suggests that Lessig's claim to endorse originalism is an idiosyncratic commitment at most.

B. THE ROLE OF ROLE

The second principal element in Lessig's account of our constitutional practice is the concept of fidelity to role. The introduction of the concept of fidelity to role reflects a refinement of Lessig's earlier work.[86] As he originally introduced the concept,

84. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997). *But see* Balkin, *Translating the Constitution*, *supra* note 37, at 981 ("This does not mean that Lessig is not an originalist. It means that he is a unique kind of originalist."). A similar reaction has greeted Jack Balkin's living originalism. *See, e.g.*, Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U.L. REV. 663 (2009).

85. Lessig asserts that "[my] belief is that we can make progress if we bracket that theoretical debate [within originalism] and immerse more deeply in actual practice" (466 n.3). It is a demonstration of the richness of Lessig's account that he relegates this fundamental conclusion to a footnote. It is not entirely clear why Lessig wouldn't bracket the whole debate. It's probably because Lessig mistakenly believes himself an originalist (p. 3). Briefly, Lessig is making a modal mistake about originalism in thinking that he is subscribing to its account. Originalism privileges the original understandings, meanings, and expectations. *See* André LeDuc, *Evolving Originalism: How Are the Original Understandings, Expectations and Intentions Privileged?* (unpublished manuscript on file with the author). That is, the original understandings, meanings, and expectations are determinative of the meaning and force of the Constitution with respect to the decision of contemporary constitutional controversies, in the way that Lessig describes one-step originalism. Lessig does not similarly privilege fidelity to meaning. First, while he begins with the original meaning and understanding, he requires the original understanding and meaning to be translated into the present. Second, the demand of fidelity to meaning may be trumped by fidelity to role. Lessig thus defends instead a pluralist account even if, like Molière's prose-speaking gentleman, he does so unknowingly. *See* MOLIÈRE, LE BOURGEOIS GENTILHOMME Act II, scene iv (F. M. Warren ed., 1899) (1670). Pluralist theories, in the strong, Bobbittian sense (without an ordering or a conflict resolution algorithm) can't be originalist. *See also* Solum, *Fidelity, supra* note 64. My only quarrel with the proposal to bracket even part of the originalism debate is that I think it underestimates the extent to which the competing stances in the originalism debate have held—and continue to hold—the participants in the debate captive. *See* LeDuc, *Striding Out of Babel*, *supra* note 32.

86. *Compare* Lessig, *Fidelity in Translation*, *supra* note 16, (no role for role) *with* pp.

Lessig termed it the "Frankfurter constraint."[87] This choice emphasizes the principal importance of role as a constraint, not a source, of law, and the extent to which it informed Justice Frankfurter's constitutional jurisprudence.[88] Most famously, it lay behind Justice Frankfurter's assiduous efforts to avoid the Court's addressing the implications of *Brown v. Board of Education* with respect to the widespread anti-miscegenation laws in the South.[89] That effort prevented the Court from reaching the question until after Justice Frankfurter had retired from the Court. As the concept has been developed by Lessig, role is both a source of, and constraint on, constitutional adjudication.

Fidelity to role now plays a complex role in the account and with respect to Lessig's current account of fidelity to meaning. Once Lessig introduces fidelity to role as an independent and incommensurable source of, and constraint on, constitutional decision, he must also offer an account of how the principles of fidelity to meaning and to role interrelate—what Lessig sometimes refers to as "the dynamic between these two fidelities" (p. 457).[90] Fidelity to role has itself two principal elements in Lessig's account, the internal and the external. The first element of the notion of fidelity to role, the internal, is an understanding of the nature of, and a loyalty to, the Court as a judicial institution and the judge as judge in the Republic (p. 17). The notions of judging and judicial institutions are central to the concept of fidelity to role. Lessig does not introduce any novel notions here. Second, the external element of the concept of role is expressly stated in terms of recognition: role is in substantial part a requirement that a judge act *so as to be recognized as* exercising

17–18 (big role for role). Lessig paradoxically credits Steven Calabresi with the criticism of his earlier work that led to the refinement (p. 462). It's paradoxical because the requirement of fidelity to role is facially inconsistent with the originalism Calabresi endorses.

87. Lessig, *Translating Federalism*, *supra* note 17, at 174–80.

88. Philip Bobbitt chose Justice Frankfurter's protégé, Alexander Bickel, as his exemplar of the modality of prudential argument. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 61–73. These choices reflect the important similarities of the two concepts.

89. *See generally* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court 1948–1958*, 68 GEO. L. REV. 1 (1979) (referring to correspondence among the Justices, principally a memorandum authored by Justice Frankfurter, to describe Justice Frankfurter's efforts to avoid the Court reaching state prohibitions on interracial marriage).

90. In the accompanying web site, Lessig asserts "the interesting part [of introducing the concept of translation] I suggest is [its] interaction with fidelity to role." *See* https://medium.com/responding-to-fidelity/translation-in-the-wild-cb297642bd24.

constitutional judgment in an impartial and nonpartisan way (p. 17). Thus, the constraint of role incorporates a standard of social recognition. Social recognition is independent of an objective test. Lessig captures this nicely with his example of the kinds of interest that would appear to subvert impartiality and disinterestedness and would therefore preclude the recognition of impartiality required by fidelity to role (pp. 16–17). One consequence of this element of the requirement of fidelity to role is that it empowers the broader political community to make the determination whether the Court has fulfilled its duty of fidelity to role.[91]

Lessig introduces the constraint of role with his analysis of *Marbury v. Madison* (pp. 23–33). He argues that the convoluted argument in that case, finding a right but denying a remedy from the Court on the ground that the Congress had purported to unconstitutionally extend the jurisdiction of the Court, is a brilliant tactical gambit to establish the power of judicial review against both the Executive Branch and the Legislative Branch in a manner that could not be challenged (p. 32). But there is nothing in Chief Justice Marshall's opinion that expressly articulates that description of the reasoning. The two kinds of constraint—the duty of fidelity and the limitations of role—are manifestly incommensurable; the political constraints of the Court's role cannot be meaningfully balanced against the constraints of doctrine and text.

The role of role is fundamentally a limiting one on Lessig's account (pp. 17–18). The external element of role calls upon the Court to temper what a naked fidelity to meaning would require in adjudication with what is possible given the institutional competence of the Court.[92] Although role is fundamentally limiting, that does not preclude fidelity to role from also acting as a source of constitutional law (pp. 173–176). There is a dimension to role that makes it a source of law that Lessig does not himself address. Constitutional controversies necessarily generate constitutional judgments and decisions. That's the almost existential empowering role of role. As in life, there can be no

91. Lessig makes this point in his very brief discussion of *Bush v. Gore*, when he notes that the public understanding that the Court had acted in a political way, when the Republican-appointed justices resolved the case in a manner that advanced the election of George W. Bush, arose outside and beyond the control of the Court (p. 17).

92. The Court's thirteen-year-long flight from the implications of *Brown* for anti-miscegenation laws is perhaps one of the ugliest and most dramatic examples of the constraint of role in action. *See* Hutchinson, *supra* note 89.

avoiding the responsibility of making choices that shape us. Generally, the Court's role requires it to decide; put a little differently, every decision or judgment—even denying *certiorari*—is a decision, upholding or modifying the constitutional status quo.[93] The role of the Court as an instrumentality of practical legal reason denies it an option to eschew decision. Even choosing judicial minimalism is to make a practical, performative choice.[94]

Lessig's notion of the external dimension of the constraint of role raises the fundamental question whether his appeal to the recognition of what the Court is doing masks a tacit appeal to neutral principles of constitutional adjudication. In the mid-twentieth century, constitutional theorists initially endorsed efforts to constrain and inform constitutional decision with neutral principles.[95] The appeal of such principles may appear obvious: they would eliminate or severely mitigate concerns that the Court acts politically in deciding cases.[96] As attractive as such constraints may be, most in the legal academy have come to doubt that there is such a neutral, Archimedean stance from which the Court can decide cases and apply constitutional texts.[97] Assuming that Lessig would endorse the conventional wisdom on the impossibility of articulating neutral principles, the question arises whether his account of the constraint of role and the need for the Court to be perceived as acting neutrally and impartially has reintroduced the concept of neutral principles as a matter of social recognition, rather than in its historic form as a matter of

93. Thus, Justice Brandeis wrote: "The most important thing we do is not doing." BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 65.

94. The necessity of judicial decision is captured by the anecdote of an encounter between Judge Learned Hand and a newly appointed Judge Henry Friendly. In the story, a conscientious Judge Friendly tortured himself about how to decide a case until Judge Hand exhorted him just to decide the case, because that was what he was paid for. *Id.* at 166–67. *See also* Alexander M. Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961) [hereinafter Bickel, *Passive Virtues*].

95. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Robert H. Bork, *Neutral Principles and Some First Amendment Problem*s, 47 IND. L.J. 1 (1971).

96. *See, e.g.*, BORK, THE TEMPTING OF AMERICA, *supra* note 40, at 143–53.

