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FIDELITY, CHANGE, AND THE GOOD CONSTITUTION

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Fidelity, Change, and the Good Constitution†

In thinking about fidelity and change in constitutional interpretation, many have framed the basic choice as being between originalism and living constitutionalism. Consider, for example, Jack M. Balkin's Living Originalism, Robert W. Bennett and Lawrence B. Solum's Constitutional Originalism: A Debate, and John O. McGinnis and Michael B. Rappaport's Originalism and the Good Constitution. I shall argue for the superiority of what Ronald Dworkin called "moral readings of the Constitution" and what what Sotirios A. Barber and I have called a "philosophic approach" to constitutional interpretation. By "moral reading" and "philosophic approach," I refer to conceptions of the Constitution as embodying abstract moral and political principles – not codifying concrete historical rules or practices – and of interpretation of those principles as requiring normative judgments about how they are best understood – not merely historical research to discover relatively specific original meanings.

I shall argue that Dworkin's and my conceptions of fidelity and change are superior to those of originalism in its many varieties. For our moral readings enable us to see what originalisms (besides Balkin's) obscure or deny: that one of the main purposes of the Constitution is to exhort us to change in order to honor our aspirational principles and affirmatively to pursue good things like the ends proclaimed in the Preamble. Thus, the aspiration to fidelity requires rather than forbids change. It aims for something better than preventing "rot," as Scalia famously put it. I shall attempt to make good on these claims by arguing that moral readings help us better understand the Constitution as both a framework for change and a charter

* Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. I prepared a draft of this essay for the Academic Symposium on Comparative Constitutional Change at the annual meeting of the Association of American Law Schools. I am grateful to Richard Albert for the invitation to participate. I benefitted from the opportunity appear in the Harvard Law School Federalist Society event on John O. McGinnis and Michael B. Rappaport's recent book, *Originalism and the Good Constitution* (2013) and to present a draft of the essay in the Boston University School of Law Faculty Workshop Series. Thanks to my research assistants Stephen Fox and Evan Miller for helpful comments.

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of aspirations to which we owe fidelity. They enable us to see how the multiple modalities of argument in constitutional interpretation (including original public meaning and precedent), rather than preventing change, are sites in which we argue about, and sources through which we justify, change: in particular, how best to realize and thus to be faithful to our constitutional aspirations. Or, as Dworkin put it, how to interpret the Constitution so as to make it the best it can be.

In sum, my topic is fidelity without originalism and change without living constitutionalism. I also ponder the reasons for the grip of originalism in our constitutional culture as contrasted with its rejection elsewhere. I shall suggest that the reasons commonly offered in fact demonstrate the grip of the aspiration to fidelity, not the grip of originalism itself. And I shall contend that those reasons in fact show the need for a moral reading or philosophic approach that conceives fidelity as redeeming the promise of our constitutional commitments, not an authoritarian originalist conception of fidelity as following the relatively specific original meaning (or original expected applications) of the Constitution.

I. INTRODUCTION

In thinking about fidelity and change in constitutional interpretation, many have framed the basic choice as being between originalism and living constitutionalism. Consider, for example, Jack M. Balkin's *Living Originalism*,¹ Robert W. Bennett and Lawrence B. Solum's *Constitutional Originalism: A Debate*,² and John O. McGinnis and Michael B. Rappaport's *Originalism and the Good Constitution*.³ This formulation puts originalism on the side of fidelity and living constitutionalism on the side of change. Indeed, the rhetoric of originalism is that of fidelity and the rhetoric of living constitutionalism is that of change.

This essay is part of my book in progress, *Fidelity to Our Imperfect Constitution*,⁴ in which I reject all forms of originalism, old or new, concrete or abstract, living or dead. Instead, I defend what Ronald Dworkin has called a "moral reading" of the Constitution⁵ and what Sotirios A. Barber and I have called a "philosophic approach" to

1. JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

2. ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* vii-viii (2011).

3. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 1-2 (2013).

4. JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (unpublished manuscript) (on file with author).

5. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2-3 (1996) [hereinafter *FREEDOM'S LAW*].

constitutional interpretation.⁶ By “moral reading” and “philosophic approach,” I refer to conceptions of the Constitution as embodying abstract moral and political principles—not codifying concrete historical rules or practices—and of interpretation of those principles as requiring normative judgments about how they are best understood—not merely historical research to discover relatively specific original meanings. I argue that the moral reading, not any version of originalism, is the most faithful to the Constitution’s commitments.

Some readers may think that Dworkin’s and my approaches are versions of living constitutionalism, but they are importantly different from it. I shall suggest that the prospects for reconciliation between, e.g., Balkin’s and Solum’s new originalisms and moral readings are greater than those between new originalisms and living constitutionalism. The basic reason is that the new originalists and moral readers share a commitment to constitutional fidelity: to interpretation and construction that best fits and justifies the Constitution. Living constitutionalists characteristically are more pragmatic, instrumentalist, and forward-looking in their approaches to the Constitution and, as such, tend to be anti-fidelity. Though, truth be told, most living constitutionalists who supposedly think this way are fabrications created in the minds of originalists like Chief Justice Rehnquist (see his “The Notion of a Living Constitution”)⁷ and Justice Scalia (see his discussion of “the Living Constitution” in his *A Matter of Interpretation: Federal Courts and the Law*).⁸

But, I shall argue, Dworkin’s and my conceptions of fidelity and change are superior to those of originalism in its many varieties. For our moral readings enable us to see what originalisms (besides Balkin’s) obscure or deny: that one of the main purposes of the Constitution is to exhort us to change in order to honor our aspirational principles embodied in the Constitution and affirmatively to pursue good things like the ends proclaimed in the Preamble. Thus, the aspiration to fidelity requires rather than forbids change. But it does so in the name of honoring our commitments and building out our framework of constitutional self-government with coherence, integrity, and responsibility, rather than in the name of “updating” a “living” constitution. It aims for something better than preventing “rot,” as Scalia famously put it.⁹

6. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* xiii, 155 (2007). See also JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 16, 210-11 (2006) (arguing for a “Constitution-perfecting theory”).

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

8. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37-48 (Amy Gutmann ed., 1997) [hereinafter *A MATTER OF INTERPRETATION*].

9. *Id.* at 40-41.

I shall attempt to make good on these claims by arguing that moral readings help us better understand the Constitution as both a framework for change and a charter of aspirations to which we owe fidelity. They enable us to see how the multiple modalities of argument in constitutional interpretation (including original public meaning and precedent), rather than preventing change, are sites in which we argue about, and sources through which we justify, change: in particular, how best to realize and thus to be faithful to our constitutional aspirations. Or, as Dworkin put it, how to interpret the Constitution so as to make it the best it can be.¹⁰

In sum, my topic is fidelity without originalism and change without living constitutionalism. Some scholars, for example, Frank Cross, have demonstrated “the failed promise of originalism.”¹¹ I shall show “the false promise of originalism.” In doing so, I shall illuminate the contrast between authoritarian (originalist) and aspirational (moral reading) views of fidelity and change.

Finally, I shall ponder the reasons for the grip of originalism in our constitutional culture as contrasted with its rejection elsewhere. I shall suggest that the reasons commonly offered in fact demonstrate the grip of the aspiration to fidelity, not the grip of originalism itself. And I shall contend that those reasons in fact show the need for a moral reading or philosophic approach that conceives fidelity as redeeming the promise of our constitutional commitments, not an authoritarian originalist conception of fidelity as following the relatively specific original meaning (or original expected applications) of the Constitution.

II. THE INCLUSIVENESS OF THE NEW ORIGINALISM AND ITS DISCONTENTS

A. *The Inclusiveness of the New Originalism*

Many have distinguished between the old originalism(s) and the new originalism(s). I have explored this distinction in other work¹² and will not repeat that discussion here. A striking characteristic of all forms of new originalism is their inclusiveness. Balkin,¹³ Solum,¹⁴ and even Keith Whittington¹⁵ and Randy Barnett¹⁶ to some degree

10. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986).

11. FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013).

12. See, e.g., James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEXAS L. REV. 1785 (2013) [hereinafter *Are We All Originalists Now?*]; James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433 (2013) [hereinafter *The Inclusiveness of the New Originalism*].

