

THE CONSTITUTION CAN DO NO WRONG

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Preserving constitutional legitimacy by holding that constitutional text can be “redeemed” from incorrect perceptions is an important theme in Jack Balkin’s Living Originalism. That premise stems from the text’s reference to a “more perfect union,” which encompasses an ideal that sits above doctrines of the U.S. Supreme Court at any given time. This piece explores the concept of redemption by drawing comparisons between our constitutional text and the British Crown, with a special emphasis on the influential English journalist, Walter Bagehot, and his work, The English Constitution. Exploring Bagehot’s analysis of the British Crown reveals an infallibility principle similar to the constitutional text. The infallibility principle empowers government by preserving reverence. It also provides a fiction whereby the Supreme Court can make errors, but the constitutional text itself remains flawless. The comparison between the British Crown and the Constitution leads to three consequences emanating from the presumption that the Constitution “can do no wrong.” First, some things are too awful to be constitutional. Second, some things are too awful to have been constitutional. And third, some things about the Constitution are too sensitive to discuss in public. These interpretive principles exemplify the role that legal fictions must play in successful constitutionalism.

We must find a way to take an appeal from the Supreme Court to
the Constitution itself.¹
Franklin D. Roosevelt

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1. Franklin D. Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary, in 1 PUB. PAPERS 122, 126 (Mar. 9, 1937).

An important theme of Jack Balkin's book, *Living Originalism*, is that constitutional legitimacy is sustained by the belief that the text can be redeemed from incorrect interpretations.² In fact, the idea is so crucial to Balkin's project that he is publishing another book entitled *Constitutional Redemption*³ that coincides with *Living Originalism*'s release. The premise behind this constitutional faith is that there is a Platonic Constitution, which is suggested by the text's reference to "a more perfect union," that sits above the doctrine that is enforced at any given time by the Supreme Court.⁴

My Article probes this infallibility principle and its effect on constitutional theory and practice. Walter Bagehot, the influential English journalist, explained long ago that all constitutions require untouchable institutions that "excite and preserve the reverence of the population" and thereby give the government its authority.⁵ In England, that "dignified" function was performed by the Crown, as exemplified by the common-law maxim that "the king can do no wrong."⁶ The constitutional text is the equivalent legal fiction in the United States, which means that while the Supreme Court can make errors without undermining constitutional legitimacy, any claim that the Constitution itself is flawed is fraught with peril.⁷

2. See JACK M. BALKIN, *LIVING ORIGINALISM* 4 (2011) ("[F]idelity to the constitutional project—and to the Constitution itself—requires faith that the Constitution can and will eventually be redeemed. Fidelity to the Constitution requires that we believe that the project is worth continuing and struggling over, even if we also believe that many current interpretations are wrong or misguided.")

3. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

4. See U.S. CONST. pmbl. Sanford Levinson, who coined the term "constitutional faith," used a weaker presumption of infallibility than I do. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 193 (1988) [hereinafter LEVINSON, FAITH] ("[W]hat makes my faith assertion only a limited one is the recognition that even my 'best' Constitution might at times come into conflict with what I regard as my most important moral commitments; under such circumstances, it would be the Constitution that (I hope) would give way."). Levinson subsequently abandoned his faith in the text because of its structural flaws. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 3–5 (2006) (explaining his loss of faith).

5. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 4–5 (1867). The citations to Bagehot that have ordinary page numbers come from the first edition of *The English Constitution*, which was published in 1867. The citations to Bagehot with roman numerals come from his introduction to the second edition, which came out in 1872. See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (2d ed. 1872).

6. See *id.* at 57 ("The use of the Queen, in a dignified capacity, is incalculable. Without her in England, the present English Government would fail and pass away." (alteration in original)); see also *id.* at 4–7 (defining dignified institutions); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *30 (stating the common-law maxim).

7. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 31 (2d ed. 1986) ("With us the symbol of nationhood, of continuity, of unity and common purpose, is, of course, the Constitution, without particular reference to what exactly it means Britain—the United Kingdom, and perhaps even the Commonwealth—is the most potent historical demonstration of the efficaciousness of a symbol, made concrete in the person of the Crown."); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 996–97 (2009) ("I contend that the fictions composing the myth of the written Constitution usefully help to

There are three consequences that follow from the strong presumption that the Constitution can do no wrong. First, some things are too awful to be constitutional. In other words, if a consensus exists that a practice is unjust, courts and scholars find it very hard to argue that a correct interpretation of the text permits that practice.⁸ Second, some things are too awful to have been constitutional. Policies that were once common, most notably racial segregation, are now seen as so noxious that acknowledging they were valid under any interpretative view is impossible for officials or commentators with a normative agenda.⁹ Lastly, some things about the Constitution are too sensitive to discuss in public. Bagehot's most famous claim about the Crown was that its pristine image could be protected only by opaqueness—that “[w]e must not let in daylight upon magic.”¹⁰ The same concern helps explain why the Justices are unwilling to permit televised oral argument, allow the disclosure of their internal deliberations, or go beyond platitudes during their confirmation hearings.

Part I outlines Bagehot's analysis of the Crown and explains that the constitutional text serves as the repository of dignified power in the United States. Part II contends that the strongest constraint on legal actors is that they must not stain the Constitution.

legitimate and stabilize the legal regime itself.”); see generally LON L. FULLER, LEGAL FICTIONS 49–92 (1967) (giving an overview of why legal systems use fictions). The fact that the text says that it is not perfect, see *supra* text accompanying note 4, does not alter the fact that the text is usually construed as perfect. At the Symposium, Sandy Levinson observed that state constitutions do not have any mystical properties. True enough, though I wonder whether that was the case prior to 1787. In any event, Bagehot was using “constitution” in a broad sense, and thus one can look outside the written text to tradition, history, or other institutions as the source of constitutional legitimacy.

8. See BALKIN, *supra* note 2, at 284 (“When most states have adopted a social policy, the Supreme Court tends to ratify these dominant values in new constitutional constructions.”); see also *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977) (invalidating a state law that imposed the death penalty for rape in part because no other state used that punishment for rape of an adult woman); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (striking down a state law barring the sale of contraceptives in part because it was one of only two statutes of its kind in the United States). Cf. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981) (“Virtually every adherent to the ‘due substance’ school of judicial review shares in whole or in large part a critical culture theme, to borrow a phrase from cultural anthropology: that of ‘Our perfect Constitution.’”).

9. In other words, a historian can say that *Plessy v. Ferguson* was decided correctly because the opinion reflected the racial sentiments of the 1890s. No judge or contemporary theorist would dare to make such a claim. While Balkin admits that “[a] system of framework originalism and living constitutionalism may be democratically legitimate and still produce or countenance very unjust results that well-trained lawyers can defend using plausible legal arguments,” BALKIN, *supra* note 2, at 337, he does not identify any major cases that are now deemed erroneous but were right under framework originalism because they were the product of a winning social movement. That omission is essential because such a specific statement would undermine support for Balkin's theory. See *infra* text accompanying notes 62–65.

10. BAGEHOT, *supra* note 5, at 86.

I. THE CROWN AND THE TEXT

It is ironic that a journalist wrote one of the most thoughtful books on constitutional law. Walter Bagehot's *The English Constitution* is a classic study of the parliamentary system during the 1860s, but his work is timeless due to its emphasis on function over form.¹¹ While *The Federalist* was the first modern study on how constitutions should be organized, *The English Constitution* was the first to ask why people obey their constitutions.¹² The latter question is more important for interpretation, as scholars and judges try to explain the legitimacy of enforcing commands ratified long ago.¹³ Bagehot's explanation was that a legal fiction was required to support constitutionalism, and that the Crown played that vital role in Britain.¹⁴ When his description of how a dignified fiction operates is compared to our legal culture, the most logical conclusion is that the constitutional text serves as our version of the Crown.¹⁵

