JACK BALKIN’S RECLAMATION OF CONSTITUTIONAL FIDELITY: A THEORY OF ABSTRACT ORIGINALISM FOR WE THE PEOPLE

ARTICLE

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If our free society is to endure, and I know it will, those who govern must recognize that the Framers of the Constitution limited their power in order to preserve human dignity and the air of freedom which is our proudest heritage. The task of protecting these principles does not rest solely with nine Supreme Court Justices, or even with the cadre of state and federal judges. We all share the burden.

- Justice William J. Brennan

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1 William J. Brennan, My Life on the Court, in REASON & PASSION 17-21 (E. Joshua Rosenkranz et al. eds., 1997).
INTRODUCTION

The question of how to interpret the United States Constitution so as to be faithful to its purpose and commitments has been the central issue driving constitutional theory throughout our Nation’s history. In his book, *Living Originalism*, Jack Balkin frames the central clash of this ongoing debate as being between living constitutionalism and originalism. Living constitutionalists view the Constitution as a living document that evolves over time and that should be interpreted in light of its changing circumstances, even if the document’s text has not been formally amended. On the other hand, originalists believe that the Constitution textual provisions became fixed at the time when they were adopted and ratified, and hence, should be interpreted in light of their original meaning. Consequently, the clash between living constitutionalists and originalists revolves around their disagreements as to what is the Constitution and how it should be interpreted. Despite these clear differences, each side claims that their respective method of constitutional interpretation is the most faithful to the Constitution’s purpose and commitments.

The question of how to interpret the Constitution, however, ultimately depends on what are the document’s purpose and commitments. It follows that the central clash of constitutional theory is best understood, as James Fleming suggests, as being between moral readings and originalisms. Moral readers perceive the Constitution as a document that embodies “abstract moral and political principles.” On the other hand, conventional, “skyscraper originalists” view the Constitution as a code of “concrete historical rules or practices.” In other words, in order to decide whether a particular theory of interpretation is faithful to the Constitution, we must first determine whether we have a Constitution of abstract principles or one of detail.

Balkin’s *Living Originalism* offers a theory of constitutional interpretation, known as “framework originalism,” that incorporates the “appeal” of both living constitutionalism and originalism and embraces a moral reading of the Constitution. Balkin rejects the view of “skyscraper originalists” that the Constitution

3 Id.; see also David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161 (2012).
4 See Balkin, supra note 2, at 2.
6 Id. at 1173.
7 Balkin, supra note 2, at 21 (defining skyscraper originalism); see infra Part II.
8 Fleming, supra note 5, at 1173.
9 Id. at 1175.
is a finished product that codifies concrete historical rules and practices.\textsuperscript{11} Instead, Balkin’s framework originalism perceives the document “as an initial framework for governance that sets politics in motion”\textsuperscript{12} and serves as a “source of political and moral aspirations.”\textsuperscript{13} Framework originalism reclaims the idea of constitutional fidelity to express that being faithful to the Constitution requires loyalty to its text and principles. According to Balkin, constitutional fidelity requires us to embrace the governance framework that is established in the document, as well as to “build out constitutional constructions that best apply the constitutional text and its associated principles in current circumstances.”\textsuperscript{14} In other words, we must be faithful to the text’s original meaning and to those abstract commitments or “principles that underlie the text.”\textsuperscript{15}

In this Article, I will discuss how Balkin’s \textit{Living Originalism} reclaims constitutional fidelity by rebuking the way that both liberals and conservatives have engaged in constitutional interpretation in recent years. He rejects the pragmatic approach of liberals embracing living constitutionalism, as well as the revisionist approach of conservatives supporting skyscraper originalism. In doing so, Balkin restores the leading role of \textit{We the People} as interpreters of the Constitution. To put it differently, Balkin’s theory of framework originalism is a form of abstract originalism designed for \textit{We the People} because it replaces the “shrine of judicial idolatry” with a platform for constitutional politics.\textsuperscript{16}

This Article proceeds in three parts. Part I discusses the pillars and basic tenets of Balkin’s theory of framework originalism. Part II discusses and elaborates Balkin’s criticism of skyscraper originalism and how he is able to recognize the true meaning of constitutional fidelity by avoiding the problems haunting skyscraper originalists. Part III provides a critique of Balkin’s interpretive method of text and principle and analyzes his discussion of the landmark case of \textit{Bolling v. Sharpe},\textsuperscript{17} in order to demonstrate how Balkin’s theory “combines the appeal of both originalism and living constitutionalism and avoids the weaknesses of each.”\textsuperscript{18}

\begin{footnotes}
\item 11 Balkin, supra note 2, at 21.
\item 12 \textit{Id}.
\item 13 Balkin, supra note 10, at 854.
\item 14 Balkin, supra note 2, at 3.
\item 15 \textit{Id}.
\item 16 Balkin, supra note 10, at 877.
\item 18 Fleming, supra note 5, at 1175.
\end{footnotes}
I. The Pillars of Framework Originalism: A Theory for *We the People*

Jack Balkin’s *Living Originalism* views the U.S. Constitution as a framework for governance and a platform for constitutional politics. The Framers of the Constitution established this framework as an unfinished project to “be built out over time by successive generations.” According to Balkin, a theory of interpretation that claims to be faithful to the Constitution must acknowledge two things: (1) the existence of a basic framework of government that was established by the Framers, and (2) the need for future generations to participate in the ongoing evolution of this unfinished project through active discussion and persuasion “about the best way to realize the constitutional plan and further its goals.” This is what Balkin refers to as the “basic law” of the Constitution, its framework of government, becoming both “higher law” and “our law,” as we embrace its framework as a source of “inspiration and aspiration” and decide to promote its purpose and commitments.

Balkin makes two key moves to show why framework originalism acknowledges these realities of our Constitution. First, he explains that “constitutional interpretation” combines two separate activities. The first activity, known as “interpretation-as-ascertainment,” consists of ascertaining the original meaning of the text to acknowledge the existence of the basic framework of government. For example, we know that the Eighth Amendment proscribes the infliction of “cruel and unusual punishments.” In order to ascertain the meaning of this phrase, we need only look at the “semantic content” of the words in the text. The second activity, “interpretation-as-construction,” consists of implementing the words in the text “through doctrines, practices, laws, and institutions.” Constitutional construction, the process through which we build the Constitution’s framework over time, permits the use of various interpretive tools, such as “arguments from history, structure, ethos, consequences, and precedent.” As a result, once the semantic meaning of the phrase “cruel and unusual punish-

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19 Balkin, supra note 2, at 3.
20 Balkin, supra note 10, at 816.
21 Balkin, supra note 2, at 3.
22 Id. at 4.
23 Id. at 59-60.
24 Id. at 4.
25 Id.
26 U.S. CONST. amend. VIII.
27 Balkin, supra note 2, at 12-13.
28 Balkin, supra note 10, at 816.
29 Balkin, supra note 2, at 4.
ments” is ascertained, the text must be applied to a specific set of facts through this process of construction.