13. BALKIN, *supra* note 1, at 3-6.

14. BENNETT & SOLUM, *supra* note 2, at 35-36.

15. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013) [hereinafter *A Critical Introduction*]; Keith E. Whittington, *On Pluralism Within Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF*

present originalism as an inclusive, big tent. First, the new originalists argue that constitutional adjudication embraces not only interpretation but also construction. And they concede that construction is not originalist. (The old originalists, by contrast, insist that constitutional adjudication legitimately includes only interpretation, and that originalism is the only legitimate theory of interpretation.) Second, they accept Philip Bobbitt's argument that multiple modalities of interpretation and construction—not just originalism—legitimately operate in constitutional law: the modalities of text, history, structure, prudence (including consequences), precedent, and ethos (or spirit).¹⁷ And they concede that the multiple modalities are not originalist. In fact, some new originalists have conceived originalism so inclusively that they have asked, “Are we all originalists now?” and they have answered “Yes!”¹⁸

But in being so inclusive, they have made spectacular concessions to critics of originalism like the moral readers. For example, I have argued that construction according to Balkin's method of text and principle is to all intents and purposes the equivalent of a moral reading of the Constitution.¹⁹ And I have argued that interpretation and construction through the multiple modalities is not driven by a quest for the original meaning (in the manner of an originalism) but instead for the best interpretation (in the manner of a moral reading).²⁰ Indeed, the new originalists have unwittingly shown that through construction and multiple modalities they are engaged in making normative judgments that the moral readers have argued were necessary in constitutional interpretation and construction and that the old originalists have contended were illegitimate and forbidden.²¹ The originalism in the new originalism is not doing the heavy lifting when it comes to making these normative judgments. In other work, I have argued that it is moral readings that are doing that work.²² Put another way, all the action concerning “change” (for example, through the normative judgments in construction and multiple modalities) lies outside originalism. Remarkably, at the same time that the new originalists have made such spectacular con-

CONSTITUTIONAL INTERPRETATION 70 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter *On Pluralism Within Originalism*].

16. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013).

17. PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982). See BENNETT & SOLUM, *supra* note 2, at 59-60 (accepting “multiple modalities”); Whittington, *On Pluralism Within Originalism*, *supra* note 15, at 76 (accepting “pluralism” of modalities).

18. BENNETT & SOLUM, *supra* note 2, at 1.

19. James E. Fleming, *The Balkinization of Originalism*, 2012 *U. ILL. L. REV.* 669, 675-79.

20. Fleming, *The Inclusiveness of the New Originalism*, *supra* note 12, at 442-43.

21. *Id.* at 443-44.

22. *Id.* at 445.

cessions to the moral reading, they also have declared victory over it! Again, they have claimed that we are all originalists now!²³

B. *Originalism ≠ Original Meaning*

One further aspect of the inclusiveness of the new originalism is that they have conceived originalism, well, too inclusively. I want to draw two distinctions concerning what originalism is. First, I distinguish between (1) the theory of originalism and (2) the practice of generic consideration of original meaning in interpreting the Constitution. Originalism is an ism, a particular theory of constitutional interpretation holding that the relatively concrete original meaning of the Constitution is the only legitimate source of constitutional interpretation. (Though originalists like Scalia typically make a “pragmatic exception” for sources like precedent.²⁴) By contrast, generic consideration of original meaning takes an eclectic approach and regards it as one among several available sources of constitutional interpretation: “These sources include the document’s text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution’s values, and the societal consequences of any given interpretation.”²⁵ We often see courts look to original meaning in this latter sense. When doing so, courts typically have a pragmatic attitude, sometimes finding evidence of original meaning helpful, but often finding it inconclusive.²⁶ This generic, eclectic consideration of original meaning as one among several available sources of constitutional interpretation is not what we mean by originalism.

Second, I insist that originalism ≠ original meaning. Originalists like Justice Scalia commonly say that originalists are the only ones who care about original meaning in constitutional interpretation.²⁷ That is, Scalia asserts or assumes that originalism = original meaning. But, as Dworkin once put it, the debate between originalists and other theorists is not about *whether original meaning should count* in constitutional interpretation; rather, the debate is about *what should count as original meaning*.²⁸ That is, the originalists like Scalia conceive the relevant original meaning as the relatively concrete understandings and expectations of the historical framers and ra-

23. BENNETT & SOLUM, *supra* note 2, at 1.

24. Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 8, at 140.

25. GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 33 (2009).

26. *Id.* at 35.

27. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-56, 862-64 (1989).

28. See DWORKIN, FREEDOM’S LAW, *supra* note 5, at 287-305; RONALD DWORKIN, A MATTER OF PRINCIPLE 33-57 (1985).

tifiers.²⁹ Other theorists, like Justice Brennan and Dworkin, conceive the relevant original meaning as the relatively abstract commitments, principles, and aspirations embodied in the Constitution.³⁰ Both sides claim or aim for fidelity to the relevant original meaning as they conceive it.³¹ The latter theorists argue that we can take original meaning seriously—be faithful to it—without being originalists.³²

More generally, as Balkin has shown, most uses of history in constitutional interpretation are not originalist in the sense of what I am calling “originalism as an ism:” in the sense of striving to be faithful to the concrete understandings and expectations of the historical framers and ratifiers. Instead, most uses of history are more abstract, aspirational, or hortatory.³³ This is how history functions in moral readings.³⁴ Not as it is said to function in conventional originalist accounts: as determining answers to the questions that we confront today.

C. *Discontent with the New Originalism*

The inclusiveness of the new originalism—and its concessions regarding construction and multiple modalities—was bound to provoke a reaction within originalism. We see vigorous pushback against the new originalism in the recent book by John McGinnis and Michael Rappaport, *Originalism and the Good Constitution*.³⁵ They show the exclusive face of originalism. They want no part of the newness of the new originalism. They reject the interpretation-construction distinction, denying the need for or the legitimacy of construction, not to mention the multiple modalities.³⁶ For them, the original meaning is not so underdeterminative as to require construction. Where the original meaning seems underdeterminative, they are confident that

29. Scalia, *supra* note 27, at 854, 862-63.

30. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. J. 433, 433, 437 (1986); DWORKIN, *FREEDOM'S LAW*, *supra* note 5, at 72-74.

31. Brennan, *supra* note 30, at 437; DWORKIN, *FREEDOM'S LAW*, *supra* note 5, at 7-12, 72-76; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997). See also LIU ET AL., *supra* note 25, at 35-36.

32. James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L. J. 1849 (1997).

33. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013). See also Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L. J. 1765 (1997).

34. Fleming, *Are We All Originalists Now?*, *supra* note 12, at 1810-12; James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1345-52 (1997).

35. MCGINNIS & RAPPAPORT, *supra* note 3, at 15.

36. *Id.* at 139-53.

ordinary lawyers' tools for resolving indeterminacy will be sufficient to yield an answer without requiring construction.³⁷

Not only do McGinnis and Rappaport condemn all versions of living constitutionalism; they reject all forms of originalism except their own, original methods originalism: discovering and applying the original meaning using the original methods that the founders used and accepted as legitimate.³⁸ Indeed, they exclude from originalism all of the leading theorists of new originalism: Balkin, Solum, Barnett, and Whittington.³⁹ For McGinnis and Rappaport, the only proper approach to interpretation is original methods originalism: that is the only defensible conception of fidelity.⁴⁰ For them, moreover, the exclusive legitimate approach to change is formal amendment through Article V.⁴¹ I think McGinnis and Rappaport are going to be lonely in their exclusive world of original methods originalism. In thinking about fidelity and change in constitutional interpretation, I am going to use their book as a foil.

Strikingly, although McGinnis and Rappaport reject the new originalism, they do not exactly revert to the old originalism. For one thing, they face up to the need to make normative arguments to justify originalism—that it fosters a good Constitution⁴²—rather than simply asserting or assuming (as the old originalists did) that originalism is what interpretation just is. For another, they acknowledge that they are making a contingent argument for originalism that applies to the American constitutional order but may not apply elsewhere—again, they are not simply assuming (as the old originalists did) that originalism is true axiomatically. Finally, more than the old originalists, they attempt to make peace with precedents that are not consistent with original meaning as they conceive it.⁴³

III. SUPER-MAJORITARIAN CONSTITUTION AS THE GOOD CONSTITUTION

McGinnis and Rappaport argue that super-majoritarian requirements of the American Constitution (Article V's requirements of proposal of amendments by 2/3 of both houses of Congress and ratification by 3/4 of the states) insure that only really good provisions get adopted.⁴⁴ For the sake of argument, let us concede that this is generally true. At the same time, we must acknowledge that super-majoritarian requirements might lead to some very good things not

37. *Id.* at 118-21, 141-44.

38. *Id.* at 14-15, 116-38.

39. *Id.* at 139-40, 254 n.1, 255 n.6.

40. *Id.* at 14-15.

