

THE ABSTRACT MEANING FALLACY

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*This Article, which is part of a symposium on Jack Balkin's book, *Living Originalism*, criticizes the principal method that is used to argue that originalism allows modern interpreters significant discretion. The key move in this argument occurs when an interpreter claims that possibly abstract constitutional language has an abstract meaning. Clauses with abstract meanings allow interpreters to exercise significant discretion over their content. Consequently, interpreters can claim to find modern values in these clauses and still argue that they are respecting the original meaning.*

We examine this interpretive move and argue that two well-known theorists who employ it, Ronald Dworkin and Jack Balkin, commit a fallacy—what we term “the abstract meaning fallacy.” This fallacy occurs when interpreters conclude that possibly abstract language has an abstract meaning without sufficiently considering the alternative possibilities. While possibly abstract language might turn out to have an abstract meaning, this result does not exhaust the interpretive possibilities. As we show with examples, the better interpretation of such language considered in context might turn out to have either a concrete meaning or a general meaning that is not abstract.

Ronald Dworkin is not himself an originalist, but he argues that an originalist methodology should lead to abstract interpretations. Unfortunately, Dworkin consistently assumes an abstract meaning without closely examining other possible historical meanings.

Jack Balkin makes a variety of more complex arguments but also commits the abstract meaning fallacy. Balkin attempts to support his preference for abstract interpretations by claiming that many constitutional provisions take the form of open-ended principles that allow modern interpreters significant discretion. But Balkin presents little evidence that the Framers embraced such a distinctive method of writing and interpreting a constitution. Balkin also claims that ab-

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stract constitutional provisions are necessary to enable politics by allowing political processes to give content to the values that the abstract provisions leave open. But provisions as abstract as he prefers are not necessary to politics because nonabstract provisions can also allow a significant political sphere. Further, Balkin attempts to support his approach with normative arguments. But Balkin's normative vision does not comport with that of the actual Constitution and, in our view, is normatively unattractive. Thus, Balkin is no more successful than Dworkin in showing that originalism can be collapsed into living constitutionalism.

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Originalism is a powerful idea. While not all constitutional interpreters are originalists, there is great intuitive appeal to the idea that the Constitution should be given its original meaning. For that reason, one of the most effective rebuttals to standard originalism has been to argue, not that originalism is wrong, but rather that originalism does not prevent modern interpreters from exercising significant discretion over the Constitution's meaning.

The principal method for arguing that originalism allows modern interpreters significant discretion is to claim that the Constitution includes clauses that have an abstract original meaning. Because these abstract clauses do not have a more specific meaning, interpreters can exercise

significant discretion over their content to further modern values. Yet, they can still claim not to have violated the original meaning.

The key move in this argument occurs when the interpreter claims that possibly abstract constitutional language has an abstract meaning. In this Article, we examine this move and argue that theorists who employ it frequently commit a fallacy—what we term “the abstract meaning fallacy.” This fallacy occurs when interpreters conclude that possibly abstract language has an abstract meaning without sufficiently considering and weighing the alternative possibilities. While *possibly* abstract language might turn out to have an abstract meaning, this result does not exhaust the interpretive possibilities. Such language might turn out to have either a concrete or a general meaning that is not abstract.

Different scholars commit this fallacy in different ways—with some scholars too quickly reading constitutional language to have an abstract meaning and other scholars viewing the history in the same manner, but the error and the result remains the same—the Constitution’s original meaning is mistakenly interpreted to allow modern interpreters more discretion than it actually does. It is, of course, understandable that scholars who favor abstract meanings would find such interpretations attractive. But correct constitutional interpretation must turn, not on the current political desires of the interpreters, but on the objective evidence of the past.

The Article begins by defining the abstract meaning fallacy and then showing how Ronald Dworkin commits the fallacy. While Dworkin is not himself an originalist, he argues that an originalist methodology should lead to abstract interpretations.¹ The basic problem is Dworkin’s mistaken belief that one can interpret possibly abstract language to have an abstract meaning without closely examining the history. Through various examples, we show how seemingly abstract language, such as the privileges or immunities clause and the due process clause, could easily have a historical, concrete meaning that fully respects the original semantic meaning. Thus, one must examine the history to determine the actual original meaning of constitutional clauses.

The Article then turns to its primary focus on Jack Balkin’s new book, *Living Originalism*. Balkin argues for a form of originalism that he claims is compatible with a living constitution approach.² Under Balkin’s method, many constitutional provisions have abstract meanings that allow modern interpreters to update the Constitution.³ We argue that Balkin also commits the abstract meaning fallacy but does so in a different way than Dworkin. While Dworkin primarily focuses on constitutional language to support abstract interpretations, Balkin instead em-

1. See Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 582 (2000) (saying that Dworkin does not wish to be confined by the meaning that the “words bore in the eighteenth century”).

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

3. *Id.* at 7, 140–41.

phasizes a variety of considerations, including interpretive method arguments, structure and purpose arguments, and normative arguments.⁴ Balkin's more complex approach also biases interpretation in favor of abstractions.

First, Balkin attempts to support his preference for abstract interpretations by arguing that many constitutional provisions take the form of principles that allow modern interpreters significant discretion.⁵ Part II contests this claim. We initially note that Balkin's discussion of principles appears undertheorized. Next, we argue that if the Constitution's enactors would have systematically adopted principles compatible with a living constitution approach, then it is likely that such a distinctive method of writing and interpreting a constitution would have been an important part of the existing legal system or at least would have been significantly discussed at the time of the Framing. Instead, we argue that Balkin fails to provide evidence that such principles or a living constitution approach either existed or were discussed. While the enacting generation discussed several interpretive approaches, none were the one he recommends.

Second, Balkin makes several structure and purpose arguments in favor of his living constitution approach,⁶ but Part III rebuts these arguments. Balkin claims that abstract constitutional provisions enable politics by allowing political processes to give content to the values that the abstract provisions leave open.⁷ We argue in response that abstract provisions are not necessary to politics because nonabstract constraining provisions also allow politics.

Balkin also argues that constitutional provisions need not be constraining because abstract discretionary provisions accomplish a useful objective by directing popular attention toward abstract values.⁸ We respond that abstract provisions do not operate to effectively constrain political cultures that adopt problematic values. Moreover, the Bill of Rights and Fourteenth Amendment were written with the full recognition that ordinary politics could trench on important individual rights and needed to be constrained from doing so. Indeed, the behavior of the courts and Congress during Reconstruction demonstrate the wisdom of this view. Finally, Balkin argues that supermajority rules preclude agreement on nonabstract constitutional provisions,⁹ but we argue that supermajority rules allow agreement on consensus rights and structures that serve as important foundations for government, like the Bill of Rights and the separation of powers.

4. *Id.* at 5, 59–60, 81.

5. *Id.* at 7.

6. *E.g., id.* at 5, 81.

7. *Id.* at 24.

8. *Id.* at 25–27.

9. *Id.* at 27–28.

Third, Balkin also attempts to support his approach based on normative arguments. Balkin maintains that the Constitution must not only be “basic law” (a fundamental framework for government) but also “higher law” (a repository of values with which to redeem the United States from its past evil practices) and “our law” (a law that each generation makes its own).¹⁰ To meet the aspirations of higher law and to become our law, Balkin claims that the Constitution needs to confer substantial discretion on future interpreters.¹¹ Part IV argues that Balkin’s normative vision does not comport with the actual Constitution and is normatively unattractive.

Interpreting these terms a little differently than Balkin does, we maintain that the Constitution is simultaneously basic law, higher law, and our law, because its provisions retain their original meaning without the distorting presumption of the abstract meaning fallacy. The Constitution is higher law, because it is of higher quality than ordinary legislation due to its enactment through a supermajoritarian process. The Constitution is our law, because every generation has equal power to change it through the amendment process. Thus, it is not necessary to use abstract interpretation to discover new constitutional rights to respect and prize our Constitution. Instead, one need only respect the original meaning and allow each generation to enact new amendments through Article V. Finally, Part V is a brief Afterword that clarifies, in light of Jack Balkin’s response essay, our position on expected applications.

Because we will mainly be criticizing *Living Originalism*, we should note what a significant accomplishment Balkin’s new work is. The book carries on a sustained argument through rough terrain arguing for the difficult position that originalism and living constitutionalism are compatible. It engages the reader on several different levels—ranging from matters of interpretive theory to political science and legal history—exhibiting significant expertise and graceful writing. Anyone contending with abstract originalism will want to read this book first. While we do not believe that Balkin’s position on constitutional interpretation is the correct one, there is no denying the extent of his achievement. Part V clarifies our position on expected applications.

