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Are We All Originalists Now? I Hope Not!

James E. Fleming^{*}

Abstract

In recent years, some have asked: “Are we all originalists now?” My response is: “I hope not!” In this Article, I explain why. But first, I show that there is a trick in the question: Even to pose the question “Are we all originalists now?” suggests that one is presupposing what I shall call “the originalist premise.” To answer the question affirmatively certainly shows that one is presupposing it. The originalist premise is the assumption that originalism, rightly conceived, is the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, has to be the best, or indeed the only, conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just has to be. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation! I will sketch some of the problematic assumptions underlying this premise (and thus underlying the projects of many scholars who seek to reconstruct originalism or to put forward new originalisms). Worse yet, raising the question “Are we all originalists now?” may presuppose that we all have come around to Justice Antonin Scalia’s and Robert Bork’s ways of thinking, without conceding that many versions of originalism themselves have

^{*} 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. This project has been germinating for a longer period than I care to admit. I presented early versions at the AALS/APSA Conference on Constitutional Law, as the Alpheus T. Mason Lecture in Constitutional Law & Political Thought at Princeton University, at the University of Illinois College of Law, and in the Yale Legal Theory Workshop, and more recent versions in the Michigan State University College of Law Faculty Workshop, the Georgia State University College of Law Faculty Lunch Series, the Boston University School of Law Faculty Workshop, the University of Chicago Constitutional Law Workshop, the University of Wisconsin Discussion Group on Constitutional Law, the University of San Diego Law School Works-in-Progress Conference on Originalism, and finally the University of Texas School of Law Symposium on Constitutional Foundations. I received valuable comments at each of these events. Along the way, I have spun off several publications from the project: *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007); *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669; and *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013) (reviewing LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011)). I also included a portion of the project in SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 91–98 (2007). For the most part, I have resisted the urge to reintegrate these pieces into this larger whole (though I indicate places where I have drawn from them). I will integrate all of the pieces into my book in progress, James E. Fleming, *Fidelity to Our Imperfect Constitution* (unpublished manuscript) (on file with author). I am indebted to Sot Barber, Abner Greene, Linda McClain, and Ben Zipursky for conversations about this project and to Jack Balkin, Randy Barnett, the late Ronald Dworkin, Larry Solum, and Keith Whittington for exchanges concerning it. I also thank Courtney Gesualdi and Jennifer Ekblaw for assistance.

been moving targets that have moved considerably toward the positions of their critics.

If I hope we are not all originalists now, what do I hope we (at least some of us) are? Much of the best work in constitutional theory today is not originalist in either an old or a new sense; rather, it is what I have called “constructivist.” I am interested in developing a constructivist account of the uses of history in constitutional interpretation. 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 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 philosophic approach to constitutional interpretation. No approach—including no version of originalism—can responsibly avoid philosophic reflection and choice in interpreting the Constitution.

I. Are We All Originalists Now?

In recent years, some have asked: “Are we all originalists now?” My response is: “I hope not!” By contrast, Lawrence Solum replies: “We Are All Originalists Now.”¹ The answer to the question depends, as he recognizes, on “what one means by *originalism*”² and whether we define it exclusively or inclusively.

In defining originalism, Solum distills an elegant framework with four basic ideas. It is worth quoting in full:

- *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.
- *The public meaning thesis*: Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax

1. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011). Since I cite only to Solum’s contribution to the debate in this book, I shall refer to it hereinafter as SOLUM. In this section and the next, I draw from my review of the book, James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013).

2. SOLUM, *supra* note 1, at 61.

that characterized the linguistic practices of the public and not by the intentions of the framers.

- *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
- *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (1) constitutional interpretation, which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.³

Solum aspires to understand originalism and, for that matter, living constitutionalism “in their best light—in their most sophisticated and defensible versions.”⁴

If we define originalism inclusively enough, we might say that we evidently are all originalists now. Indeed, we might just define originalism so broadly that even I would no longer hope that we are not all originalists now! Applying Solum’s framework, we would conclude that Jack Balkin, with his self-described living originalist method of text and principle,⁵ definitely is an originalist. Ronald Dworkin, with his moral reading of the Constitution,⁶ surely also is. Sotirios A. Barber and I, with our philosophic approach to constitutional interpretation⁷ (and my own “Constitution-perfecting theory”),⁸ are as well. (By “moral reading” and “philosophic approach,” I refer to conceptions of the Constitution as embodying abstract moral and political principles—not merely codifying concrete historical rules or practices—and of interpretation of those principles as requiring judgments of political theory about how they are best understood—not merely historical research to discover relatively specific original meanings.) So, too, are reasonable, bounded, and grounded versions of living constitutionalism. All of these theories evidently can accept the four theses quoted above. Under Solum’s formulation, originalism clearly is a big tent—charitable, magnanimous, and inclusionary—rather than the dogmatic, scolding, and exclusionary outlook that we see in originalist works like Robert Bork’s *The Tempting of America* and Antonin Scalia’s *A Matter of Interpretation*.⁹

3. *Id.* at 4.

4. *Id.* at 5.

5. JACK M. BALKIN, LIVING ORIGINALISM 3–6 (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

6. RONALD DWORIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) [hereinafter DWORIN, FREEDOM’S LAW].

7. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS xiii, 155 (2007).

8. JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 16, 210–11 (2006).

9. Compare SOLUM, *supra* note 1, at 1–77 (arguing that “we are all originalists now” by broadly defining originalism), with ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 136, 143 (Touchstone 1991) (1990) (arguing that “only the approach of

But if we define originalism so inclusively—and we are all now in this big tent—it may not be very useful to say that we are all originalists now. We may obscure our differences more than elucidate common ground. For we would persist in most of our theoretical disagreements—it is just that we would say that the disagreements are among varieties of so-called originalism. And the debates concerning interpretation and construction, thus recast or translated, would go on much as before.

Clearly, affirmative answers to the question “Are we all originalists now?” stem from inclusive conceptions of what comes within originalism and, in particular, the new originalism or new originalisms. For we most definitely are not all old originalists now!

II. The Inclusiveness of New Originalisms

What is the new originalism? Who are the new originalists? And what is new about their originalism?¹⁰ These questions presuppose three prior questions: *What* is the old originalism? *Who* are the old originalists? And *why* have many constitutional scholars and jurists sought to move beyond old originalism to new originalism?

What? The old originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court (and early Burger Court). Before Richard Nixon and Robert Bork launched their attacks on the Court, originalism as we now know it did not exist. Constitutional interpretation in light of original understanding¹¹ did exist, but original understanding was seen as merely one source of constitutional decision making among several—not as a general theory of constitutional interpretation, much less the exclusive legitimate theory. The old originalists conceive original understanding in terms of concrete intentions of the Framers or their original expected applications (as distinguished from their abstract intentions).¹² Accordingly, these originalists argue that fidelity in constitutional interpretation requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the Framers of the Constitution. And, they argue

original understanding” as he conceives it “is consonant with the design of the American Republic” and describing “new theorists of constitutional law” as espousing views that involve “nothing less than the subversion of the law’s foundations”), and ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–48 (Amy Gutmann ed., 1997) (arguing that only originalists look for “the original meaning of the text” and scathingly criticizing theories of “The Living Constitution” as rejecting the original meaning as an authoritative guide).

10. I have addressed these questions in BARBER & FLEMING, *supra* note 7, at 91–98, and in Fleming, *supra* note 1, at 544–46. I have incorporated some of those analyses in this Part.

11. Here I am using the term “original understanding” generically to include original understanding, intention of the framers, and original public meaning. I am not taking a position on the debates between varieties of originalism concerning these particular formulations.