41. *Id.* at 81-99.

42. *Id.* at 2.

43. *Id.* at 154-96.

44. *Id.* at 33-61.

getting approved. Everyone's favorite example here is the Equal Rights Amendment, which would have prohibited denial or abridgement of equality on account of sex.⁴⁵ The ERA was ratified by thirty-five states, three short of the necessary 3/4. Yet, because of the success of the social movement behind the push for the ERA, and because the Supreme Court adopted "intermediate scrutiny" for gender-based classifications, some scholars (such as Reva Siegel) have argued that we nonetheless have a "de facto ERA."⁴⁶

Aside from amendments concerning topics like term limits for presidents (two)⁴⁷ and the date of the inauguration of a president (January 20),⁴⁸ what wins a 2/3 vote and 3/4 approval is typically abstract. A consequence is that adopting it does not resolve future problems of meaning but will require considerable judgment in interpreting and applying it. Consider, for example, freedom of speech, free exercise of religion, unreasonable searches and seizures, cruel and unusual punishment, equal protection, and due process.

Moreover, many things that win super-majoritarian approval do so through what John Rawls called an overlapping consensus⁴⁹ and what Cass Sunstein calls incompletely theorized agreements.⁵⁰ That is, people support a given abstract proposition for their own independent yet overlapping reasons. There is not one authoritative reason or justification. Proponents pull together shallow rather than deep consensus or agreement. And the agreements are, as Sunstein puts it, incompletely theorized. There is not one coherent theory or rationale that underlies the provision. The upshot is that many provisions adopted will be general and will not be determinate. People will have supported the proposal for different reasons, perhaps in spite of rather than because of the reasons others offered for it. Or, after the fact, the provision or framework adopted will have different reasons to support it, whatever the original framers and ratifiers may have thought were the reasons supporting it. The agreement will be shallow rather than deep—and so, there will not be a deeply, completely, coherently theorized commitment. As a consequence, interpretation and application will require judgment, even if we aspire to fidelity to the original meaning of the Constitution.

To recapitulate, many things that win supermajority approval—while presumably good—may not be determinately good. Their adoption will not have resolved the differences among those who made up

45. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 165 (2006).

46. Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

47. U.S. CONST., amend. XXII.

48. U.S. CONST., amend. XX.

49. JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993).

50. Cass R. Sunstein, *Commentary: Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

the overlapping consensus or who supported the incompletely theorized agreement. Thus, realizing the good of a provision or amendment will depend upon interpreters using good judgment in future interpretation of it.

Originalism as applied to such super-majoritarian commitments is not likely to yield determinate interpretations. But McGinnis and Rappaport remarkably, and inexplicably, argue that originalism is necessary to preserve the goodness of the super-majoritarian Constitution.⁵¹ This is (1) false and in any case (2) a non sequitur. It is false because originalism as applied to such super-majoritarian commitments is not likely to yield determinate interpretations. It is a non sequitur because there is nothing about the super-majoritarian process or the super-majoritarian outcome that requires any particular theory of interpretation, let alone originalism—unless, that is, one is presuming that interpretation just is originalism. All the work remains to be done in deciding what theory of interpretation to apply and how to justify it. A fortiori there is nothing about super-majoritarianism that requires McGinnis and Rappaport's particular version of originalism: original methods originalism. Similarly, there is nothing about super-majoritarianism that forbids a moral reading. To the contrary, fidelity to a scheme that could win supermajoritarian support will require a moral reading, not forbid it. We will have to make normative judgments in interpreting and applying our constitutional commitments.

Despite these criticisms, I agree with McGinnis and Rappaport to a certain extent that the goodness of the Constitution stems in part from its supermajoritarian features and the obduracy of Article V to constitutional amendment. But I think it is good for different reasons than they do. Indeed, for the opposite reasons. In recent years, many have criticized Article V for its obduracy to constitutional amendment.⁵² In support of Article V, I would make two points.⁵³

First, I would give two cheers for Article V in a *defensive* sense, for it has protected the Constitution and its citizens against the recent rash of "amendmentitis" (a term that Kathleen Sullivan has used⁵⁴). Numerous illiberal and ill-conceived amendments that would erode basic liberties or limit important powers have been introduced in Congress in recent years: the Flag Burning Amendment, the Balanced Budget Amendment, the Parental Rights Amendment, the Religious Freedom Amendment, the Human Life Amendment, and the Federal Marriage Amendment, to name a few. Despite the claims

51. MCGINNIS & RAPPAPORT, *supra* note 3, at 12-15.

52. See, e.g., LEVINSON, *supra* note 45, at 155-66.

53. In this paragraph and the next, I draw upon James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1533-34 (1998).

54. Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT 20 (Fall 1995) (criticizing a rash of proposals to amend the Constitution).

of representatives and senators in Congress to have a mandate from the People, all of the measures that have come up for a vote have failed to secure the two-thirds vote of both houses required by Article V to propose an amendment for ratification by the states. Thus, Article V's requirements have protected the Constitution and its citizens from such measures.

Second, there is much to be said for Article V in an *affirmative* sense. As Lawrence Sager has cogently argued, the obduracy of Article V to ready and easy amendment of the Constitution has encouraged and fostered broad interpretation of the Constitution's rights-protecting and power-conferring provisions.⁵⁵ It has underscored the character of the Constitution as a charter of "majestic generalities"⁵⁶—abstract principles, general powers, and general frameworks and structures—as opposed to a code of relatively specific original meanings (as original expected applications). (Any consensus in support of such majestic generalities or general frameworks is going to be abstract and indeterminate, and it is not going to resolve our problems for us.) Thus, Article V has underwritten approaches to constitutional interpretation like those of Dworkin's moral reading,⁵⁷ Sager's justice-seeking constitutionalism,⁵⁸ and Barber's and my philosophic approach⁵⁹ (not to mention David Strauss's common law constitutional interpretation⁶⁰). That is as it should be, by design, not by accident. And not because "updating" judges have circumvented Article V as the exclusive route for legitimate constitutional change. Rather, because that is the best way to be faithful to our supermajoritarian, good Constitution.

Thus, the goodness of the super-majoritarian Constitution is bound up with the moral reading or philosophic approach, not with originalism in general or original methods originalism in particular. Original methods originalism would undermine its goodness. In fact, I have argued elsewhere, even if the framers and ratifiers expected that we would interpret the Constitution according to originalism of some sort, it is one of the "successful failures" of the American Constitution that we have not followed originalism.⁶¹ That is why

55. LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 164, 183-87, 213-19 (2004).

56. I allude to Justice Jackson's famous formulation in *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943).

57. DWORKIN, *FREEDOM'S LAW*, *supra* note 5.

58. SAGER, *supra* note 55.

59. BARBER & FLEMING, *supra* note 6.

60. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 115-39 (2010) (discussing the "irrelevance of constitutional amendments").

61. James E. Fleming, *Successful Failures of the American Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 29, 44-45 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

originalists are second to none in criticizing our actual constitutional practice for not being originalist.⁶²

IV. ORIGINAL METHODS ORIGINALISM

As stated above, McGinnis and Rappaport argue that, to preserve the goodness of the super-majoritarian Constitution, we must interpret it according to original methods originalism (and we must amend it exclusively through Article V). In this section, I shall focus my critique on original methods originalism. I have two criticisms: one that emphasizes the peculiarity of original methods originalism and another that emphasizes its familiarity!

Original methods originalism seems at first glance to be a peculiar constitutional theory counterpart to the Academy of Ancient Music (England) or Aston Magna (United States): these are orchestras committed to performing, for example, Beethoven, using the period instruments that Beethoven (so they say) intended his symphonies to be performed on. Recall Judge Posner's famous critique, "Bork and Beethoven," relating Bork's originalism to the authentic performance movement.⁶³ That critique applies a fortiori to McGinnis and Rappaport's original methods originalism. I ask, would anyone seriously claim that the only way to realize what is good in Beethoven's sonatas is to use period instruments? Would we take seriously an objection to playing Beethoven on a Steinway grand piano rather than an 1827 pianoforte that we found in Beethoven's apartment in Vienna or the like? We would not. We might appreciate the Academy of Ancient Music—just as we might appreciate a re-enactment of the Constitutional Convention of 1787 with people wearing wigs and using quill pens. But we should look upon them as quaint antiquarians rather than as guardians of the goodness of Beethoven's compositions—or of the Constitution. It would be implausible to claim that anyone who did not use period instruments was subverting the goodness of Beethoven's compositions. We should view original methods originalism in the same light.