97. *See, e.g.*, Mark V. Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804–24 (1983); TRIBE & DORF, *supra* note 15, 65–80 (1991) (challenging the appeal to neutral principles on the grounds that a number of interpretative choices, including principally the determination of the level of the generality at which to apply a constitutional provision, can only be made with the introduction of normative choices).

concept.[98]

Two defenses of Lessig's position may be made. First, it may be that the limited impartiality required by Lessig's account does not carry the problematic inferential commitments and conceptual content that led to the rejection of the concept of neutral principles. Lessig's external constraint is in substantial measure a procedural requirement of disinterestedness, writ broadly (pp. 155–157). Justices must not appear to decide cases as if they were serving their political sponsors or their own self-interest. This requirement does not appear to carry the conceptual claims that the defenders of neutral principles asserted. Neutral principles aspired to being globally neutral; the external constraint of role simply requires that the Court not appear to have a dog in the fight. It is possible for a court to satisfy the disinterestedness required by Lessig's constraint of role without making a concomitant endorsement of the claim that adjudication proceeds by the application of neutral principles. Second, the notion of appearing impartial, as a matter of social practice, does not carry the objective, conceptual commitments that led to the rejection of neutral principle arguments. A move something like this is made by ethical relativists.[99] They treat the best arguments for ethical claims as claims made by other members of the community.[100] In the context of the external constraint of role, the best argument for what the constraint requires are the beliefs of the community as to what impartiality requires. Lessig's concept of the external constraint of role raises an apparent question whether he has snuck into his account of adjudication an appeal to neutral principles. On balance, I think he should be acquitted of this charge.

There is a fundamental difference between the two constraints Lessig identifies: the constraint of fidelity yields express, transparent arguments and reasons for decision (p. 417). We can debate those arguments and associated judgments within the canons of accepted modes of constitutional argument. Lessig never explains how the constraint of role can be expressed and articulated within our authoritative constitutional discourse—let

98. *See, e.g.*, Wechsler, *supra* note 95.

99. *See, e.g.*, GILBERT HARMAN, THE NATURE OF MORALITY (1977) (exploring the ways that ethics and science differ with respect to observational evidence and the reasons for their respective conclusions).

100. *See* Brandom, *Hegelian Model*, *supra* note 68, at 27.

alone argued about. Lessig does not believe that such arguments can generally be made expressly. Instead, he attributes the recognition of the limitations of role to an almost instinctive tactical cunning on the part of the justices, beginning with Chief Justice Marshall (pp. 31–33). For the constraint of role, except in limited cases, like those raising the political question doctrine, the political considerations that Lessig describes do not always admit of transparent articulation and debate.[101] Sometimes they do, of course. The Court's authoritative and dissenting opinions contain numerous examples of arguments why the Court's role precludes a particular course or decision.[102] Moreover, constitutional theorists like Alexander Bickel—and Larry Lessig—have endorsed the recognition by the Court of the limitations of its role as necessary and proper.[103]

While the articulation of the constraints of role cannot always be made clear, those constraints are sometimes articulable in reasoned arguments. *Marbury* is an outlier, on Lessig's reading, because of the boldness with which Chief Justice Marshall manipulated the case before the Court to assert the Court's power. In other contexts, role, political realities, and prudential concerns can often be addressed more directly—and thus subjected to the usual reasoned argument.[104] Second, the constraint of role is best understood as comprising a subset of arguments of prudence. Prudence here relates to the recognition of what the Court can do as an institution and what it can do *vis-à-vis* the other state actors. But the concept of role is not disinterested in the ordinary sense; recognizing the constraint of role is a means of maintaining the power, status, and authority of the Court (pp. 451–452).[105] Only derivatively is it about justice or

101. *See* Lawrence Lessig. *Reply to Gerard N. Magliocca*, BALKANIZATION (Aug. 13, 2019), https://balkin.blogspot.com/2019/08/lessig-replies.html [hereinafter Lessig, *Reply to Magliocca*] ("'fidelity to role' is harder to track than 'fidelity to meaning.' That's partly because, ordinarily, to announce itself would be self-defeating . . .").

102. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that merely political, non-racial gerrymandering cases presented a non-justiciable political question); Comm. for the Judiciary, U.S. House of Representatives v. McGahn, II, 951 F.3d 510 (D.C. Cir. 2020).

103. *See* Bickel, *Passive Virtues*, *supra* note 94.

104. Thus, for example, it is easy enough for an advocate to argue that a question should not be decided because of the application of the political question doctrine, or because the matter is not ripe, is moot, or because a party lacks standing—all of which raise implicit considerations of role.

105. This is the external dimension of fidelity to role. When I served as Counsel to the United States Senate Finance Committee in the early 1980s, fidelity to the role of the

the Constitution, insofar as protecting the Court will deliver greater justice and greater compliance with the Constitution. Thus, the constraint of role is conceptually different from the prudential concerns that factor more generally into argument and decision.

It may be that such arguments may be made subtly, by tacitly invoking them rather than articulating them expressly or indirectly, by showing the problems for the Court's role if the wrong decision is made or a wrong argument accepted. I argue below that arguments from fidelity to role encompass what Bobbitt terms structural argument.[106] We know how structural arguments are made.[107] In the case of other appeals to fidelity to role, the nature of the argument may be subtler; it may require showing rather than saying. Consider how a Lessigian advocate would make the salient role-based arguments to the Court in *NFIB v. Sebelius*,[108] which Lessig considers as a brilliant decision reflecting the constraint of role (pp. 191–194). How should an advocate recognizing the constraint of role have argued the case? On the question of the scope of the Commerce Power, the government should have articulated a limit on the federal power, claiming and emphasizing the difficulty, if not impossibility, of drawing the line between activity and inaction that the Court emphasized.

Lessig is right, however, that there are also instances where the constraint of role does and should go unstated. What distinguishes these cases is how bad the arguments from fidelity (or perhaps, otherwise) are for the path chosen or the decision made. These are the cases of the constitutional anti-canon.[109] Lessig departs from the critics of the anti-canon in recognizing

Senate and to the Committee of Finance was also important. While part of that role required care, diligence, and seriousness of purpose in the execution of the legislative power, another important part of fidelity to role required protection and preservation of the jurisdiction of the Committee and the perquisites of the Senate. Thus, fidelity to role there also had the internal and external dimensions that Lessig describes.

106. *See infra* at note 114 and accompanying text.

107. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 74–92 (describing the category of structural arguments and giving examples).

108. 567 U.S. 519 (2012).

109. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (arguing that the anti-canon does not so much reflect constitutional errors in argument and decision as it does a performative choice made later in our constitutional practice to elevate these cases as paradigms of constitutional error, to articulate and endorse constitutional norms inconsistent with the arguments and outcomes of those cases).

why the Court often had good cause to do what it did—even if it did not have good reason, as a matter of reading and applying the Constitution and our constitutional law. So he's less willing to characterize such cases as wrong the day that they were decided.

Perhaps the biggest problem Lessig's account faces is thus how to harmonize his notion of the constraint of role with the discursive, inferential character of our constitutional practice. The challenge is not simply one of transparency, although considerations of role may militate against transparency (pp. 313–319). Lessig offers *Cruikshank*[110] as an example of an opinion that was manifestly not transparent, because of the demands of maintaining fidelity to role. The more fundamental problem is that the unstated constraint of role (and arguments about role) are not easily incorporated into our argumentative, discursive, inferential practices. As Lessig acknowledges, the constraint of role is imposed on the Court in the space of causes as a result of the power exercised by other branches of government and other political actors, it is not chosen by the Court in the space of reasons. If we accept Lessig's claim that constraints of role provide grounds for decision in constitutional decision, do we compromise the otherwise reasoned and inferential character of our constitutional law and practice?

I don't see a plausible alternative to a constitutional practice reflecting the Court's institutional limitations. Just as the Constitution is not a suicide pact among the citizens, it's not a suicide pact among the Supreme Court Justices. There's no alternative, as a practical matter, to the Court recognizing the constraint of role in constitutional decision and judgment. The only choice is between recognizing and responding to the constraint self-consciously, if not expressly, and accepting the constraint in a passive or mechanical way. Lessig makes the argument for an active recognition of, and response to, the constraint of role very powerfully. If our constitutional practice is reasoned and inferential, then it must be so subject to the constraint of role. The space of causes constrains the space of reasons in manifold ways—what we can understand, what we can sense, how fast we can reason through problems or make calculations are all examples of such constraints. The space of reasons we know and the inferential normative social practices we

110. United States v. Cruikshank, 92 U.S. 542 (1876).

have unfold within and subject to those constraints.

The constraint of history (in Lessig's words, a little Whiggishly)—what we have learned, collectively, over time—is an element of the constraint of role; it has a complex relationship with the requirement of fidelity to meaning. That such historical knowledge constraint plays an important role is clear; Lessig writes, in the context of gender equality: "[It] is not that Courts take advantage of what time has taught. It is that they are *constrained* by it" (p. 416). How this constraint operates is worth exploring; the new historical knowledge does not grab the Court by the throat, of course.[111] How does it work? The constraints that Lessig describes are reasons, sometimes compelling reasons, to take, make, or choose an interpretation or a decision. As Lessig notes, "[r]eality constrains even judges" (p. 417).

There is a parallel between the account of an autonomous discursive social practice of constitutional judgment and Lessig's account of constraint by role. Both accounts emphasize what is done, not merely the conceptual content of what is said or implied. I want to explore the ways in which those elements are alike as well as the important ways in which they are different. For Lessig, the institutional role of the Court in our constitutional democratic republic has historically shaped the Court's approach to constitutional controversies. He argues that this sensitivity is necessary and proper, because the Court's role is constrained by historical practice and, perhaps more importantly, political realities. What the Court can do and how it can do it are constrained by the place of the Court in our constitutional democratic republic and the corresponding role of the more powerful legislative and executive branches.

C. LESSIG'S HISTORICAL DIALECTICS OF FIDELITY AND CONSTRAINT, MEANING AND ROLE

With all of Lessig's principal conceptual tools in hand, it is possible to describe his historical account of the Court's tacit use of these concepts to adjudicate constitutional cases and thereby determine our constitutional law. Lessig notes that translation as the means by which fidelity to meaning is established is less often associated with the constitutional jurisprudence of the Right and

111. For a similar point about the nature of logic and the constraint it imposes, see Lewis Carroll, *What the Tortoise Said to Achilles,* 4 MIND 278 (1895).

the constraint of role is correspondingly less often associated with Left constitutional jurisprudence (p. 5). He wants to show that both fidelity to meaning through translation and the constraint of role figure for both sides of the constitutional politic, although he acknowledges that demonstrating the unconventional role is more difficult in each case. The result is stylistically somewhat unbalanced, but nevertheless a persuasive treatment.