I. THE ABSTRACT MEANING FALLACY

The abstract meaning fallacy is an interpretive fallacy committed by interpreters who are attempting to use an originalist methodology. The fallacy involves an inference that a constitutional provision has an abstract original meaning that operates to delegate decision-making authority to future decision makers because the provision employs what seems to be abstract language.

10. *Id.* at 59–60.

11. *Id.* at 60–61, 69.

This inference from apparently abstract language to an abstract meaning is not necessarily an incorrect one. It is possible that a constitutional provision that contains abstract language is best understood as having an abstract meaning that allows future decision makers significant power to define its meaning. But this abstract meaning inference is not the only or necessarily the most likely conclusion to draw from the use of apparently abstract language. There are other ways to read such language.

The abstract meaning inference becomes the abstract meaning fallacy when the interpreter employs this inference without sufficiently considering and weighing the alternative possibilities. The interpreter may assume that the abstract meaning is the only possible interpretation, or may have general reasons that are faulty for preferring the abstract meaning, or may give short shrift to the other possibilities in particular cases. When the interpreter takes any of these actions, or similar actions that unduly prefer the abstract meaning, the abstract meaning inference becomes the abstract meaning fallacy.

We believe that many constitutional scholars are prone to this fallacy. The fallacy can be committed either by originalists who favor abstract interpretations or by nonoriginalists who seek to argue that originalism leads to meanings that allow modern interpreters significant discretion.

The fallacy, moreover, is of central importance to contemporary constitutional theory, as inferences from seemingly abstract language to abstract meaning have recently been celebrated as a bridge between originalism and living constitutionalism. Three prominent scholars have argued in articles published almost simultaneously that there is less and less difference between these interpretive approaches.¹² The fundamental reason is their common claim that many originalist scholars have now accepted that important constitutional concepts, such as due process and equal protection, have abstract meanings.¹³ As a result, runs the argument, these originalists have conceded that the Constitution delegates substantial authority to future judges and that cases cannot simply be decided by looking to original meaning.¹⁴ “Put differently, for many constitutional provisions, the original meaning of the Constitution is sufficient-

12. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (suggesting that in recognizing an abstract meaning of the Constitution, new originalists have sacrificed the determinate constraints purported to be provided by the old originalism and have moved closer to living constitutionalism); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (suggesting that originalists and living constitutionalists have converged on a textualism that respects the abstract and thus flexible meaning of the Constitution); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707 (2011) (suggesting the difference between originalists and living constitutionalists depends on the extent to which originalists accept abstract meaning).

13. Ryan, *supra* note 12, at 1533 (“[The Constitution] therefore contains many general and abstract phrases—like equal protection, cruel and unusual punishments, privileges and immunities, or the free exercise of religion—that necessarily have general and abstract meanings.”).

14. See Colby, *supra* note 12, at 726.

ly open-ended as to be incapable of resolving most concrete cases.”¹⁵ This Article, among other things, presents a riposte to these incisive articles. We do not believe that they, or the originalist scholars on whom they rely, have done the work to show that the Constitution’s meaning is sufficiently abstract to dissolve the fundamental incompatibility between originalism and living constitutionalism.

In this Article, we focus on two leading scholars who we believe commit the abstract meaning fallacy in different ways. We first focus on the nonoriginalist, Ronald Dworkin; we then discuss the originalist, Jack Balkin.

A. *Ronald Dworkin*

Although Ronald Dworkin is not an originalist, he has argued that the correct originalist interpretation of the Constitution would read its abstract language to have an abstract meaning.¹⁶ At different times, Dworkin has made at least three arguments for interpreting possibly abstract textual language to have an abstract meaning.¹⁷ First, Dworkin has argued that the use of abstract language strongly suggests that the Framers intended to constitutionalize an abstract meaning.¹⁸ After all, the Framers knew how to use language, and it would have been incompetent of them to use abstract language to convey more concrete meanings.¹⁹

In making this argument, Dworkin has drawn a distinction between two different types of intentions that the Framers could have had. Dworkin distinguishes between the semantic intentions of the Framers (what the Framers intended the words to say) and the expectation intentions of the Framers (what the Framers expected or hoped would be the consequence of their saying it).²⁰ Thus, how the Framers would have interpreted their abstract language in particular cases, such as whether they thought the equal protection clause protected against sex discrimination, would not constitute their semantic intentions but instead their expectation intentions. In Dworkin’s view, a proper originalism binds one only to the semantic intentions.²¹

Second, Dworkin has argued for interpreting seemingly abstract language to have an abstract meaning based on the existence of multiple intentions of the Framers in drafting constitutional provisions.²² Dworkin

15. *Id.* at 732.

16. See Keith E. Whittington, *Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 197 (2000).

17. Here we follow Keith Whittington’s superb analysis of Dworkin’s three arguments for originalism and his close reading of Dworkin’s books. See *id.* at 203–08.

18. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135–36 (1977).

19. *Id.* at 136.

20. Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 116 (Amy Gutmann ed., 1997).

21. *Id.* at 117.

22. *Id.* at 118.

has argued that the Framers had two intentions when enacting constitutional clauses—an abstract intention and a more concrete intention.²³ Since the Framers had both of these intentions, one cannot properly choose between them on nonnormative originalist grounds.²⁴ Instead, one must provide a reason based on political morality to choose between these intentions. Dworkin then argues that the political morality of making the Constitution as good as it can be justifies selecting the abstract intention.²⁵

Third, Dworkin has also argued for abstract interpretations of the Constitution based on the claim that abstract language in the Constitution refers to a real moral entity.²⁶ Thus, when the Framers used terms such as equal protection, or cruel and unusual, or freedom of speech, they were referring to real moral terms relating to equality, or cruelty, or freedom. As our understanding of these real moral entities improves and develops—as we come to understand that equality is best understood as including more categories—then Dworkin claims it is entirely appropriate and even required for judges to change their interpretive decisions.²⁷ The Framers' views about the results of their provisions are therefore not binding on subsequent interpreters.

We do not believe that any of these arguments do the work that Dworkin's position appears to require. That is, they do not allow interpreters to reach abstract interpretations without closely investigating historical sources to determine the historical meaning of constitutional provisions. Without such a historical inquiry, concluding that the Constitution has an abstract meaning commits the abstract meaning fallacy. The next Subsection critically examines Dworkin's argument that possibly abstract language should be given an abstract interpretation. The succeeding Subsection briefly reviews Dworkin's second and third arguments for preferring abstract interpretations.

In responding to these arguments and throughout this Article, we shall employ an original public meaning approach as informed by an original methods methodology. Under this approach, one examines the meaning of the constitutional language as an informed speaker would have understood it at the time of the Constitution's enactment. One also interprets language based on interpretive rules that were deemed to apply to that type of document, because that is what informed speakers at the time would have done. Moreover, we also employ *legal* interpretive rules, because informed speakers would have understood that a legal document like the Constitution would be interpreted using such rules.

23. *See id.*

24. RONALD DWORKIN, *LAW'S EMPIRE* 361–63 (1986).

25. *See* RONALD DWORKIN, *A MATTER OF PRINCIPLE* 49 (1985).

26. *See id.* at 48–55.

27. *See id.*

1. Nonabstract Interpretations of Possibly Abstract Language

Dworkin's argument that possibly, or even seemingly, abstract language should be given an abstract meaning is mistaken. An abstract meaning is neither the only possible nor necessarily most likely interpretation of such language. There are strong reasons why a rigorous and consistent original meaning analysis will often read seemingly abstract language not to have an abstract meaning. These alternative meanings may derive from legal doctrines or legal usages, or they may just be contemporary understandings of the meaning of what might seem to be abstract terms. But so long as these meanings would have been employed by people at the time, there is no reason why an original meaning approach should avoid these interpretations.

Here, we explore two principal alternative ways to read possibly abstract language that are perfectly in accord with original meaning analysis. First, language that appears to be abstract may actually, upon examination, turn out to have a less abstract, more concrete meaning. Second, language that appears to be abstract may turn out to be general, not abstract. It may have a general meaning that does not confer discretion on future decision makers to decide how to apply it, even though it applies to new circumstances not envisioned by the enactors.

In the first category—language that appears at first glance to be abstract but turns out to be relatively concrete—consider the privileges or immunities clause of the Fourteenth Amendment.²⁸ Someone attracted to the abstract language inference would be likely to read this clause as prohibiting states from violating the rights of U.S. citizens and therefore requiring judges to make a determination as a moral matter of what rights citizens should enjoy. Under this view, the enactors of the Fourteenth Amendment might have believed that only certain rights were privileges or immunities of U.S. citizens, but they used abstract language and therefore did not bind future interpreters who might have different and better understandings of this moral language.