Now, just what are the original methods to which McGinnis and Rappaport's original methods originalism would limit us? Here is the part about familiarity. I had expected McGinnis and Rappaport to give a thorough account of the methods or modalities or sources of interpretation extant in 1787 (at the founding) and 1868 (at Reconstruction) and so on. I had expected some powerful demonstrations that many of the modalities that we use today—in particular, those

62. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); MCGINNIS & RAPPAPORT, *supra* note 3; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

63. Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365 (1990) (reviewing Bork, *supra* note 62).

championed by the pragmatists, living constitutionalists, and moral readers—had no counterparts in 1787 and 1868 and so on. Or, indeed, that they were specifically forbidden at those times. Or maybe even that there were original methods with which we are not familiar—and which we now have to revive on pain of being charged with illegitimately updating the Constitution! Instead, we get little more than a couple of quotations from Blackstone and Story about the importance of text and intent in constitutional interpretation,⁶⁴ plus assurances that, if there were ambiguity or vagueness in a constitutional commitment, interpretive rules extant at the time would resolve them.⁶⁵ Beyond that, they make dogmatic assertions that there was no such thing in 1787 or 1868 as “judicial updating” or living constitutionalism or dynamic interpretation.⁶⁶ This core chapter is the thinnest, weakest, and most conclusory of their book. I shall limit my remarks to three criticisms.

One, McGinnis and Rappaport give us no reason to believe that all of the familiar modalities of interpretation that we use today were not used at the time of the founding or Reconstruction. Take, for example, Philip Bobbitt’s well-known typology of six modalities of constitutional interpretation (which Balkin has helpfully reformulated as styles of justification⁶⁷): text, history, structure, prudence (including consequences), precedent, and ethos (or spirit).⁶⁸ It is important to note that Bobbitt’s own illustrations of each of these modalities date from early in our history. He is not saying we have added new modalities to the original modalities as we have gone along. More generally, proponents of each of these modalities claim to find them in operation from the beginning of our constitutional system and throughout its history. McGinnis and Rappaport do not make a convincing case that any, much less most, of these modalities were not among the original methods of constitutional interpretation. Nor that the approaches of living constitutionalism and the moral reading were not extant at the time of the founding.

Two, McGinnis and Rappaport’s purported examples of canonical original methods originalism do not support their arguments. For example, Blackstone’s and Story’s accounts of text and intent as sources of meaning⁶⁹ are so generic that I cannot imagine that anyone would reject them. They hardly stand for contemporary originalism as an *ism*. They instead represent traditional recourse to text and intent in constitutional interpretation (as a generic consideration of text and intent as available sources of constitutional meaning). They do not

64. MCGINNIS & RAPPAPORT, *supra* note 3, at 135-36, 144-45.

65. *Id.* at 118-21, 141-44, 153.

66. *Id.* at 144-48.

67. Balkin, *supra* note 33, at 658.

68. BOBBITT, *supra* note 17, at 7-8.

69. MCGINNIS & RAPPAPORT, *supra* note 3, at 144-45.

cut ice in differentiating McGinnis and Rappaport's method of originalism from, say, Balkin's living originalism or Dworkin's moral reading.

Three, I would argue that the original methods of 1787 and for that matter 1868 did not include originalism as we know it today (what I have called "originalism as an ism"). To explain, I shall recall the distinction I drew earlier: (1) originalism as an ism versus (2) generic consideration of original meaning as one among several available approaches in interpreting the Constitution. The latter existed in 1787 and in 1868. The former originated in 1971, with the publication of Robert Bork's "Neutral Principles and Some First Amendment Problems."⁷⁰ Indeed, Steven Calabresi has called Bork "the father of originalism."⁷¹ Before Richard Nixon's and Robert Bork's criticisms of the Warren Court and the early Burger Court, originalism as an ism, as we know it today, did not exist. You don't have to take my word for it. In addition to Calabresi, just read the work of the systematic theorists of originalism like Keith Whittington and Larry Solum. They date old originalism as a negative, reactive attitude to the Warren Court that began in the 1970s and was developed in earnest in the 1980s.⁷² The new originalism dates from 1999 (Barnett)⁷³ or 2002 (Whittington).⁷⁴

The most implausible claim that McGinnis and Rappaport make is that original meaning or original intent is determinate enough to resolve our problems today or, where it is not, original interpretive rules will eliminate any ambiguity, vagueness, or indeterminacy.⁷⁵ They say very little about what these interpretive rules are or about how they will work in resolving ambiguities, vagueness, and disagreement. In any case, our most fundamental disagreements do not typically involve ambiguities and vagueness as they conceive them; instead, our deepest disagreements are about competing understandings of interpretive concepts, as Dworkin puts it.⁷⁶ For example, is the Equal Protection Clause best understood as embodying an anti-

70. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

71. Steven G. Calabresi and Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v. Evans*, 80 U. CHI. L. REV. DIALOGUE 155, 155 (2013).

72. Whittington, *A Critical Introduction*, *supra* note 15, at 375-77; Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 599-602 (2004); BENNETT & SOLUM, *supra* note 2, at viii, 7-8.

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

74. Whittington, *The New Originalism*, *supra* note 72. Whittington presented drafts of this paper as early as 2002.

75. MCGINNIS & RAPPAPORT, *supra* note 3, at 141-44.

76. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 158-70 (2011) [hereinafter *JUSTICE FOR HEDGEHOGS*].

caste principle⁷⁷ or a principle of racial neutrality (or a “color-blind Constitution”⁷⁸)? McGinnis and Rappaport do not provide any interpretive rules that would enable us to decide which of the competing understandings of these concepts is the best interpretation. The moral of the story is that original methods concerning the interpretation of text and intent, supplemented by original interpretive rules, are not going to provide determinacy in interpreting abstract constitutional commitments. We will need to make moral, philosophic, and jurisprudential judgments in deciding which—among competing available interpretations—is the best interpretation of the Constitution.

V. FIDELITY AS REDEMPTION VERSUS JUDICIAL UPDATING: THE CASE OF EQUAL PROTECTION FOR GAYS AND LESBIANS

McGinnis and Rappaport have coarsened the debate in constitutional interpretation by reducing it to a clash between fidelity to the Constitution through original methods originalism and judicial “updating” of the Constitution. Those who engage in construction or moral readings are said to bypass Article V amendment through judicial “updating.”⁷⁹ With all due respect, the style of justification of the moral reading is one of fidelity to the Constitution in redeeming its promises, rather than a rhetoric of judicial updating of the Constitution to keep it in tune with the times. I shall analyze briefly the case of gay and lesbian rights, in particular, the concern for securing the status of gays and lesbians as equal citizens as manifested in *Romer*, *Lawrence*, and *Windsor*. My point will be that the idea of “updating” does not capture what is going on, whereas the idea of fidelity to the Constitution in redeeming its promises (Balkin)⁸⁰ or making it the best it can be (Dworkin)⁸¹ does.

On the McGinnis-Rappaport view, the original meaning of the Equal Protection Clause in 1868 did not include a commitment to securing the status of gays and lesbians as equal citizens.⁸² Nor did it in 1986, when *Bowers* was decided, holding that the Due Process Clause did not protect a right of privacy or intimate association for gays and lesbians.⁸³ Nor in 1996, the year *Romer* was decided, hold-

77. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243-46 (1995) (Stevens, J., dissenting); *Adarand*, 515 U.S. at 271-73 (Ginsburg, J., dissenting).

78. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring in part and concurring in the judgment); *Grutter v. Bollinger*, 539 U.S. 306, 347-49 (2003) (Scalia, J., dissenting); *Grutter*, 539 U.S. at 349-53 (Thomas, J., dissenting).

79. MCGINNIS & RAPPAPORT, *supra* note 3, at 81-82, 100-01.

80. BALKIN, *supra* note 1, at 73-99.

81. DWORKIN, *supra* note 10, at 255.

82. See MCGINNIS & RAPPAPORT, *supra* note 3, at 100-15 (analyzing the exclusion of African Americans and women as “super-majoritarian failures”).

83. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

ing that the Equal Protection Clause did protect gays and lesbians against legislation reflecting “animus” against, and “a bare . . . desire to harm [them as] a politically unpopular group.”⁸⁴ Nor in 2003, the year of *Lawrence*, which overruled *Bowers* and held that the Due Process Clause did protect a right of autonomy or intimate association for gays and lesbians.⁸⁵ Nor for that matter in 2013, when *Windsor* was decided, holding that the federal Defense of Marriage Act—which defined marriage for purposes of federal law as the union of one man and one woman—reflected “animus” against, and “a bare . . . desire to harm [gays and lesbians as] a politically unpopular group,” as well as classifications that “demean” on the basis of sexual orientation, in violation of Equal Protection.⁸⁶ And so, on their view, the argument for interpreting the Constitution to secure the status of equal citizenship for gays and lesbians is necessarily an argument for judicial updating of the Constitution to keep up with current ideas of equality and illegitimate updating at that. (This is also how Justice Scalia views these matters, as indicated in his dissents in *Romer*, *Lawrence*, and *Windsor*.⁸⁷)

As McGinnis and Rappaport see it, after *Bowers*, if you wanted to secure the status of equal citizenship for gays and lesbians through constitutional law, the only constitutionally appropriate route would be to work for an Equal Rights Amendment protecting gays and lesbians against discrimination. To press for equality for gays and lesbians, as a matter of constitutional interpretation and construction, without formally amending the Constitution, would be to seek “judicial updating” of the Constitution, which is illegitimate.

Moral readers see the matter rather differently. On their view, the Equal Protection Clause embodies an abstract commitment to securing the status of equal citizenship for all—on our best understanding of what doing so entails.⁸⁸ Perhaps in 1868, our best understanding would have been that it principally protected the newly freed slaves (or persons of African descent more generally). Perhaps we would not have seen any analogies between the second-class citizenship of the newly freed slaves and, for example, that of women (much less that of gays and lesbians). But over time, we came to appreciate those analogies, partly through the suffrage movement culminating in the ratification of the 19th Amendment, partly through the changing roles and place of women in the world, and even partly through the failed campaign to ratify the Equal Rights

84. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

85. *Lawrence v. Texas*, 539 U.S. 558, 562, 574 (2003).

86. *United States v. Windsor*, 133 S.Ct. 2675, 2693, 2694, 2695 (2013).

87. *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 594-98 (Scalia, J., dissenting); *Windsor*, 133 S.Ct. at 2710-11 (Scalia, J., dissenting).

88. DWORKIN, *FREEDOM'S LAW*, *supra* note 5, at 72-74; BARBER & FLEMING, *supra* note 6, at 82-84; FLEMING, *supra* note 6, at 5, 69, 70, 96, 118.

Amendment. Through such developments, we came to see, for example, in *Frontiero* (plurality)⁸⁹ and *Craig* (majority),⁹⁰ that certain longstanding history and tradition relegated women to second-class citizenship and thus denied them equal protection. We came to a better understanding of our commitment to equal protection as condemning second-class citizenship not only for newly freed slaves and African Americans generally but also for women.

Ditto for the rights of gays and lesbians. In 1986, when *Bowers* was decided, the Supreme Court did not see that longstanding history and tradition denied gays and lesbians the status of equal citizenship.⁹¹ From *Bowers* through *Romer* and beyond to *Lawrence* and *Windsor*, the Court came to see that gays and lesbians were being relegated to second-class citizenship—on our best understanding of what equal protection and due process require. As Justice Kennedy put it in *Romer*: “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens’” (quoting from dissent in *Plessy v. Ferguson* (1896)).⁹² Kennedy added that Colorado, by prohibiting protection of gays and lesbians from discrimination, had “deem[ed] a class of persons a stranger to its laws” in violation of the Equal Protection Clause.⁹³ As Justice Kennedy observed in *Lawrence*:

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁹⁴

In other words, persons in every generation can seek to redeem the Constitution’s promise of liberty.

Now, does the fact that we did not go through the formal supermajoritarian procedures of Article V for amending the Constitution to protect gays and lesbians cheapen that evolution in our understanding of the constitutional commitment to securing equal

89. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

90. *Craig v. Boren*, 429 U.S. 190 (1976) (majority opinion).

91. *Bowers*, 478 U.S. at 190-91 (asserting that none of the precedents protecting a right of privacy “bears any resemblance” to the case at hand).

92. *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

93. *Id.* at 635.

94. *Lawrence*, 539 U.S. at 578-79.

protection and the status of equal citizenship for all? Or does it imply that those insights and hard-fought victories for gays and lesbians, after centuries of second-class citizenship, were illegitimate? Should gays and lesbians have proceeded differently in bringing people to understand that longstanding laws were relegating them to second-class citizenship? Should *Romer*, *Lawrence*, and *Windsor* be disparaged as illegitimate judicial “updating” and the much-maligned *Bowers* be celebrated for upholding the legitimate Constitution (as Scalia has argued⁹⁵)? In sum, is there something wrong with how we came to realize the promise or the implications of our commitments?

Hardly. These formulations simply do not capture what is going on here. Instead, through interpretation grounded in analogies and understandings rooted in our constitutional practice, we are redeeming the promise of equal protection and liberty for gays and lesbians. We are realizing the best understanding of our constitutional commitments to securing the status of equal citizenship for all. This is the moral reading’s rhetoric of fidelity as redemption of the promise of the abstract commitment to securing the status of equal citizenship for all (I interpret Balkin, with his idea of fidelity as redemption of the promises of the Constitution, as a moral reader⁹⁶). It is not a rhetoric of judicial updating (or even of living constitutionalism).

VI. ORIGINALISM: FAILED PROMISE OR FALSE PROMISE?

One tack in criticizing originalism is exemplified in Frank Cross’s recent book, *The Failed Promise of Originalism*.⁹⁷ Cross begins by granting the supposed appeal or promise of originalism, but he proceeds to show that originalism does not deliver on that appeal or promise. That’s what he means by the “failed promise” of originalism. Along similar lines is John Hart Ely’s famous critique of originalism (or “clause-bound interpretivism”). He begins by granting the “allure of interpretivism.”⁹⁸ But then he shows that it is “impossible,” for it dispositively fails on its own terms: for the Constitution itself, for example, in the Ninth Amendment, tells us not to be a clause-bound interpretivist.⁹⁹

My tack is different: instead of demonstrating the failed promise of originalism, I show the false promise of originalism. I deny the appeal or promise of originalism unless we cast originalism so abstractly that it is the functional equivalent of the moral reading or philosophic approach (as with Balkin’s living originalism). Why do I

95. *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting) (arguing that *Bowers* is “unassailable” for those who believe in following the Constitution instead of making up a living constitution).

96. Fleming, *supra* note 19, at 675-79 (analyzing BALKIN, *supra* note 1).

97. CROSS, *supra* note 11.

98. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 1-9 (1980).

99. *Id.* at 13.

deny the appeal or promise of originalism?¹⁰⁰ First, originalism, old and new, is at bottom authoritarian, an insult to the founders for their arrogance and an insult to us for our subservience. A regime of purportedly dispositive concrete original meanings is, at best, beside the point in constitutional interpretation and, at worst, an authoritarian regime that is unfit to rule a free and equal people. To add further insult, its proponents serve it up to us in the name of democracy!

Second, originalism, old and new, makes a virtue of claiming to exile moral and political theory from the province of constitutional interpretation. That is neither possible nor desirable, nor is it appropriate in interpreting our Constitution, which establishes a scheme of abstract aspirational principles and ends, together with a general framework of structures and powers, rather than a code of detailed historical rules. Interpreting our Constitution with fidelity requires judgments of moral and political theory about how those principles, frameworks, and structures are best understood.

Third, originalism, old and new, misconceives fidelity in constitutional interpretation. Under the best conception of fidelity—as integrity with a moral reading of the Constitution—we conceive fidelity as *honoring* our aspirational principles—the principles to which we as a people aspire, and the principles for which we as a people stand—rather than as *following* our historical practices and concrete original understandings or meanings, which surely have failed to realize our aspirations. Ironically, in the name of interpretive fidelity, originalists would enshrine an imperfect constitution that does not deserve our fidelity. The moral reading, because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, offers hope that the Constitution may deserve our fidelity, or at least may be able to earn it.

Finally, I reject the *irresponsibility* of originalism: originalists fail to take responsibility for the decisions we have to make in interpreting the Constitution; instead, they say, “We didn’t do it, the framers and ratifiers did it!”

The commitment to fidelity is a commitment to honor our aspirations and framework for constitutional self-government: to build them out with integrity and responsibility—not to evade responsibility by claiming that we are just following the commands of the founding fathers and that they have already made our decisions for us. The former view also reflects an understanding of the Constitution itself as a framework for furthering the good things proclaimed in the Preamble—and an understanding that being faithful to the

100. In this paragraph and the next, I draw upon Fleming, *Are We All Originalists Now?*, *supra* note 12, at 1805-06. See also BARBER & FLEMING, *supra* note 6, at 97-98.