The competing demands of fidelity to meaning, through translation, and the constraint of role are not commensurable (p. 457). As noted above, this means that Lessig needs to describe how conflicts between the two are to be resolved. He doesn't say much about this. But it is clear, I think, that Lessig recognizes that resolving the conflicts between the duties—the two modes of constitutional argument, in Bobbitt's formulation—requires judgment. As a result, sometimes the Court gets it right the first time, and sometimes it doesn't.

It is through the combination of Lessig's concept of meaning and his account of translation that judges and, most especially, Supreme Court justices, become masters of the words of the constitutional text. It is here that Lessig's metaphor of reading breaks down; the Court doesn't just read the Constitution; it determines the Constitution. The mastery the justices have through the fidelities to meaning and role and the power of translation is not unconstrained, however (pp. 58–59).[112] But it is a mastery that allows constitutional argument and decision to reflect changing technologies and knowledge (pp. 416–418). Moreover, because Lessig's concept of fidelity to role requires that constitutional adjudication be recognized as impartial and unbiased and in some sense principled by the broader political community, as in the master-slave dialectic described by Hegel, the masters of the constitutional text also become the servants of the governed, toiling to secure the recognition and acknowledgment of their fidelity to role.[113]

Lessig has not fully appreciated the significance of his

112. Lessig asserts that while the translator must read the original text charitably, she is not to seek to improve it, to make it "the best it could be," *pace* Dworkin.

113. *See* G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A.V. Miller trans., 1977) (1807); Brandom, *Hegelian Model*, *supra* note 68, at 19–20; AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (Joel Anderson trans., 1995). There is much more to say about Hegel's implicit account of the nature of judicial authority, as Brandom's extraordinary work shows, but that topic cannot be explored here.

introduction of the concept of fidelity to role into his constitutional theory or account of fidelity to meaning. First, the introduction of the concept of fidelity to role makes Lessig's account a pluralist theory of constitutional adjudication. That's a profound break with originalism. Second, the introduction of the concept of fidelity to role also significantly modifies how fidelity to meaning works in the pluralist theory. It is instructive to consider how Lessig's pluralist account compares to the canonical pluralist account Philip Bobbitt defends. Bobbitt identifies six forms of canonical argument; Lessig may appear to endorse only two, arguments from meaning and arguments from role.

This appearance is misleading, because Lessig's arguments from meaning and role subsume more than two of Bobbitt's modalities. Most obviously, the argument from meaning includes historical and textual arguments and the argument from role includes structural arguments.[114] But what of Bobbitt's doctrinal, prudential, and ethical arguments? Some prudential arguments, those that implicate the institutional competence of the courts, would also appear to sound in arguments from fidelity to role.[115] The question of how to treat Bobbitt's concept of doctrinal argument implicates Lessig's concept of *stare decisis* and precedent. Lessig doesn't say much expressly about either, so his position must be teased out. The first question is whether the concept of role includes a doctrine of *stare decisis* and precedent. If so, then appeals to precedent and doctrine would also be part of arguments from fidelity to role. There is a precedential element to the constraint of role, as Lessig highlights in his discussion of *Planned Parenthood v. Casey*[116] (pp. 400–401). The treatment of Bobbitt's limited concept of ethical argument implicates Lessig's concepts of social meaning and understanding. Certain kinds of uncontested backgrounded concepts of social understanding would appear a significant source of ethical argument. *Rochin*[117] is a good example. The principle of bodily integrity protected by

114. *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 7–8 (cataloging the modalities of constitutional argument—historical, textual, structural, prudential, doctrinal, and ethical).

115. *See generally* Gerard N. Magliocca, *What Is a Judge?*, BALKANIZATION (June 26, 2019), https://balkin.blogspot.com/2019/06/what-is-judge.html (arguing that Bickel's passive virtues, famously articulating Justice Frankfurter's prudential arguments, parallel Lessig's fidelity to role); Lessig, *Translating Federalism*, *supra* note 17.

116. 505 U.S. 833 (1992).

117. Rochin v. California, 342 U.S. 165 (1952) (striking down the warrantless use of a stomach pump to extract evidence of drug possession).

that case may be just such an uncontested background claim.

Lessig's account of the constitutional dialectic between fidelity to meaning and fidelity to role emphasizes the exogenous changes in what counts as contested or uncontested social knowledge. In Lessig's account the expansion of contestability has been the foundational source of much of the greater protection accorded equal rights in the past century. But the relationship of contestability and felicitous constitutional evolution is not necessarily positive. Indeed, Lessig suggests that the expansion of contested beliefs may be undermining the role that the Court has historically played (p. 458). Lessig does not articulate clearly the particular expansion of contestability that he fears, but it is associated with the increasing partisanship in our national politics and the risk of nominees being induced to make implicit commitments as to their treatment of particularly politically salient questions that may come before the Court (p. 458).

Lessig despairs of the Court's continuing its constitutional dialectic between fidelity to meaning and the constraint of role and its important role in building a path to our constitutional future (pp. 457–459). Lessig's pessimism about the Court is admittedly overshadowed by his criticism and pessimism about Congress and the place of corruption in the Republic.[118] But *Fidelity and Constraint* is about the Court, and Lessig has independent grounds for his pessimism there. The principal source of concern appears to be the intensifying political partisanship in the Republic and its absorption into the Court (pp. 5–6, 458–459). He views that partisanship as corrosive and as exacerbating the risk that the judicial role of the Court will be compromised.[119] It will be potentially compromised as a matter of the Court's independence from political actors and of the non-partisan aspirations that the Court asserts (pp. 458–459).[120] Yet Lessig sees a possible dialectical silver lining in the potential degeneration of the Court. Such a decline may revivify the

118. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

119. The risks include a diminished or lost ability on the part of the Court to constrain unconstitutional acts of the other branches of the federal government, the states, and the community at large.

120. *See also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

constitutional commitments of the more democratic branches and institutions of the Republic and, perhaps, even more fundamentally, the citizens.

It is also possible that another dialectic is playing out and the Court itself is becoming increasingly concerned about the risk that politicization poses for it. If the Court becomes merely another political actor, its status and its stature will be substantially diminished. The Court is never going to have the political force of Congress or the President; its only route to power is the ambiguous, institutional route that Lessig has described. [121] Evidence for such a dialectic and increased recognition by the Court of the risk it faces is admittedly thin. But three instances come to mind. Paradoxically, one of them is *Bush v. Gore*.[122] That case was excoriated, at least on the Left, as demonstrating the partisan politicization of the Court. [123] Yet the Court has consistently failed to cite that decision in the intervening nearly twenty years; that failure to cite has been interpreted as a signal that the case is an outlier in our constitutional jurisprudence. Second, Chief Justice Roberts' umpire testimony, however wooden-headed it may otherwise have been, expressed a commitment to resist politicization—or at the least to acknowledge the importance of endorsing the norm of rejecting politicization.[124] The Chief Justice has subsequently made public statements along the same lines.[125] Third, the exchange between Justices Scalia and Alito with respect to the applicability of the Fourth Amendment to the installation of GPS trackers also demonstrates a sensitivity to the requirement of fidelity to role and a concern with the risk of party line politicization.[126] Justice Alito was at pains to demonstrate that he was not hostage to a doctrinaire and implausible originalist theory.[127] We may all hope,

121. *See* THE FEDERALIST (No. 78) (Alexander Hamilton) ("[The judiciary] may be said to have neither force nor will, but merely judgment.").

122. Bush v. Gore, 531 U.S. 98 (2000).

123. *See* BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

124. *See Confirmation Hearing*, *supra* note 120.

125. *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks "Obama Judge"*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/ us/politics/trump-chief- justice-roberts-rebuke.html (denying that there are Trump judges, Obama judges, Bush judges, or Clinton judges, because all are impartial, nonpolitical decisionmakers).

126. United States v. Jones, 565 U.S. 400 (2012).

127. *Id*. at 420 n.3 (Alito, J., concurring in the judgment) (mocking the Court's

as Lessig does himself, that the risk does not prove as grave as he suggests.

It's hard to summarize Lessig's account of the fidelity and constraint of meaning and role, the nature of social meaning and understanding, and the nature and role of constitutional translation and two-step originalism. At the most fundamental level, his arguments support four fundamental conclusions. First, the introduction of the concept of fidelity to role fundamentally changes Lessig's theory. Fidelity to role not only provides a second, important source of constitutional decision; the introduction of the concept of fidelity to role changes how the original concept of fidelity to meaning functions within Lessig's theory. In the final theory, the incommensurable requirements of fidelity to meaning and role must be reconciled when they conflict; there is no algorithm to do that. Second, the introduction of the concept of fidelity to role fundamentally changes the nature of Lessig's constitutional theory, from a traditional, systematic, unified account to a pluralist account. Constitutional judges face incommensurable arguments that sometimes conflict; when they do, the judges must make judgments about the decisions to make and the grounds to advance for those decisions.[128] Third, the introduction of the concept of fidelity to role, while probably the most creative and profound part of *Fidelity and Constraint* (and perhaps the most creative contribution to constitutional scholarship in the past several decades) is so profound that Lessig himself doesn't fully appreciate what he's done. Fourth, articulating how fidelity to role operates and how it is reconciled with our normative discursive social practice of constitutional law is the biggest challenge that Lessig's theory faces.[129] In particular, the role of role has to be articulated in a manner that makes it consistent with the discursive, normative, performative character of our social practice of constitutional law and harmonizes that role with the demands of fidelity to, and constraint by, meaning.

originalist analysis of the applicability of the warrant requirement of the Fourth Amendment to the installation of a GPS tracker).