A. *Dignity and Monarchy*

Bagehot's thesis was that there is a distinction between how a constitution functions and how it is described, that is essential for its success. To explain this claim, he distinguished between two parts of a constitution: "[F]irst, those which excite and preserve the reverence of the population,—the *dignified* parts, if I may so call them; and next, the *efficient* parts—those by which it, in fact, works and rules."¹⁶ Separating these two parts is necessary because "[t]here are two great objects which every constitution must attain to be successful . . . every constitution must first *gain* authority, and then *use* authority; it must first win the loyalty and

11. Bagehot is best known as the founding editor of *The Economist* magazine. See Adam Tomkins, *The Republican Monarchy Revisited*, 19 CONST. COMMENT. 737, 742 (2002) (reviewing BAGEHOT, *supra* note 5).

12. The Framers were aware of this legitimacy problem, but they did not need to spend much time worrying about it. First, the leaders of the 1787 Philadelphia Convention possessed charismatic authority based on their role in the Revolution. Second, there was a consensus in the United States that popular ratification by state conventions would make the Constitution binding. See THE FEDERALIST NO. 40, at 263 (James Madison) (Jacob E. Cooke ed., 1961) (stating that the objections to the ratification requirement of Article Seven were "the least urged in the publications which have swarmed against the Convention").

13. See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 168–69 (2008) (summarizing the "dead-hand" problem).

14. Compare HENRY SUMNER MAINE: ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 26 (4th ed. 1870) ("I now employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."), with FULLER, *supra* note 7, at 6 (contending that a fiction "was not intended to deceive and did not deceive anyone"). Bagehot's view was closer to Fuller's in that they both saw fictions as a persuasive device in some situations. See *infra* text accompanying notes 36–38.

15. Cf. Max Lerner, *Constitution and Court As Symbols*, 46 YALE L.J. 1290, 1294 (1937) ("Every tribe needs its totem and its fetish, and the Constitution is ours.")

16. BAGEHOT, *supra* note 5, at 4–5; see also Edward S. Corwin, *The Constitution As Instrument and As Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936) (drawing a similar distinction using different terminology).

confidence of mankind, and then employ that homage in the work of government.”¹⁷ Bagehot stated that the dignified parts of a constitution are what give government “its motive power,” and that scholars are mistaken when they call those institutions useless or try to make up reasons why they are still important in formulating policy.¹⁸

The reason why Bagehot thought dignified bodies are required to sustain constitutionalism is that people are fools and respond only to institutions with a special aura.¹⁹ In delightfully candid language, he explained that “[a]s a theoretical writer I can venture to say, what no elected member of Parliament, Conservative or Liberal, can venture to say, that I am exceedingly afraid of the ignorant multitude of the new constituencies.”²⁰ Ordinary people “are uninterested in the plain, palpable ends of government,” yet they “will sacrifice all they hope for, all they have, *themselves*, for what is called an idea—for some attraction which seems to transcend reality, which aspires to elevate men by an interest higher, deeper, wider than that of ordinary life.”²¹ This kind of reverence cannot be manufactured out of whole cloth; it has to draw upon tradition, religious feeling, or something else that is sacred.²²

Bagehot believed that the Crown (and to a lesser extent the House of Lords) served this transcendental function for Britain.²³ In part this was because the monarch led the Anglican Church, but the Crown was also a fine dignified institution because it was venerable and embodied in national tradition.²⁴ Since the Crown’s mystical status was critical for the legitimacy of the state, Bagehot argued that “[i]t should be evident that [it] does no wrong.”²⁵ Transparency into its inner workings is evil be-

17. BAGEHOT, *supra* note 5, at 5.

18. *See id.* (“There are indeed practical men who reject the dignified parts of government. . . . [O]ther reasoners, who distrust this bare philosophy, have propounded subtle arguments to prove that these dignified parts of old governments are cardinal components of the essential apparatus, great pivots of substantial utility; and so manufactured fallacies which the plainer school have well exposed. But both schools are in error.”).