Balkin’s second move is to explain that the text of the Constitution contains rules, standards, and principles. These different kinds of language vary in terms of their level of generality or abstraction. While the constitutional text includes determinate rules (the president must be thirty-five), it also contains standards (no “unreasonable searches and seizures”) and general principles (no denial of equal protection). When engaging in interpretation-as-construction, fidelity to the Constitution requires the application of whatever the text offers. Consequently, the application of the text will depend on whether the specific textual provision contains a determinate rule, a vague standard, or an abstract principle. Balkin calls this method of constitutional interpretation the method of “text and principle.”

As a historicist and a Hartian positivist, Balkin argues that constitutional fidelity requires us to “pay careful attention to the reasons why constitutional designers choose particular kinds of language.” Framework originalism assumes that the choice to use these kinds of language was deliberate and that, as a result, they are a key component of our body of law. The theory specifically suggests that the constitutional designers incorporated rules, standards, and principles into the constitutional text to notify future generations of the proper amount of discretion that should be applied when engaging in constitutional construction. While the use of “hardwired rules” demonstrates the designers’ intent to limit discretion, the choice to use “vague standards or abstract principles” reflects a conscious decision “to channel political judgment” and “delegate the task of construction and application to future generations.” Moreover, Balkin also suggests that silences in the constitutional text could also be understood as a deliberate choice. These silences could be interpreted either as the designers’ inability to “agree on how to resolve a particular issue [or their desire] to leave the question open to future political deliberations.”

30 Id. at 6.
31 Id.
32 Id.
33 Id. at 6-7.
34 Id. at 6.
35 Id.
36 Balkin, supra note 10, at 817.
37 BALKIN, supra note 2, at 6-7.
38 Balkin, supra note 10, at 817.
39 Id.
40 Id.
Balkin’s efforts to reclaim constitutional fidelity away from other conventional constitutional theories shift the power of interpretation away from the courts and the legal hierarchy into the hands of “ordinary participants.” Despite U.S. citizens, the “ordinary participants” of constitutional construction, apply the text of the Constitution through constitutional politics. Political and social mobilizations depict the process by which a group of citizens seeks to persuade others about the best way of fulfilling the Constitution’s purposes and commitments. This ongoing exchange has become evident in recent decades serious discussions over key issues, such as school segregation, abortion, death penalty, and same-sex marriage. Even though these “waves of mobilizations and counter-mobilizations” do not change the original semantic meaning of the relevant textual provision, they do affect the process of constitutional construction through which said provision is applied in our present-day circumstances. In this regard, Balkin’s framework originalism is a theory of constitutional interpretation for We the People.

As the Preamble of the Constitution suggests, the Constitution belongs to those who decided to “ordain and establish” the document in the first place, We the People. While We the People certainly includes those who drafted and ratified the Constitution, the constitutional designers believed this phrase to include “the whole Number of free Persons.” Despite this early understanding of the phrase, we now hold a vastly different conception of We the People. This transformation is in itself evidence of the evolving nature of the Constitution. Moreover, since it cannot be said that the commitments “to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity” were achieved at the time of the Constitution’s adoption, the text of the Preamble further confirms the aspirational nature of the document to establish an “intergenerational plan for politics, [where] each generation [as part of We the People] must do its part to keep the plan going.”

In order to take the side of the Constitution, our generation must embrace the responsibility of becoming active participants in the process of constitutional construction within the meaning of We the People, and like the founders, em-
brace the framework of government that continues to evolve over time. As Balkin suggests, "[o]ne merely has to believe that what makes one a member of We the People and a part of the American constitutional tradition is acceptance of and commitment to realizing the American plan for self-government." If we merely become the guardians of a finished project imposed upon us that can only be amended through the rigid process of an article V amendment, then our place within the meaning of We the People is surely limited. It follows that framework originalism is a theory for We the People because, like the phrase itself, it recognizes the fixed and abstract components of our Constitution.

To recapitulate, Balkin makes the following moves to argue that framework originalism and his method of text and principle are faithful to the Constitution: (1) distinguish interpretation-as-ascertainment from interpretation-as-construction, and (2) explain that the constitutional text includes rules, standards, and principles that must be applied through constitutional construction. In order to acknowledge the Constitution’s basic framework of government, we must be faithful to the original meaning of the text through interpretation-as-ascertainment. This is the originalist component of Balkin’s theory. But in order to embrace and develop the framework’s purpose and commitments, we must be faithful to the designers’ deliberate choice of rules, standards, and principles through interpretation-as-construction. This is the living constitutionalist component of the theory. When combined, we are left with a form of abstract originalism that reconciles “the best versions of originalism and living constitutionalism” for We the People.51

II. TAKING FIDELITY SERIOUSLY: SKYSCRAPER ORIGINALISM AS A REVISIONIST THEORY OF CONSTITUTIONAL INTERPRETATION

Balkin’s Living Originalism argues that the clash between living constitutionalism and originalism is a false one because the best versions of each theory are fully compatible.52 Political ideologies have certainly influenced the way that constitutional interpretation has been conducted in recent decades. While this influence is probably inevitable, it exposes the weaknesses of both living constitutionalism and originalism as being politically driven at the expense of recognizing the document as a platform for constitutional politics. Framework originalism praises those elements that are essential to Balkin’s reclamation of constitutional fidelity and depicts the weaknesses of conventional forms of originalism. In doing so, it presents an abstract form of originalism that provides a platform for both liberals and conservatives to engage in constitutional construction through political and social mobilization. The emergence of framework

50 Balkin, supra note 2, at 57.
51 Balkin, supra note 10, at 815.
52 Id. (emphasis added).
originalism portrays the demise of conventional originalisms and exhorts everyone to take constitutional fidelity seriously.