128. For a very thoughtful discussion of the implications of our incommensurable values in ethics and economics (and, by implication, in constitutional law), see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (paperback ed. 1993).

129. *See* Magliocca, *supra* note 115.

II. HISTORICAL CONSTITUTIONAL ETHNOGRAPHY?

Lessig is methodologically catholic, tolerant of other approaches to constitutional theory (p. 422). He doesn't believe that his is the only approach the study of the Constitution and he acknowledges that other explanations may also shed light on our practice (p. 422). More puzzlingly, Lessig is also methodologically schizophrenic. He describes his methods in inconsistent terms. On the one hand, Lessig accords constitutional theory a fundamental place in his account (pp. 3–4). There he describes his project as articulating a theory that fits the facts, where facts are simply that which is. According to Lessig, his goal is to construct a theoretical model and account of the Constitution that is both *falsifiable*[130] and *predictive*.[131] As Lessig describes his intellectual journey, he appears to remain a little bit dazzled by the theoretical ambitions of econometrics.[132] In setting out this mission, Lessig does not address the various criticisms that have been made of systematic and abstract constitutional theory making.[133]

For Lessig's theory to be falsifiable, it would need to be possible that there exist constitutional judgments and decisions that not only don't fit naturally into Lessig's theoretical framework but whose very existence challenges the theory itself. They need to defy—or at least resist—tweaks to the theory to make them fit. To be predictive, Lessig's account of our constitutional theory and practice must be able to help us predict the outcome of the adjudication of constitutional controversies. Looking at some of the major developments in constitutional doctrine that have unfolded in the past couple of decades, how does Lessig's theory do? Lessig himself has added substantial discussions of several of those important developments to his 1997

130. *Id.*

131. Lessig doesn't expressly claim that his account is predictive, but in describing his project as a "kind of econometrics brought to constitutional theory," without any disclaimer of predictive force, that claim would appear inherent in his project (p. 2). Econometric theories are predictive—and Lessig understands and admires them as such (p. 4).

132. See Anderson, *supra* note 128, at 201 (noting the predictive aspirations of economic theory).

133. *See, e.g.*, RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 320 (2016) [hereinafter POSNER, DIVERGENT PATHS]; DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); Richard A. Posner, *The Problematics of Moral and Legal Theory,* 111 HARV. L. REV. 1637, 1639–40 (1998).

manuscript, including *NFIB v. Sebelius*,[134] *Lawrence v. Texas*,[135] and *Obergefell v. Hodges*.[136] I'll test the theory with both the falsifiable and predictive criteria.

The Affordable Care Act case held the penalty on individuals who fail to maintain a minimum level of health insurance invalid as an exercise of federal power under the Commerce Clause but upheld it under the taxing power.[137] With the benefit of Lessig's theory, should we have seen this decision coming in this way as a matter of fidelity to meaning and the constraint of role? The initial reaction of surprise to the reasoning of the decision from many academic commentators suggests grounds for skepticism. One possibility, of course, is that Chief Justice Roberts's decision demonstrates a creative resolution to the controversy that could not have easily been expected except perhaps by those with the same constitutional insight, creativity, and judgment as the Chief Justice.[138] Perhaps. But even so, two threshold questions that arise are how the Commerce Clause question with respect to the individual mandate to secure health insurance presented questions of fidelity to meaning and role (leaving aside, initially the alternative tax characterization). Put another way, would Justice Ginsburg's dissent violate either or both the constraints of fidelity to meaning and role?

Justice Ginsburg is not insensitive to these kinds of concerns and she did not think that her approach would be problematic. To the extent that her opinion fits the Court's Commerce Clause precedent more closely and following precedent is an element of fidelity to role,[139] then there is an argument for her approach and proposed decision as a matter of fidelity to role. Moreover, to the extent that Justice Ginsburg asserts that the Commerce Clause does, indeed, have limits with respect to the mandates that the Congress can impose, the most obvious concern whether the approach taken by her dissent would maintain fidelity to role

134. 567 U.S. 519 (2012).
135. 539 U.S. 558 (2003).
136. 135 S. Ct. 2584 (2015).
137. 567 U.S. at 550–74.
138. We see in Lessig's interpretation of this decision and opinion the importance of constitutional judgment in his theory. It fell to the Court to recognize the evolving social knowledge and to make a judgment about the import of that evolution for the continuing vitality of *Bowers*.
139. 567 U.S. 605–08 (Ginsburg, J., concurring in part and dissenting in part).

appears addressed.[140]

Lawrence overruled *Bowers v. Hardwick*[141] seventeen years after it was decided, harshly holding that "*Bowers* was not correct when it was decided, and it is not correct today."[142] Lessig does not analyze the case simply in terms of the proper role of the state governments in the construction of social meaning. Instead, he emphasizes the rapidly evolving contested social understanding about human sexuality (pp. 410–417). In *Bowers* that role was accepted and the corresponding role of the Court was described as limited, albeit not in those conceptual terms.[143] In *Lawrence* that role was rejected, again not in those terms, in the face of a determination that the law had an unconstitutional discriminatory effect.[144]

Lessig argues that the evolution in the reasoning and decision in the two cases can best be explained by a more fundamental analysis. The evolution in the constitutional law follows and reflects changes in the social understanding of the status of homosexual sexual freedom (p. 410). In 1986, on Lessig's account, the right of the State to restrict homosexual sexual freedom was uncontested. In 2003 the right to such freedom, and the corresponding State interest in regulating such conduct, had become accepted. The issue was likely foregrounded as a matter of social meaning or knowledge at both dates.[145] As a result of such changing status, the Court came to view very similar criminal statutes differently. In 2003 the Court viewed criminalization as a matter of invidious discrimination that was required to be scrutinized closely. When reviewed so closely, the statute did not pass constitutional scrutiny.

These three cases don't easily support a claim that Lessig offers a predictive account of our constitutional practice. They instead suggest that our constitutional decisional practice is fundamentally contingent. In deciding constitutional cases, judges

140. *See id*.

141. 478 U.S. 186 (1986).

142. 539 U.S. at 578.

143. 478 U.S. at 196 (White, J.) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

144. 539 U.S. at 578.

145. Although Lessig does not make this point expressly, it seems likely in light of the continuing legislative initiatives he describes and the continuing legal challenges they drew.

must make choices. While social science may develop theories that predict the choices that individuals will make, it cannot provide normative theories that explain what choices they should make. The constitutional choices judges make cannot be predicted with confidence even with Lessig's normative theory.

In addition to invoking the predictive and falsifiable theories of hard social science, Lessig also expressly invokes the methods of anthropologist Clifford Geertz in describing his constitutional project (p. 422). Lessig references Geertz's anthropological methods as a model for the kind of analysis of our constitutional practice he wants to provide.[146] Geertz created the concept of thick description.[147] His interpretative project is explanatory, not predictive.[148] Ethnographic theories do not claim to be falsifiable and predictive.[149] Instead, their interpretative goal is to capture and convey the character of being a member of the subject society and the nature of that society's culture and institutions.[150]

How does Lessig harmonize the two, disparate characterizations of his enterprise? One possibility is that the disparate methodological statements reflect Lessig's evolving conceptualization of the project and the increasingly historically instantiated character of his account. In its early form in which fidelity to meaning was the sole source of authority and argument for constitutional decision, Lessig's theory had a crystalline precision that could be analogized to the equations of econometric models—or Ackerman's dualist account of normal and revolutionary constitutional change. With the introduction of the concept of fidelity to role, however, the theory became richer and a more adequate description of our constitutional practice. But Lessig's theory also abandoned its purported creation of a decisional algorithm for constitutional adjudication and its pretension to offer a predictive account of our constitutional

146. He is telling an origin story of our Constitution and constitutional practice. *Compare* MARCEL GRIAULE, CONVERSATIONS WITH OGOTEMMÊLI: AN INTRODUCTION TO DOGON RELIGIOUS IDEAS (1965) (describing Dogon origin myths).

147. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973) [hereinafter GEERTZ, THE INTERPRETATION OF CULTURES]; *see also* Robert Darnton, *Foreword*, *in id.*

148. GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 147.

149. *See generally* PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 91–94 (1958); Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 147, at 3 [hereinafter Geertz, *Thick Description*].

150. Geertz, *Thick Description*, *supra* note 149, at 3.

practice.

Lessig's constitutional ethnography is a very big tent. It admits Bruce Ackerman and Ronald Dworkin (p. 422). Lessig's reading of these two theorists is puzzling, however. Dworkin's theory of law as integrity is fundamentally a prescriptive, philosophical account of our law, including our constitutional law.[151] Dworkin asserts that constitutional adjudication ought to be fundamentally a matter of crafting a theory of moral and political philosophy that best explains the aspirations of our Constitution and its precedents and applies them to the case at bar.[152] That philosophical-theory-intensive project may have begun as a descriptive ethnography of our constitutional practice, but it stands now as a rich, normative, theoretical account of our historical and continuing constitutional practice.