Yet, this abstract language inference is merely one possibility. Despite first appearances, the privileges or immunities clause might have a more concrete interpretation. Michael McConnell has argued that the original meaning of the privileges or immunities clause protects basic rights that had been conferred for a long period by a wide number of states at the time of the Fourteenth Amendment.²⁹ More specifically, McConnell claims that the clause protects “fundamental” rights that were recognized by “all free governments” and that had been enjoyed by

28. The privileges or immunities clause of the Fourteenth Amendment provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

29. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665.

citizens of the several states from the beginning of the republic.³⁰ Thus, under this interpretation, the clause requires judges to make “*historical*, not moral or philosophical judgments.”³¹

This interpretation involves a straightforward interpretation of the original meaning of the privileges and immunities clause. In the years before the adoption of the Fourteenth Amendment, Justice Bushrod Washington had written an extremely influential judicial opinion in *Corfield v. Coryell* on the privileges and immunities clause of Article IV, which had defined privileges and immunities in the terms that McConnell’s interpretation employs.³² When the Fourteenth Amendment was being debated, many persons had asked what the privileges or immunities were, and a very common response was to quote Justice Washington’s description in *Corfield*.³³ This evidence suggests that privileges and immunities were understood by people who were familiar with legal terms to have the meaning that *Corfield* had articulated. Hence, legally sophisticated people who were reading the Fourteenth Amendment at the time would have understood that one possible meaning of the term was the one that McConnell suggests.

It is important to emphasize that this interpretation does not rely on what Dworkin refers to as the expectation intentions of the Founders (and what Balkin terms the Framers’ expected applications)³⁴—that is, what the Fourteenth Amendment framers expected or hoped would be the consequence of their enacting the privileges or immunities clause. The evidence here is not attempting to show how the constitutional enactors were interpreting the abstract language of privileges or immunities. Rather, it is seeking to show that there was a usage or meaning at the time of the Fourteenth Amendment that associated privileges or immunities with the historical rights enjoyed by citizens of free states. Thus, it is evidence of one of the original meanings of the language.

It is true that this evidence does not show that this was the only meaning of privileges or immunities at the time or that a more abstract meaning was not in existence. But that just means that the language may be ambiguous and therefore require interpreters to employ the standard techniques for resolving such ambiguities, such as considering structure, purpose, and history. As we have argued elsewhere, when there is ambiguity or vagueness, the original meaning approach requires that it be resolved based on the interpretive rules that existed at the time.³⁵ This is how the reasonable and knowledgeable interpreter, employing the original meaning approach, would resolve the question. While there may still be close cases, the approach requires the interpreter to select the inter-

30. *Id.* at 694.

31. *Id.*

32. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

33. See David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 918 (2007).

34. BALKIN, *supra* note 2, at 100.

35. See *infra* note 36.

pretation which has the stronger support under the relevant interpretive rules.³⁶

Under McConnell's interpretation, then, the apparently abstract language of privileges or immunities does not have an abstract meaning, but a historical meaning. Nor is McConnell's interpretation unique in this regard. There are other original meaning interpretations of the privileges or immunities clause that are also not abstract, such as Kurt Lash's view that the privileges or immunities clause protects the rights expressly conferred by the Federal Constitution.³⁷

Consider another interpretation of apparently abstract language that renders it concrete. This interpretation of the due process clause, once again proposed by McConnell, also relies on an influential interpretation of the constitutional language that existed at the time of the Fourteenth Amendment.³⁸ Here, McConnell relies on the leading case interpreting the Fifth Amendment due process clause prior the Civil War—*Murray's Lessee v. Hoboken Land & Improvement Co.*, decided in 1855.³⁹

36. After reading this Article, Balkin added to his book some criticisms of our own interpretive theory—original-methods originalism which requires interpreters to ascertain the meaning of the document by reference to the interpretive rules the enactors deemed applicable. First, he suggests that the original-methods approach is adopted in order to avoid delegations to the future and to constrain judges. BALKIN, *supra* note 2, at 353–55 n.18. This claim is not accurate. As we explain at length elsewhere, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761–72 (2009), we believe that the original-methods approach best captures the actual meaning of the Constitution, because the enactors would have understood the Constitution against the background of the relevant interpretive rules of the time. Additionally, we argue that the meaning determined by original methods of interpretation is the normatively most attractive one, because it best captures the meaning of the provision that obtained the beneficial consensus behind the Constitution. *Id.* at 781–83. It is true that original interpretive rules constrain interpretive discretion and these rules may, depending on their content, avoid delegation to the future. But these are happy consequences of rules that should be followed for far more compelling reasons.

Second, Balkin argues against the utility of an original methods approach by contending that there will be disagreement about the content of the original interpretive rules. BALKIN, *supra* note 2, at 353–55 n.18. But Balkin does not show that there was disagreement about all such rules and thus provides no argument against applying those interpretive rules that enjoyed consensus support. Moreover, the mere fact of disagreement does not imply that the content of other interpretive rules cannot be determined or that enactors of the Constitution did not expect the meaning of the Constitution to be ascertained with the help of such rules. After all, originalists recognize that the meaning of words can be contested, often for the result-oriented reasons that Balkin contends were at play in the debate over interpretive rules in the early republic. Yet it is common ground between originalists of different types that at least in some circumstances these disagreements can be resolved and the original meaning determined.

Resolution of disagreements about the content of original interpretive rules depends on procedures well-known to originalism. We should look to how many people supported a rule when the rule was relevant, how well the rule coheres with the rest of the Constitution, and how it comports with legal conventions of the time. We are not saying, of course, that investigation of the meaning of words and the content of interpretive rules is exactly the same. Nevertheless the strong family resemblance between these inquiries undermines the attempt of any originalist to claim the existence of disagreement over their content negates their utility or binding force.

37. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" As an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010).

38. McConnell, *supra* note 29, at 694–95.

39. *Id.*; see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

In determining whether a government procedure conformed to due process, Justice Curtis wrote for the Court that:

[W]e must look to those settled usages and modes of proceeding existing in the common and statute [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.⁴⁰

This interpretation of the seemingly abstract language of the due process clause—of what procedure is due or fair—is based on the settled modes of proceedings. Because this was a leading understanding of the legal language, this understanding of due process was certainly one of the meanings of the term. Thus, an original meaning interpreter might understand due process to have this meaning rather than an abstract one.

While these two instances of possibly abstract language that may turn out to have a concrete, historical meaning will have to suffice, they are hardly the only examples of discovering concrete meanings for language that appears abstract. In fact, the growth in originalist scholarship in recent years has produced a number of historically informed interpretations of what might otherwise seem to be abstract terms. To mention just a few such interpretations involving a variety of possibly abstract clauses, there is Saikrishna Prakash and Michael Ramsey's Hamiltonian interpretation of "executive power" as the powers that eighteenth century observers associated with executives,⁴¹ John Stinneford's interpretation of "cruel and unusual punishments" as a bar on harsh punishments that are contrary to long usage,⁴² and our own interpretation of "members" of the House of Representatives as possessing the powers traditionally enjoyed by legislators in Anglo-American legislatures.⁴³

Now consider the second way that apparently abstract language may result in less than abstract meanings. In this situation, language may have a general meaning that applies to circumstances not envisioned by the enactors, but this general meaning is not abstract and therefore does not confer significant discretion on future decision makers.

To put the point more simply, seemingly abstract language may simply operate as a general rule that is not abstract. One example of interpreting possibly abstract language to have a general, nonabstract meaning involves the provision empowering Congress to regulate "com-

40. *Murray's Lessee*, 59 U.S. at 277.

41. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001) (interpreting executive power to be the powers associated with executives at the time, minus those powers given to other branches or limited by the Constitution).

42. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

43. John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997).

merce among the states.”⁴⁴ There are at least two possible readings of what is known as the interstate commerce clause that read it as a general rule that does not have an abstract meaning. One such interpretation is what Balkin calls “the trade theory.”⁴⁵ Under this theory, which has significant grounding in the dictionaries and other legal materials at the time of the Framing, commerce among the states means trade or exchange across state lines.

This theory of the interstate commerce clause is a general one and would cover new circumstances not known to the Framers. Thus, if an exchange of goods were to be effected using a railroad or over the Internet, Congress could regulate it. If new types of goods were sold across state lines, such as electronic books, Congress once again could regulate it. Yet this understanding of the clause would not allow future decision makers discretion to determine what it covers. The scope of the clause—which applies to sales across state lines—would be reasonably clear.

Another reading of the clause is what Balkin calls the economic theory.⁴⁶ Under this theory, Congress can regulate economic behavior. Once again, this reads the clause to establish a general rule that covers new circumstances but not to confer significant discretion on future decision makers. Thus, Congress can regulate new types of economic behavior, but neither Congress nor the courts can expand the concept of economic behavior.