A. Conventional Originalisms under the Umbrella of Skyscraper Originalism

Conservatives embraced originalism as a tool to curtail what they perceived as the “judicial revisionism” of the Warren and Burger Courts to incorporate the “modern liberal agenda” into the text of the Constitution. Since its emergence half a century ago, originalism has experienced numerous transformations. Scholars of constitutional theory have noted how originalism has split into “warring camps.” James Fleming calls this phenomenon the “balkanization of originalism.” Some of the different formulations of originalism include: “intent-of-the-Framers” originalism, “intent-of-the-ratifiers” originalism, “original-public-meaning” originalism, and “original-methods” originalism. In fact, Mitchell Berman’s Originalism is Bunk identifies seventy-two different types of originalism. They all disagree as to “which feature of the Constitution’s original character demands fidelity (framers’ intent, ratifiers’ understanding, or public meaning); why such fidelity is required; and whether this interpretive obligation binds judges alone or citizens, legislators, and executive officials too.” In light of these disagreements, it is hard to perceive originalism as one cohesive theory of constitutional interpretation.

Despite the underlying and perhaps irreconcilable differences between these varieties of originalism, a coherent criticism of conventional originalism requires us to identify those elements shared by all forms of originalism. Fleming suggests that “Balkin came to bury conventional forms of originalism, . . . to praise a new form” of abstract originalism. But, what are these conventional forms of originalism that Balkin came to bury and what do they share in common? Balkin asserts that all originalisms, including his theory of framework originalism, share three basic claims: (1) that there is something fixed at the time

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55 Id.
58 Fleming, supra note 56, at 671 (citing Mitchell N. Berman, Originalism is Bunk, 84 N.Y.U. L. Rev. 1 (2009)).
59 Berman, supra note 58.
60 See Fleming, supra note 56, at 671 (“Given how much these versions of ‘originalism’ differ, it would not mean much to claim that we are all originalists now.”).
61 Fleming, supra note 5, at 1172 (emphasis added).
of the constitution’s ratification (the fixation thesis); (2) that the fixed components of the constitution can only be altered through an article V amendment (the amendment thesis); (3) and that these fixed components are essential to the correct interpretation of the document (the consequences thesis). Balkin argues that framework originalism satisfies all three because his theory claims that the “original semantic meaning of the text” was fixed at the time of adoption, that it can only be changed through a constitutional amendment, and that it “matters for interpretation [because it is] the framework on which all construction is built.”

Even though it could seem that Balkin decided to frame these three theses in sufficiently broad terms to be able to characterize his theory as originalist, most originalisms agree as a formal matter that the original semantic meaning of the text was fixed at the time of adoption. This is for example the view of Justice Antonin Scalia and those who embrace original-public-meaning originalism. The problem is that conventional originalisms reject the central distinction between interpretation-as-ascertainment and interpretation-as-construction and presume that the original semantic meaning of the text includes the original expected applications of the constitutional designers. This essentially means that even though conventional originalists might acknowledge that some provisions might facially seem more abstract than others, in reality, their understanding and application became fixed at the time of the Constitution’s adoption. Moreover, prominent conservative originalists, such as John McGinnis and Michael Rappaport, disagree with Balkin’s conclusion that the Constitution includes rules, standards, and principles. McGinnis and Rappaport argue that these so-called “abstract principles” can be easily interpreted as “abstract or general rules.” As a result, they accuse Balkin of promoting the “abstract meaning fallacy,” or the idea of claiming “that possibly abstract language has an abstract meaning without sufficiently considering and weighing the alternative possibilities.”

Balkin refers to these forms of conventional originalism as “skyscraper originalism.” For purposes of clarity and simplification, the basic tenets of skyscraper originalism can be summarized into two. First, skyscraper originalists claim that the understanding and application of a particular textual provision

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62 Balkin & Strauss, supra note 41, at 1271.
63 Id.
65 Balkin, supra note 10, at 826.
67 See id. at 747-51.
68 Id. at 739.
69 BALKIN, supra note 2, at 21.
became fixed at the time of the Constitution’s adoption. This claim entails that skyscraper originalists in fact embrace original expected applications and view the Constitution as a code of detailed historical rules and practices embodied in concrete and abstract time-dated provisions. Second, they claim that the Constitution is a finished project of governance whose content can only be changed through an article V amendment. In other words, since skyscraper originalists embrace original expected applications and reject a moral reading of the Constitution, framework and skyscraper originalisms “differ in the degree of constitutional construction and implementation that later generations may engage in.”

B. Critiquing the First Claim of Skyscraper Originalism: Original Expected Applications

Many skyscraper originalists argue that they believe in the semantic meaning of the text, as opposed to its expected application. Justice Scalia, for example, refers to interpretation-as-ascertainment as the constitutional “import” of the text’s “semantic intent.” Along with many originalists, Scalia frames the central clash of constitutional interpretation as being between the original meaning and the current meaning of the text, as opposed to being between the Framers’ intent and the objective meaning of the text. Another prominent skyscraper originalist, Robert Bork, agrees with Justice Scalia that constitutional interpretation, like statutory interpretation, consists of looking at the original meaning of the text, rather than the subjective intentions of the original draftsmen. It follows that skyscraper originalists consult the writings of the constitutional designers not because their intent is “authoritative and must be the law[,] but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”

There are, however, several problems with the way that skyscraper originalists “import” the original semantic meaning of the text. Since skyscraper originalists reject the central distinction between the two activities of constitutional

70 Id.
71 Id.
72 Id.
73 Id.
74 SCALIA, supra note 64, at 144.
75 See id. at 147.
76 Id. at 38.
77 Id. See generally BORK, supra note 53.
78 See generally BORK, supra note 53; see also SCALIA, supra note 64, at 38.
interpretation, what they are in fact doing is incorporating into the original meaning of the text the constitutional constructions of the public at the time when the relevant text was adopted. This is essentially what Justice Scalia calls “public-expected-meaning” originalism. Balkin, however, refers to it as “original expected application” originalism. Balkin defines original expected applications as a “limited interpretive principle” that evaluates “how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).”76

If we take the Eighth Amendment as an example, Justice Scalia and other skyscraper originalists do not view the prohibition against “cruel and unusual punishments” as a “moral principle of ‘cruelty’ that philosophers can play with in the future.”82 Instead, Justice Scalia argues that this principle is “rooted in the moral perceptions of the time [i.e., in 1791].”83 Justice Scalia offers two justifications for this approach. First, he claims that the “passage of time cannot reasonably be thought to alter the content of those rights.”84 In other words, both the semantic meaning and the substantive content were fixed in 1791 and can only be changed through a constitutional amendment. Second, he argues that the more abstract provisions of the Constitution are also time-dated because otherwise, there would be “no protection against the moral perceptions of a future, more brutal generation.”85 Consequently, Scalia would argue that fidelity to the Eighth Amendment requires a faithful application of what the public in 1791 perceived as “cruel,” as opposed to what subsequent generations consider “cruel and unusual.”