Lessig might resist my challenge to his aspiration to offer a predictive, falsifiable theory on the basis that the practice of constitutional law is a discursive, normative social practice. As a result, normative arguments must be accorded substantial weight and a theoretical account of our constitutional practice must incorporate such arguments. This response conflates the normative arguments made in our argumentative constitutional practice with the arguments of political and moral philosophy. While Dworkin would incorporate such philosophical arguments as authoritative sources of constitutional law, our current discursive constitutional practice does not. The normative arguments of our discursive constitutional practice also include, for example, arguments that an approach is impractical[153] or subverts the democratic principles of the Constitution, arguments that have no easy analogues in moral or political philosophy.[154]

151. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 20, at 354–99 (describing Judge Hercules's use of moral and political philosophy to ground and articulate the requirements of the Constitution); *see also* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

152. DWORKIN, LAW'S EMPIRE, *supra* note 20, at 379–92 (*Brown*), 393–97 (*Bakke*).

153. *See* Garcia v. San Antonio Metropolitan Transit, 469 U.S. 528, 546–47 (1985) (concluding that the line drawn by *National League of Cities v. Usery* between traditional governmental functions and other activities was impractical: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").

154. The leading democracy-enhancing decisions of the Warren Court championed by John Hart Ely would appear to be good examples. *See, e.g.*, *Reynolds v. Sims,* 377 U.S. 533, 561–562 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and

Our constitutional argumentative practice does not incorporate naked philosophical arguments.[155] Dworkin and Lessig are doing two very different things; at the outset of his career, Ackerman used to do something like what Dworkin does; in *We the People*, Ackerman immersed himself in the complex contingent historical particulars of our constitutional history and discursive constitutional practice.[156]

Lessig may believe that he can remain agnostic, without harmonizing these competing methodological approaches. At the level of his historical and doctrinal account of our American constitutional decisional and doctrinal practice, he is surely right. His account stands independently of the implicit methodological claims inherent in it. Nevertheless, having introduced his methodological discussion, Lessig would seem to need to offer a more coherent account. He should recognize the conflict between his two methodological claims and should recognize that his anthropological theory analogy is more accurate and compelling. His account shouldn't aspire to being predictive or falsifiable. It can only hope to be an edifying and enlightening account. But *Fidelity and Constraint* never takes this step.

Lessig's methodological claims raise another important question.[157] To what extent does Lessig believe that there is an artificial reason of constitutional law and that constitutional law is an autonomous or independent field or practice? Lessig's argument about the constraint of role and the requirement of the Court's fidelity to a particular role creates special (or at least particular) forms of argument that apply in constitutional discourse and decision that are not part of other, more general

democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

155. André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J. L. & PUB. POL'Y 99, 153–54 (2014); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 45 (mocking the notion that constitutional law looks to philosophical argument); *but see* DWORKIN, LAW'S EMPIRE, *supra* note 20, at 379–97.

156. *See* André LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 ALA. C.R. & C.L. L. REV. 201 (2019) (criticizing the central role accorded philosophical argument and analysis in the analysis of the constitutional law of takings).

157. Jack Balkin focuses extensively on this question, arguing that Lessig exaggerates the autonomy of constitutional law and sacrifices the explanatory power of his account as a result. *See* Balkin, *Translating the Constitution*, *supra* note 37, at 998–1002.

rational discourse. If one is not a judge, there is no requirement to be faithful to the court or to endorse commitments to the integrity and stature of judicial institutions. Do these arguments rise to the status of an artificial reason of the law? And are other constitutional arguments, like those from fidelity to meaning, not so parochial or special? Arguments from role would appear to be particular to constitutional argument. The role of social meaning in constitutional argument, while more complex, may be parochial, too. While social meaning is a general concept, not confined to constitutional law, the way that meaning figures in constitutional argument may be peculiar to our constitutional practice. Criticizing Lessig for an excessively autonomous account of our constitutional law and practice appears unfair in light of the role he accords the requirement of fidelity to, and constraint by, role. The role of role is to mediate between the realities of power and politics in the Republic and the meaning, understanding, and application of the constitutional authorities and arguments in our discursive constitutional social practice.[158]

Lessig invokes two radically different methods and resulting theories: those of econometrics and those of ethnography. Those two models fundamentally conflict. Lessig appears unwilling or unable to resolve the manifest conflict between the two methodological models he invokes (it's not clear that there is a resolution other than to choose one or the other). The predictive, falsifiable theories produced by the methods of econometrics are fundamentally different from the interpretive theories produced by the methods of social sciences like ethnography and history.[159] The methodological dissonance doesn't lead Lessig astray in his substantive analysis, but the result is some conceptual static in his account.

III. CONTINUITIES AND DISCONTINUITIES IN CONSTITUTIONAL FLUX

Larry Lessig is one of the most insightful observers and theorists of constitutional flux.[160] He has long asserted that our

158. Perhaps Balkin should be understood as acknowledging that Lessig tells a non-autonomous account of our constitutional practice, but arguing that he underestimates or values the inputs to that practice from non-constitutional sources.

159. *See* WINCH, *supra* note 149, at 91–94.

160. *See* Lessig, *Fidelity in Translation*, *supra* note 16 (describing the process of applying the historical constitutional text to current constitutional cases as requiring

constitutional theory must offer an adequate account of constitutional flux—and that many contemporary constitutional theories fail to do so.[161] In *Fidelity and Constraint*, Lessig engages the other most prominent account of constitutional change, the radical account defended by Bruce Ackerman.[162] Ackerman has completed a three-volume history of popular constitutionalism and revolutionary moments in the adoption and amendment of the Constitution. In his account, Ackerman first emphasizes the illegality or extralegality of the adoption of the Constitution, its lacking compliance with the procedural rules of the Articles of Confederation.[163] Second, he emphasizes that the adoption of the Reconstruction Amendments cannot be reconciled with the procedural requirements of Article V.[164] Lastly, and most controversially, he argues that the changes to our constitutional law in the New Deal constitute a third constitutional moment that produced *de facto* constitutional amendments.[165] At the core of all three events was an energized and politicized society that acted through popular democracy to effect these changes.

Lessig's choice of Ackerman's theory as a foil for his account offers insight into how Lessig conceptualizes our constitutional practice and his own interpretive and theoretical project. Lessig makes no theoretical objection to Ackerman's methodology; indeed, he views Ackerman as pursuing the same kind of constitutional theory as Lessig articulates himself (pp. 422–423). That claimed kinship raises the question whether readers who found Ackerman's account in *We the People* excessively academic and theoretical and implausible—as some important critics also found Larry Tribe's *The Invisible Constitution*[166]—will find Lessig's story more powerful and engaging.[167] Put differently, if Dan Farber and Suzanna Sherry were to produce a revised second edition of *Desperately Seeking Certainty*, would Lessig's theory be a good candidate for inclusion? None of Farber and Sherry's theorists defend pluralist accounts of the Constitution. If Lessig's

translation); Lessig, *Understanding Changed Readings, supra* note 16.

161. Lessig, *Fidelity in Translation*, *supra* note 16, at 1167–73.

162. 1 ACKERMAN, WE THE PEOPLE, *supra* note 19.

163. 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 32–95.

164. *Id.* at 99–159.

165. *Id.* at 279–344.

166. LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

167. *See* POSNER, DIVERGENT PATHS, *supra* note 133, at 320 (implicitly characterizing Akhil Amar's *Unwritten Constitution* and Tribe's *Invisible Constitution* as works of provocation because of their academic impracticality).

account is pluralist, then it cannot so easily be criticized as an excessively theorized grand theory. Pluralist theories don't provide decisional algorithms for constitutional adjudication; their aspirations are more modest—but also richer and more realistic. Before the introduction of the concept of fidelity to role, Lessig's account would have been a better candidate for inclusion in a second edition of Farber and Sherry.

Ackerman's theory is rich and complex, grounded in a deeply historical account of the constitutional history of the Republic. At its core is the concept of a radically discontinuous constitutional development and the primacy of action by the People expressing their collective will—a concept that, in various iterations, has long had a rich role in political philosophy.[168] It is an account of constitutional revolution, not of normal constitutional practice.[169] Nor can the account of constitutional revolution be confined to the Founding or to subsequent revolutionary tremors, as new amendments have been adopted pursuant to the guidelines of Article V. This radical account has elicited strong criticism.[170]

Lessig wants the explanatory, redescriptive bang of Ackerman's rich account of constitutional flux, without taking on board all of Ackerman's theoretical baggage (pp. 422–423).[171] In particular, Lessig wants to avoid endorsing the claim that there are critical amendments that are now part of the Constitution without ever having even been definitively expressed or formally proposed as amendments, let alone ratified, and that could only have been adopted at the end of extra-constitutional paths (pp. 439–440). Lessig articulates three particular criticisms of Ackerman's account (two of which he endorses)(pp. 428–440). He first identifies two anomalies in Ackerman's account, each of which grounds an argument against that account.

First, Lessig explores the challenges to Ackerman's elevation

168. 1 ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 19, at 3–33.

169. Lessig styles Ackerman's a dualist theory because it articulates two largely independent ways of constitution making. The first, primary way, is by the People through a self-conscious mass expression of political will. The second is through the formal process of amendment pursuant to the terms of the constitutional instrument (Article V). This dualism is not inconsistent with my characterization of Ackerman's theory as a unified theory, because the two processes that Ackerman identifies fit together in an ordered way.

170. *See, e.g.*, FARBER & SHERRY, *supra* note 133, at 7, 99.

171. "The most important player of this game in American constitutional law—by far—is Bruce Ackerman" (p. 422). I don't think Ackerman and Lessig are doing the same thing—offering the same kind of constitutional account—any more than Lessig and Justice Scalia are.

of the Reconstruction Amendments to a constitutional moment analogous to the Founding (pp. 428–429). The flaw in Ackerman's account, critics like Mike McConnell suggest,[172] is that much of those amendments remained a dead letter until the middle of the twentieth century, when the Jim Crow laws were struck down or repealed and some, but hardly all, patterns of racial segregation and degradation began to erode (pp. 428–429). The extent of the backtracking on guarantees of civil rights and the duration of that resistance challenges the claim that Reconstruction forged a popular, democratic constitutional moment. The interpretation of the changes Ackerman has identified have been treated by the Court less as a revolutionary break with the past and more as an array of decisions in our normal constitutional practice that may be revisited, limited, and reinterpreted in the customary ways. Lessig concludes that McConnell's challenge is overstated, because there was no popular democratic movement that arose to reverse the Reconstruction's constitutional revolution (pp. 428–429, 434–437).