Thus, there are at least two ways that possibly abstract language might turn out to have a nonabstract meaning. That language might have a historically informed, concrete meaning, or it might have a general meaning. Both of these possibilities are perfectly consistent with a rigorous original meaning analysis. It is true that some originalist commentators have sought to limit abstract constitutional language through the expected applications of the framers of the provision. But that approach is not the only way that seemingly abstract language can be read to have a nonabstract meaning. Thus, to determine the meaning of a seemingly abstract clause, one must actually do the hard work of closely examining the clause and its history. There are no philosophical shortcuts.

It is worth exploring here from a more general perspective how seemingly abstract language can be understood to have a nonabstract meaning. Such language can have a nonabstract meaning through legal meanings that existed at the time of the enactment of the constitutional provision. It is a common occurrence for legal terms with specific meanings to have seemingly abstract names. This is in part a key aspect of the

44. See U.S. CONST. art. 1, § 8, cl. 3. It might not seem at first glance that the language of the commerce clause is abstract. While we are not aware of Dworkin claiming it is abstract, Balkin interprets it this way. Another reason to discuss it here is that it provides a useful addition to our later discussion of Balkin’s view of the clause. See *infra* notes 67–72 and accompanying text.

45. BALKIN, *supra* note 2, at 151.

46. *Id.* at 152.

legal method, which is to define terms with ordinary meanings with legal precision.⁴⁷ Moreover, it is entirely appropriate under an original meaning approach to interpret these terms to have a legal meaning. The Constitution is a legal document, and when it employs words that have an existing legal meaning, this is strong evidence that the legal meaning is the correct meaning.

To neglect the meanings developed through previous legal traditions and processes is to deprive constitutional provisions of the interpretive capital that law has built up through the generations before the provisions' enactment. Everyday language can be a slippery thing with ambiguous and vague meanings. One important contribution of law is to create mechanisms to pin down meaning. This enterprise helps generate more certainty and reduces the discretion of political officials, including judges, so that citizens can rely on norms around which to build their lives. One of these mechanisms is to use legal meanings that have grown up around language that might otherwise seem abstract, general, or opaque to the ordinary reader. Another is to resort to methods of legal interpretation which the law has developed to resolve ambiguity and vagueness. Constitutional provisions are generally not created *ex nihilo*, but rather against the background of a complex and reticulated legal tradition which provides more information about their meaning than could be gleaned from a naïve reading of the text.

The importance of seemingly abstract terms with historical legal meanings has two significant implications. First, it suggests that interpreters who disclaim history, as Dworkin seems to do, are prone to making a big mistake. One cannot interpret the constitutional language without understanding what the historical legal meanings of these terms were. In the end, one may conclude that the abstract meaning is the correct one, but one cannot reach that conclusion without considering the alternatives. Second, one would expect that the abstract meaning fallacy would be more likely to occur in areas in which the historical research is less developed or otherwise ignored.⁴⁸ Without an investigation into the history, the interpreter would have little reason to know there is a concrete meaning to the clause. He would therefore mistakenly believe that the abstract meaning was the only alternative. It is only after doing the historical research that one can properly conclude that the abstract interpretation is the best one.

47. A review of the names of doctrines in ordinary common-law subjects reveals a wealth of abstract-sounding terms that have more definite meanings, such as unjust enrichment, assumption of risk, and negligence.

48. Examples might include the cruel and unusual punishment clause and the First Amendment.

2. *Different Types of Intentions and Moral Referents*

Having addressed at length Dworkin's argument that seemingly abstract language should be interpreted to have an abstract meaning, we now turn briefly to Dworkin's second and third arguments for preferring abstract interpretations.

Dworkin's second argument—that abstract language necessarily refers to a moral entity and therefore requires judges to make a determination as to the nature of that entity⁴⁹—is also mistaken. Under this view, the terms “freedom of speech” and “equal protection” would refer to real moral entities, such as freedom or equality.⁵⁰ The judge would therefore be required to decide these cases based on his best understanding of the concepts to which this language refers. But this argument cannot justify bypassing historical inquiry. While it is certainly possible that the enactors were referring to real moral entities, it is by no means the only possibility. They might have been referring to conventional meanings of terms. The only way to know is to conduct a historical inquiry.

Dworkin's third argument—that one cannot choose between abstract and concrete intentions without normative arguments⁵¹—is also flawed. Dworkin imagines that legislators vote for the equal protection clause because they have an abstract intention that the equal protection clause should require that people be treated equally as to their fundamental interests.⁵² But these legislators also have a concrete intention that education is not a fundamental interest, and therefore segregated public schools would not violate the clause. If a judge believes that education is a fundamental interest, then he believes there is a conflict between the legislators' abstract and concrete interests. But Dworkin argues that both of these intentions are real, and therefore one cannot choose between them without a normative theory.⁵³

Dworkin's argument here appears to be directed towards those who follow an original intention approach. But since our focus is original public meaning, we can answer it here initially as if it were directed at that approach. We will then address it from the perspective of an original intention approach in the margin.

Under an original public meaning analysis that focuses on how a reasonable, well-informed reader would understand the language of a clause, language is ordinarily, if not always, reasonably understood as having a single meaning. In some cases, this language will have a clear meaning. In other cases, it may be ambiguous or vague, but there are various tools in the interpretive rules, such as history, structure, and purpose, that can be employed to resolve uncertainty as to the single mean-

49. See DWORKIN, *supra* note 18, at 135; Whittington, *supra* note 16, at 204–07.

50. DWORKIN, *supra* note 18, at 147.

51. DWORKIN, *supra* note 25, at 48–51.

52. *Id.* at 48–49.

53. *Id.* at 49; see DWORKIN, *supra* note 24, at 292–93.

ing of a provision.⁵⁴ Thus, there is little reason to believe that there will be two meanings to a provision that cannot be resolved.⁵⁵

B. *Jack Balkin*

We now turn to Jack Balkin's *Living Originalism*. Although Balkin's approach differs from that of Dworkin's, we believe that it is also prone to the abstract meaning fallacy. Like Dworkin, Balkin also tends to downplay or ignore the type of concrete and general interpretations discussed above. Yet the reasons that Balkin employs to reach his abstract results differ from those of Dworkin.

We understand Balkin's approach to include three different types of arguments. First, Balkin claims that a significant number of constitutional provisions are principles that are to be understood abstractly. His discussion of these principles seems undeveloped as compared to the discussion of Dworkin. Balkin's principal textual discussion of what principles are is the following:

Principles are norms that are normally indeterminate in reach, that do not determine the scope of their own extension, that may apply differently given changing circumstances, and that can be balanced against other competing considerations. . . . [T]heir jurisdiction, their scope, their weight, and the kinds of practices they regulate can shift over time.⁵⁶

Given the centrality of principles for Balkin's "method of text and principle," this discussion of principles seems overly brief.⁵⁷ One wants some discussion of what a principle is, why these characteristics attach to it,

54. It is theoretically possible that the interpretive rules may not resolve every uncertainty, especially uncertainty resulting from vagueness. We have argued that such uncertainties are unlikely if the interpretive rules require interpreters to choose the meaning that is more likely, even if other meanings are possible. But if there is a remaining uncertainty, then one might be in a situation involving construction, where the original meaning does not provide an answer. While that might require a normative answer, that will only occur in a limited number of cases. Therefore, once again, the interpreter will not be able to assume the text provides no answer, and Dworkin's assumption that it does not will therefore commit the abstract meaning fallacy.

55. Under an original intent argument, which Dworkin's example seems to assume, matters are more complicated, but one still cannot assume that there will always be two intentions. Without addressing this argument in detail, there are many other possibilities. For example, the Framers may have had concrete expectations about a provision but not an intent to enact those expectations. Alternatively, the Framers may have had various types of dominant intentions, such as holding one intention more strongly than another or believing that one intention should prevail in case the two conflicted. Once again, one cannot know that two apparently conflicting intentions cannot be resolved without consulting the history.

56. BALKIN, *supra* note 2, at 44.

57. In the draft of *Living Originalism* circulated to the conference, the portion we quote in the text was virtually the entire discussion of principles. In response to criticisms like those we have made here, Balkin has added a very long footnote attempting to explicate his discussion of principles. *See id.* at 349–53 n.12. While his new discussion is longer, we are still left with many of our previous questions. In any event, we do not believe the inclusion of the footnote changes our basic point made below that Balkin is focused on structure, purpose, and history arguments for abstract interpretations rather than theoretical arguments about the meaning of language. After all, if one were focused on the latter, one would not place one's discussion of the matter in a footnote.

and how one determines that a constitutional provision contains a principle.