12. SOLUM, *supra* note 1, at 7–11; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 603 (2004) [hereinafter Whittington, *The New Originalism*].

that these concrete intentions or original expected applications are determinative concerning constitutional doctrine.¹³

Who? The old originalists include, most prominently, Bork and Raoul Berger.¹⁴

Why? The old originalism is vulnerable to dispositive criticisms. In his book, *Constitutional Interpretation*, Keith Whittington has forthrightly addressed many of these criticisms, for example, that the old originalism is circular, question begging, and axiomatic.¹⁵ Likewise, in the book *Constitutional Originalism: A Debate*, Solum has acknowledged the shortcomings of the old originalism.¹⁶ I would argue that the old originalism suffers from three incorrigible flaws: (1) the moral burden of the old originalism with regard to both rights and powers: its concrete intentionalism entails that *Brown v. Board of Education*¹⁷ was wrongly decided¹⁸ and that most of the modern federal government is unconstitutional;¹⁹ (2) the authoritarianism of the old originalism is a massive insult to the dignity of both the founders and us—it attributes arrogance to the authors of the norms of the Constitution and subservience to the subjects of those norms (to add further insult, its proponents serve it up to us in the name of democracy!); and (3) its concrete intentionalism is untenable as a theory of interpretation of our Constitution, which establishes a charter of abstract aspirational principles and ends and an outline of general powers, not a code of detailed rules.

I shall sketch several available varieties of new originalism. My sketch will be broader and less programmatic than the accounts of “the new originalism” advanced by Whittington and Solum.²⁰ Many self-styled originalists are at pains to differentiate themselves from old originalists like Berger and to insist that their versions of originalism are not vulnerable to common criticisms of the old originalism. There is an argument that even

13. SOLUM, *supra* note 1, at 21.

14. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 28 (2d ed. 1997) (stating that his purpose was “to ascertain what the framers sought to accomplish”).

15. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 46 (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*].

16. SOLUM, *supra* note 1, at 20–21.

17. 347 U.S. 483 (1954).

18. See, e.g., BERGER, *supra* note 14, at 133–54 (criticizing *Brown* as wrongly decided).

19. Even some new originalists take such a narrow view of the scope of the federal government’s powers that they imply that much if not most of the modern federal government is unconstitutional. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 273–318 (2004).

20. Like Mitch Berman and Kevin Toh, I am here distinguishing “new originalisms” from “the new originalism.” Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* (forthcoming 2013) (manuscript at 2) (on file with author). The new originalism is more programmatic and is associated with Whittington, Solum, and Randy Barnett. *Id.* (manuscript at 9). New originalisms could include broad or abstract originalisms that are not associated with the programs of those scholars.

Scalia is a new originalist. In *Originalism: The Lesser Evil*, Scalia rejects “strong medicine originalism,” which he associates with Berger: roughly, originalism that is prepared to swallow the bitter pill of following whatever historical research shows to be the concrete framers’ intention, even if, e.g., it entails that *Brown* was wrongly decided.²¹ Instead, he embraces “fainted-hearted originalism” (surprising as that label may sound coming from his mouth!): originalism with a dose of evolutionary intent to the Constitution, or a “trace of constitutional perfectionism,” e.g., *Brown* was rightly decided.²² Furthermore, Scalia has supplemented originalism with his understanding that the Constitution includes certain traditions, understood as specific historical practices as distinguished from abstract aspirational principles.²³ Thus, Bork charges that Scalia is a conservative constitutional revisionist, i.e., a new originalist.²⁴ Scalia also has “adulterate[d]” originalism²⁵ by making a “pragmatic exception” to accommodate some precedents that are inconsistent with his view of the original public meaning.²⁶ Officially, Scalia accepts original public meaning as opposed to intention of the framers as the authoritative source.²⁷ In this respect, he comes within what Solum characterizes as the new originalism.²⁸ But Scalia rejects Solum’s interpretation–construction distinction—viewing what Solum conceives as construction as beyond the pale of originalist interpretation.²⁹ In this respect, he differs importantly from Solum’s conception of the new originalism.³⁰

Whittington certainly qualifies as a new originalist. Before reading Whittington’s article on *The New Originalism*,³¹ I had thought that the new, improved originalists would be scholars and jurists who seek to reconstruct originalism to correct the theoretical flaws of the old originalism or at least to bolster it against powerful criticisms. But Whittington, with startling and refreshing frankness, provides a rather different account: He says that the new originalists are conservatives in power, whereas the old originalists were

21. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

22. See *id.* at 863–64.

23. See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (acknowledging that the Fourteenth Amendment protects unenumerated liberties that are “deeply rooted in this Nation’s history and tradition”). For a criticism of Scalia’s understanding of tradition as “concrete historical practices,” as distinguished from Brennan’s understanding of tradition as “abstract aspirational principles,” see FLEMING, *supra* note 8, at 112–16.

24. See BORK, *supra* note 9, at 223, 236–37 (criticizing Scalia’s plurality opinion in *Michael H.* as a version of “conservative constitutional revisionism” as distinguished from originalism).

25. Scalia, *supra* note 21.

26. SCALIA, *supra* note 9, at 140.

27. *Id.* at 38.

28. See *supra* note 3 and accompanying text.

29. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–15, 427 (2012).

30. See *infra* note 44 and accompanying text.

31. Whittington, *The New Originalism*, *supra* note 12.

conservatives in the minority!³² His account of the old originalism is quite similar to mine: It emerged as a conservative reaction against the Warren Court and was mostly negative and critical of Warren Court decisions like *Griswold v. Connecticut*,³³ recognizing a right of privacy, and early Burger Court decisions like *Roe v. Wade*,³⁴ recognizing the right of a woman to terminate a pregnancy.³⁵ Now that conservatives are in power and have control of the judiciary, Whittington says, originalists need to move from being largely reactive and critical to developing “a governing philosophy appropriate to guide majority opinions, not just to fill dissents.”³⁶ Enter the new originalism.

As a governing conservative constitutional theory, Whittington suggests, the new originalism “is less likely to emphasize a primary commitment to judicial restraint,”³⁷ the leading aim of the old originalism.³⁸ Indeed. First, “there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge.”³⁹ Second, “there is also a loosening of the connection between originalism and judicial deference to legislative majorities.”⁴⁰ Instead, “[t]he primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”⁴¹ In sum, Whittington argues, the new originalism “does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”⁴² Now, I have always known this—that originalism is not fundamentally a theory of “judicial restraint” or democratic majoritarianism—but rather a program for upholding the Constitution as originalists conceive it. Still, it’s good to hear it proclaimed by a thoughtful originalist!

Solum’s account of the old originalism is similar to Whittington’s.⁴³ And their accounts of the new originalism are similar in two respects. Solum’s new originalism, like Whittington’s, stresses: (1) original public meaning (as contrasted with the old originalists’ emphasis on the intention of the Framers or their original expected applications) and (2) the significance of the

32. *Id.* at 604.

33. 381 U.S. 479 (1965).

34. 410 U.S. 113 (1973).

35. Whittington, *The New Originalism*, *supra* note 12, at 601–03.

36. *Id.* at 604.

37. *Id.* at 608.

38. *Id.* at 602.

39. *Id.* at 608.

40. *Id.* at 609.

41. *Id.*

42. *Id.*

43. See SOLUM, *supra* note 1, at 5–11 (tracing the history of originalism and explaining the views of “old” originalists).

distinction between interpretation and construction (as contrasted with the old originalists' rejection of construction as illegitimate).⁴⁴

But Solum's new originalism is significantly different. Whittington developed his new originalism to replace the old originalists' negative reaction against the liberal Warren Court with a governing constitutional theory for conservative judges, now that they are in power.⁴⁵ Solum, by contrast, developed his new originalism to overcome the theoretical errors and excesses not only of the old originalists but also of Legal Realism and Critical Legal Studies.⁴⁶ In fact, he wants to acknowledge the conservative ideology of the old originalists but to distance that from the new originalism, which he views not as an ideology but as a constitutional theory.⁴⁷

New originalists surely also include the "broad originalists," for example, Lawrence Lessig, Akhil Amar, and Bruce Ackerman.⁴⁸ These scholars do not necessarily identify with or come within what Whittington and Solum call "the new originalism," but they nonetheless profess to develop or are identified with broad, new originalisms. They are liberals who want to reclaim history from the narrow originalists. They believe that liberals and progressives ignored or neglected history for so long that they practically ceded it to conservatives.⁴⁹ The broad originalists undertake the "turn to history" to show that their constitutional theories, aspirations, and ideals are firmly rooted in our constitutional history and practice, and indeed provide a better account of our constitutional text and tradition than do those of the conservative narrow originalists.⁵⁰ In general, what is broad about their forms of originalism is that

44. *Id.* at 22–24, 34–36.

45. *See supra* notes 32, 36–42 and accompanying text.

46. SOLUM, *supra* note 1, at 50–54.

47. *Id.* at 64.