Even more importantly, with the dialectic of role and meaning, Lessig can account for the rise of the Jim Crow regime and the failure of the Court to deliver the promise of the Reconstruction Amendments as a triumph of political causes over constitutional reasons. That is, the failure of the Court can be understood as flowing from the recognition of the limited power associated with the Court's role. Lessig repeatedly styles this an account of *force majeure* (p. 431).[173] The force in question was the systemic, organized resistance by the Southern whites, accompanied by a willingness to employ violence, to the extension of the franchise and political civil rights to the formerly enslaved African-Americans, coupled with a failure of will on the part of the North to expend the blood and treasure necessary to overcome this resistance. In this case it was the *force majeure* of the triumphant white resistance in the South and the failure of political and moral will on behalf of the constitutional principles of equal civil rights without regard to race—and the willingness to employ military force in support of that political and moral will—

172. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMM. 115 (1994) (arguing that a second constitutional moment followed the adoption of the Reconstruction Amendments when those amendments were repealed with the Redemption).

173. I am indebted to Professor Lessig for highlighting this step in his argument.

in the North. It is an account of causes, not reasons. But Lessig is insistent that such triumph of causes leaves intact the constitutional principles and reasons that were rediscovered in the mid-twentieth century (p. 432).

Treating the Reconstruction Amendments as the fruits of a popular constitutional moment seems to require imposing a national, rather than a regional test of constitutional change. Initially, this may seem an obvious choice. However, if we follow Ackerman and abandon the formalities required by Article V as the sole test for constitutional textual change, then the Reconstruction Amendments would not need to be formally repealed for the triumph of the Jim Crow system to count as a constitutional moment. If we apply a regional test, moreover, denying the Redemption status as a constitutional moment becomes more questionable. The Redemption movement in the South proceeded with powerful (white) democratic support—if with an exclusionary, anti-democratic end.[174] Uniformly across the former Confederate States, albeit over an extended period of time, stringent racial inequality was systematically (if not uniformly) re-imposed at the state level, racial segregation legislatively adopted, and voting and other civil rights stripped from the nominally free African-Americans.[175] Why shouldn't we see this as a regional constitutional moment? Ackerman insists, however, on a national standard.[176] Again, if we reject traditional formal constitutional tests (which would seem to require national constitutional moments with respect to our formally national Constitution), it's not clear how or why Ackerman can insist on a nationwide test and thus deny the Redemption and enactment of the Jim Crow regime status as an otherwise qualifying

174. *See generally* RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896 363–64 (2017) (describing the introduction of the poll tax); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 564–87 (1988); W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 549–81 (1935); *see generally* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2019).

175. *See generally* FONER, *supra* note 174, at 587–601; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 31–109 (1955) (2d ed. 1966) (describing the lag between the restoration of white, Democratic rule in the former Confederate states and the adoption of comprehensive Jim Crow laws, including the substantial lag between the introduction of the first racial segregation laws and the enactment of the regime in the last state).

176. 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 474 n.126.

constitutional moment, simply because it's not national, only regional. Within the former Confederate States, the racist Redemption movement was popular, pervasive and comprehensive. Perhaps Ackerman would distinguish the formalism of limiting constitutional amendments to those proceeding through the express processes prescribed by Article V from the formalism of requiring a nationwide test so as to preserve the practical result of having a single American Constitution. After all, had the Civil War come out differently and the Confederated States survived as a sovereign nation, its secessionary and reconstitutive constitutional moments would have been nationwide. The opposing constitutional moment of the surviving Union, too, would have been nationwide in scope, albeit all three would have unfolded within two, smaller nations. Nevertheless, there may appear to be some inconsistency in Ackerman's acceptance of formalistic standards.

Lessig would likely argue that McConnell's argument, even as reinforced with an informal regional focus, nevertheless founders on the meaning and force of the constitutional text. There was a fundamental significance to the Reconstruction Amendments, and despite their effective eclipse in the decades between the end of Reconstruction and the mid-twentieth century, they are the constitutional foundation for the rights that the Court and the Nation began again to protect then. McConnell's argument proves too much, and while it appears to fit the facts of the Jim Crow Era, fails to fit the later facts.

Second, Lessig explores the challenges Ackerman's characterization of the implicit constitutional changes of the New Deal as a popular constitutional moment, albeit without formal constitutional amendment.[177] Those changes also appear to be under systematic continuing—and mounting—challenge within our normal constitutional practice (pp. 429–430). Lessig denies the constitutional changes of the New Deal status as a constitutional moment (pp. 437–440). His arguments are two-pronged. First, the gradual retrenchment of the more sweeping constitutional decisions has been undertaken as part of our normal constitutional decisional practice (p. 430); the absence of a counterrevolution argues against recognizing the original changes as revolutionary. Second, Lessig focuses upon the self-

177. *See id.* at 279–344.

consciousness of the constitutional actors—and their opponents—except perhaps in the context of the Court Packing Plan, the actors didn't think that they were defending the Constitution against a coup (pp. 437–440). Lessig also argues that the New Deal constitutional actors didn't think that they were changing the Constitution (pp. 437–440). That self-consciousness indicates that a constitutional moment was not unfolding with the constitutional changes of the New Deal (p. 440). [178] These arguments are persuasive.

Third, Lessig argues against Ackerman's claim that the Constitution was born in the sin of illegality even as he asserts that judicial review was born in the sin of infidelity to text, if not illegitimacy (p. 33). Lessig argues that it was not the Constitutional Convention that violated the governing foundational law of the Articles of Confederation; it was the Congress (pp. 432–433). Lessig seeks to strip the performative character of the Convention and instead characterize the Convention as acting as an adviser to the Congress—indeed, perhaps as its lawyer. Lessig asserts that this is an important point because of its implications for our contemporary constitutional practice. But the evidence for his claim appears weak, particularly in light of the argument and evidence advanced by Michael Klarman's *The Framer's Coup*. [179] The analogy of the Constitutional Convention, chaired by George Washington and including many of the leading political lights of the Confederation, as a mere adviser to the Congress is implausible. It's implausible because most historians describe the Convention and the crisis of the 1780s in stark terms that highlight the force with which the assembled delegates reported back the Constitution. [180] Lessig might reply that my description

178. 1 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 167–80 (arguing that our understanding of the political revolution that produced the Constitution and the United States has been obscured by subsequent revolutions in France and Russia and by Marxist accounts of revolution).

179. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION xi–xii (2016) [hereinafter KLARMAN, FRAMERS' COUP] (emphasizing the illegality of the choices made by the Constitutional Convention of 1787).

180. *See, e.g.*, KLARMAN, FRAMERS' COUP, *supra* note 179, at 110–25 (describing the State and congressional deliberations regarding the appointment of delegates to the Convention in the first months of 1787); JOHNSON, *supra* note 61, at 15–39 (describing the fiscal crisis of the 1780s); LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 1–3 (2002) (describing Shays's Rebellion and the other popular unrest in the winter of 1786–1787 as sufficiently serious to bring George

exaggerates the crisis leading up to the Philadelphia Convention and note that Klarman's book—other than the title—doesn't consistently refer to the adoption of the Constitution as a *coup*, except with the introduction of scare quotes.[181]

The extra-legal actions of the Convention have to be understood in that context of crisis. In that context, the Constitutional Convention of 1787 does not look like a bar convention. Moreover, the stature of the delegates to the Philadelphia Convention—most of them among the leading statesmen of the United States—look like principals, not advisers.[182] The delegates to the Convention understood very well the seriousness and presumption of the mission they had embarked upon—and its extra-legality.[183] Using the important factor of the self-consciousness that Lessig elsewhere invokes, the Convention shouldered the responsibility for the extra-legal project that they undertook.[184]

In sum, Lessig recognizes the Founding and Reconstruction as constitutional moments (pp. 432–437). He wants to acquit the 1787 Constitutional Convention of at least the most serious charges of illegality that Ackerman makes, and instead assign responsibility for the illegality or extra-legality to the Congress (pp. 432–434). Most fundamentally, Lessig denies the non-textual

Washington out of retirement to chair the Philadelphia Convention); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 393–429 (1969) (describing the crisis of the 1780s); *but see* MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789 (1950) (emphasizing the economic recovery during the 1780s and minimizing the crisis).

181. Lessig has made this suggestion to me. *See* KLARMAN, FRAMERS' COUP, *supra* note 179, at xi. But there is a century of historical literature that has emphasized the extraordinary nature of the process leading to the adoption of the Constitution. See*, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 63 (1913) ("Having failed to realize their great purposes through the regular means, the leaders in the movement [to protect the landed class through a new constitution] set to work to secure by a circuitous route the assembling of a convention to 'revise' the Articles of Confederation . . ."). Klarman also describes the express concerns of the delegates to the Philadelphia Convention that the country was on the brink of a civil war. KLARMAN, FRAMERS' COUP, *supra* note 179, at 126.

182. Ely captured the natural, modest limits of lawyers and their particular skills in applying and policing procedural rules. John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 423 (1978) [hereinafter Ely, *Constitutional Interpretation*] ("Observe a lawyer on a committee with nonlawyers and see what role she ends up playing.").

183. *See* KLARMAN, FRAMERS' COUP, *supra* note 179, at 126–33; *see also* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913).