It follows that Balkin correctly points out that Scalia is not really a semantic originalist, but rather, a skyscraper originalist who embraces the original expected applications of the text. Other constitutional scholars, like Ronald Dworkin and Laurence Tribe, offer similar criticisms of Justice Scalia’s interpretive methods. Dworkin, for example, characterizes Justice Scalia’s theory as a form of “expectation” originalism, as opposed to a form of “semantic” originalism.86 This is because Justice Scalia and other skyscraper originalists hold that the Constitution’s textual provisions “should be understood to have the consequences that those who made them expected to have.”87 Since skyscraper originalists contend that the concrete and abstract provisions in the Constitution

79 SCALIA, supra note 64, at 38.
80 BALKIN, supra note 2, at 7.
81 Id.
82 SCALIA, supra note 64, at 145.
83 Id.
84 Id. at 147.
85 Id. at 145.
86 Id. at 144.
87 Ronald Dworkin, Comment, in A MATTER OF INTERPRETATION, supra note 64, at 115, 119.
are both equally time-dated, their theory fails to acknowledge the different levels of generality and specificity in the text. For example, while it is certainly true that the Constitution’s text includes terms-of-art, the abstract principle of freedom of speech embodied in the First Amendment cannot be treated as a hard-wired rule or a term-of-art because “[t]here was no generally accepted understanding of the right . . . on which the framers could have based a dated clause even if they had wanted to write one.” Consequently, skyscraper originalists recast the vague standards and abstract principles of the constitutional text as if they were concrete and determinate rules, even in cases when there is no historical or legal basis for this assumption. Their reliance on such ungrounded assumptions is probably what Fleming refers to as “the originalist premise,” or the originalists’ unfounded belief that their theory, “rightly conceived, is the best -or indeed the only- conception of fidelity in constitutional interpretation.”

If skyscraper originalists would be truly committed to the original semantic meaning of the text, they would have to embrace some type of abstract originalism that is consistent with a moral reading of the Constitution. This is because fidelity to the original semantic meaning of the text “insists that the rights-granting clauses be read to say what those who made them intended to say.” Since the Constitution includes both concrete rules and abstract principles as a matter of original meaning, constitutional fidelity merely requires loyalty to the semantic content of the words. It follows that only the semantic meaning of the text, as opposed to the “unenacted expectations and assumptions” of earlier generations, should govern constitutional interpretation.

C. Critiquing the Second Claim of Skyscraper Originalism: Limited Constitutional Change

The adoption of original expected applications responds to the conservatives’ desire to constrain “judicial revisionism” and foreclose the processes of constitutional construction. To put it differently, conservatives have embraced skyscraper originalism as a theoretical mechanism to hinder the process of constitutional politics. This leads to the second essential claim of skyscraper originalism that the Constitution is a finished project of government that can only be altered through an article V amendment. Because skyscraper originalists believe that both the semantic and substantive content of textual provisions

88 Id. at 124-25; see Laurence H. Tribe, Comment, in A MATTER OF INTERPRETATION, supra note 64, at 65.
89 Dworkin, supra note 87, at 124.
90 Fleming, supra note 56, at 675 (citations omitted).
91 Dworkin, supra note 87, at 119.
92 BALKIN, supra note 2, at 12-13.
93 Tribe, supra note 88, at 66.
were fixed at the time of the text’s adoption, it follows that the only possibility for constitutional change is through the amendment process.\footnote{See \textsc{Bork}, supra note 53, at 143.}

First, it is important to understand why skyscraper originalists embrace such a restrictive approach to constitutional change. Robert Bork explains the foundation for this approach in very precise terms:

When we speak of “law,” we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires. Otherwise there would be no need to agree on procedures for changing the rule. Statutes, we agree, may be changed by amendment or repeal. The Constitution may be changed by amendment pursuant to the procedures set out in article V. \textit{It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges.}\footnote{Id. (emphasis added).}

It follows that the main reason for this approach is their view that the Constitution should be treated as a statute for purposes of interpretation. Justice Scalia offers a similar view in his book \textit{A Matter of Interpretation: Federal Courts and the Law}, where he rejects the courts’ reliance on the common law approach to interpret statutes and the Constitution.\footnote{See generally \textsc{Scalia}, supra note 64.} Justice Scalia claims that the problem of constitutional interpretation is “distinctive, not because special principles of interpretation apply, but \textit{because the usual principles are being applied to an unusual text.”}\footnote{Id. at 37 (emphasis added).}

This view, however, ignores how the distinct nature of the constitutional text will necessarily affect the way that it is interpreted and constructed. Chief Justice Marshall made this observation in \textit{McCulloch v. Maryland}:

[The Constitution’s] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves . . . \[T]hen, we must never forget, that it is a constitution we are expounding.\footnote{\textit{McCulloch v. Maryland}, 17 U.S. 316, 407 (1819) (alteration in original).}

It follows that the fact that a statute can only be changed through an amendment or repeal is irrelevant for purposes of determining whether an article V amendment is the only tool available for \textit{We the People} to elicit constitutional change. As mentioned above, the Constitution, unlike a statute, contains determinate rules, vague standards, and abstract principles, and each type of language deserves a specific kind of treatment when engaging in constitutional construc-

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tion. Consequently, while a constitutional amendment is necessary to change the text, and thus the framework established therein, the democratic foundation of our Constitution requires us to apply the text to our specific circumstances without having to formally amend the framework. Unlike the rigid and restrictive approach of skyscraper originalism, a theory that distinguishes the article V amendment process from the process of interpretation-as-construction is more consistent with the Constitution’s democratic foundation and one that is “deeply rooted in this Nation’s history and tradition.”

Another reason why the statute-constitution analogy is flawed is that the process of constitutional change is inherently different from that of amending a statute. While Congress may repeal or amend a statute through the ordinary legislative process, changes to the constitutional text must meet the high bar established in article V of the Constitution. Unlike a statute, the Constitution’s text cannot be formally amended every time we apply the text to a new set of circumstances. Instead, our historical and legal traditions suggest that this is when constitutional construction comes in. It follows that even though constitutional change as a formal matter is limited to the article V amendment process, the bulk of constitutional change occurs through constitutional construction as We the People seek to apply the text to our own realities.

Ultimately, the view of skyscraper originalism that the Constitution is a finished project, subject to change through a very difficult and complicated process, creates two insuperable problems: the absence of democratic legitimacy and the impracticality of relying on pragmatic exceptions. Balkin’s framework originalism specifically avoids these two problems by embracing a moral reading of the Constitution that reclaims constitutional fidelity for We the People.