19. For some examples of Bagehot’s attitudes, see *id.* at 7 (“The lower orders, the middle orders, are still, when tried by what is the standard of the educated ‘ten thousand,’ narrow-minded, unintelligent, incurious.”); *id.* at xiii (“[Voters] were competent to decide an issue selected by the higher classes, but they were incompetent to do more.”).

20. *Id.* at xxvii. This comment was in response to the Second Reform Act of 1867, which expanded male suffrage. *See id.* at x–xxiv (discussing the Act).

21. *Id.* at 8–9.

22. *See id.* at 4 (“The mystic reverence, the religious allegiance, which are essential to a true monarchy, are imaginative sentiments that no legislature can manufacture in any people.”); *id.* at 9 (“Other things being equal, yesterday’s institutions are by far the best for [today]; they are the most ready, the most influential, the most easy to get obeyed, the most likely to retain the reverence which they alone inherit, and which every other must win.”).

23. *See id.* at 70 (“The nation is divided into parties, but the Crown is of no party.”); *id.* at 118 (“The use of the House of Lords—or, rather, of the Order of the Lords in its dignified capacity—is very great. It does not attract so much reverence as the Queen, but it attracts very much.”).

24. *See id.* at 61 (“The characteristic of the English Monarchy is that it retains the feelings by which the heroic kings governed their rude age”); *id.* at 63–64 (“The English Monarchy strengthens our government with the strength of religion.”).

25. *Id.* at 70.

cause “royalty is to be revered, and if you begin to poke about it you cannot reverence it. When there is a select committee on the Queen, the charm of royalty will be gone. Its mystery is its life.”²⁶ While that kind of secrecy cannot be reconciled with democratic self-government, Bagehot contended that democracy and constitutionalism are different.²⁷

Americans accept this distinction because of judicial review, but Bagehot came at the problem from a different angle, which is worth thinking about. He said that the necessity of legal fictions was what separated constitutionalism from democracy.²⁸ Even while conceding that “[i]n the bare superficial theory of free institutions” the need for fictions or legitimating myths “is undoubtedly a defect,” he claimed that “it is a defect incident to a civilisation such as ours, where august and therefore unknown powers are needed, as well as known and serviceable powers.”²⁹ In other words, transparency is a necessity for the efficient institutions that govern but not for the dignified ones that are the source of that power.

Bagehot’s defense of legal fictions is rare in the annals of jurisprudence and stands in stark contrast to Sir Henry Maine’s view of the subject, which proved influential and was written at about the same time.³⁰ Maine argued that legal fictions are the hallmark of a primitive society.³¹ They are useful there because “[t]hey satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.”³² Nonetheless, Maine said that it would be “foolish to agree with those theorists who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system.”³³ This encapsulates the disdain that most lawyers have for fictions.³⁴ But Bagehot was not a lawyer, and that out-

26. *Id.* at 85–86.

27. *Id.*

28. *See id.* at 85 (“All the acts of every administration are to be canvassed by it; it is to watch if such acts seem good, and in some manner or other to interpose if they seem not good. But it cannot judge if it is to be kept in ignorance; it cannot interpose if it does not know. A secret prerogative is an anomaly—perhaps the greatest of anomalies. That secrecy is, however, essential to the utility of English royalty as it now is.”).

29. *Id.* at 85–86.

30. Maine’s *Ancient Law* was published just six years before the first edition of *The English Constitution*. *See* MAINE, *supra* note 14.

31. *See id.* at 26 (“It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society.”); *cf.* ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 294–95 (1941) (noting that law resorts “to fiction to explain facts where modern learning would resort to facts to clarify fictions”).