Constitution by honoring its aspirations will entail change as we confront new problems in new circumstances. We confront such problems with an attitude of integrity and responsibility, not of following commands that have already made our decisions for us. And not with an attitude of “updating” in the forward-looking, anti-fidelity sense of hackneyed versions of living constitutionalism. I do not call that updating the Constitution. I call it being faithful to the Constitution by redeeming its promises, thereby interpreting it so as to make it the best it can be. In that sense, fidelity entails change.

VII. A FRESH START CONCERNING FIDELITY

It is time for a fresh start in thinking about fidelity and change in constitutional interpretation. Conventional formulations of the clash between originalism and living constitutionalism have enabled the originalists to claim a monopoly on concern for fidelity and enabled originalists to disparage living constitutionalists as attempting to “change” or “update” the Constitution rather than be faithful to it.¹⁰¹ Living constitutionalists, both wittingly and unwittingly, have willingly gone along with this rhetoric and its implications.¹⁰² Moral readers like Dworkin have rejected these formulations,¹⁰³ but this has not been sufficiently appreciated.

We should begin at the beginning, by observing that the aspiration to fidelity raises two fundamental questions: *Fidelity to what?* and *What is fidelity?* The short answer to the first—fidelity to the Constitution—poses a further question: *What is the Constitution?* For example, does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules? The short answer to the second—being faithful to the Constitution in interpreting it—leads to another question: *How* should the Constitution be interpreted? Does faithfulness to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts or prohibit it and instead require historical research to discover relatively specific original understanding or meaning? And does the quest for

101. See, e.g., MCGINNIS & RAPPAPORT, *supra* note 3, at 81-82, 100-01; SCALIA, *supra* note 8, at 37-48; Scalia, *supra* note 27, at 852.

102. For example, I fear that David Strauss’s arguments in support of living constitutionalism as common law constitutional interpretation are more “anti-fidelity” than is necessary and than is good for him. See STRAUSS, *supra* note 60, at 24. The same may be true of Erwin Chemerinsky’s arguments for living constitutionalism as an “open-ended modernism.” ERWIN CHEMEKINSKY, INTERPRETING THE CONSTITUTION 129, 133 (1987). By contrast, Liu, Karlan, and Schroeder’s recent defense of a living constitutionalism is cast in terms of fidelity and “keeping faith with the Constitution.” LIU ET AL., *supra* note 25.

103. See *infra* note 120 and accompanying text.

fidelity in interpreting the Constitution exhort us to make it the best it can be or forbid us to do so in favor of enforcing an imperfect Constitution?¹⁰⁴

On pain of being charged with illegitimately “updating” the Constitution?

Let’s begin with the question, *Fidelity to what?*¹⁰⁵ My answer is fidelity to our abstract constitutional aspirations, including ends, principles, and basic liberties, together with our general constitutional framework of structures and powers. Fidelity to our aspirations does not entail obligation to follow the past in the sense of concrete original meanings. That would enshrine an imperfect Constitution that falls short of our aspirations and does not deserve our fidelity.

Next, let’s consider the other question, *What is fidelity?* It is not fealty, or subservience. It is not following the authority of the past in the manner of an authoritarian originalism. Furthermore, it is not obligation to the concrete past, whether original meaning or precedents. Rather, fidelity is honoring our aspirations and pursuing our commitments by furthering our best understandings of them. The concrete original meaning and precedents are evidence of good-faith efforts to pursue those aspirations, but they are not the aspirations themselves. They have no doubt fallen short of our aspirations. If following those sources from the past dishonors our aspirations and undermines our commitments, we have good reasons to reject them in order to pursue our aspirations and commitments.

Moreover—to return to the question, *Fidelity to what?*—we should aspire to fidelity to our scheme as an ongoing frame of government pursuing the ends of the Preamble, not as a set of concrete original meanings or a string of precedents. Again, I do not say that we have an obligation to follow the concrete past, though I do say that we aspire to fidelity to the Constitution. How can we aspire to fidelity while rejecting an obligation to the concrete past?

If we conceive the Constitution as a frame of government, to be lived under and worked out over time, we can approach it with an attitude of fidelity but without an obligation of obedience to concrete expected applications or precedents. Fidelity on this understanding entails a commitment to making the frame of government work, to learning from experience, and to interpreting the Constitution so as to further its ends and realize its aspirations.

Fidelity? Yes. Commitment? Yes. Obligation or obedience in an authoritarian sense to original expected applications or precedents?

104. Fleming, *supra* note 34, at 1335.

105. In this section, I draw from James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. 1283, 1291-92 (2013).

No. Fidelity is not obedience to decisions already made for us in the past by people who are long dead and who were ignorant of the challenges and problems of our age. Fidelity, rather, is an attitude of commitment to making the scheme work and to further developing it, building it out over time, as Balkin puts it,¹⁰⁶ in ways to better realize its ends and our aspirations. Or, as Dworkin and I put it, to making the Constitution the best it can be.¹⁰⁷

Let me encapsulate the contrast between two radically different attitudes toward fidelity and change. On the authoritarian originalist view, fidelity in constitutional interpretation requires preventing change by preserving relatively concrete original meanings and longstanding historical practices. On the aspirational view, fidelity requires criticizing longstanding historical practices and pursuing change in order to realize the Constitution's aspirational, transformative principles and purposes.

For example, for moral readers such as Justice Brennan, Justice Ginsburg, or Justice Stevens, the point of adopting and amending the Constitution is not to embody longstanding historical practices, but to transform them in pursuit of our constitutional aspirations to normative principles like equality and liberty. Brennan wrote, "Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized."¹⁰⁸ He continued, "Thus, for example, when we interpret the Civil War amendments . . . we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world."¹⁰⁹ That is Brennan's conception of the abstract, aspirational original public meaning of the Civil War Amendments, including the Fourteenth Amendment.

For Brennan, Ginsburg, and Stevens, the Fourteenth Amendment commits us to equal protection on our best understanding, not equality as it was reflected in the common law and statute books in 1868, with all manner of racist, sexist, and heterosexist expectations and presuppositions.¹¹⁰ It also commits us to liberty on our best un-

106. BALKIN, *supra* note 1, at 3.

107. DWORKIN, *supra* note 10, at 255; FLEMING, *supra* note 6, at 16, 210-11.

108. Brennan, *supra* note 30, at 438. In this paragraph and the next, I draw upon Fleming, *The Inclusiveness of the New Originalism*, *supra* note 12, at 448.

109. Brennan, *supra* note 30, at 438.

110. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) ("[T]he Civil War Amendments used 'language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality.'" (quoting AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 361, 363, 399 (2005))); Reva B. Siegel, *Equality's Frontiers: How Congress's Section 5 Power Can Secure Transformative Equality (as Justice Ginsburg Illustrates in Coleman)*, 122 *YALE L.J. ONLINE* 267 (2013).

derstanding, not liberty as it was manifested in the common law and statute books as of 1868.¹¹¹ As they see it, originalists seeking to enforce Scalia-like conceptions of original public meaning eviscerate the Fourteenth Amendment's transformative purposes. Such originalists subvert the aspiration to fidelity to our commitments.

In sum, fidelity entails change:

1. If fidelity is commitment to honoring abstract aspirational commitments, not to following concrete original expectations of how those commitments should be applied.
2. If fidelity is commitment to living under our constitutional framework as an "experiment" in constitutional self-government as opposed to an authoritarian command that we must follow.
3. If fidelity is building out our framework with coherence, integrity, and responsibility versus following original expected applications and longstanding historical practices.
4. If fidelity is redemption of the Constitution's promises, not adherence to its concrete original meanings and longstanding historical practices.

VIII. THE MORAL READING IS SUPERIOR TO LIVING CONSTITUTIONALISM

I want to make clear that I am not advocating living constitutionalism or judicial "updating" of the Constitution as an alternative to originalism. I always say, the only thing I hate as much as originalism is living constitutionalism. Some readers may think that Dworkin's and my approaches are versions of living constitutionalism, but they are importantly different from it.

In the larger book of which this essay is a part,¹¹² I shall suggest that the prospects for reconciliation between Balkin's and Solum's new originalisms and moral readings are greater than those between new originalisms and living constitutionalism. The basic reason is that the new originalists and moral readers share a commitment to constitutional fidelity: to interpretation and construction that best fits and justifies the Constitution. Living constitutionalists characteristically are more pragmatic, instrumentalist, and forward-looking

111. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 743 (1997) (Stevens, J., concurring) ("[T]he source of [the] right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law. This freedom embraces not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death.").