48. *See* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 88, 159–62 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*] (developing an understanding of interpretation as questing "multigenerational synthesis" or "interpretive synthesis" across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); AKHIL REED AMAR, *AMERICA'S CONSTITUTION* xi (2005) (contending that readers cannot fully appreciate the Constitution's "meaning and richness" without historical background as context); *see generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*] (developing a conception of fidelity as translation). Ackerman, Amar, and Lessig are sometimes interpreted as developing broad originalism—or "a kinder, gentler originalism"—for liberals. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1774–87 (1997) (criticizing the "[k]inder, [g]entler [o]riginalism[s]" of Ackerman and Lessig); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 212–29 (1996) (analyzing Ackerman and Amar as liberals who have taken the turn to history and relating their work to "liberal originalism"). Amar primarily does constitutional interpretation without writing about approaches to constitutional interpretation, but on occasion he has called for "rethinking originalism." Akhil Reed Amar, *Rethinking Originalism*, SLATE (Sept. 21, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html.

49. *See* KALMAN, *supra* note 48, at 132–35, 138–39, 141, 156 (discussing liberal "[a]cademic lawyers . . . ced[ing] the historical battleground to the right" and now trying to reclaim it).

50. *See, e.g., id.* at 212–29 (evaluating Ackerman's and Amar's uses of history).

these theorists and historians conceive original understanding or original meaning (to which they argue fidelity is owed) at a considerably higher level of abstraction than do the narrow originalists like Bork and Scalia (to say nothing of Whittington).⁵¹ At the same time, they typically argue that the quest for fidelity in constitutional interpretation requires that we reject abstract theories like Dworkin's moral reading of the Constitution.⁵²

In 1996, Fordham had a major conference on *Fidelity in Constitutional Theory*.⁵³ In my article for the conference, *Fidelity to Our Imperfect Constitution*, I explored the reasons for broad originalists' resistance to the moral reading.⁵⁴ I argued that "broad originalists, like . . . narrow originalists, fundamentally misconceive fidelity."⁵⁵ The commitment to fidelity entails, as Dworkin argues, that we should interpret the Constitution so as to make it the best it can be.⁵⁶ I also suggested that the "moral reading is a big tent," and that the broad originalists should "reconceive their work as coming within it: in particular, as being in service of the moral reading by providing a firmer grounding for [it] in fit with historical materials than Dworkin has offered."⁵⁷ On another occasion, I plan to say more by way of constructive engagement with the broad originalists.

Balkin's abstract "living originalism" certainly counts as a variety of new originalism. Like Solum, he stresses original public meaning and the significance of the distinction between interpretation and construction.⁵⁸ Like the broad originalists, he argues that the original public meaning of the Constitution to which fidelity is owed is not only rules but also general standards and abstract principles.⁵⁹ And he, like Dworkin and I, rejects efforts by originalists to recast abstract principles as if they were rules (or terms of art) by interpreting them as being exhausted by their original expected applications.⁶⁰ In short, he argues that fidelity to original public meaning entails fidelity to our abstract framework and commitments.⁶¹ Elsewhere, I have argued that Balkin's abstract living originalism not only comes within the

51. See, e.g., Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 321 (1992) (arguing for the liberating "power of abstraction" in interpreting the Bill of Rights).

52. See, e.g., Lessig, *Fidelity in Translation*, *supra* note 48, at 1259–60 (arguing that the quest for fidelity requires rejection of Dworkin's theory).

53. Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

54. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344–53 (1997) [hereinafter Fleming, *Fidelity*].

55. *Id.* at 1338.

56. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

57. Fleming, *Fidelity*, *supra* note 54, at 1338.

58. BALKIN, *LIVING ORIGINALISM*, *supra* note 5, at 4–5, 48–50.

59. *Id.* at 23–34.

60. *Id.* at 42–45.

61. *Id.* at 21–34.

big tent of the moral reading but also has close affinities to Dworkin's moral reading and Barber's and my philosophic approach.⁶²

Finally, Whittington even interpreted Dworkin (of all people!) as a new originalist.⁶³ After all, Dworkin professes fidelity to original meaning, conceived as abstract moral principles rather than particular historical conceptions.⁶⁴ Similarly, Amy Gutmann portrayed Dworkin as an abstract originalist in her introduction to *A Matter of Interpretation*, the book publishing Scalia's Tanner Lectures at Princeton together with the commentaries upon them, including Dworkin's.⁶⁵ As I have put it, Dworkin has sought to turn the tables on the narrow originalists like Bork and Scalia: he argues that commitment to fidelity (understood as pursuing integrity with the moral reading of the Constitution) entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates.⁶⁶ But I would resist characterizing Dworkin as a new originalist, for doing so seems to presuppose that anyone who argues that she or he has the best constitutional theory—of what the Constitution is, what is interpretation, and what is fidelity in constitutional interpretation—is claiming thereby to be an originalist. (See my discussion below of “the originalist premise.”)

If all of the above are new originalists, new originalism is truly inclusive. It is a “[f]amily of [t]heories,”⁶⁷ not one unified view.

III. The Originalist Premise

As I mentioned earlier, some have posed the question: “Are we all originalists now?”⁶⁸ If anything would prompt that question, it would be Dworkin and Balkin articulating their theories as forms of originalism (or, at any rate, being interpreted as originalists).⁶⁹ For they are exemplars of two *bêtes noires* of originalism as conventionally understood: namely, the moral reading of the Constitution and pragmatic, living constitutionalism,

62. James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 675–79 [hereinafter Fleming, *Balkinization*].

63. See Keith E. Whittington, *Dworkin's “Originalism”: The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000) [hereinafter Whittington, *Dworkin's “Originalism”*] (arguing that Dworkin is an originalist who believes “the Founders chose abstract principles”).

64. DWORKIN, *FREEDOM'S LAW*, *supra* note 6, at 7–12, 72–76; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997) [hereinafter Dworkin, *The Arduous Virtue*].

65. Amy Gutmann, *Preface to SCALIA*, *supra* note 9, at xi–xii.

66. DWORKIN, *FREEDOM'S LAW*, *supra* note 6, at 73–76; RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 125–29 (1993) [hereinafter DWORKIN, *LIFE'S DOMINION*].

67. SOLUM, *supra* note 1, at 35.

68. See *supra* Part I.

69. See Whittington, *Dworkin's “Originalism,” supra* note 63 (arguing that Dworkin is an abstract originalist). See generally BALKIN, *LIVING ORIGINALISM*, *supra* note 5 (contending that the method of text and principle constitutes a living originalism).

respectively. I suppose that such developments have led to Solum's claim that we are all originalists now.

With all due respect to Solum, given how much these versions of "originalism" differ, it would not mean much to claim that this shows that we are all originalists now. Indeed, we are witnessing the "Balkanization" of originalism (that's what happens when originalism splits into warring camps) along with the "Balkinization" of originalism (that's what happens when even Jack Balkin, hitherto a progressive, pragmatic living constitutionalist, becomes an originalist).⁷⁰

Furthermore, there is a trick in the question "Are we all originalists now?" Even to pose the question suggests that one is presupposing what I shall call "the originalist premise." To answer the question affirmatively certainly shows that one is presupposing it. The originalist premise is the assumption that originalism, rightly conceived, *is* the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, *has to be* the best—or indeed the only—conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just *has to be*. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation!

The originalist premise is expressed in its most extreme form by Bork, who asserted that originalism is the only possible approach to constitutional interpretation that is faithful to the historic Constitution and consonant with the constitutional design.⁷¹ He rejects all other approaches, most especially those like Dworkin's, as revisionist.⁷² In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory. For example, Lessig evidently takes the view that originalism, by definition, is the only method of fidelity.⁷³ Most strikingly, he made the Borkish assertion that Dworkin is an "infidel,"⁷⁴ and he and Cass Sunstein suggested that Dworkin does not even have a method of fidelity.⁷⁵ I believe that the originalist premise drives the broad originalists' resistance to Dworkin's moral reading. We also see the originalist premise illustrated more innocuously in the inclusiveness of the new originalism as programmatically developed by Solum. The moment an ostensible

70. James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007); Fleming, *Balkinization*, *supra* note 62. In this Part, I draw from the former piece.