32. MAINE, *supra* note 14, at 26.

33. *Id.* at 27.

34. *See id.* (“[T]here can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction.”); *see also* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1803 (2007) (arguing that fictions in constitutional law were the result of a “formalist legal culture that refused to reform itself”).

sider's perspective shaped his argument that constitutions needed fictions to prosper.³⁵

Perhaps the best explanation of Bagehot's position comes from Lon Fuller's concept of an emotive legal fiction.³⁶ Fuller argued that some metaphors are just convenient shorthand for complex ideas, but others are persuasive devices designed "to induce conviction that a given legal result is just and proper."³⁷ Likewise, he contended that historical fiction is often a result of emotional conservatism, which is an "obscurely felt judgment that stability is so precious a thing that even the *form* of stability, its empty shadow, has a value."³⁸ While Fuller did not salute fictions in the way that Bagehot did, his explanation of why the legal system resorts to them resonates with the analysis in *The English Constitution* that some sort of mystical or magical quality is necessary to support higher law.

B. *The Constitutional Text As a Legal Fiction*

The most obvious issue raised by Bagehot's framework is whether there is a dignified institution in the United States.³⁹ An answer, ironically enough, can be found in Bagehot's book, though he did not grasp its significance. In passing, he talked about Article V and about how hard it is to enact constitutional amendments (in contrast to what he saw as the superior, uncodified British system):

Every alteration . . . must be sanctioned by a complicated proportion of States or legislatures. The consequence is that the most obvious evils cannot be quickly remedied; that the most absurd fictions must be framed to evade the plain sense of mischievous clauses; that a clumsy working and curious technicality mark the politics of a rough and ready people. The practical arguments and the legal disquisitions in America are often like those of trustees carrying out a misdrawn will—the sense of what they mean is good, but it can never be worked out fully or defended simply, so hampered is it by the old words of an odd testament.⁴⁰

This passage expresses a common criticism of constitutional law, but the phrase that leaps from the page is "absurd fictions." Bagehot saw that

35. Bagehot's defense of fictions relied on the view that the masses were ignorant, and thus one could say that there was no inconsistency between his view and Maine's. My view, however, is that Bagehot's argument about the need for a dignified constitutional force does not require an assumption of popular stupidity. See *infra* text accompanying note 47.

36. See FULLER, *supra* note 7, at 53 ("In dealing with the motives for the fiction, probably the most fundamental distinction we can make is between expository and emotive fictions.")

37. *Id.* at 54.

38. *Id.* at 58.

39. In *Federalist No. 49*, Madison made the argument that frequent revisions of the constitutional text "would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." THE FEDERALIST NO. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

40. BAGEHOT, *supra* note 5, at 268.

the actual (or, to use his term, efficient) work of governing is not usually done by the text. Presumably, he felt that relying on fictions to overcome those textual flaws was absurd, because the text served no useful purpose. The Crown, by contrast, was not an absurd fiction because it was the dignified linchpin of the state. What Bagehot did not consider was whether the text served the same purpose in the United States.

In fact, our constitutional text possesses many of the qualities that Bagehot associated with dignified institutions. For instance, Bagehot said that “[t]he elements which excite the most easy reverence will be the *theatrical* elements; those which appeal to the senses, which claim to be embodiments of the greatest human ideas—which boast in some cases far more than human origin.”⁴¹ That is a terrific description of how many people think of the Constitution and its Framers.⁴² Next, Bagehot said that a legitimating force must be “mystic in its claims,” “occult in its mode of action,” and “brilliant to the eye,” which are all phrases that fit rather well with the text and the way in which the Supreme Court engages in interpretation.⁴³ Even more important is his concept that a dignified institution must be “intelligible” so that “[t]he mass of mankind understand it.”⁴⁴ The absolute rule of one person meets this test, but so does a brief text that anyone can read and carry in a pocket. Furthermore, Bagehot held that “[o]ther things being equal, yesterday’s institutions are by far . . . the most likely to retain the reverence which they alone inherit, and which every other must win.”⁴⁵ Most of the Constitution is, of course, quite old. Last but not least, he said the dignified Crown is a disguise that “enables our real rulers to change without heedless people knowing it.”⁴⁶ If you change the word “rulers” to “rules,” then the text can be seen as a similar disguise that permits broad constitutional change.