With respect to the first problem, Balkin aptly observes that “[t]he democratic legitimacy of the Constitution is not established at the moment of adoption.” Instead, it derives from multiple sources, such as “the act of adoption or amendment” and “the processes of constitutional construction over time.” The Constitution’s democratic legitimacy is established “by struggling over its meaning in constitutional politics, producing new constitutional constructions, and building on or revising older ones.” This process is what Balkin refers to as making the Constitution “our law,” and “taking the side” of the Constitution. In this regard, framework originalism reclaims constitutional fidelity away from skyscraper originalists who would restrict the opportunities for We the People to make the Constitution “our law.”

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100 Balkin, supra note 10, at 830.
101 Id.
102 Id.
103 Balkin, supra note 2, at 60.
Skyscraper originalists would probably agree with Balkin’s statement that “[c]onstitutions cannot maintain their democratic legitimacy without contributions from multiple generations.” Framework and skyscraper originalism diverge, however, as to the tools available for current generations to contribute to the Constitution. Balkin is right in asserting that constitutional change must go beyond a formal article V amendment process. Nonetheless, he falls somewhat short of explaining why this is so. The reason for this small gap in his theory is perhaps what Fleming calls the absence of Balkin’s “substantive vision of the Constitution’s core commitments.” Balkin would certainly benefit from articulating a substantive vision of the document to explain why establishing the Constitution’s democratic legitimacy requires a more flexible process of constitutional change. Balkin argues that the Constitution is “a collective exercise in realizing a certain historical (and evolving) version of political liberalism over time.” This vision, however, does not really explain why constitutional constructions are required to establish the document’s democratic legitimacy.

Other constitutional theories have articulated that the Constitution establishes a particular kind of democracy that embraces a specific set of commitments. In doing so, these theories offer a clear explanation as to why skyscraper originalism’s account of constitutional change is simply insufficient to establish the Constitution’s democratic legitimacy. For example, in Democracy and Distrust: A Theory of Judicial Review, John Hart Ely offers a theory of constitutional interpretation that relies upon a specific view of the Constitution’s purpose and commitments. Ely claims that the Constitution establishes a representative democracy and that as a result, constitutional fidelity requires a “participation-oriented, representation-reinforcing approach to judicial review.” In his book, Ely offers several criticisms of skyscraper originalism and what he calls “clause-bound interpretivism.” Since Ely’s theory of judicial review is specifically concerned with the democratic identity of our constitutional framework, he quickly points to the absence of democratic legitimacy in skyscraper originalism.

For example, Ely describes the efforts of skyscraper originalists to restrict constitutional change as a “conservative brake” that attempts to control “today’s generation . . . by the values of its grandparents.” Ely claims that this “conservative brake” is inconsistent with democratic theory and the idea that the Constitution reinforces those processes that are essential for political participation in a
representative democracy.111 Moreover, restricting constitutional change to the article V amendment process is antidemocratic on its face because as Ely and Dworkin would say, such an approach would prevent minorities from the “equal concern and respect in the design and administration of the political institutions that govern them.”112

Another example is Cass Sunstein’s theory in The Partial Constitution.113 Sunstein asserts that the Constitution embodies a theory of “deliberative democracy.”114 Like Ely, Sunstein advocates for aggressive judicial review under certain limited circumstances. Sunstein claims that in addition to the judicially enforceable Constitution, there is a Constitution for “outside the Courts” that is binding on We the People and the political branches.115 His theory seeks to preserve and reinforce the preconditions for deliberative democracy.116 In order to secure these preconditions, constitutional change cannot be possibly limited to the article V amendment process. Instead, the process for political deliberation within his theory of deliberative democracy provides the basis for said change.

Finally, James Fleming’s Securing Constitutional Democracy: The Case of Autonomy offers a competing conception of the kind of democracy established in our Constitution. Fleming, who embraces a moral reading of the Constitution, claims that the Constitution establishes a “constitutional democracy” that protects and secures those basic, fundamental liberties that are preconditions for both deliberative democracy and deliberative autonomy.117 Unlike Ely and Sunstein’s “process-perfecting theories,” Fleming advocates for a “Constitution-perfecting theory” that seeks to protect both procedural and substantive liberties.118 As a moral reader, Fleming would also argue that since our constitutional scheme is one of abstract aspirational principles, an article V amendment is unnecessary to frame our conception of which fundamental rights are essential to that scheme of constitutional democracy.

Even though Balkin would probably disagree with the court-centered nature of the theories of Ely, Sunstein, and Fleming, their approach demonstrates how articulating a substantive vision of the Constitution’s purpose and commitments bolsters the claim that skyscraper originalism’s account of constitutional change is insufficient to establish the document’s democratic legitimacy.

111 Id.
112 Id. at 82 (quoting RONALD DWOR RN, TAKING RIGHTS SERIOUSLY 180 (1977)) (citing J. PO LE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 5 (1978); ROAL DAHL, DEMOCRACY IN THE UNITED STATES 14 (3d ed. 1976)).
114 Id. at 133.
115 Id. at 133-41.
116 Id.
118 Id. at 4, 38-39.
Similarly, looking at the abstract nature of other constitutions around the world reinforces Balkin’s argument that democratic legitimacy requires a greater role for *We the People* to engage in constitutional construction. At the very core of international law is the recognition of the “general and consistent practice of states” of adopting abstract constitutional schemes. These schemes, many of which have been inspired in one way or another by the U.S. Constitution, reflect a general understanding across the international community that the basis for any democratic regime must be popular sovereignty, or the idea that political legitimacy and governmental authority are grounded on the “consent of the people in the territory in which a government purported to exercise power.”

The fundamental right of the people to participate in the state’s formal political processes and to develop their constitutions in accordance with their respective abstract commitments has become an indispensable feature of this basic principle of popular sovereignty. The American Constitution is not the exception, since its democratic legitimacy is also grounded on this evolving sense of popular sovereignty. Consequently, in addition to supporting Balkin’s democratic legitimacy argument against skyscraper originalism, this basic tenet of international law perhaps provides further support for Fleming’s assertion that “we are all moral readers now.”

Furthermore, many skyscraper originalists acknowledge that their approach could lead to many politically unacceptable results. This leads to the second problem with the view that the Constitution is a finished project: the impracticality of relying on pragmatic exceptions. Justice Scalia argues that most skyscraper originalists are in fact “faint-hearted originalists” because they allow for these deviations in their method of constitutional construction. For example, Justice Scalia claims that no originalist in the federal bench would uphold a federal statute that imposes the punishment of flogging.

It follows that we can identify three different scenarios in which


120 W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 867 (1990) (“By the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of political legitimacy.”).

121 James Crawford, *Democracy and the Body of International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 92 (Gregory Fox & Brad R. Roth eds., 2000) (“The will of the people is to be the basis of the authority of government is as good as summary as any of the basic democratic idea.”).