112. FLEMING, *supra* note 4.

in their approaches to the Constitution and, as such, tend to be anti-fidelity. Though, truth be told, most living constitutionalists who supposedly think this way are fabrications created in the minds of originalists like Chief Justice Rehnquist (see his “The Notion of a Living Constitution”¹¹³) and Justice Scalia (see his discussion of “the Living Constitution” in his *A Matter of Interpretation: Federal Courts and the Law*¹¹⁴).

Dworkin made such arguments long ago in *Taking Rights Seriously*,¹¹⁵ but they have been neglected. I shall briefly recall them here (Barber and I fully elaborate such arguments in our book, *Constitutional Interpretation: The Basic Questions*¹¹⁶). Dworkin argued that the Constitution embodies concepts rather than the founders’ specific conceptions of those concepts.¹¹⁷ As he subsequently put it, the Constitution embodies interpretive concepts.¹¹⁸ He argued that fidelity in constitutional interpretation requires elaborating those concepts—rather than enforcing the founders’ specific conceptions of them—in quest of our best understanding of those concepts.¹¹⁹

Dworkin contended that arguments for “living constitutionalism” were vulnerable:

Those who ignore the distinction between concepts and conceptions . . . are forced to argue in a vulnerable way. They say that ideas of cruelty change over time, and that the Court must be free to reject out-of-date conceptions; this suggests that the Court must change what the Constitution enacted. But in fact the Court can enforce what the Constitution says only by making up its own mind about what is cruel. . . . If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the concepts in question.¹²⁰

Indeed, many liberal living constitutionalists have argued in the “vulnerable way” sketched by Dworkin, leaving them open to the charge that they do not care about fidelity to the Constitution but instead want to change or update it.

Liberal constitutional theorists need a rhetoric of fidelity and redemption, as Dworkin and Balkin well know and have powerfully

113. Rehnquist, *supra* note 7.

114. SCALIA, *supra* note 8, at 37-48.

115. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 136 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

116. BARBER & FLEMING, *supra* note 6, at 13-33.

117. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 115, at 134-36.

118. DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 76, at 158-70.

119. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 115, at 134-36.

120. *Id.* at 136.

demonstrated. To be sure, liberal living constitutionalism is on firmer ground now than it was when Dworkin wrote. In particular, David Strauss has given it its most persuasive formulation to date, framing it as a common law constitutional interpretation¹²¹ rather than simply a forward-looking program for changing or updating the Constitution. Strauss convincingly shows the extent to which (1) common law constitutional interpretation rather than originalism has been our practice; (2) common law constitutional interpretation provides better constraints upon judicial decision making than does originalism; and (3) common law constitutional interpretation rather than the formal procedures of Article V has been our procedure for change.¹²² He gives living constitutionalism a grounding, rigor, and structure that it previously lacked.

Yet, I have argued, Strauss's common law constitutional interpretation would be more compelling if it were interpreted or reconstructed as a moral reading.¹²³ For common law constitutional interpretation is not just a matter of making forward-looking, unbounded judgments of fairness and good policy. I have suggested that there are affinities between the aspiration of common law constitutional interpretation to "work[s] itself pure" and the aspiration of moral readings, in Dworkin's famous formulation, to interpret the Constitution so as to make it the best it can be.¹²⁴ We should interpret the Constitution so as to redeem its promises: through working them out with coherence, integrity, and responsibility, rather than engaging in anti-fidelity living constitutionalist talk about "updating" the Constitution.

IX. WHY ORIGINALISM IN THE UNITED STATES BUT NOT ELSEWHERE?

Finally, I shall ponder the reasons for the grip of originalism in our constitutional culture as contrasted with its rejection elsewhere. Some originalists assert or assume that originalism is what interpretation *just is*, as a matter of fact.¹²⁵ Others assert or assume that originalism is what interpretation *should be*, as a normative matter.¹²⁶ Both are evidently universalist assertions or assumptions about interpretation, not contingent claims about American constitutional interpretation and practice. I am not a comparative

121. STRAUSS, *supra* note 60.

122. *Id.* at 33-49, 77-92, 115-39.

123. James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. Rev. 1171, 1177-85 (2012).

124. *Id.* at 1179-80; DWORKIN, *supra* note 10, at 255.

125. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1250 (1994); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823 (1997).

126. I interpret Larry Solum as belonging in this camp. BENNETT & SOLUM, *supra* note 2, at 36-64.

constitutional law scholar, but I wrote my Ph.D. dissertation at Princeton University under Walter Murphy, the greatest political science comparative constitutional law scholar of his generation. The first thing I learned about comparative constitutional law from Murphy was that originalism is peculiar to the United States and that it is rejected elsewhere.¹²⁷ Indeed, among many if not most domestic constitutional theorists and comparativists, this seems to be the conventional wisdom.¹²⁸

If true, this conventional wisdom (1) refutes the matter of fact claim and (2) casts doubts upon the normative claim. First, it is not the fact of the matter that interpretation *just is* originalism. Second, although it could be the case that American originalists are right, normatively—and everyone else in the world is wrong—it is more likely that there are contingent reasons for originalism’s normative appeal (at least to some) in the United States. As mentioned above, McGinnis and Rappaport concede that their arguments for originalism and the good Constitution in the United States are contingent, not universal.¹²⁹ Viewing the normative arguments as contingent, we should ask, what accounts for the appeal of originalism in the United States but not elsewhere?

I acknowledge that, in recent years, some comparativists have questioned this conventional wisdom. They have suggested that originalism is not so peculiarly American after all.¹³⁰ But we need to bear in mind the distinction I drew above: (1) Original meaning in a generic sense as one source among several available sources versus (2) originalism as an ism, as a claim that original meaning conceived at a very specific level of abstraction is the only legitimate source of constitutional meaning. The comparativists who find originalism here, there, and everywhere most likely are finding original meaning in a generic sense as one source among several.¹³¹ I doubt that they are finding what I call originalism as an ism outside the United States. No doubt, resort to original meaning in a generic sense is used

127. Murphy later developed this argument in his magnum opus. WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* (2007).

128. See, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1 (2009); Jack M. Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* (David Schiff & Richard Nobles eds., forthcoming 2015). For a critique of Greene, see David Fontana, *Response: Comparative Originalism*, 88 TEXAS L. REV. SEE ALSO 189 (2010).

129. See *supra* text accompanying notes 42-43.

130. Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1247-48 (2011) (arguing that “the Turkish Constitutional Court has employed a convoluted combination of most of the versions of originalism that have found a following in the United States”).

131. Bradley Miller, *Beguiled By Metaphors: The “Living” Tree*, 22 CAN. J. L. & JURISPRUDENCE 331, 343 (2009) (“The orthodox Canadian view is that while original intentions or understandings may be relevant to interpretation, the judge may decide that they have little or no weight.”).

elsewhere. For example, Australian comparative scholar Jeffrey Goldsworthy says that we find “moderate” originalism (roughly, what I am calling generic consideration of original meaning) elsewhere, but not “extreme” originalism (roughly, what I am calling originalism as an ism as found in the United States).¹³²

And so, we should ask what accounts for the appeal of originalism as an ism here in the United States but not elsewhere. I should say, the appeal of originalism as an ism here in the United States since the 1970s and 1980s. I shall mention several reasons commonly given, without conceding that they actually are good reasons for practicing originalism as an ism in the United States. In fact, I believe the claims that our constitutional culture and practice is originalist are greatly exaggerated. Indeed, if our constitutional culture and practice is so originalist, then why is it that originalists are so critical of our constitutional culture and practice for not being originalist?¹³³

Moreover, I believe that the reasons commonly given for the grip of originalism in our constitutional culture are better understood as reasons for the grip of the aspiration to fidelity— explaining recourse to first principles and the aspiration to fidelity to those first principles—not the grip of originalism as such. I contend that those reasons in fact show the need for a moral reading or philosophic approach that conceives fidelity as redeeming the promise of our constitutional commitments, not an authoritarian originalist conception of fidelity as following the relatively specific original meaning (or original expected applications) of the Constitution. Furthermore, I argue that it is moral readings that are actually doing the work in invoking conceptions of those first principles and elaborating upon them. Ironically, the arguments said to explain the appeal of originalism in the United States work better as arguments explaining the need for a moral reading here.

First reason: In the United States, we had a revolution followed by a constitutional founding based on “reflection and choice,” as *The Federalist* No. 1 put it.¹³⁴ These experiences, the argument goes, have fostered a constitutional culture where people, instead of accepting matters as settled, always feel free to recur to first principles in criticizing existing arrangements.¹³⁵ Indeed, originalism is characteristically a radical invocation of first principles from which we are said to have fallen away. These first principles are invoked to justify overthrowing erroneous precedents and throwing out longstanding

132. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1, 21 (1997).