The main obstacle to a conclusion that the text is a dignified force is Bagehot’s view that transcendent values appeal only to the uneducated,

41. *Id.* at 9.

42. *See, e.g.*, LEVINSON, FAITH, *supra* note 4, at 14 (“[T]he belief in some kind of transcendent origin of the Constitution obviously contributes to according it utmost devotion.”); *id.* at 14–15 (collecting statements supporting this view); *cf.* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 3, 11–12 (Paul Leicester Ford ed., 1905) (criticizing the fact that “[s]ome men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it.”).

43. BAGEHOT, *supra* note 5, at 9; *see also infra* text accompanying note 65.

44. BAGEHOT, *supra* note 5, at 57.

45. *Id.* at 10. Bagehot noted that there is a mutually exclusive relationship between constitutional dignity and efficiency, because “[t]he most imposing institutions of mankind are the oldest; and yet so changing is the world—so fluctuating are its needs, so apt to lose inward force, though retaining outward strength . . . we must not expect the oldest institutions to be now the most efficient.” *Id.* at 10–11. The eighteenth century text exemplifies this adage.

46. *Id.* at 80. In other words, a queen can have many prime ministers.

but in this respect he was simply wrong.⁴⁷ Americans proudly define themselves through their commitment to a creed of liberty and equality: those who died to further those ends were not doing so out of ignorance. And the most concrete expression of our ideals is the canonical constitutional texts which are on display in the National Archives as if they are holy relics. The Constitution is also central to our civic order because we do not have a common ethnicity, language, or other intrinsic bond that forges our national identity, but once again that is not due to a lack of collective intelligence. In sum, Bagehot's perceptive analysis of dignified constitutionalism stands despite his inadequate explanation for its existence.⁴⁸

Thus, there are good reasons to view the text of the Constitution as the U.S. equivalent of the Crown. The next question is what impact that belief has on interpretive theory and practice.

II. INTERPRETIVE CONSEQUENCES

This Part examines the operational effect of thinking that the text is mainly a dignified source of authority.⁴⁹ The chief point that follows from that conclusion is that the text must be seen as perfect. Bagehot insisted that the Crown should be conceptualized as flawless and “not be brought too closely to real measurement.”⁵⁰ It turns out that the major players in our legal system adhere to this infallibility principle with respect to the text. The best statement of that concept is that: (1) some things are too awful to be constitutional, (2) some things are too awful to have ever been constitutional, and (3) some things about the Constitution are too sensitive to discuss publicly.

A. *Too Awful to Be Constitutional*

If the Constitution is the chief source of legitimacy in the United States, then public officials and commentators should be very reluctant to say that practices widely seen as unjust are constitutional. There is, of course, plenty of room for disagreement about the merits of different policies. Once a consensus is forged, however, there is enormous pressure to say that this position is in the text even when it is not. Henry M.

47. See Pettys, *supra* note 7, at 1029–48 (offering a more detailed analysis of why the myth of written constitutionalism is necessary for self-government).

48. It is not clear that Bagehot's description was accurate in his time. It seems likely that many aristocrats and other highly educated people in Victorian Britain believed in the ideals represented by the Crown; they were probably not all cynics who just endorsed the monarchy as a smoke screen.

49. I am not suggesting that the text has no functional importance. The areas where the text states a rule that is widely seen as wrong, though, are few and far between and do not inflict much damage on constitutional legitimacy. Perhaps the best example is the rule that only natural-born citizens can be President. See U.S. CONST. art. II, § 1, cl. 5. Almost no one defends this rule, but at the same time it does not cause lawyers to lose much sleep.