123 BALKIN, *supra* note 2, at 8.


126 See BALKIN, *supra* note 2, at 8.
“faint-hearted” originalists would generally allow these deviations or pragmatic exceptions: “(1) when the text is insufficiently rule-like, (2) when precedent has deviated from original meaning and (3) when the first two justifications are unavailing, just ignore originalism to avoid sufficiently objectionable results.”

Balkin identifies four major problems with this approach that reflect the impracticality of pragmatic exceptions in skyscraper originalism. First, Balkin argues that Justice Scalia’s solution undermines the basic claim that “legitimacy comes from adhering to the original meaning of the text adopted by the framers.” Second, the solution does not afford equal deference to all precedents because it allows judges to choose which “incorrect” and non-originalist decisions should be overruled and which ones should be accepted. A clear example of this problem is the evident contrast between Justice Scalia’s dissenting opinion in Planned Parenthood v. Casey and the plurality opinion of moderate conservatives Justices Souter, O’Connor, and Kennedy concerning a woman’s right to terminate her pregnancy. This degree of indeterminateness allows skyscraper originalism “to track particular political agendas and allows judges to impose their political ideology on the law — the very thing that the methodology purports to avoid.”

Third, Balkin claims that “incorrect” precedents should be either overturned or construed as narrowly as possible “to avoid compounding the error, with the idea of gradually weakening and overturning them so as to return to more legitimate decisionmaking.” Skyscraper originalism does not take this approach and instead relies on the individual choices of judges to determine which precedents should be overturned or accepted. Lastly, our modern society does not consider the achievements of civil rights legislation, greater freedom of speech, and equal rights for women to be “mistakes” in our constitutional tradition that we must either overturn or “unhappily retain.” To put it differently, we do not regard the protection of those fundamental rights that are essential to secure the preconditions for deliberative autonomy to be unfortunate errors in our constitutional tradition.

As Ronald Dworkin claims: “Justices whose methods seem closest to the moral reading of the Constitution have been champions, not enemies, of individual rights, and, as the political defeat of Robert Bork’s nomination...

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128 BALKIN, supra note 2, at 8-9.
129 Id. at 9.
130 Compare Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 833-901 (1992) (plurality opinion), with id. at 979-1002 (Scalia, J., dissenting).
131 BALKIN, supra note 2, at 9.
132 Id.
133 Id.
134 See generally FLEMING, supra note 117.
tion taught us, the people seem content not only with the moral reading but with its individualist implications.\textsuperscript{135}

These four arguments highlight the key flaws of Justice Scalia’s \textit{faint-hearted} approach. In addition to Balkin’s criticism, it is important to point out that skyscraper originalism presumes the primacy of the courts in the process of constitutional interpretation. Justice Scalia, for example, tries to ground the need for these pragmatic exceptions in the judicial doctrine of \textit{stare decisis}.\textsuperscript{136} He explains that, “[t]he whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held true, all in the interests of stability.”\textsuperscript{137}

A court-centered theory grants exclusive authority to the federal courts at the expense of \textit{We the People} to build out the framework of government over time and to decide how to best fulfill the abstract commitments embodied in our Constitution. This is why Balkin’s theory of framework originalism relies on the process of political and social mobilizations,\textsuperscript{138} and other constitutional scholars, such as Cass Sunstein, embrace a Thayerian view of constitutional interpretation when distinguishing between the judicially enforceable constitution and the constitution that binds the political branches and citizens across the United States.\textsuperscript{139}

\textit{Stare decisis} is a doctrine of adjudication and not a principle of constitutional interpretation. It follows that carving out pragmatic exceptions to retain non-originalist precedents is not the right way of dealing with these so-called interpretive mistakes and questionable precedents. Courts should rely on how \textit{We the People} have construed the Constitution’s textual provisions in the context of constitutional politics when deciding whether to overrule or narrowly construe questionable precedents. This should be the thought process when considering the “interests of stability” in the doctrine of \textit{stare decisis}. The legitimacy of the Court depends on the realization that it is \textit{We the People} who truly decide to carry on the “Nation’s commitment to the rule of law.”\textsuperscript{140}

As the plurality opinion in \textit{Casey} stated regarding \textit{stare decisis}: “If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.”\textsuperscript{141} In other words, in order to restore the leading role of \textit{We the People} as interpreters of the Constitution, the adjudicatory doctrine of

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\textsuperscript{135} Dworkin, \textit{supra} note 87, at 126-27.
\textsuperscript{136} SCALIA, \textit{supra} note 64, at 139.
\textsuperscript{137} Id.
\textsuperscript{138} BALKIN, \textit{supra} note 2, at 30.
\textsuperscript{139} See generally SUNSTEIN, \textit{supra} note 113.
\textsuperscript{141} Id. at 868.
\end{flushleft}
**stare decisis** should follow the process of constitutional politics, and not the other way around.\(^{142}\) It seems clear that we have reached a point when the pragmatic exceptions in our political and legal tradition have started to swallow the *rule of conventional originalisms*. We have reached a point in which “the Constitution-in-practice [has become] further and further removed from what conservative originalism considers the legitimate basis of constitutional interpretation.”\(^ {143}\) As time goes on, we have become witnesses of the demise of skyscraper originalism.

In conclusion, Balkin did come to bury skyscraper originalism in order to demonstrate that the best form of originalism, framework originalism, provides an equal platform for both conservatives and liberals to build out the framework of government established in our Constitution. The demise of skyscraper originalism shows that it is an incomplete and restrictive theory for *We the People*, as well as revisionist, in terms of what constitutional fidelity requires. It is incomplete because it only recognizes the role of the constitutional designers as *We the People*, and restrictive because future generations are only able to provoke constitutional change through the complex process of an article V amendment. Finally, it is revisionist for purposes of constitutional fidelity because it rejects the central distinction between interpretation-as-ascertainment and interpretation-as-construction\(^ {144}\) and acknowledges the existence of a predetermined and inflexible framework of government that elicits serious problems of democratic legitimacy.\(^ {145}\)


**A. A Critique of Balkin's Method of Text and Principle**

The method of text and principle is the interpretive method of Balkin’s theory of framework originalism. It consists of determining whether the relevant textual provision is a concrete rule, a vague standard, or an abstract principle and treating them as such when engaging in constitutional construction. In other words, the method of text and principle asserts that fidelity to the constitutional framework requires us to be faithful to the semantic content of the text, as

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\(^{142}\) Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court, and to the system of law which it is our abiding mission to serve.”).

\(^{143}\) Balkin, *supra* note 10, at 821.