133. See *supra* text accompanying note 62.

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

135. BALKIN, *supra* note 1, at 74-81; Balkin, *supra* note 128, at 11-14.

practices.¹³⁶ Ironically, originalism may be most appealing where people are deeply critical of current practices and want radical change that ostensibly returns to their conceptions of first principles. Indeed, we will see this borne out in the additional reasons for the appeal of originalism in the United States.

Second reason: The conservative “counter-revolutionary” reaction against the Warren Court “revolution” (and the early Burger Court’s decision in *Roe v. Wade*¹³⁷). As suggested above, before Richard Nixon and Robert Bork launched their attacks on the Warren Court and the early Burger Court, originalism as we now know it (as an ism) did not exist.¹³⁸ Recall what I said about the first reason: The appeal of originalism consists in its promise of radical change and ostensible return to originalists’ conceptions of first principles. What drives this move to originalism clearly are conservative moral readings of the Constitution.

Third reason (related to the second): The conservative counter-revolutionary reaction against the modern regulatory state (emboldened by the Reagan revolution).¹³⁹ Especially since the administration of Ronald Reagan, conservatives and libertarians have called for restoring the lost constitution,¹⁴⁰ or the “Constitution in exile.”¹⁴¹ They argue that progressive and liberal “living constitutionalists” have rewritten the Constitution.¹⁴² In doing so, they have destroyed the goodness of the original founding principles, believed (fervently) to be conservative and libertarian. Thus, the abandonment of founding principles has enabled the rise of the modern regulatory and welfare state. If only we could restore the original, lost Constitution—through originalism. But what fuels this counter-revolutionary fervor, again, are conservative moral readings: conservative conceptions of liberty against government that they believe put the founding in its best light, not a concern for fidelity to concrete original meanings for its own sake.

Fourth reason: The poverty of constitutional theory (both in originalism and its alternatives). Originalists commonly charge that “you can’t beat somebody with nobody,”¹⁴³ or say that “it takes a theory to beat a theory.”¹⁴⁴ The presuppositions are that originalism is the traditional, familiar view and that it is a cogent theory. Even if

136. BALKIN, *supra* note 1, at 361 n.5; Balkin, *supra* note 128, at 11-14.

137. 410 U.S. 113 (1973).

138. See *supra* text accompanying notes 70-72.

139. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 680-81 (2009).

140. See, e.g., BARNETT, *supra* note 62.

141. See, e.g., Douglas H. Ginsburg, *On Constitutionalism*, 2003 CATO SUP. CT. REV. 7.

142. See, e.g., RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

143. Scalia, *supra* note 27, at 855.

144. BENNETT & SOLUM, *supra* note 2, at 73-75.

originalism itself, truth be told, was not much of a theory. It passed, so originalists say, for the common sense of the matter.¹⁴⁵ But, if so, originalism passed for common sense in a generic sense rather than in the specific sense of originalism as an ism. The further presupposition is that there really is no alternative cogent theory. This view, I believe, was reinforced by the poverty of the rhetoric of the living constitution (at least prior to the publication of Strauss's *The Living Constitution* in 2010¹⁴⁶) and the poverty of constitutional theory generally (at least prior to the publication of Dworkin's *Taking Rights Seriously* in 1977¹⁴⁷ and John Hart Ely's *Democracy and Distrust* in 1980¹⁴⁸). But constitutional theory is richer today, and there are cogent alternatives to originalism, including Strauss's common law constitutional interpretation and Dworkin's moral reading. Meanwhile, originalism itself has split into warring camps. Indeed, in my "The Balkanization of Originalism,"¹⁴⁹ I have argued that the only thing originalists agree upon is their rejection of living constitutionalism (and moral readings).

Fifth reason: Written constitution coupled with the constitutional protestantism of our constitutional culture (by "protestantism," I mean the view that not only courts but also other institutions and ultimately every citizen may share in the responsibility of interpreting the Constitution¹⁵⁰). Relatedly, written constitution as the font of our civil religion.¹⁵¹ This is said to explain why Americans are originalist.¹⁵² Yet, ironically, originalism tends to promote the juridic lawyer's constitution, conceiving it as terms of art to be understood only through specialized legal knowledge of original meanings.¹⁵³ (Not at all a constitutional protestantism after all.) Constitutional protestantism actually typically expresses itself in the form of moral readings rather than lawyerly readings. For "the lawyerhood of all citizens" celebrated by constitutional protestantism actually is more

145. Scalia, *supra* note 27, at 852.

146. STRAUSS, *supra* note 60.

147. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 115.

148. ELY, *supra* note 98.

149. James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 11 (2007); Fleming, *supra* note 19, at 670.

150. For the idea of constitutional protestantism, see, e.g., BALKIN, *supra* note 1, at 17-18, 93-99; SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 40-42 (1988).

151. LEVINSON, *supra* note 150, at 9-53; Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123. See also Greene, *supra* note 128, at 7 ("Constitutionalism is often called our civil religion, and the originalism movement that so glorifies the Constitution's original understanding is conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God's word").

152. Balkin, *supra* note 128, at 7.

153. See, e.g., MCGINNIS & RAPPAPORT, *supra* note 3.

likely to generate readings of the Constitution as embodying moral principles than as enacting lawyerly terms of art.¹⁵⁴

Sixth reason: Written constitution coupled with the promise of redemption and the belief that the American Constitution is a shining city on a hill.¹⁵⁵ The founding is glorified as embodying great wisdom, leading to worship of the founders.¹⁵⁶ If so, the argument or presupposition seems to be, we have to be originalists to determine what is so good about the Constitution and to preserve what is good about it. We see a contemporary version of this argument in McGinnis and Rappaport's *Originalism and the Good Constitution*.¹⁵⁷ But, I have argued, to be faithful, to redeem the promises of the shining city on a hill, we must forsake originalism for the moral reading or philosophic approach.¹⁵⁸ And so, this supposed argument for originalism in the United States works better as an argument for the moral reading.

X. CONCLUSION: FIDELITY WITHOUT ORIGINALISM AND CHANGE WITHOUT LIVING CONSTITUTIONALISM

In conclusion, we need a theory of fidelity without originalism and change without living constitutionalism. My project is to develop such a theory in the form of a constructivist account of the uses of history in constitutional interpretation.¹⁵⁹ A constructivist world would look somewhat like the pre-originalist world (that is, the pre-Borkian world), although it would be far more sophisticated theoretically than that world was. It would treat original meaning as one source of constitutional meaning among several, not the exclusive source, let alone the exclusive legitimate theory. It would use history for what it teaches rather than for what it purportedly decides for us.

In a constructivist world, we would understand that history is a jumble of open possibilities, not authoritative, determinate answers. We would understand that we—self-styled originalists no less than the rest of us—always read the past selectively, from the standpoint of the present, in anticipation of the future. We look to the past, not

154. Sanford Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 99 n.*.

155. BALKIN, *supra* note 1, at 74-81; Balkin, *supra* note 128, at 14-15.

156. Greene, *supra* note 128, at 63 ("Less charitably, Canadian Supreme Court Justice Ian Binnie is said to have told a New Zealand conference that 'the approach of [his] counterparts in the United States could only be explained by appreciating that Americans were engaged in a ritual of ancestor worship'"); Balkin, *supra* note 128, at 14-15.

157. MCGINNIS & RAPPAPORT, *supra* note 3, at 12-14.

158. Justice Brennan made a similar argument regarding the need for a moral reading to redeem our "shining city upon a hill." Brennan, *supra* note 30, at 445.

159. Fleming, *Are We All Originalists Now?*, *supra* note 12, at 1806-13. In this conclusion, I draw from *id.* at 1812. In prior work, I have developed a constitutional constructivism by analogy to John Rawls's political constructivism. FLEMING, *supra* note 6, at 4, 6, 61-64, 92-94 (building upon RAWLS, *supra* note 49, at 89-129).

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for authoritative answers, but for illumination about our experience and our commitments.

Finally, we would understand that it dishonors the past to pretend—in the name of originalism—that it authoritatively decides questions for us, and to pretend that it avoids the burden of making normative arguments about the meaning of our commitments to abstract moral principles and ends.

I argue that fidelity in interpreting the Constitution as written requires a moral reading or philosophic approach. No approach—including no version of originalism—can responsibly avoid philosophic reflection and choice in interpreting the Constitution. Only a moral reading or philosophic approach has much hope of redeeming the promise of our commitments to a good Constitution.