Second, Balkin makes various arguments based on structure and purpose, or constitutional theory, for reading constitutional provisions in this manner.⁵⁸ The argument here seems to be intended to explain why people would write a constitution that appears intended to limit the future and then leave so much discretion to future decision makers. Perhaps the most important argument here is that reading constitutional provisions as principles allows the Constitution to be updated to reflect modern values while at the same time still placing limits on the values that can be followed.

Third, Balkin then attempts to justify his interpretation based on historical discussions of the original meaning of the provisions.⁵⁹ In a way, these chapters read as investigations of the original meaning. But the chapters consistently interpret the historical materials as supporting abstract meanings that leave significant discretion to future decision makers.

Given Balkin's emphasis, we tend to view his argument as having a different focus from Dworkin's. As a jurisprudential theorist, Dworkin tends to rely on theoretical arguments about interpretation and the nature of legal principles. Balkin, by contrast, focuses more at the level of political theory and constitutional lawyering. He provides constitutional theory arguments for why the Framers would have intended to adopt abstract meanings that allow future development of the constitutional framework. Moreover, Balkin provides extensive discussion of particular constitutional provisions. Thus, Balkin appears to have exploited the division of labor, focusing on the political theory and constitutional lawyering side of things and leaving the philosophical arguments about meaning to the philosophers.

While Balkin differs from Dworkin in relying on these three sets of arguments, we still believe that he is prone to committing the abstract meaning fallacy. In the next three Parts, we argue that Balkin commits the fallacy by unduly favoring abstract meanings in each of the types of arguments he employs.

First, Balkin is quick to read constitutional language as expressing an abstract principle that allows future decision makers to determine the concrete meaning of the clause. Yet he has not really explained why this should be true as a matter of semantics or historical interpretive rules. In part, this is because Balkin does not consider, with sufficient seriousness, that abstract language need not have an abstract meaning. But it is also because he ignores historical evidence that suggests the interpretive approach in existence at the time of the Framing did not favor interpretations that conferred discretion. Part II develops this argument.

58. *Id.* at 3–20.

59. *Id.* at 129–277.

Second, Balkin's structure and purpose arguments lead him to view clauses that could otherwise be read as nonabstract to be abstract, because he believes that is how the constitutional design should be understood. But these structure and purpose arguments are not well-grounded in the Constitution, neither being justified by the text nor the Founding sources. They seem largely invented by Balkin (and other living constitutionalists) to express their vision of the Constitution. Part III elaborates this argument.

Third, Balkin's historical arguments interpreting specific provisions also are prone to the abstract meaning fallacy. While the historical discussions are presented as standard examinations of the original meaning, they actually seem to be discussions intended to discover and justify very abstract readings of the clauses. The reason we say this is that they appear to resolve every ambiguity and vagueness in favor of abstract meaning. One might view such historical inquiries as result oriented. We believe, however, the better way to interpret them is as reflecting Balkin's approach, as developed in our first and second points in the previous two paragraphs,⁶⁰ that the Constitution is more justifiably read as containing abstract provisions. Thus, Balkin's reading of the history is driven by his arguments to prefer the most abstract interpretations. Of course, if one doubts the arguments discussed in the first and second points above, as we do, then the historical sections will seem less justifiable.

Because we discuss Balkin's first and second points below but do not further discuss the historical arguments, it may be helpful if we elaborate a bit about our view of his historical discussions. Consider then Balkin's interpretation of the commerce clause to have the abstract meaning of allowing Congress "to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state."⁶¹ This reading of the original meaning is extremely broad and it does not flow well from the definitions of commerce at the time.

To reach this broad, abstract meaning, Balkin consistently has to read ambiguous language or evidence (and sometimes not so ambiguous language or evidence) to have the broader, more abstract meaning. Here we just mention some of these conclusions.

1. Defining commerce to mean something like social interaction, by relying on the secondary meaning of the term, even though the primary meaning suggests merely trade.⁶² And

60. See *supra* Part 1.B.

61. BALKIN, *supra* note 2, at 140.

62. *Id.* at 149–50; see Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56–57 (2010), <http://www.michiganlawreview.org/assets/fi/109/natelsonkopel.pdf>.

- neglecting to consider other dictionaries, word usage studies, and legal usage studies, which support the primary meaning.⁶³
2. Treating the most important textual indication of the scope of the enumerated powers—that each enumerated power be consistent with the other ones and with limited enumerated powers overall (which involves an interpretive rule at the time of the Constitution)⁶⁴—as essentially unimportant.⁶⁵
 3. Discerning the meaning of the enumerated powers from language in the Virginia Plan that was not placed in the Constitution, rather than from the actual words of the Constitution.⁶⁶
 4. Cherry-picking a statement about the enumerated powers by James Wilson, one of the most nationalist of the Framers, rather than other, narrower interpretations by other Framers.⁶⁷ (And then ignoring that Wilson himself believed that regulations of the press were not authorized by the enumerated powers, even though they largely would be under Balkin’s interpretation.⁶⁸)
 5. Treating early interpretations that conflict with his interpretation, such as the trade theory distinctions between commerce and manufacturing, as constructions rather than indications of original meaning, without explanation.⁶⁹
 6. Relying heavily on the enactment of a statute allegedly based on the Indian commerce clause as evidence of a broad meaning of the commerce clause, without explaining why it is not an expected application or a construction and without discussing the numerous alternative constitutional bases for the statute.⁷⁰

63. There is a substantial body of work that takes a position contrary to Balkin’s. See, e.g., Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623; Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 844–45 (2006) (finding that legal usage of commerce at the time of the founding was limited to commerce and exchange).

64. Interpreting the commerce clause so broadly that it comprehends the scope of other enumerated power violates the antisurplusage rule of interpretation. For the antisurplusage rule, see *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 88–89 (1793), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

65. BALKIN, *supra* note 2, at 146–47.

66. *Id.* at 142–43.

67. *Id.* at 160, 377 n.27.

68. James Wilson, *SPEECH IN THE STATE HOUSE YARD* (Oct. 6, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES 167, 168 (Merrill Jensen ed., 1976).

69. BALKIN, *supra* note 2, at 153–54.

70. Balkin argues that the meaning of commerce must include interactions because the Framers punished crimes of U.S. citizens against Indians in the Trade and Intercourse Acts. *Id.* at 156. Even assuming that Congress relied on the Indian commerce clause as authority for this statute, this event does not show more than this statute being an expected application of the clause, and Balkin else-

7. Assuming that the commerce clause covers the complete power over immigration, without considering other possibilities, including (a) that the clause covers only a portion of that power,⁷¹ with the residual being held by the states,⁷² and (b) that the immigration restriction power is jointly held by the President and Congress, with the President enjoying the traditional executive power to allow aliens admission to the nation and Congress having the power under the necessary and proper clause to carry that power into execution.⁷³
8. Assuming that the correct interpretation of the commerce clause must justify the New Deal, when there is little reason

where attacks the relevance of expected applications. But even this assumption that the Indian commerce clause was the basis for the statute is warranted only if the Constitution did not provide other authority to punish crimes against Indians. Yet, there are at least three other plausible bases of authority on which the Framers might have relied. As Anthony Bellia and Bradford Clark suggest, it is possible that “a nation became responsible under the law of nations for injuries that its citizens inflicted on aliens if it failed to provide an adequate means of redress—by punishing the wrongdoer criminally, extraditing the offender to the aggrieved nation, or imposing civil liability.” Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 450 (2011). The danger that unpunished crimes would put the United States in violation of the law of nations may well have caused the Framers to believe that they had the authority to impose criminal liability on offenses by their citizens against Indians under the authority to define and punish offenses against the law of nations. See U.S. CONST. art. I, § 8, cl. 10. Unpunished crimes against Indians could also give rise to war with Indian tribes. As a result, Congress may have believed that the combination of the war powers clause and the necessary and proper clause gave it the authority to punish these crimes to make it less probable that the nation would have to go war. U.S. CONST. art. 1, § 8, cl. 11; U.S. CONST. art. 1, § 8, cl. 18. Similar interpretations of the congressional war powers were offered by both Alexander Hamilton, writing as Pacificus, and James Madison, writing as Helvidius. 1 JAMES MADISON, *Helvidius, in Answer to Pacificus, on President Washington's Proclamation of Neutrality* (April 22, 1793), in LETTERS AND OTHER WRITINGS OF JAMES MADISON 607 (1884). Finally, George Washington apparently wanted to maintain a policy of peace with the Indians. If that policy constituted the policy of the United States in a foreign affairs sense, it could have been enforced by Congress under its necessary and proper power to give effect to this foreign policy judgment. Similarly, the Neutrality Act has been “understood as a law carrying into execution the President’s residual power to set foreign policy”—in that case Washington’s policy of neutrality in the European wars of the time. See Prakash & Ramsey, *supra* note 41, at 353 n.538.

71. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 125–28 (2001) (asserting that the commerce clause probably covers navigation).

72. It is quite possible that the Framers would have left a significant portion of the power to restrict immigration with the states. Almost all the Founders favored open immigration. EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 88 (1900). Moreover, the first general immigration law was, in fact, not passed until 1875, under the plenary powers doctrine which has little basis in the original meaning. See James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 835 n.168 (1983) (discussing early immigration policy). It is true that Congress in 1798 gave the President the authority to block undesirable immigrants, but that law is best understood as carrying into effect residuary foreign affairs powers of the President. Act of June 25, 1798, ch. 58, 1 STAT. 570. For an analogous argument, see Prakash & Ramsey, *supra* note 41, at 351 (showing that while Congress had no power to issue passports, in the early republic it legislated in support of the President’s authority to issue passports under his foreign affairs power). See also *infra* note 74.

73. The Constitution may have provided the President with the traditional executive power to issue passports. See Prakash & Ramsey, *supra* note 42, at 350–51. Congress may then have the power under the necessary and proper clause to carry the President’s authority into execution by passing a law imposing penalties for coming into the United States without the executive’s permission. A similar congressional power was exercised to pass the Neutrality Act. See *id.* at 353 n.538.

to conclude, and much reason to doubt, that the New Deal was consistent with the Constitution's original meaning.⁷⁴

For these reasons, we do not find Balkin's interpretation of the commerce clause to be a persuasive take on the original meaning. Instead, we see the other arguments doing much of the work here to support his abstract interpretation.

After discussing the reasons why, as a matter of interpretation, Balkin's approach is prone to the abstract meaning fallacy, we then address in Part IV one last type of argument that Balkin makes that might be thought to justify his preference for interpreting provisions to have abstract meanings—his normative claims. Balkin argues for abstract interpretations because they allow future generations to put their own stamp on the Constitution through interpretation and to use the Constitution to critique and correct existing constitutional wrongs.⁷⁵ We reject these normative arguments on a variety of grounds, including that they fail to provide a persuasive reason to believe good consequences will result.

II. LINGUISTIC AND INTERPRETIVE CONSIDERATIONS FOR NOT FINDING CONSTITUTIONAL PROVISIONS TO HAVE ABSTRACT MEANINGS

Balkin argues that we should interpret many constitutional provisions to contain principles that have abstract meanings that can be given varying content over time.⁷⁶ Balkin also argues that these principles and abstract meanings allow significant room for constitutional construction.⁷⁷ Under Balkin's view, the original meaning of constitutional provisions extends only so far, and the resulting gap in meaning can then be filled with constitutional constructions that rely on extraconstitutional values.⁷⁸

The problem is that Balkin's inclination to interpret provisions in this manner has little support from the original Constitution or the legal culture that created it. If the Framers had placed provisions of this sort in the Constitution, then one would expect that there would be some evidence for this from the enacting period. One would expect some discussion of legal principles of the type that Balkin envisions. One would also expect reference to the distinction between interpretation and construc-

74. See BALKIN, *supra* note 2, at 172–73.

75. *Id.* at 14, 80.

76. *Id.* at 309.

77. *Id.* at 7.

78. See *id.* at 282 (“Framework originalism requires that we interpret the Constitution according to its original meaning. Living constitutionalism concerns the process of constitutional construction. Framework originalism leaves space for future generations to build out and construct the Constitution-in-practice. Living constitutionalism occupies this space. It explains and justifies the process of building on and building out. That is how the two ideas are related, and why they do not conflict but in fact are inextricably connected.”). *But see infra* note 101 (noting some uncertainty about Balkin's concept of construction).

tion. In the absence of such evidence, it would seem that the Framers were unacquainted with these concepts and therefore unlikely to have placed them in the Constitution. This would provide some support against interpreting the provisions to be abstract and in favor of reading them as having a more concrete meaning.

Balkin, however, does not present much historical evidence of this sort.⁷⁹ His discussion of principles does not provide any historical evidence that the Framers' generation employed or even were conscious of such principles. Similarly, Balkin does not provide any historical discussion of interpretive rules that would favor abstract meanings as a means of allowing future decision makers to update the Constitution.⁸⁰

Finally, Balkin does not provide any historical evidence that the Framers' generation distinguished between interpretation and construction, or that their generation saw the latter concept as a warrant for subsequent actors to imbue abstractions with their own understanding.⁸¹

79. In the original draft of *Living Originalism*, Balkin did not appear to supply any historical material in favor of his interpretive approach. In response to our criticism at the conference, he added a long footnote addressing this issue. BALKIN, *supra* note 2, at 353–56 n.18. We shall respond to this footnote, appropriately, in three footnotes of our own, including this one. See also *infra* notes 81, 99. In Balkin's extended footnote, he relies on a forthcoming article by Saul Cornell, which he claims provides support for his living originalist approach. See Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011). But the Cornell article fails to supply the requisite support. For our present purposes, there are three basic problems with Cornell's article.

First, Cornell's article suggests there was a fight between Federalists who embraced legal interpretation of the Blackstonian sort and Antifederalists who favored ordinary language interpretation. *Id.* at 304. Even assuming this premise, it does not follow that people at the time differed over how the Constitution would be properly interpreted. After all, under this view, the Antifederalists *opposed* the Constitution because it would be expected to receive a lawyer's interpretation. That the Antifederalists favored a different mode of interpretation does not mean they expected the Constitution to be interpreted with ordinary language.

Second, while Cornell claims that Brutus and the Antifederalists favored a living-constitution approach, he presents no evidence for this assertion. *Id.* at 312–13. His only evidence suggests that the Antifederalists favored an ordinary-language interpretive approach, and that it should occur not merely by judges but also by legislatures and juries. This is hardly living constitutionalism.

Third, Cornell fails to recognize that the lawyer's view was over time becoming less intentionalist and more textualist, and therefore closer to the ordinary language approach. See McGinnis & Rappaport, *supra* note 36, at 788–91. This trend suggests that there may have been more of a consensus on interpretation than Cornell presents.

80. By contrast, the Constitution does on occasion incorporate provisions that allow for the future to update them. But those provisions are not the ones that Balkin identifies. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 287–97 (1989) (providing examples of discretionary provisions, such as the qualifications of legislative candidates and the time and place of elections).

81. In his extended footnote, Balkin also argues that construction existed at the time of the Framing. BALKIN, *supra* note 2, at 353–56, n.18. But his argument is weak. Balkin claims that construction exists in two situations—“when the terms of the Constitution are vague or silent on a question,” and “when we need to create laws or build institutions to fulfill constitutional purposes.” *Id.* at 282. But Balkin does not present compelling evidence for either of these.

First, Balkin provides no direct evidence that the Framers believed that the original meaning runs out when the Constitution is vague or silent and therefore judges can decide based on other considerations. Instead, he claims that the application of the interpretive rules at the time of the Constitution involved judgment and therefore discretion by the interpreters. This is weak. The interpretive rules are not designed to convey discretion, but to guide the judge. Moreover, even if the rules do not

If the legal culture of the Framers did not employ abstract principles or construction, or favor abstract meanings, then what constitutional and interpretive concepts did it feature? This is a complicated matter, but the highlights are pretty clear. There were several different approaches to the Constitution and its interpretation, but none of them involve Balkinian principles or construction. To begin with, there were two main interpretive approaches. First, there was the approach of Hamilton and Marshall and their followers.⁸² Under this approach, the natural sense of the language of the Constitution was understood as expressing the intentions of the enactors.⁸³ As the case for judicial review made clear, these intentions were understood as placing limits on the government that were intended to be permanent unless amended. Second, there was the approach of Jefferson and his followers.⁸⁴ Under this approach, the Constitution was understood to be a compact between the states.⁸⁵ State intentions could sometimes be discerned through the statements of drafters or ratifiers. Moreover, the constitutional provisions were interpreted to protect the power of the states.

Interpreters did recognize that constitutional provisions were not always clear. But there is no evidence that they contemplated that the uncertainty was the result of Balkinian principles having been employed or that it could be resolved through the use of construction. Instead, there is evidence of at least three approaches to resolving this uncertainty. First, one approach to an unclear constitutional provision was simply to pick the interpretation that appears to be the most likely.⁸⁶ Even

fully resolve a question, that does not imply that the judge should exercise the resulting discretion as he wishes. Instead, the judge would be required to make his best judgment as to which interpretation best accords with the constitutional provision. See McGinnis & Rappaport, *supra* note 36, at 774–76.