184. KLARMAN, FRAMERS' COUP, *supra* note 179, at 126–33.

constitutional changes of the New Deal status as a constitutional moment (pp. 437–440). In place of Ackerman's account of more frequent recurring revolutionary change, Lessig offers an account of constitutional change that emphasizes its source in our normal argumentative, discursive constitutional practice.[185]

Somewhat puzzlingly, Lessig does not make a textual argument against Ackerman's anti-formalist account of constitutional amendment. One of the puzzles created by Ackerman's account of *de facto* constitutional amendment by the People in constitutional moments is the nature of the amended constitutional text. For Lessig's two-step originalism and his insistence on the importance of fidelity to meaning, this uncertainty appears problematic, if not unacceptable. Lessig emphasizes the importance of the written Constitution as providing a source of legal meaning with which the process of constitutional adjudication begins. Yet Lessig does not invoke the importance of a textual foundation as an argument against Ackerman's theory.

Lessig and Ackerman therefore offer starkly different accounts of constitutional flux. Even more stark are their different stances taken with respect to textualism and originalism in constitutional interpretation and decision.[186] The first step is to refine the relationship between textualism and originalism in this context. Sometimes the two are substantially lumped together, at least as a practical matter.[187] Textualism, or "hypertextualism," as Ackerman styles it,[188] asserts that constitutional adjudication can and should determine constitutional controversies on the basis of the meaning of the constitutional text.[189] Originalism is sometimes distinguished from textualism, either because it looks to the

185. This characterization of Lessig's account is subject to the reservations explored above with respect to the incorporation of the concept of fidelity to role into this discursive practice.

186. Lessig characterizes the fundamental mission of *We the People* as rebutting textualism (p. 441). The ambition was grander than that. *See* 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 344 (describing the purpose of *We The People* as seeking to restore the understanding and recognition of the popular democratic power of the people).

187. *See* Balkin, *Translating the Constitution*, *supra* note 37, at 982 ("Most originalists these days are textualists.").

188. 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 72.

189. *See* Ely, *Constitutional Interpretation, supra* note 182; LeDuc, *Striding Out of Babel*, *supra* note 32, at 104 ("Originalism is also to be distinguished from textualism because it is focused on the original *historical understandings* of the text, not the text itself." (footnote omitted)).

expected or intended application of the constitutional text or because it looks to the historical meaning or understanding of meaning.[190] While some originalists look to the original expected application of a constitutional provision—a decidedly non-textual concept, most modern originalists look to the original semantic or linguistic meaning or the original understanding of that meaning. Textualism and modern originalism are kissing cousins, conceptually speaking.

The fidelity to meaning underlying Lessig's two-step originalism begins with textual meaning. That textual meaning may be amplified and enriched by the introduction of social meaning, but it remains the core. Lessig's commitment to the constitutional text is different from Ackerman's polemical rejection of textualism.[191] The two accounts of constitutional moments thus yield very different interpretive stances. The difference may best explained as a consequence of the difference between a pluralist theory like that defended by Lessig and the aspirations of Ackerman's unified theory.

Lessig has refined Ackerman's theory in a powerful way. Most other constitutional theorists have either dismissed Ackerman's account or endorsed it uncritically. Lessig has radically revised Ackerman's theory, retaining the anti-formal, popular constitutionalist kernel of that theory while excising the more sweeping theoretical claims that are so far at odds with our constitutional practices. Lessig's account recognizes the primacy of practice, even as he cherishes the ambition, shared with Ackerman and Dworkin, of articulating a systematic, unified theory of our constitutional doctrine and practice.

IV. CONCLUSION

Fidelity and Constraint is a big, exciting, and ambitious book; its intellectual virtuosity makes it fun to review. *Fidelity and Constraint* undertakes four central missions. The first goal is to redescribe our constitutional history. While I have not assessed that historical project systematically, it should be clear that many

190. *See, e.g.*, BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 9–38 (distinguishing historical and textual arguments); FARBER & SHERRY, *supra* note 133, at 10–54 (distinguishing the originalism of Robert Bork from the formalism of Justice Scalia, which is grounded on originalism but adds an emphasis upon formal reasoning and a system of legal rules).

191. 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 72.

of Lessig's redescriptions are powerful and persuasive. My focus has been on Lessig's second and third projects.

The second goal for the book is to account for the Janus-faced character of constitutional decision. While the Court is free to determine how to translate historical text, it is yet constrained by that text and the role of the Court in our Republic—and by the need to persuade the justices of the future Court of the choices made. Lessig makes three principal claims about fidelity to meaning. First, constitutional decision should maintain fidelity to the meaning of the constitutional text. Second, it is the social meaning of the Constitution to which fidelity should be maintained. Third, the original social meaning should be translated into the context of the current case. Lessig makes a modal mistake in his defense of fidelity to meaning. Non-originalist theories do not deny that the original understandings and meanings matter in constitutional judgment and decision and originalist theories do not simply assert that they do. Originalist theories privilege such sources of constitutional authority and non-originalist theories deny that privilege. Thus, looking to such meanings does not make Lessig an originalist, as so many of the originalists themselves have concluded.[192] Assessing the value of Lessig's appeal to translation and social meaning is one of the central issues presented by *Fidelity and Constraint*.

Lessig argues that the fidelity to meaning must be tempered by a parallel fidelity to role. It is hard to imagine that he is not right, both descriptively and prescriptively. How could judicial decision proceed without some attention to what the Court can do? Ought assumes can. Constitutional adjudication is a practical, not a theoretical exercise. The pluralist theory that incorporates the duty of fidelity to meaning and recognition of the judicial role is powerful. It captures the contingency of our constitutional decision-making and doctrinal development and, at least tacitly, what judges do when they decide cases (p. 4). It captures the ebb and flow of doctrine in ways that the express arguments of the opinions don't always make explicit.

Lessig's methodological claims for his reconceptualizing project are inconsistent. On the one hand, he sometimes claims to offer a falsifiable, predictive account of our constitutional practice, along the lines of an econometric model. On the other

192. *See, e.g.*, Solum, *Fidelity*, *supra* note 64.

hand, he characterizes his account as a thick description of constitutional decisional practice over time. The first claim is overambitious and indefensible; the latter characterization of the account is apt and instructive, capturing what we should aspire to in our accounts of our constitutional practice. Lessig also doesn't conceptualize his theory as pluralist. His failure to conceptualize his account of meaning and role leaves him insensitive to the full descriptive, explanatory payoff that his account of the Constitution delivers. He sees only that it fails to offer a unified account of our historic constitutional practice and aspirations, and provides no equivalent to a properly specified econometric equation with an R-squared close to 1.

In sum, Lessig's theory gets enmeshed in making methodological claims that he cannot, and need not, sustain. More fundamentally, his account of social meaning and translation is articulated in a representational account of our constitutional language and knowledge. Lessig sometimes seems to believe that propositions of constitutional law are made true by corresponding with the constitutional text (pp. 415, 469 n.15). His account of fidelity to role is inconsistent with such a correspondence account of truth. That's because the institutional and political demands of fidelity to role are determined by the social and political practices of the Republic, not by any objective meaning or import of the Constitution-in-the-world. Lessig should recognize and acknowledge the performative role of the Court's decisions. For the Court, saying makes it so. Introducing references to truth and correspondence for propositions of constitutional law into the context of the Court's decision practice obscures far more than it illuminates and does not accord with the important performative dimension of the Court's decisional discourse.

The third project of *Fidelity and Constraint* compares Lessig's account with Bruce Ackerman's comprehensive high theory of popular constitutionalism. Lessig wants to account for constitutional flux without Bruce Ackerman's radical theory of a discontinuous popular constitutionalism, exercised by the People in constitutional moments that effect constitutional change outside the four corners of the Constitution (and Article V, in particular). This is an important and illuminating project, because the anti-formal arguments Ackerman makes about the

Reconstruction Amendments are compelling.[193] On the other hand, the open-ended and abstract theoretical claims he asserts about popular sovereignty, the constitutional crisis of the New Deal, and the ability to amend the Constitution outside the process required by Article V, are problematic. Lessig's implicit rehabilitation of Ackerman's account on the more modest lines Lessig defends, excluding the New Deal from the litany of constitutional moments and informal constitutional amendments, is persuasive.

One of the reasons Lessig's account is more persuasive is because it is a pluralist account; it recognizes that there are multiple sources of decision and constraint that must be taken into account in decision. Lessig's account incorporates all, or almost all, of Bobbitt's modes of constitutional argument. It does so in a manner which may be even more perspicuous than Bobbitt's own, because it tells a richer narrative about why the Court has proceeded this way. By showing how such arguments maintain fidelity to role and to meaning, Lessig tacitly explains why such practice has proven so compelling and resilient. I am just skeptical that he has shown that it is *justified*.

Fidelity and Constraint's fourth mission is to justify and defend the nature of the constitutional practice that we have (pp. 420, 457–459). This may be the least developed argument in the book; Lessig acknowledges how fast his argument goes (pp. 5–6). Neither does Lessig reconcile his normative claim of justification with his apparently inconsistent characterization of his project as an anthropological thick description. I am skeptical that we can—or need to—justify our constitutional practice within this practice any more than we need to justify the Electoral College within our political electoral practice or judicial review within our constitutional decisional practice. The bedrock of all is the practice they are a part of. Admittedly, many other constitutional scholars agree with Lessig's pursuit of justification.[194] While this

193. Lessig's strategy offers the promise of enriching our constitutional discourse with Ackerman's contrarian insights and reminders of the course of our constitutional history, without needing to endorse his highly theoretical and generally implausible comprehensive theory.

194. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) [hereinafter BICKEL, LEAST DANGEROUS] (identifying the countermajoritarian difficulty inherent in judicial review by unelected judges of democratically enacted legislation); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter ELY, DEMOCRACY

argument is important to our understanding of the nature and limits of constitutional theory, I can't explore this theme of *Fidelity and Constraint* here.