71. See BORK, *supra* note 9, at 143.

72. See *id.* at 187–240.

73. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85 n.336 (1994) ("There are of course methods of constitutional interpretation that are not methods of fidelity, in the sense that they do not ultimately depend on whether the outcome is traceable to some judgment or commitment of the framers.").

74. See Lessig, *Fidelity in Translation*, *supra* note 48, at 1260.

75. Lessig & Sunstein, *supra* note 73, at 11 n.35, 85 n.336.

anti-originalist like Dworkin or I acknowledges that original public meaning is a factor in constitutional interpretation and professes an aspiration to fidelity in constitutional interpretation, she or he is welcomed into the big tent of the new originalism.⁷⁶

What troubles me most is that raising the question “Are we all originalists now?” may presuppose that we all have come around to Scalia’s and Bork’s ways of thinking without conceding that many versions of originalism themselves are moving targets that have moved considerably toward the positions of their critics. To illustrate, let’s have a pop quiz. Read the following passage:

In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.

Who wrote the passage? Choose from the following:

1. Lawrence Lessig (a broad originalist)
2. Ronald Dworkin (proponent of a moral reading of the Constitution)
3. Robert Bork (an old originalist)
4. Keith Whittington (a new originalist)
5. Jack Balkin (a living originalist)

The correct answer: (3) Robert Bork!⁷⁷ I bet that at least some readers got the answer wrong. And I bet that some thought that the correct answer might be any of these choices besides Bork. The passage suggests that, whether or not Bork would admit it, he has made spectacular concessions to critics of originalism like Dworkin. For example, notice how abstractly he conceives original understanding (note his reference to principle or value). And notice how open to judgment he acknowledges interpretation to be (it does not sound like interpretation is simply a matter of discovering historical facts that are dispositive, as opposed to elaborating abstract principles or values). Finally, notice how slippery he is in moving from original understanding to original

76. For example, at a recent conference at Fordham University School of Law on “The New Originalism in Constitutional Law,” March 1–2, 2013, Solum suggested that, to the extent I take fidelity to the text to operate as a constraint, I am a new originalist.

77. BORK, *supra* note 9, at 162–63.

purpose (after already moving, off stage, from intention of the framers to original understanding of the ratifiers).

The new originalism, as formulated by Solum, is more open about the concessions it has made to critics of the old originalism like Dworkin. In particular, Solum acknowledges that the relevant original public meaning of certain provisions is abstract.⁷⁸ And he admits that construction, as distinguished from interpretation, lies beyond originalism⁷⁹ and may involve choices of political theory.⁸⁰ Balkin's new originalism puts such concessions at the heart of his abstract, living originalism, which I have interpreted to have close affinities to Dworkin's moral reading of the Constitution.⁸¹

Thus, I ask, are we all moral readers now?

IV. Assumptions Undergirding the Originalist Premise

Next, I want to sketch some problematic assumptions and misconceptions that undergird or drive the originalist premise (which in turn underlie the view that we are all originalists now). First, I shall label these assumptions or misconceptions through formulating them as *inequations* (if that is a word). In the following formulations, I use $\neq$ to mean "is not the same as," or to mean that a commitment to the thing on the left side does not entail a commitment to originalism. Proponents of originalism, and people who are caught in the grip of the originalist premise, commonly make these assumptions or hold these misconceptions. That is, they assume or assert that a commitment to the thing on the left side *does* entail a commitment to originalism.

1. Original meaning $\neq$ originalism
2. Interpretation $\neq$ originalism
3. Fidelity in constitutional interpretation $\neq$ originalism
4. The classical, interpretive justification of judicial review $\neq$ originalism

In my book in progress, *Fidelity to Our Imperfect Constitution*, I plan to ponder fully the reasons for the grip of the originalist premise—and these assumptions or misconceptions—on the imaginations of constitutional theorists and judges. Here I shall briefly explicate these assumptions or misconceptions, illustrating them as manifested in Bork's, Scalia's, and Whittington's work.

First, I shall argue, *original meaning $\neq$ originalism*. Scalia says that the originalists are the ones who care about original meaning, and all those other

78. See SOLUM, *supra* note 1, at 22, 24–25 (arguing that original meaning does not definitively answer every constitutional question).

79. *Id.* at 26, 60.

80. See *id.* at 26 (describing different political theories that can underlie originalists' constitutional constructions).

81. Fleming, *Balkinization*, *supra* note 62, at 675–79.

folks—the “nonoriginalists”—are the ones who don’t.⁸² But, as Dworkin ably and tirelessly pointed out, the disagreement between Scalia and Bork and their critics is not about *whether original meaning should count*—instead, it is about *what should count as original meaning*.⁸³ For example, should we conceive original meaning quite narrowly and concretely (as Scalia and Bork do)⁸⁴—as relatively specific original meanings, as concrete expected applications, as a deposit of concrete historical practices and detailed rules? Or should we conceive original meaning more broadly and abstractly (as Dworkin and Balkin do)⁸⁵—as relatively abstract commitments, as a charter of abstract aspirational principles? Originalism reflects a particular conception of what should count as original meaning (or a family of such conceptions), and a highly controversial and problematic one at that. Thus, a commitment to honoring original meaning does not necessarily entail a commitment to originalism. In fact, I argue (with Dworkin and Balkin), the best conception of the relevant original meaning is that of abstract aspirational principles.

Second, I shall show, *fidelity in constitutional interpretation* ≠ *originalism*. Narrow originalists such as Bork and Scalia have asserted a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original meaning of, the framers and ratifiers of the Constitution.⁸⁶ Bork and Scalia say that the originalists are the ones who care about fidelity in constitutional interpretation, and all those other folks—the revisionists and nonoriginalists—don’t.⁸⁷ The Fordham Symposium on *Fidelity in Constitutional Theory* implicitly challenged the narrow originalists’ claim to a monopoly on fidelity, for it featured several competing conceptions of fidelity: (1) Dworkin’s understanding of fidelity as pursuing integrity with the moral reading of the Constitution;⁸⁸ (2) Ackerman’s understanding of fidelity as synthesis of constitutional moments;⁸⁹

82. Scalia, *supra* note 21, at 852–56, 862–64.

83. See DWORKIN, *FREEDOM’S LAW*, *supra* note 6, at 287–305; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33–57 (1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*].

84. See BARBER & FLEMING, *supra* note 7, at 79 & n.1, 99–101 (distinguishing narrow from broad originalism and arguing that Bork and Scalia adhere to the former view).

85. See *supra* notes 54–62 and accompanying text.

86. See BORK, *supra* note 9, at 143; Scalia, *supra* note 21, at 854, 862–63.

87. See BORK, *supra* note 9, at 187–240; SCALIA, *supra* note 9, at 37–47; Scalia, *supra* note 21, at 852–56, 862–64.

88. DWORKIN, *FREEDOM’S LAW*, *supra* note 6, at 73–76; DWORKIN, *LIFE’S DOMINION*, *supra* note 66, at 125–29; Dworkin, *The Arduous Virtue*, *supra* note 64, at 1253.

89. See ACKERMAN, *FOUNDATIONS*, *supra* note 48, at 88, 159–62 (developing an understanding of fidelity as questing “multigenerational synthesis” or “interpretive synthesis” across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519–20 (1997) (advancing his conception of fidelity as pursuing intergenerational synthesis).

(3) Lessig's understanding of fidelity as translation across generations;⁹⁰ (4) Jack Rakove's understanding of fidelity as keeping faith with the founders' vision;⁹¹ and (5) an early formulation of Balkin's conception that ultimately became his method of text and principle with its argument for fidelity to abstract original public meaning.⁹²

Most pointedly, Dworkin sought to turn the tables on the narrow originalists like Bork and Scalia: he argued that commitment to fidelity—understood as pursuing integrity with the moral reading of the Constitution—entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates.⁹³ Ackerman, Lessig, and Balkin have taken a different tack, attempting to beat narrow originalists at their own game: they advance fidelity as synthesis, fidelity as translation, and the method of text and principle as broad or abstract forms of originalism that are superior, as conceptions of originalism, to narrow originalism.⁹⁴

And so, again, originalism reflects a particular conception of fidelity in constitutional interpretation, and a deeply problematic one at that. Thus, a commitment to pursuing fidelity in constitutional interpretation does not require a commitment to originalism. To the contrary, I argue that the best conception of fidelity is that of pursuing integrity with the moral reading of the Constitution (in Dworkin's terms) or of redeeming the promises of the Constitution's abstract commitments (in Balkin's terms).