Second, Balkin's claim that construction involves the building of institutions for constitutional purposes is also problematic. While Balkin is not explicit about it, we assume that he believes such building occurs in the so-called vague and silent areas of the Constitution. Otherwise, it would seem to be inconsistent with the original public meaning approach he employs. (Cutting against this interpretation is that Balkin's description of this type of construction omits any mention of textual vagueness or silence. If this type of construction does not involve textual vagueness or silence, then it is not clear in what way it differs from interpretation and how it could involve additional discretion beyond interpretation of the original meaning.) Assuming that this type of construction involves textual vagueness or silence, Balkin's claim that examples of construction are abundant in the early republic, as the nation established new institutions, is very weak. The establishment of institutions is no evidence that the political or judicial branches were engaged in construction. When the Federalists established the First Bank of the United States, they did not argue that the Constitution was vague or silent. See, e.g., 4 ALEXANDER HAMILTON, *Opinion As to the Constitutionality of the Bank of the United States*, in THE WORKS OF ALEXANDER HAMILTON 104 (John C. Hamilton ed., 1851). Instead, the Federalists merely claimed that the Constitution's original meaning allowed Congress to establish the bank (and that the political branches believed the bank was desirable as a policy matter). No evidence of a distinct interpretive or constructive action is exhibited.

82. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824).

83. See *id.* (arguing that the Constitution should be read according to the natural sense of those who enacted it).

84. See Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679, 710 (2003–2004).

85. See *id.* at 709–10 (describing the compact theory of Kentucky Resolutions).

86. See BALKIN, *supra* note 2, at 257–58.

though an issue might be a close one, an interpreter might still be in a position to choose the more likely interpretation. Second, it was sometimes asserted that if a constitutional provision was unclear, then the courts should not use it to strike down legislation if a reasonable interpretation of the provision would allow the legislation.⁸⁷ Third, it was sometimes claimed that unclear provisions would be liquidated or clarified over time through a series of reasonable judicial interpretations.⁸⁸ This would fix the meaning and obligate future courts to follow the meaning. None of these approaches to uncertainty is consistent with Balkin's approach.

Moreover, there is additional evidence for concluding that Balkin's interpretive tools would have been rejected by the Framers' generation. One of the closest examples of something like Balkin's approach being discussed at the time of the Framing arose in Antifederalist Brutus's famous critique of judicial review.⁸⁹ Brutus there claimed that the Supreme Court would interpret the Constitution in an expansive way over time, and the result would be a change in the Constitution's meaning.⁹⁰ Brutus clearly regarded such a power as undesirable.⁹¹ Significantly, Alexander Hamilton also believed that this power was undesirable.⁹² Therefore, Hamilton sought to rebut this critique in his classic argument for judicial review in the *Federalist Papers*, claiming that the courts would be constrained by the Constitution.⁹³

So alien was Balkin's type of approach to the contemporary legal culture that it is possible that the Constitution would not be ratified had the Federalists embraced the approach instead of repudiating it. Had Hamilton and other Federalists argued that Brutus was correct, or had they defended something like Balkin's approach, it does not seem extravagant to imagine that the Constitution might then have been rejected. The votes were close in many states, including the key states of Massachusetts, New York, and Virginia,⁹⁴ and such a controversial statement might have tipped the balance.

87. See, e.g., JAMES WILSON, COMPARISON OF THE CONSTITUTION OF THE UNITED STATES WITH THAT OF GREAT BRITAIN, reprinted in 1 THE WORKS OF JAMES WILSON 309, 329–30 (Robert Green McCloskey ed., 1967) (noting that the judiciary should strike down laws only when they were “manifestly repugnant . . . to the [C]onstitution”).

88. THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

89. “Brutus” XI, *The Supreme Court: They Will Mould the Government into Almost Any Shape They Please*, N.Y. J., Jan. 31, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 129, 131 (Bernard Bailyn ed., 1993).

90. *Id.* at 134.

91. See generally *id.* (describing the judiciary as having the capacity to expand its own power).

92. See THE FEDERALIST NO. 78, at 486–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

93. See *id.* (arguing that judges would interpret the Constitution according to reasonable rules).

94. See Robert A. Rutland, *Ratification of the Constitution*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1512, 1513 (Leonard W. Levy et al. eds., 1986).

The one piece of evidence from the early Republic that advocates of the living constitution use to support their view of an abstract Constitution that can change meanings over time is a portion of Chief Justice Marshall's opinion in *McCulloch v. Maryland*.⁹⁵ Defenders of the New Deal have long relied on this passage to support the living constitution view. But their reading of the passage is mistaken. Consider Marshall's discussion:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.⁹⁶

While Marshall certainly addresses the problems of allowing future decision makers to respond to new circumstances, his argument is not that the Constitution should be adapted to mean whatever those future decision makers believe it should mean. Instead, he argues that this problem of anticipating future circumstances requires that *Congress be given broad authority* so that it can choose among the means.

Moreover, even if one were to interpret the language as allowing Congress to adapt the Constitution to future circumstances, it does so only in a narrow way. Congress might have the power to adapt the *means* to future circumstances, but it clearly does not have the power to change the meaning of the *ends*. While Congress can select new means to regulate commerce among the states, it cannot change the meaning of regulating commerce among the states.

The interpretation of Marshall's opinion as embracing a broad but static meaning to Congress's powers also has the advantage of rendering this decision consistent with his other opinions. Marshall's discussions of both constitutional and statutory interpretation generally read like one

95. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415–16 (1819).

96. *Id.*

version of textualist originalism. It would be incongruous for *McCulloch* to be voicing a different view. Finally, it is significant that the New Deal interpretation was not one that was followed by the courts at the time. During the nineteenth century, this quote was never cited to support the view that the meaning of the Constitution could change over time.⁹⁷

This absence of evidence from the Framing era of the core elements of Balkin's living constitution interpretation of originalism—abstract principles, construction, and allowing future decision makers significant discretion over constitutional terms—should not really be all that surprising. It turns out that, as Howard Gillman has shown, the living constitution approach was not part of the constitutional culture until at least the last part of the nineteenth century.⁹⁸ Thus, it is no surprise that so much of Balkin's book sounds like the New Deal rather than the Framing.⁹⁹

That the Framing did not employ these concepts does not mean that some constitutional provisions might not have an abstract meaning that allows future decision makers substantial discretion. It is possible that the best reading of apparently abstract language might be for it to have an abstract meaning. If that is really what the Constitution says, then it should be enforced. But the absence of these concepts in the legal culture of the Framing period counts against finding that constitutional provisions have this meaning. Put differently, if there is uncertainty about whether the constitutional provision has a meaning congenial to the living constitution approach or whether it has a more constrained meaning, one should interpret it to have the more constrained meaning.

97. See Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191, 205 (1997).

98. *Id.* at 215–16.

99. That the living constitution approach did not emerge until at least the last part of the nineteenth century also suggests that Balkinian interpretive methods and concepts did not exist at the time of the Reconstruction amendments. In his extended footnote, Balkin argues that it is not only the interpretive methods at the time of the Framing that matter, but also those at the time of the Reconstruction amendments. BALKIN, *supra* note 2, at 353–56 n.18. We agree that the interpretive methods at the time of the Reconstruction amendments probably should inform the meaning of those amendments. But Balkin fails to supply evidence that the Reconstruction era exhibited interpretive methods or principles of the kind that he employs. Rather, he cites one example of a statement by Representative Monroe that he claims "is essentially framework originalism," but which we believe is at best ambiguous and is most likely read as simply recognizing that constitutional rules can apply in unexpected ways to new circumstances. *Id.* at 355. As Monroe stated, "A new application of a well-known principle . . . takes us by surprise . . . and yet it is only what is required by the most logical consistency." CONG. GLOBE, 42D CONG., 1ST SESS. 370 (1871) (statement of Rep. Monroe).

III. CONSTITUTIONAL PURPOSE AND STRUCTURE ARGUMENTS

Balkin also argues from purpose and structure in favor of construing provisions to have an abstract meaning that provides substantial interpretive discretion.¹⁰⁰ First, he suggests that the purpose of a constitution is to establish a framework for future politics, and thus constitutional provisions are most naturally interpreted as delegations to the future rather than constraints.¹⁰¹ Second, as a response to the possible critique that rights are valuable precisely because they are constraints, he argues that rights can be valuable by shaping the future subject matter of politics, even if they do not act as constraints.¹⁰² Finally, he argues that the supermajoritarian nature of constitution making precludes precise agreements on principles, and thus constitution makers tend to delegate to the future to paper over disagreements.¹⁰³ We disagree with each of these arguments.