\(^{144}\) *Id.* at 826.

\(^{145}\) *Id.* at 830.
well as to the kind of language that it embodies (rule, standard, or principle). What Balkin refers to as applying whatever the text has to offer, Fleming calls it a moral reading of the Constitution.

Balkin’s interpretive method constitutes a moral reading of the Constitution because it refuses to recognize our constitutional scheme as a code of historical rules and practices, and instead identifies the aspirational nature of the scheme’s commitments. It is also a moral reading because “[t]o succeed as higher law, the Constitution must serve as a source of political and moral aspirations that critiques existing law and political arrangements and holds them to account.”

Balkin’s moral reading, unlike Dworkin’s, does not focus on deep discussions of political morality and legal philosophy. Instead, Balkin tries to show that a moral reading of the Constitution is firmly grounded in the Constitution’s text, history, and structure. The underlying reason for this difference is perhaps Balkin’s self-identification as a positivist and a historicist.

Fleming argues that, in reality, Balkin’s method of text and principle closely resembles Dworkin’s moral reading of the Constitution. Despite the positivist and protestant nature of Balkin’s theory, Fleming claims that both Balkin and Dworkin agree that “we have to make moral and political judgments concerning the best understanding of our commitments; [since] history alone does not make these judgments for us in rule-like fashion.” In addition, Fleming praises Balkin’s theory for being able to “skillfully weave[] together a constitutional historicism with an aspirational constitutionalism.” Fleming, however, criticizes Balkin for being “too bashful about his aspirational constitutionalism -framing it within a constitutional historicism- and therefore [leaving] unexplored the affinities between his own aspirationalism and more openly aspirational moral readings of the U.S. Constitution.”

While Fleming aptly points to certain similarities between Balkin and Dworkin’s moral readings of the Constitution, his criticism of the interpretive method of text and principle does not address Balkin’s own struggle in identifying the proper level of generality at which the constitutional text should be interpreted. If anything, Balkin is too vague as to the importance of constitutional historicism in determining whether the relevant textual provision is a rule, a standard, or a principle. Moral readers of the Constitution recognize the abstract

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146 Balkin, supra note 2, at 6-7.
147 Balkin, supra note 10, at 854. (emphasis added).
148 Id. at 855.
149 Id.
150 See id.
151 See Fleming, supra note 56.
152 Id. at 676.
153 Id. at 673 (citations omitted).
154 Id.
nature of the document’s commitments and emphasize the role for *We the People* to decide how to best fulfill those commitments. In order to do so, however, we still need to ascertain what kind of language is embodied in a particular textual provision. When answering this question, we must recognize the value of constitutional historicism over that of aspirational constitutionalism. So, while Fleming’s criticism might be perfectly reasonable as to Balkin’s theory of constitutional construction, I would argue that Balkin is too bashful about his constitutional historicism in the particular context of determining whether the relevant text offers a concrete rule, a vague standard, or an abstract principle.

Balkin claims that “[c]onstitutional fidelity is creative activity, not passive obedience.” This distinction, however, seems inapposite to a certain extent. Constitutional fidelity is certainly not passive obedience in the skyscraper originalist sense of embracing the original expected applications of the text. Nonetheless, it is passive obedience in the sense that in order to be faithful to the framework through creative activity, we must obey and respect what the text has to offer. Even Balkin recognizes that “the principles we derive from history must be at roughly the same level of abstraction as the text itself.” It follows that in the same way that living constitutionalism and originalism are “opposite sides of the same coin,” creative activity and passive obedience should also be intertwined in Balkin’s reclamation of constitutional fidelity.

In addition to the “abstract meaning fallacy” criticism by many skyscraper originalists, living constitutionalists have questioned the efficacy of Balkin’s somewhat vague attempt to deal with the perennial problem of identifying the proper level of generality in constitutional interpretation. Prominent living constitutionalist, David Strauss, argues that Balkin’s method of text and principle does not save originalism from this problem. Strauss argues that Balkin’s abstract originalism is highly “implausible” and “manipulable” because deciding “whether a provision is a rule, a standard, or a principle, usually cannot simply be determined from the text.” Instead, Strauss asserts that “[c]onstitutional provisions become rules, standards, or principles, depending on how the law develops.” In the same way that future generations are able to apply the constitutional text to their unique set of circumstances through an active process of constitutional constructions, Strauss contends that “[t]he same is true of where a

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155 *Id.* at 678 (describing how Balkin’s popular constitutionalism is a moral reading of the Constitution).
156 Balkin, *supra* note 10, at 820.
159 See McGinnis & Rappaport, *supra* note 66.
161 *Id.*
162 *Id.*
 provision falls on the continuum from highly determinate rules to open-ended standards.163

David Strauss’s criticism of Balkin’s interpretive method highlights the flaws of his common law approach. His common law method rejects the authoritative choices of the constitutional designers in framing the text, and hence does not require fidelity to the written Constitution.164 In this regard, Strauss’s view of the Constitution is in direct tension with Balkin’s theory of framework originalism. If we are to accept Balkin’s view of the Constitution as an established framework for government, we must rely on constitutional historicism to evaluate the designers’ deliberate choices in choosing between abstract, general principles or hard-wired rules.

Balkin claims that “historical research may also be necessary to determine whether a legal norm is a rule, standard, or principle.”165 The problem is that constitutional historicism in this particular context should not be a mere resource, but rather the primary tool for courts and for We the People to engage in constitutional construction. Constitutional historicism is essential for this task because the reason why we look, in the first place, at the kind of legal norm embodied in a constitutional provision is to ascertain the degree of discretion permissible for applying the text to a specific set of circumstances. The varying degrees of discretion that exist in the constitutional text, which is what gives birth to aspirational constitutionalism, result from the conscious and deliberate choices of the constitutional designers, or what Balkin refers to as “dead hands and delegations.”166

It is counterintuitive for We the People to engage in constitutional construction in order to ascertain the nature of the language that allows us to engage in said construction in the first place. For these reasons, it is imperative to look at the text and rely on constitutional historicism before we engage in constitutional constructions and embrace the kind of aspirational constitutionalism that Fleming would like to emphasize. Finally, it is important to understand that this kind of reliance on constitutional historicism to determine whether the relevant text is a hardwired rule or an abstract principle does not run afoul Fleming’s characterization of Balkin’s theory as a moral reading of the Constitution. Instead, relying on constitutional historicism in this narrow context shows liberals that “the [written] Constitution is more than the burdensome chains of ancient ancestors”167 and teaches conservatives that the “Constitution-in-practice” is well