Third, I shall argue, *interpretation* $\neq$ *originalism*. Originalists sometimes claim or assume that interpretation necessarily entails originalism, ranging from naive or crude versions of this claim (e.g., Bork and Scalia)⁹⁵ to sophisticated versions of it (e.g., Whittington). I shall develop a critique of

90. See Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1367–68, 1371–76 (1997) (arguing for an understanding of fidelity as “grounded in a practice of translation”); see also Lessig, *Fidelity in Translation*, *supra* note 48, at 1263–64 (arguing for a conception of fidelity as translation).

91. See Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1605–09 (1997) (discussing “fidelity to history” and its superiority to originalism, which is a kind of “fidelity through history”); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3–22 (1996) (discussing the “perils” of conventional originalism).

92. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1708–09 (1997) (distinguishing between fidelity to the “true Constitution or the best interpretation of the Constitution [and] its various historical interpretations and manifestations”). Balkin subsequently reworked and incorporated this piece in JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 103–38 (2011), the companion book to BALKIN, *LIVING ORIGINALISM*, *supra* note 5, at 3–5 (arguing for fidelity to abstract text and principle).

93. DWORKIN, *FREEDOM'S LAW*, *supra* note 6, at 73–76; DWORKIN, *LIFE'S DOMINION*, *supra* note 66, at 125–29; Dworkin, *The Arduous Virtue*, *supra* note 64, at 1253.

94. See *supra* notes 89–90, 92.

95. See, e.g., BORK, *supra* note 9, at 251–59 (“All theories of constitutional law not based on the original understanding contain inherent and fatal flaws.”); Scalia, *supra* note 21, at 854 (“The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality.”).

Whittington with respect to this assumption.⁹⁶ This claim is most famously illustrated in the old, discredited dichotomy of "interpretivism" versus "noninterpretivism."⁹⁷ People who now call themselves originalists used this dichotomy to load the dice in favor of interpretivism, saying that they were the ones who believed in "interpreting" the Constitution, while the others advocated "noninterpreting" it (or remaking or changing it).

Whittington's project in his book, *Constitutional Interpretation*, is to reconstruct originalism to attempt to rescue it from criticisms of the old originalism.⁹⁸ His general tack is to appear to concede points to critics of originalism. For example, he more forthrightly grapples with arguments Dworkin made about interpretation than practically any other originalist.⁹⁹ Unlike Bork and Scalia, he doesn't simply hurl insults about Dworkin being a "noninterpretivist" or, worse yet, a heretic or expatriate who would subvert the Constitution.¹⁰⁰ For example, Whittington appears to concede that Dworkin (and Thomas Grey) were right in saying that "[w]e are all interpretivists" and that the real question was not whether we should interpret or not, but rather, *What* the Constitution is and *how* we should interpret it?¹⁰¹ Thus, Whittington appears to concede that Dworkin advanced a conception of interpretation that is an alternative to originalism.

What is more, Whittington's project in his companion book, *Constitutional Construction*, is to broaden constitutional discourse to include two types of elaboration of constitutional meaning: not only *interpretation* by courts (the characteristic preoccupation of the old originalists) but also

96. For a fuller version of this critique, see BARBER & FLEMING, *supra* note 7, at 94–97.

97. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980) (distinguishing "interpretivism" and "noninterpretivism"); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703–07 (1975) (distinguishing the "pure interpretive model" from the "noninterpretive" model).

98. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 15, at xi–xii.

99. See *id.* at 182–87 (analyzing Dworkin's normative approach to "understanding the level of generality in the founders' intentions"). See generally Whittington, *Dworkin's "Originalism," supra* note 63 (writing an entire article analyzing Dworkin's constitutional theory as an abstract originalism).

100. See BORK, *supra* note 9, at 136 ("subversion"); *id.* at 213–14 (alleging revisionism); *id.* at 352 ("heresies"); Scalia, *supra* note 21, at 854 (referring to Dworkin, an American citizen, as an "Oxford Professor (and expatriate American)").

101. Whittington, *The New Originalism*, *supra* note 12, at 606–07 (internal quotation marks omitted) (discussing Thomas Grey's and Dworkin's analyses of interpretation and originalism); see also WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 15, at 164–65 ("[A]s Dworkin himself has done, we must ask after both the nature of the Constitution and the nature of interpretation in order to discover the best interpretive method for this text."); Whittington, *Dworkin's "Originalism," supra* note 63, at 197–99 ("I do not wish to resurrect the old interpretive/noninterpretive distinction I contend that Dworkin's discussion of constitutional intentions has not rendered traditional originalism incoherent . . . and that there remain substantial differences in *what* different constitutional theorists are seeking to interpret.").

construction outside the courts by legislatures and executives.¹⁰² He explains his distinction between interpretation and construction as follows:

Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning. Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.¹⁰³

But then, just when it begins to look like Whittington is developing a constitutional theory—of interpretation and construction—that might be safe for people who are not originalists, he makes two key moves.

The first move is to say that what people like Dworkin (and me) call *interpretation* is really *construction*, and therefore is appropriate for legislatures but not for courts.¹⁰⁴ That is, he tries to deflect the force of Dworkin's criticisms of originalism by saying that Dworkin's conception of interpretation more properly should be understood as a theory of construction, which would be appropriate for legislatures, not courts. This is Whittington's more sophisticated version of Bork's and Scalia's polemical assertions that Dworkin is advocating judicial legislation—judges making law, not interpreting it.

Whittington's second move is to say that a commitment to interpretation necessarily entails a commitment to originalism. Indeed, he practically revives a version of the discredited distinction between interpretivism and noninterpretivism. He writes that his "account of originalism largely assumes a prior commitment on the part of constitutional theorists, judges, and the nation to constitutional interpretation."¹⁰⁵ He continues: "If we are to interpret, then I believe we must be originalists."¹⁰⁶ That is, interpretation entails originalism. Whittington adds: "But we may not want to interpret. . . . We may want to engage in a 'text-based social practice,' but that is not the same thing as being committed to interpretive fidelity."¹⁰⁷ In other words, the people who want to do that are not interpreting. Here he echoes the discredited old charge that anyone who is not committed to an originalist conception of interpretive fidelity is a "noninterpretivist" whose real interest is not interpreting the Constitution but changing it.

102. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–2 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION].

103. *Id.* at 5 (footnote omitted).

104. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at 54, 58, 206–12; Whittington, *The New Originalism*, *supra* note 12, at 611–13.

105. Whittington, *The New Originalism*, *supra* note 12, at 612.

106. *Id.*

107. *Id.* at 612–13.

I want to step back for a moment and offer a hypothesis about what Whittington is doing. My hypothesis is that, in responding to criticisms of the old originalism, Whittington tries to *expand* the realm of constitutional discourse to include constitutional construction *outside the courts*; but he does so in order to justify *narrowing* constitutional interpretation *inside the courts* to originalism. All of this is a rhetorically effective way of seeming to agree with arguments that no originalist could answer, while deflecting those arguments and reinstating positions that no originalist can defend. Whittington sketches a notion of constitutional construction by legislatures and executives and gives historical examples of it, such as the impeachment of Justice Samuel Chase in 1804–1805, which helped establish subsequent understandings of the purpose and limits of federal impeachment power, and the nullification crisis of 1832–1833, which promoted more decentralizing conceptions of federalism.¹⁰⁸ Yet he does not articulate criteria for distinguishing kinds of decisions that are appropriately made by courts through “interpretation” and kinds of decisions that should be left to legislatures and executives through “construction.” Nor does he answer the question of why courts should limit themselves to what he calls interpretation as distinguished from what he calls construction. As stated above, he throws out the old originalist arguments for originalism based on “judicial restraint” and “democratic majoritarianism.”¹⁰⁹ All that is left is his assumption that interpretation necessarily entails originalism.

Whittington forthrightly criticizes the old originalism for being circular, question begging, and axiomatic.¹¹⁰ Yet his originalism is vulnerable for the same reasons and, more generally, it does not overcome the flaws of the old originalism. In any case, his work embodies a sophisticated version of the assumption that a commitment to interpretation necessarily—by definition, axiomatically—entails a commitment to originalism. But, contrary to this common originalist assumption, “[t]here is nothing that interpretation just is,” as Sunstein has aptly put it.¹¹¹ Indeed, I argue, the best conception of interpretation is that of law as integrity, not any variety of originalism.