I conclude with a handful of speculative reflections about the impact *Fidelity and* Constraint may have. The richness and subtlety of Lessig's account allows readers to find support for much of what they already believe in Lessig's analysis. Richard Fallon, who accords constitutional theory a fundamental role in our constitutional discourse,[195] finds *Fidelity and Constraint* "the most ambitiously theorized study of American constitutional law in decades."[196] It's theorized at that level only if one understands its methodological commitments in the way that they are articulated as analogous to a project like the predictive projects of economic theory (pp. 2–3). Understood as historical constitutional ethnography, the theoretical content and aspirations of Lessig's account are markedly less. It's not that theory doesn't matter in ethnography; it does. The beliefs and concepts of the ethnographer's subject community need to be reconstructed and the behavior and practices conceptualized. But of foremost importance in the project is to capture and describe what it's like to be a member of such an alien community. It's a bottom-up rather than top-down project; the granular experiences of life are the building blocks of the narrative, not the premises or axioms of an abstract theory.

A reader's ability to find something in *Fidelity and Constraint* that supports what she already believes insures that there will be a lot of forces pulling *Fidelity and Constraint* into the black hole of the originalism debate.[197] That would be unfortunate; *Fidelity and Constraint* will provide more illumination if we pay closer attention to its mission. *Fidelity and Constraint* is not about the originalism debate. [198] It is intended to redescribe our

AND DISTRUST].

195. André LeDuc, *Toward a Reflective Equilibrium: Making Our Constitutional Practice Safe for Constitutional Theory*, 92 S. CAL. L. REV. POSTSCRIPT 39 (2018) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

196. Richard Fallon, *Blurb*, on back dustcover. Fallon's own work defending a methodology of reflective equilibrium (but without a veil of ignorance) can make a claim to be a much more theoretical account of our constitutional law and practice than Lessig's thick historical account.

197. *See, e.g.*, Balkin, *Translating the Constitution*, *supra* note 37, at 970, 979–86; Solum, *Fidelity*, *supra* note 64.

198. Active participants in the originalism debate like Larry Solum and Jack Balkin

constitutional practice by redescribing our constitutional history. For Lessig, as for Ackerman, the stakes are a lot higher than merely our choice of interpretive theories.[199]

Will Lessig's argument make any headway with Ackerman and others subscribing to central tenets of his popular constitutional theory? Ackerman, after all, is conspicuously absent from the manifold dust cover endorsements of *Fidelity and Constraint*. At the least, Lessig's argument will reinforce the beliefs of practicing lawyers, to the extent that they encounter Lessig's argument, in their skepticism about Ackerman's radical theory (pp. 14, 469 n.15). Lessig won't likely be able to advance the debate over originalism, despite the force of his arguments, because of its tenor and style.[200] Originalists generally rejected Lessig's original account of translation and the concept of social meaning (even before Lessig's introduction of the concept of fidelity to role) on the ground that it introduced impermissible sources of constitutional authority. [201] Lessig argues that what must be pursued is a meaning that functions in a shared social and political project in the Republic (pp. 416–420). As a result, mainstream originalists, new and old, seek fidelity to a different kind of meaning than Lessig describes. The meaning Lessig champions won't do the work that originalism was called forth to

think Lessig hasn't captured the exciting and creative theoretical developments in the debate. Solum, *Fidelity*, *supra* note 64; Balkin, *Translating the Constitution*, *supra* note 37, at 970, 979–86; ("As a result, Lessig has relatively little to say about the copious literature on originalist theory that began at the turn of the twenty-first century, a few years after his important articles on fidelity in translation were written."). I think they're kidding themselves, and that few outside the debate are deceived into believing that anything of intellectual importance is going on. *See* LeDuc, *Striding Out of Babel*, *supra* note 32, at 117–31 (arguing that the debate over originalism has degenerated into an unproductive stalemate).

199. *See* 2 ACKERMAN, WE THE PEOPLE, *supra* note 19, at 344 (describing his ambition to "keep alive the American tradition of popular sovereignty").

200. *See* LeDuc, *Striding Out of Babel*, *supra* note 32 (arguing that the debate over originalism is marked by intellectual pathologies and requires therapeutic treatment rather than the articulation and defense of more powerful arguments made within the framework of the existing debate).

201. *See* Calabresi, *supra* note 84.

perform.[202] Lessig is not likely to convince many originalists.[203]

How originalists should respond to Lessig's duty of fidelity to role presents a more difficult question. Lessig invokes Justice Scalia's faint-hearted originalism in his support (pp. 16–17). Justice Scalia repeatedly acknowledged that the principled demands of originalism must be tempered by prudential concerns.[204] As Justice Scalia put it, "I am an originalist, but I am not a nut"(p. 471 n.20).[205] Elsewhere, Justice Scalia characterized himself as a faint-hearted originalist.[206] The combination of translation in two-step originalism and fidelity to role are what keeps originalists from becoming nuts, according to Lessig (pp. 16–17). Academic originalists were surprisingly critical of Justice Scalia's pragmatic concessions and his self-styled faint-hearted originalism.[207] One difference here is that Justice Scalia introduced his concessions from originalism only defensively;[208] Lessig defends the duty of fidelity to role with affirmative arguments (pp. 28–33). He argues, indeed, that there is no alternative to such fidelity to role. The originalists need an answer to Lessig's structural and prudential arguments from role.

202. A point that some traditional originalists have also made about New Originalism, and that even the New Originalists have made about the New New or Positivist Originalism. *See, e.g.*, Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1326–27 (2017) (noting the substantial criticism of new positivist originalism, including that the new positivist originalism cannot deliver the substantive constitutional law sought by originalists traditionally); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 16–19 (2015); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation,* 103 NW. U. L. REV. 703, 725 (2009) ("I do not mean, of course, that adoption of the original public meaning approach necessarily leads to this elastic kind of constitutional interpretation. But relying on an artificial concept instead of on an actual historical event inevitably enlarges the field of such imaginative reconstructions."). Lessig doesn't need his account of meaning to perform the same work that orthodox originalists need done.

203. *See, e.g.*, Solum, *Fidelity*, *supra* note 64; James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997) (describing the genesis of originalism as a critical response to the constitutional jurisprudence of the Warren Court).

204. SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 139–40 (acknowledging that without the recognition of non-originalist precedent under the doctrine of *stare decisis* originalism would not be a "workable prescription for judicial governance").

205. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); *accord* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 76 (2005).

206. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

207. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006); Barnett, *Trumping Precedent*, *supra* note 33.

208. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 15, at 140 (characterizing departures from originalism as "pragmatic exceptions" to the theory).

Does *Fidelity and Constraint* offer the Court methodological tools like those that Justice Scalia presented in *A Matter of Interpretation*? Because of the richness and complexity of Lessig's account, the tools it offers are subtler and more nuanced. They may be more easily overlooked in the hurly-burly of constitutional adjudication and constitutional theory construction. Nevertheless, the mission and methods of two-step originalism should be of practical application in deciding cases.[209] As noted above, Lessig's account may articulate why flogging is constitutionally impermissible for originalists.

Recognizing the constraint of role, in our reasoned, discursive constitutional practice appears trickier, as Lessig has acknowledged.[210] Making arguments to the Court as an advocate from role expressly is problematic on Lessig's account. Lessig's account of role seems vulnerable to the criticism offered against some of the claims of the legal realists, that they are asserting that judicial decision must be opaque and, ultimately, deceptive.[211] Something more like Brandom's Hegelian account of adjudication offers a more fruitful description of the freedom and constraint inherent in constitutional adjudication. Brandom offers a description that preserves the full discursive character of our practice of constitutional argument and law.[212] That is, the account of freedom and constraint is told within the context of the practice of the constitutional arguments we make.[213]

209. This is likely why Lessig expressed hope that he could have convinced Justice Scalia of the merits of his interpretive and theoretical approach (p. 461). But, tellingly, Lessig acknowledges that his clerkship with Justice Scalia had been early in the Justice's tenure on the bench, tacitly recognizing that Justice Scalia's originalism became increasingly dogmatic over time.

210. Lessig, *Reply to Magliocca*, *supra* note 101.

211. *See* DWORKIN, LAW'S EMPIRE, *supra* note 20, at 36–39, 39 ("In fact there is no positive evidence of any kind that when lawyers and judges seem to be disagreeing about the law they are really keeping their fingers crossed."). *But see* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, *in* NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 25 (2007) (arguing that the realists were deeply committed to a transparent, predictive theory of law).

212. *See* Brandom, *Hegelian Model*, *supra* note 68, at 19–20; LeDuc, *Striding Out of Babel*, *supra* note 32.

213. *See* André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111, 184, 188–90 (2016) (exploring Brandom's inferentialist account of language and reasoning). For a fuller account and analysis of Brandom's Hegelian, inferentialist account of legal concepts in adjudication, see André LeDuc, A Robust Account of Constitutional Judgment (unpublished manuscript on file with the author).

Is *Fidelity and Constraint* destined to become a constitutional classic like *Democracy and Distrust*[214] or *The Least Dangerous Branch*?[215] Or is it destined to be a classic like Edward Levi's *An Introduction to Legal Reasoning* [216] or Philip Bobbitt's *Constitutional Fate*,[217] cited often with respect, but rarely read, and still less often understood? It is too soon to tell. But at a functional level, like that of Hilary Putnam's celebrated test for a philosophical classic, the smarter you get as you plow through *Fidelity and Constraint*, the smarter it gets.

214. ELY, DEMOCRACY AND DISTRUST, *supra* note 194.
215. BICKEL, LEAST DANGEROUS, *supra* note 194.
216. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).
217. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18.