50. BAGEHOT, *supra* note 5, at 70.

Monaghan once explained that “[p]erfectionism requires the continuous reformulation of the minimum ideal norms of the polity, and the continuous application of the norms to varying circumstances. . . . Otherwise, the [C]onstitution might begin to show the hallmarks of a less-than-perfect document.”⁵¹ This prediction comports with the empirical observation that the Supreme Court’s “decisions tend to converge with the considered judgment of the American people.”⁵² To the extent that the Justices try to justify this convergence (as opposed to pretending that it is a coincidence), they sometimes invoke the notion of a living tradition,⁵³ sometimes look to contemporary state law for guidance,⁵⁴ and sometimes characterize changes in values as changes in facts.⁵⁵

The fact that the Constitution maintains its perfection by responding to popular and elite opinion is something that Balkin celebrates, but that malleability poses a major problem for what he calls “original expected application.”⁵⁶ Many social practices that we consider essential to freedom or equality do not match the views of those who wrote the Bill of Rights or the Fourteenth Amendment. While some originalists stick to their guns and argue that we cannot deviate from the original expected application in those cases, most follow Justice Scalia’s attitude of “faint-hearted” originalism.⁵⁷ This means that well-settled precedents contrary to that kind of originalist evidence should nonetheless be retained and

51. Monaghan, *supra* note 8, at 390–91; *see id.* at 358 (stating that, for many scholars, “the constitution is not Perfect with a capital ‘P’; it is, however, perfect in the more limited sense that a necessary link is asserted between the constitution and currently ‘valid’ notions of rights, equality and distributive justice. The constitution is, in sum, ‘perfect’ with a small ‘p.’”). I am not saying that every widely condemned practice thus becomes unconstitutional. Indeed, free speech is one area where lawyers take pride in protecting thoughts that they hate. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (holding that antigay protestors at military funerals are shielded by the First Amendment from state tort damages).

52. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) (encapsulating the thesis of his book); *see also* Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) (“*Heller’s* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”).

53. For the classic exposition, see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”).

54. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564–68 (2005) (looking at state statutes for guidance before striking down the death penalty for minors); *Atkins v. Virginia*, 536 U.S. 304, 312–16 (2002) (relying in part on the collective views of state legislation to invalidate capital punishment for the mentally retarded).

55. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 862 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (explaining the demise of the liberty of contract as based on a factual change).

56. *See* BALKIN, *supra* note 2, at 7 (“Original expected application asks 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).”); *id.* at 4 (praising “the work of the many political and social movements that have transformed our understandings of the Constitution’s guarantees”).

57. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–64 (1989) (describing his approach).

respected.⁵⁸ Stare decisis preserves the Constitution's immaculateness for expected-application originalists by allowing them to accept decisions that are popular and put the blame on the Court for distorting the text's true meaning.⁵⁹

B. *Too Awful to Have Ever Been Constitutional*

The other side of the coin is that maintaining an unblemished Constitution sometimes requires us to say that doctrines with broad support in the past must have been incorrect from day one.⁶⁰ In this respect, constitutional law is not like science. Scientists at one time or another held beliefs that we now think are false (e.g., the sun revolves around the earth), but nobody concludes from these mistakes that the scientific method is wrong. Instead, we think that knowledge advances towards some ideal of truth. The constitutional text does evolve that way via Article V amendments that repudiate evil constructions, but when it comes to reforms undertaken through a new reading of the existing text, that cognitive leap is elusive.⁶¹ People just have a hard time swallowing the idea that the same equal protection clause that we have now could have tolerated segregation. That is not a sign of textual perfection.