Fourth, I shall argue, the *classical, interpretive justification of judicial review* ≠ *originalism*. Originalist scholars and jurists sometimes claim or assume that the classical, interpretive justification of judicial review, put forward in *The Federalist No. 78*¹¹² and *Marbury v. Madison*,¹¹³ necessarily

108. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 102, at 17, 20.

109. Whittington, *The New Originalism*, *supra* note 12, at 609.

110. See WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at 46 (describing old originalists as having “begged the question” and having left certain points as “purely axiomatic”).

111. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 19–32 (2009); see also Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2870–74 (2007) (arguing that no approach to interpretation follows from the idea of interpretation itself).

112. THE FEDERALIST NO. 78, at 467–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

113. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

entails originalism. Scalia makes this assumption in his piece, *Originalism: The Lesser Evil*,¹¹⁴ and in his partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹¹⁵ In analyzing this assumption, we should distinguish between the following two fundamental interrogatives of constitutional interpretation: *What* is the Constitution? and *Who* may authoritatively interpret it?¹¹⁶ To elaborate the distinction: The answer to the question, *What* does the Constitution include?—for example, text expressing specific rules only or text embodying abstract moral principles—does not determine the answer to the question, *Who*, as between legislatures and courts, may authoritatively interpret and enforce the Constitution?, whatever it includes.

The classical, interpretive justification for judicial review, put forward in *The Federalist No. 78* and *Marbury v. Madison*, is a famous answer to the *Who* question: Courts are obligated to interpret the higher law of the Constitution and to preserve and enforce it against encroachments by the ordinary law of legislation.¹¹⁷ This justification is *agnostic* as between the following two competing answers to the *What* question. The first is a legal positivist conception advanced by Bork and Scalia. On this view, the Constitution is basically a code of detailed historical rules. It excludes abstract moral principles.¹¹⁸ The second answer is Dworkin's idea of a moral reading of the Constitution, and Barber's and my philosophic approach to constitutional interpretation. These theorists believe the Constitution embodies a scheme of abstract moral principles.¹¹⁹ Thus, the important question becomes, *What* is the Constitution? That is, *What* is the character of our commitments and *What* does the Constitution include? In particular, which of the two foregoing general answers is superior?

Narrow originalists like Bork and Scalia have asserted a monopoly on the classical, interpretive justification of judicial review and on concern for fidelity in constitutional interpretation (recall the two corresponding inequations I formulated above). Again, they offer the foregoing legal

114. See Scalia, *supra* note 21, at 854 (asserting that only originalism is compatible with Chief Justice Marshall's justification for judicial review in *Marbury*).

115. 505 U.S. 833, 984, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (invoking *The Federalist No. 78* as if it supported his originalist view as opposed to the joint opinion's conception of the Constitution as a scheme of abstract aspirational principles whose interpretation requires "reasoned judgment").

116. For a work that conceives the enterprise of constitutional interpretation on the basis of these two fundamental interrogatives—along with a third, *How* ought we interpret the Constitution?—see WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, *AMERICAN CONSTITUTIONAL INTERPRETATION* 16–20 (4th ed. 2008).

117. See *Marbury*, 5 U.S. at 177–78; *THE FEDERALIST NO. 78*, *supra* note 112, at 467–69.

118. See, e.g., SCALIA, *supra* note 9, at 134–37 (arguing that the Constitution "abound[s] in concrete and specific dispositions" and does not embody abstract aspirational provisions and principles).

119. DWORKIN, *FREEDOM'S LAW*, *supra* note 6, at 7; BARBER & FLEMING, *supra* note 7, at 82–84, 165–66.

positivist answer to the question *What* does the Constitution include. The Constitution consists of the text only, which should be understood as a code of detailed historical rules, and it excludes any conception of a scheme of abstract moral principles.¹²⁰ For them, the classical, interpretive justification of judicial review requires judges to interpret and enforce the Constitution so understood. And for them, fidelity to the Constitution so understood forbids judicial interpretation and enforcement of abstract moral principles.¹²¹

Dworkin, Barber, and I have challenged the narrow originalists' pretensions to a monopoly on the classical, interpretive justification of judicial review and their understanding of fidelity in constitutional interpretation. We have sought to reclaim and reconstruct the classical, interpretive justification with our own conceptions of both constitutional meaning and constitutional fidelity.¹²² The Constitution includes the text, but words like "liberty," "due process," and "equal protection" refer to abstract moral principles. And so, for us, the classical, interpretive justification of judicial review requires judges to interpret and enforce the Constitution so understood. And fidelity to the Constitution *as written* requires judicial interpretation and enforcement of abstract moral principles including "liberty."

To return to my main point, the classical, interpretive justification of judicial review does not necessarily entail a commitment to originalism. Formally, it is agnostic as among competing conceptions of *what* the Constitution is. That is, this justification simply entails that we should interpret the fundamental law of the Constitution—whatever it is, code of concrete rules or charter of abstract principles—and enforce it against encroachment by the ordinary law of legislation. I argue that the better conception of the Constitution is as a charter of abstract principles.

In this Part, I have been examining assumptions undergirding the originalist premise, the assumption that originalism is the best or only conception of constitutional interpretation. I grant that some originalists—especially the new originalists like Solum—do make normative arguments for originalism rather than simply taking it as axiomatically given. For example, Solum makes rule of law/determinacy arguments, popular sovereignty/democratic legitimacy arguments, and fidelity arguments¹²³ for originalism (the first two of which are the arguments Whittington evidently

120. See *supra* note 118.

121. See, e.g., BORK, *supra* note 9, at 210–14, 351–55.

122. See, e.g., SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 202–36 (1993) (defending the "classical theory" but on a "moral realis[t]" reading rather than an originalist understanding); DWORKIN, FREEDOM'S LAW, *supra* note 6, at 72–83 (arguing that originalists are not faithful to the "natural reading" of the Bill of Rights as a scheme of abstract principles but instead are "revisionists").

123. SOLUM, *supra* note 1, at 36–44.

disavowed).¹²⁴ But I argue elsewhere that the inclusiveness of the new originalism undercuts these normative justifications.¹²⁵

V. Why Do I Hope That We Are Not All Originalists Now?

Richard Posner confessed to a “visceral dislike . . . of academic moralism,” a body of literature bringing normative moral and political theory to bear on legal analysis: “A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, [and] insipid.”¹²⁶ I won’t say anything of this sort about originalism! I have more substantive, and less visceral, reasons for hoping that we are not all originalists now.¹²⁷

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.¹²⁸ A regime of purportedly dispositive 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 (at least those besides Whittington)¹²⁹ serve it up to us in the name of democracy!¹³⁰

Second, originalism, old and new, makes a virtue of claiming to exile moral and political theory from the province of constitutional interpretation.¹³¹ That is neither possible nor desirable, nor is it appropriate in interpreting our Constitution, which establishes a scheme of abstract aspirational principles and ends, not a code of detailed rules. Interpreting our Constitution with fidelity requires judgments of moral and political theory about how those principles are best understood.

124. See *supra* text accompanying notes 37–42.

125. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 *FORDHAM L. REV.* (forthcoming 2013).

126. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637, 1640 (1998).

127. I have made similar arguments in BARBER & FLEMING, *supra* note 7, at 97–98.

128. Justice Brennan famously stated that originalism is “arrogance cloaked as humility.” William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 *S. TEX. L. REV.* 433, 435 (1986). Brennan is clearly referring to the arrogance of originalists in claiming to be able to determine dispositive original meaning or original intention. We might also interpret the line as attributing arrogance to the founders for presuming in authoritarian fashion to decide our questions for us in the manner that originalists claim they did.

129. See *supra* text accompanying notes 40–42 (discussing Whittington’s disavowal of the democratic justification for originalism).

130. See, e.g., SOLUM, *supra* note 1, at 43 (“The connection between democratic legitimacy and original public meaning is so close and the argument for that connection so obvious that very little needs to be said about it.”).

131. See, e.g., BORK, *supra* note 9, at 210–14, 351–55 (arguing against recourse to “abstract moral philosophy” in constitutional interpretation); WHITTINGTON, *supra* note 15, at 182–87 (criticizing Dworkin’s argument that the constitutional text embodies abstract concepts and that interpreters have to make judgments of moral and political theory about the best understanding of those concepts).