163 Id.
164 Balkin, supra note 2, at 50-51.
165 Balkin, supra note 10, at 823 (emphasis added).
166 Balkin, supra note 2, at 41.
167 Balkin, supra note 10, at 877.
grounded in the text, history, and structure of the document, as well as deeply rooted in our constitutional tradition.\textsuperscript{168}

\textit{B. The Method of Text and Principle in Bolling v. Sharpe}

At the same time the Supreme Court decided the landmark school segregation case of \textit{Brown v. Board of Education},\textsuperscript{169} it decided the companion case of \textit{Bolling v. Sharpe}.\textsuperscript{170} In \textit{Bolling}, the plaintiffs challenged the constitutionality of the school segregation laws in the District of Columbia.\textsuperscript{171} Even though most conservative originalists have made their peace with the Warren Court’s decision in \textit{Brown}, the same cannot be said of \textit{Bolling}.\textsuperscript{172} The reason for this discrepancy is that originalists argue that the equal protection clause of the Fourteenth Amendment, under which \textit{Brown} had been decided, only applied to states, and thus could not be extended to the federal government and the District of Columbia.\textsuperscript{173} Nonetheless, Chief Justice Warren explained that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”\textsuperscript{174} As a result, the Court held that the Due Process Clause of the Fifth Amendment, which does apply to the federal government, contains a constitutional guarantee of equal protection that prohibited the District’s school segregation laws.\textsuperscript{175}

Skyscraper originalists, such as Robert Bork and Michael McConnell, argue that \textit{Bolling} was not grounded on any history or precedent, and “[h]ad the Court been guided by the Constitution, it would have had to rule that it had no power to strike down the District’s laws.”\textsuperscript{176} Moreover, they argue that because the Fourteenth Amendment includes both an equal protection and a Due Process Clause, the framers of the amendment “obviously underst[ood] that due process, the requirement of fair procedures, did not include the requirement of equal protection in the substance of state laws.”\textsuperscript{177} Robert Bork claims that \textit{Bolling} “was a clear rewriting of the Constitution by the Warren Court,” and that “however much one likes the result, [it] was a substantive due process decision in the same

\textsuperscript{168} Id. at 876.
\textsuperscript{171} Id.
\textsuperscript{172} BORK, supra note 53, at 81-83.
\textsuperscript{173} Id. at 83.
\textsuperscript{174} Bolling, 347 U.S. at 499.
\textsuperscript{175} Id.
\textsuperscript{177} BORK, supra note 53, at 83.
vein as *Dred Scott* and *Lochner.*"\(^{178}\) Bork’s *Lochnering* accusations reflect his clear support of skyscraper originalism’s original expected applications, and his rejection of the possibility for future generations to apply the text through constitutional construction. This reality can be better appreciated in Bork’s statement that while “it would be unthinkable that the states should be forbidden to segregate and the federal government allowed to,” it would be “as a matter of morality and of politics,” but not as a matter of constitutional law."\(^{179}\)

This approach can be easily contrasted with Balkin’s analysis of *Bolling* through the lens of his method of text and principle. The legal norms of “due process of law” and “equal protection of the laws” are examples of general, abstract principles in the Constitution.\(^{180}\) As such, we must look at constructions that match their level of generality. Balkin claims that “by the time the Fourteenth Amendment was ratified the concept of due process embodied in the Fifth Amendment required equality before the law and banned special, partial, or class legislation."\(^{181}\) Even though the *original semantic meaning* of procedural fairness today might seem to be unrelated to the substantive principle of equality, Balkin argues that “early nineteenth-century lawyers did not reason this way.”\(^{182}\) Furthermore, Balkin claims that the equal protection clause was added to the Fourteenth Amendment not because it was deemed redundant, but rather because “it was in part a clarifying gloss on the due process idea."\(^{183}\) Therefore, Balkin shows that *Bolling* might be easily justified by nineteenth-century constructions of the text, as opposed to the seemingly popular, and somewhat controversial, idea that “the Fifth Amendment’s [D]ue [P]rocess [C]lause somehow ‘incorporates’ the Fourteenth Amendment’s equal protection clause."\(^{184}\)

Balkin’s analysis of *Bolling* teaches us two things. First, it shows that even though we are not bound by the constitutional constructions of the framers and their original expected applications of the text, we can choose those constructions that best fit our current expectations of how to develop the “larger constitutional plan."\(^{185}\) If anything, Balkin’s use of history as a *resource* as opposed to a *command* demonstrates that the due process clause in the Fifth Amendment “can easily bear this construction, for it was widely held throughout the nineteenth century."\(^{186}\) Second, Balkin’s method of text and principle teaches liberal constitutionalists, such as David Strauss, that “originalism is their friend, not

\(^{178}\) Id.

\(^{179}\) Id.

\(^{180}\) BALKIN, supra note 2, at 250-51.

\(^{181}\) Id.

\(^{182}\) Id. at 251.

\(^{183}\) Id. at 252 (quoting Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 772 (1999)).

\(^{184}\) Id. at 254 (citations omitted).

\(^{185}\) Id.

\(^{186}\) Id.
their enemy; and the Constitution and its text, its history, and its structure really is on their side.\textsuperscript{187}

\textbf{Conclusion}

Jack Balkin’s theory of framework originalism reclaims constitutional fidelity for \textit{We the People} in various ways. First, it recognizes the Constitution as a framework for government and a platform for constitutional politics that allows both liberals and conservatives to persuade each other regarding the best ways to fulfill the document’s purpose and commitments. Second, it acknowledges the fact that \textit{We the People} not only includes the constitutional designers, but also those of us who embrace our responsibility to build out the Constitution’s framework over time. Third, it embraces a moral reading of the Constitution that properly reconciles the best forms of originalism and living constitutionalism, while highlighting the demise of skyscraper originalism. Finally, it places the primary responsibility of constitutional interpretation and redemption on the average person, rather than on the courts.

The theory’s constitutional historicism is essential in determining whether the relevant textual provision is a hardwired rule or an abstract principle. This allows us to be faithful to the designers’ deliberate choices in framing the Constitution. This loyalty is what allows us to take fidelity seriously and to acknowledge the theory’s aspirational constitutionalism that characterizes Balkin’s method of text and principle as a moral reading of the Constitution. In conclusion, framework originalism is a theory of abstract originalism for \textit{We the People} because it invites us to take the Constitution’s text and commitments seriously and to “stop worshiping at the shrine of judicial idolatry.”\textsuperscript{188} This is a lesson that both liberals and conservatives must learn in order to successfully redeem the Constitution and make it “our law.”

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\begin{footnotes}{187}{Balkin, supra note 10, at 876.}
\begin{footnotes}{188}{Id. at 877.}
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