The need to condemn retroactively some constitutional results is a problem for framework originalists and living constitutionalists.⁶² One understanding of Balkin's approach is that the rogue's gallery of Court decisions (e.g., *Plessy v. Ferguson*⁶³ or *Buck v. Bell*⁶⁴) were right at the time since they reflected a consensus of popular and elite opinion about race or eugenics. Indeed, one could go further and say that the best example of constitutional faith in our history was the decision by racist white Southerners to ratify the Fourteenth Amendment in 1868. Some might well see that choice as illegitimate because the South was com-

58. See Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 139 (Amy Gutmann ed., 1997) (stating that the purpose of stare decisis is "to make us say that what is false under proper analysis must nonetheless be held true, all in the interest of stability").

59. See BALKIN, *supra* note 2, at 8 ("Scalia's originalism must be 'faint-hearted' precisely because he has chosen an unrealistic and impractical principle of construction, which he must repeatedly leaven with respect for precedent and other prudential considerations. The basic problem with looking to original expected application for guidance is that is inconsistent with so much of our existing constitutional traditions.").

60. See BALKIN, *supra* note 3, at 174–225 (elaborating on this theme).

61. In other words, people understand that the 1787 Constitution permitted slavery within the United States. That does not pose a problem for the current legitimacy of the text, though, because of the Thirteenth Amendment.

62. To be fair, this is also a problem for expected-application originalists. It explains why they work so diligently to say that the Fourteenth Amendment's Framers wanted to prohibit racial segregation. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131–40 (1995). Saying that *Brown v. Board of Education* was wrong but should be nonetheless be retained on stare decisis grounds is not an acceptable answer.

63. 163 U.S. 537 (1896).

64. 274 U.S. 200 (1927).

pelled to ratify the Amendment in order to end its occupation by Union troops. But framework originalism makes it plain that this exercise in constitutionalism was valid because racists could take a leap of faith that in time the Reconstruction Amendments could be improved and made consistent with the true constitutional principle of white supremacy; a dream that was achieved from the perspective of, say, 1910. That kind of concession just cannot be made because of the perfectionism constraint. Just as expected-application originalists use *stare decisis* to bridge the gap between the imaginary Constitution and the real one, proponents of a more flexible reading use the idea of wrong *ab initio* to achieve the same goal.

C. *Ritual and Pomp*

The final consequence of the Constitution's dignified status relates to the way in which the Justices do their work. The illusion of flawlessness cannot survive close scrutiny. In one sense, the Court's application of the Constitution is more accessible than that of the other branches, as the Justices must explain the reasons for their decisions in a way that Congress or the President do not have to. Most of the Court's process, though, is shrouded in mystery just as the Crown is (the Queen, for example, never gives interviews). Oral arguments are not televised, no explanation is given for the denial of certiorari, the notes of the Justices' conference are kept secret for years, and judicial nominees are notoriously vague in their confirmation hearings.

All of this opaqueness is at odds with ordinary standards, but we tolerate these customs largely because of the distinction between democracy and constitutionalism that Bagehot identified.⁶⁵ The legal fiction of the text must be maintained even if that harms other values. This raises a rather interesting question that most scholars do not ask; namely: how would increasing the Court's transparency influence the content of its decisions? The only point of comparison is Chief Justice John Marshall's move to end the practice of issuing opinions *seriatim*, which decreased the public's view of the Court's divisions and ended up enhancing its authority.⁶⁶ There is probably no political valence to the link between transparency and substance, but that is not clear and should be examined more thoroughly.

In sum, lawyers often act as if the Constitution is a religious text. And the maintenance of its sanctity is the only real constraint on what the Supreme Court and theorists like Balkin do.

65. See *supra* text accompanying notes 28–30.

66. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 292–93 (1996) (describing this change from English practice); see also *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801) (marking the start of issuing an “Opinion of the Court”).

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III. CONCLUSION

We are trained to look behind the forms of legal action to see what is really going on. Maybe it is time for us to think more about what the constitutional façade must look like to make our law work. Function sometimes follows form.