Third, originalism, old and new, misconceives fidelity in constitutional interpretation. Under the best conception of fidelity—fidelity as integrity with the 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 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.¹³²

If I hope we are not all originalists now, what do I hope we (at least some of us) are? Much of the best work in constitutional theory today is not originalist in either an old or a new sense; rather, it is what I have called “constructivist.” (Note that I did not say “nonoriginalist.” I’m not going to fall into that rhetorical trap set by Scalia and Bork.)¹³³ This work acknowledges the place of history in constitutional interpretation: it recognizes the limitations of history but also appreciates the uses of history (which are different from conventional originalist uses of history). In prior work, I have developed a constitutional constructivism by analogy to John Rawls’s political constructivism, a theory he developed in *Political Liberalism*.¹³⁴ Constitutional constructivism conceives constitutional interpretation as a quest, not for the relatively specific original meaning of the constitutional text, but for the best interpretation of our constitutional text, history, and structure, together with our constitutional practice, tradition, and culture. As just sketched, it conceives our Constitution as a scheme of abstract aspirational principles and ends, not a code of detailed rules. And it entails that interpreting our Constitution with fidelity requires judgments of moral and political theory about how those principles and ends are best understood. Constitutional constructivism enables us to see that history helps illuminate the best understanding of our commitments, but it does not make our decisions for us.

132. I must acknowledge that one avowed originalist, Jack Balkin, is not vulnerable to this criticism. But he is not because his abstract, living originalism is a moral reading of the Constitution. See Fleming, *Balkinization*, *supra* note 62, at 675–79.

133. See *supra* notes 86–87 and accompanying text.

134. FLEMING, *supra* note 8, at 4, 6, 61–64, 92–94 (building upon JOHN RAWLS, *POLITICAL LIBERALISM* 89–129 (expanded ed. 2005)).

A. *The Limitations of History in Constitutional Interpretation*

What would the use of history look like in a constructivist world? In this subpart, I will speak to the limitations of history¹³⁵ and, in the next, to the uses of it. In a constructivist world, we would give due regard to *original meaning* and history in constitutional interpretation without being *originalist*. We would embrace Dworkin's idea that there are two dimensions of best interpretation—fit and justification.¹³⁶ Fidelity in constitutional interpretation is not purely a matter of fit with historical materials, but also a matter of justification in political theory. Fit and history do have a role to play in the quest for fidelity to the Constitution, but a limited one. We should acknowledge the place of history in constitutional interpretation—as a resource or factor that comes into play in the dimension of fit—but should keep it in its place. Originalists—narrow and broad, old and new—exaggerate the place of history and give it a greater role than it deserves and than it is capable of playing.

History is, can only be, and should only be a starting point in constitutional interpretation. It has a threshold role, which is often not dispositive. Contrary to originalists like Michael McConnell, fit is not everything.¹³⁷ In the dimension of fit, history helps (or should help) screen out “off-the-wall” interpretations or purely utopian interpretations, but often does not lead conclusively to any interpretation, let alone the best interpretation. History usually provides a foothold for competing interpretations or competing theories. It alone cannot resolve the clash among them. Deciding which theory provides the best interpretation is not a historical matter of reading more cases, tracts, or speeches or more scrupulously doing good professional history.

To resolve the clash among competing interpretations or competing theories, we must move beyond the threshold dimension of fit to the dimension of justification. History rarely has anything useful, much less dispositive, to say at that point. Indeed, the best professional historians understand this and know better than to be originalists; unfortunately, some constitutional lawyers and scholars do not. In deciding which interpretation among competing acceptably fitting interpretations is most faithful to the Constitution, we must ask further questions: which interpretation provides the best justification, which makes our constitutional scheme the best it can be, which does it more credit, or which answers better to our best aspirations as a people? These questions are required by the quest for fidelity in the sense of

135. I develop the arguments of this subpart more fully in Fleming, *Fidelity*, *supra* note 54, at 1348–51.

136. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 83, at 143–45; DWORKIN, LAW'S EMPIRE, *supra* note 56, at 239.

137. See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1273 (1997).

honoring our aspirational principles, not merely *following* our historical practices or the original meaning of the text.

B. The Misconceived Quest for the Original Public Meaning

Some new originalists seem to think that they can overcome the limitations of the old originalism, and of the use of history in constitutional interpretation, by reconceiving their quest: from intention of the Framers or original expected applications to original public meaning.¹³⁸ The new originalists may have reconceived the quest of the old originalists, but their new quest for the original public meaning is likewise misconceived. The inspiration for the title of this section is, of course, Paul Brest's classic article, *The Misconceived Quest for the Original Understanding*.¹³⁹

The quest for the original public meaning is misconceived because on most important provisions there will not be a definitive original public meaning that will be useful in resolving our disagreements, much less in resolving hard cases. Let me give a hypothetical example of constitutional amendment and interpretation. Let's imagine that, in the near future, the Supreme Court overturns *Lawrence v. Texas*¹⁴⁰—which had recognized a right of gays and lesbians to privacy or autonomy¹⁴¹—even as our constitutional culture has accepted it and has come not merely to tolerate but indeed to respect gays and lesbians as equal citizens. Let's imagine that We the People then amend the Constitution by adopting the following Twenty-Eighth Amendment: "Well-ordered liberty being necessary to the happiness of a free state, the right to autonomy shall not be infringed."

How would debates about the original public meaning of the Twenty-Eighth Amendment likely proceed? Let's distinguish two quite different understandings, which parallel recognizable disagreements between originalists and moral readers of the Constitution. On the one hand, originalists like Scalia, who want to construe constitutional language specifically, might say that the original public meaning was simply, specifically, and exclusively to reinstate the narrow holding in *Lawrence*. Such originalists might say that the Twenty-Eighth Amendment protects *only* the right of gays and lesbians to engage in "deviate sexual intercourse," as the Texas statute invalidated in *Lawrence* had put it.¹⁴² Or, the right of gays and lesbians to engage in "homosexual sodomy," as Justice White had put it in *Bowers v. Hardwick*,¹⁴³ which was overruled in *Lawrence*.¹⁴⁴ On their view,

138. I develop a fuller version of the arguments of this section in Fleming, *supra* note 1, at 551–56.

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

140. 539 U.S. 558 (2003).

141. *Id.* at 574.

142. *Id.* at 563.

143. 478 U.S. 186, 191 (1986).

the Twenty-Eighth Amendment would be no more abstract a commitment to a right to autonomy than that. They would hold this view, not because they made an objective historical inquiry into original public meaning, but because of prior jurisprudential assumptions and commitments about what an original public meaning must be—and about the character of the Constitution, constitutional interpretation, and constitutional amendment. On their view, that evidently abstract language in the Twenty-Eighth Amendment simply has to embody specific meanings.

On the other hand, moral readers, who conceive of the Constitution as a charter of abstract commitments, would likely say that the original public meaning was nothing less than to ratify the right to autonomy that the Supreme Court had developed through the line of cases from *Meyer*¹⁴⁵ and *Pierce*¹⁴⁶ on through *Griswold*,¹⁴⁷ *Roe*,¹⁴⁸ *Casey*,¹⁴⁹ and *Lawrence*.¹⁵⁰ Moreover, they would claim that the original public meaning was to authorize the Supreme Court to go on as it had before in these cases elaborating our basic commitment to a right to autonomy. Indeed, they might go further and claim that the Constitution, properly interpreted, should protect whatever rights of autonomy we and the Supreme Court decide over time are essential to the concept of well-ordered liberty and autonomy. They, too, would take this view, not because they made an objective historical inquiry into original public meaning, but because of prior jurisprudential assumptions and commitments about the character of the Constitution, constitutional interpretation, and constitutional amendment. On their view, that evidently abstract language in the Twenty-Eighth Amendment simply has to embody abstract commitments.

Let's observe that there would be no independent original public meaning—as a matter of history—that either side could resort to in order definitively to resolve their disagreements. Proponents of both understandings of the Twenty-Eighth Amendment would claim that their understandings were more faithful to the original public meaning. There would not be some definitive original public meaning of the words “right to autonomy” out there

144. *Lawrence*, 539 U.S. at 578.

145. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (recognizing parents' right to control the upbringing and education of their children).

146. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing the right of parents and guardians “to direct the upbringing and education of children under their control”).

147. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing a right to marital privacy).

148. *Roe v. Wade*, 410 U.S. 113, 164–66 (1973) (recognizing the right of a woman to decide whether to terminate a pregnancy under certain circumstances).

149. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (reaffirming the central holding in *Roe* that the Constitution protects the right of a woman to decide whether to terminate a pregnancy).

150. See JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 244–67 (2013) (analyzing this line of cases protecting a “rational continuum” of ordered liberty).

in our constitutional culture that would resolve our disputes—any more than there is a core public meaning of a right to autonomy out there in our constitutional culture right now. Furthermore, there is no lawyerly term of art, “right to autonomy,” to which we could resort to resolve disagreement over the meaning of the right to autonomy. Those who are learned in the law vehemently disagree among themselves about it—along the lines sketched above—just as citizens generally do. So likewise it is with the Equal Protection Clause¹⁵¹ and the Due Process Clause.¹⁵² The same goes for the Privileges or Immunities Clause.¹⁵³ Ditto the First Amendment’s protections of freedom of speech,¹⁵⁴ freedom of the press,¹⁵⁵ and freedom of religion.¹⁵⁶ So it is and ever shall be with significant constitutional provisions.

The debate, under the guise of arguments about original public meaning, is a debate among competing moral readings of the Constitution. Any quest for original public meaning that seeks to deny or avoid the moral reading of the Constitution or a philosophic approach to constitutional interpretation is misconceived. It cannot overcome the limitations of history in constitutional interpretation and the need for a moral reading or philosophic approach.

C. *The Uses of History in Constitutional Interpretation*

So much for the limitations of history, or what history cannot do. Now, what can history do in a constructivist world? What are the uses of history in constitutional interpretation? Here I’ll mention a few ideas illustrating what I am calling constructivist uses of history (which differ significantly from conventional originalist uses).

Michael Dorf has provided a rich descriptive account of argument about original meaning as it actually functions in Supreme Court decisions.¹⁵⁷ He shows that such argument generally is not conventionally originalist.¹⁵⁸ His descriptive account richly elaborates certain ways of using history to do fit work—to show that an interpretation under consideration has a footing in our constitutional text, history, or structure¹⁵⁹—and it nicely accords with the type of fit work called for by normative accounts such as Dworkin’s and my own. He develops categories of “ancestral originalism” and “heroic originalism,” which are species of an aspirational and hortatory constitutionalism rather than

151. U.S. CONST. amend. XIV, § 1.

152. *Id.*

153. *Id.*

154. U.S. CONST. amend. I.

155. *Id.*

156. *Id.*

157. See generally, Dorf, *supra* note 48. I have praised Dorf’s account in James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849 (1997).

158. See Dorf, *supra* note 48, at 1811–16 (discussing cases where original meaning, understanding, and history do not necessarily entail originalism).

159. See *id.* at 1796–800, 1805 (describing the textual, historical, and structural considerations in constitutional interpretation).

of originalism as conventionally understood.¹⁶⁰ “Ancestral originalism” underscores the notion that an interpretation should fit our practice, tradition, and culture.¹⁶¹ “Heroic originalism” shows that an interpretation should be in accord with our deepest aspirations and the best in us as a people.¹⁶² These types of argument about original meaning, and uses of history, give due regard to original meaning without being originalist.

Likewise, Christopher Eisgruber has argued that history should “contribute to constitutional jurisprudence as servant, not rival, to justice.”¹⁶³ Eisgruber argues that “history matters specially to constitutional adjudication not because (as originalists want us to believe) judges have an obligation to preserve the past, but because historical argument can sometimes help them to represent the people’s convictions about justice.”¹⁶⁴ For example, in making judgments about justice in interpreting abstract constitutional provisions like the Equal Protection Clause or the Executive Power Clause,¹⁶⁵ judges “cannot simply act on the basis of their own best judgment about justice.”¹⁶⁶ Instead, judges should draw upon history to “show that those judgments are plausibly attributable to the American people as a whole.”¹⁶⁷ Thus, on his conception of constitutional self-government, judges resort to history, not to obey the “dead hand of the past,” but to enable them to discharge their responsibilities as a representative institution speaking on behalf of the people about questions of moral and political principle.¹⁶⁸

Reva Siegel’s work illustrates that history matters, not as it binds our choices—as it were, through “the law of the father”—but as it informs our choices, decisions for which we as a people are responsible.¹⁶⁹ Similarly, Martin Flaherty has suggested that in a “post-originalist” world, we would take an “experiential” rather than an authoritarian approach to the use of history in constitutional interpretation.¹⁷⁰ For example, we would look to “past experience to assess how given constitutional doctrines or mechanisms have succeeded or failed.”¹⁷¹ He shows that such use of history held a central place in the early republic.¹⁷²

160. *See id.* at 1800–16.

161. *Id.* at 1802–03.

162. *See id.* at 1803–04.

163. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 127 (2001).

164. *Id.* at 110.

165. U.S. CONST. art. II, § 1, cl. 1.

166. EISGRUBER, *supra* note 163, at 126.

167. *Id.*

168. *Id.* at 11, 64.

169. *E.g.*, Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 343 (2001).

170. Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1107–11 (2001).

171. *Id.* at 1092.

172. *See id.* at 1107 (“Call this post-originalist approach to constitutional history ‘experiential.’ Hamilton much earlier extolled the method, urging, ‘Let experience, the least fallible guide of human opinions, be appealed to for an answer to these [constitutional] questions.’”).

Finally, Balkin's work, although he characterizes it as a "living originalism," shows how history figures in a moral reading of the Constitution. History—whether evidence of original public meaning or precedent—functions as a resource for making arguments about the best understandings of our constitutional commitments, not as a constraint that makes our decisions for us.¹⁷³ Abner Greene's work, although it is avowedly anti-originalist, is similar to Balkin's in showing how history—or fit with original public meaning or precedent—serves as a factor in making arguments about the best understanding of the Constitution as a matter of justice.¹⁷⁴ These examples are illustrative rather than exhaustive of what I call constructivist uses of history as distinguished from conventional originalist uses.

VI. Conclusion: Toward a Philosophic Approach to Fidelity in Constitutional Interpretation

In sum, 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 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. Fidelity in interpreting the Constitution as written requires a philosophic approach to constitutional interpretation. No approach—including no version of originalism—can responsibly avoid philosophic reflection and choice in interpreting the Constitution.

173. BALKIN, LIVING ORIGINALISM, *supra* note 5, at 258–59.

174. See ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 192, 197, 201–06 (2012) (arguing that there is "room for fit" with history as a "factor" in arguments about the best understanding of the Constitution, but that "reasoning about political justice" or "justification" should have "primacy" over fit). I have analyzed Greene's account of "room for fit" and the "primacy of justification" in James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. (forthcoming 2013).

In my book, *Securing Constitutional Democracy*, I gave three reasons for embracing a philosophic approach or moral reading over and against any version of originalism. I shall close this Article by repeating them.

The first reason is hortatory: [The moral reading] exhorts judges, elected officials, and citizens to reflect on and deliberate about our deepest principles and highest aspirations as a people. It does not conceive the commitment of fidelity to the Constitution as commanding us to follow the authority of the past. [In a word, it rejects the authoritarianism of originalism as inappropriate and unjustifiable in a constitutional democracy.]

The second, related reason is critical: [The moral reading] encourages, indeed requires, a reflective, critical attitude toward our history and practices rather than enshrining them. It recognizes that our principles may fit and justify most of our practices or precedents but that they will criticize some of them for failing to live up to our constitutional commitments to principles such as liberty and equality. Put another way, [the moral reading] does not confuse or conflate our principles and traditions with our history, or our aspirational principles with our historical practices. Again, it recognizes that fidelity to the Constitution requires honoring our aspirational principles, not following our historical practices and concrete original understanding. That is, fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.

The final reason is justificatory: [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, gives us hope of interpreting our imperfect Constitution in a manner that may deserve our fidelity, or at least may be able to earn it.¹⁷⁵

Unlike originalism, it does not enshrine an imperfect constitution that does not deserve our fidelity.

That, in short, is why I hope we are not all originalists now.

175. FLEMING, *supra* note 8, at 226–27.