A. *Purpose of Constitutionalism As Establishing Politics*

Balkin argues that constraints on future discretion are not the best argument for constitutionalism, thus suggesting that the purpose of constitutionalism militates in favor of interpreting language as abstract delegations to the future rather than specific constraints.¹⁰⁴ He states: “Constitutions are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future decisionmaking but to enable it. The job of a constitution, in short, is to make politics possible.”¹⁰⁵ Thus, a constitutional provision is, at least other things being equal, best interpreted as enabling rather than constraining.

We do not disagree that one important strand of constitutionalism is to make politics possible, but that can be done by constitutional structures that empower various political processes, such as the state legislative process, the federal legislative process, and the constitutional amendment process, within generally determinate, nondiscretionary boundaries set by the Constitution. For instance, the Constitution establishes a space for federal politics through its determinate rules requiring that legislation be passed by the House and the Senate and then present-

100. There are two ways to understand the type of arguments that Balkin makes here. First, one can consider them to be arguments of constitutional purpose or constitutional structure. These are traditional arguments for construing constitutional text, especially ambiguous or vague text (although they are not uncontroversial). Second, one can consider these arguments to be of constitutional theory. Under this classification, they tell us something about the nature of constitutions and how they work. Understood in this latter way, the arguments are less clearly legal and therefore more problematic for judges to rely upon.

101. BALKIN, *supra* note 2, at 21.

102. *Id.* at 25, 28–29.

103. *Id.* at 27–28.

104. *Id.* at 24.

105. *Id.*

ed to the President. By contrast, Balkin believes that politics exist within the spaces created by abstract provisions, such as the political debates over the meaning of equal in the equal protection clause.¹⁰⁶ For Balkin, political discretion is lodged within the markers of these boundaries rather than between them.

In this Subsection, we show that the traditional understanding, that the Constitution's space for politics comes from its determinate structures and limits, is at least as plausible as Balkin's conception that the space for politics comes from the opportunity for changing interpretations of the Constitution's provisions. We show substantial space for politics within this traditional conception exists at three levels. First, the Constitution permits the states to develop policy and rights with limited constraints. Second, the federal government, within the relatively broad scope of its enumerated powers, has space for substantial politics. Finally, the constitutional amendment process provides an almost unlimited space for constitutional politics, and the traditional operation of that process is in tension with routinely regarding constitutional provisions as abstractions. We now look at the space for politics at the state, federal, and constitutional level.

The structure of the original Constitution permits enormous opportunity for politics at the state level. The boundaries that the original Constitution sets to state lawmaking are relatively few and, by any understanding, relatively determinate. An example is the clause providing that "No State shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws . . ." ¹⁰⁷ So long as states avoided prohibited acts such as these, the original Constitution left vigorous and open-ended politics to them. This structure shows there is no necessary connection between enabling politics and reading provisions as open-ended delegations. The Constitution created space for politics through a regime where, what was not forbidden to the states by a few relatively determinate provisions, was generally permitted.¹⁰⁸

The Constitution also leaves states an important role in the development of rights—an important part of any politics. It is not necessary to interpret the Fourteenth Amendment to be an abstract delegation for state politics to continue to be a vigorous framework for political deliberation about rights.¹⁰⁹ For instance, even without abstract interpretations of the Fourteenth Amendment, states can still provide new rights to their citizens through legislation or state constitutional law. Moreover, if these rights are attractive, that can put political pressure on other states to adopt them because of the competition among the states for residents

106. *Id.* at 23–26.

107. U.S. CONST. art. I, § 10, cl. 2.

108. *Cf.* Hamburger, *supra* note 80, at 287.

109. Note that abstract language largely empowers federal politics rather than state politics.

and businesses.¹¹⁰ Moreover, this kind of politics allows for experiments that aid in the development of new rights. This is the familiar laboratories-of-democracy argument for federalism.¹¹¹ Balkin can certainly argue on other grounds that the Fourteenth Amendment is an open-ended framework for rights. But that construction is unnecessary to assure space for the development of rights.

The Constitution also establishes a federal legislative structure with a determinate process for passing legislation, which creates another space for politics. To be sure, the enumerated powers set the space for politics, but that space is certainly significant. For instance, because the commerce clause is a general rule, it permits a greater scope for federal politics over time as the nation grows, and more matters become interstate commerce.

Finally, the Constitution itself establishes a process by which it can be amended, which creates the opportunity for constitutional politics. Yet the amendment process allows for constitutional politics through relatively clear and unambiguous rules. A constitutional amendment can be passed in one of two ways. First, it can be passed by being proposed by two-thirds of both houses of Congress and then being ratified by three-quarters of the states.¹¹² Second, an amendment can be passed when two-thirds of the states apply for a convention that proposes an amendment, which is then ratified by three-quarters of the states.¹¹³ Thus, determinate rules generate a wide, open space for constitutional politics.

Moreover, it is a space that is in substantial tension with an interpretive approach that favors abstract interpretations. If constitutional provisions were routinely interpreted abstractly, the need for constitutional amendments is greatly reduced. The Framers did not believe the amendment process had such a nugatory role. James Madison, for instance, declared that the amendment process was to be used when the people want “to enlarge, diminish, or new-model the powers of government.”¹¹⁴

The space for constitutional politics was in fact used to pass constitutional amendments. When the Supreme Court permitted unconsented suits against a state by citizens of other states,¹¹⁵ the Eleventh Amendment was enacted to preclude such suits.¹¹⁶ When the Court held that a

110. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599–1603 (2004) (discussing virtues of competitive federalism).

111. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

112. U.S. CONST. art. V.

113. *Id.*

114. THE FEDERALIST NO. 49, at 310–11 (James Madison) (Clinton Rossiter ed., 1961); see also Gillman *supra* note 97, at 202 (discussing the role of constitutional amendment in Madison’s plan).

115. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793).

116. U.S. CONST. amend. XI.

part of the income tax was a direct tax that had to be apportioned,¹¹⁷ the Sixteenth Amendment was passed, authorizing the federal government to enact income taxes.¹¹⁸ When it was felt that women should be guaranteed suffrage, the Nineteenth Amendment granting women the vote was passed.¹¹⁹ These amendments would have been unnecessary if the provisions were interpreted abstractly. The meaning of the term “state” in the Constitution is certainly broad enough to contain immunities from suits by citizens of other states.¹²⁰ Without the benefit of history and context, “direct tax” could be a relatively abstract term. If the equal protection clause is understood as an abstract provision that delegates the interpretation of equality to the future, it could easily support the right of women to vote.

Thus, not only is it unnecessary to interpret constitutional provisions abstractly to create a space for politics, our traditions do not comport with such an approach. The Constitution’s basic structures already create wide opportunities for politics. These opportunities are not only capable of being seized, but they have been seized for this purpose. The authority left to the states creates plenty of space for ordinary politics by state action, including the formulation of rights. The legislative authority established under Article I creates substantial space for federal politics. Finally, the amendment process permits the people to change the basic rules and the demarcations for ordinary politics and to do so through a special kind of politics—the intensive deliberative process of Article V.

B. *The Value of Indeterminate Constitutional Rights*

Another problem with Balkin’s preference for abstract interpretations is that it can undermine the traditional function of constitutions as anchors of politics. Constitutions have been traditionally understood as placing limits on the actions that ordinary governmental majorities can take.¹²¹ Since such majorities often respond to short-term passions and the influence of special interests, their actions can be quite undesirable. The Constitution binds the polity, protecting it from folly as Ulysses bound himself to protect against the sirens’ songs.¹²² But if constitutions have abstract meanings that allow ordinary government, including the courts, to alter their meaning over time, then the Constitution will no

117. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), *aff’d on reh’g* 158 U.S. 601 (1895).

118. U.S. CONST. amend. XVI.

119. U.S. CONST. amend. XIX.

120. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830–68, 874 (1999).

121. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7–8 (1980).

122. The classic discussion is JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

longer serve this function. Abstract interpretation will then undermine a primary function of constitutions.

This Section elaborates on this argument, using examples to illustrate how abstract meanings fail to achieve this function of constitutions. It also shows that many of the Constitution's so-called abstract provisions—including the Bill of Rights and the Fourteenth Amendment—were passed in circumstances that suggest the enactors would not have desired that they be given meaning by later generations, because the enactors would have distrusted the ordinary politics that could emerge after the amendment's passage.

One way that the Constitution anchors politics is by ensuring that ordinary political majorities cannot infringe on basic rights that contribute to a well-functioning polity. By guaranteeing the right to criticize government, the First Amendment promotes political competition and effective democracy. But if the First Amendment were understood in abstract terms as delegating its content to future interpreters, its value would be greatly reduced. The First Amendment might then permit a party in power to suppress speech on various grounds, allowing the party to insulate itself from criticism.¹²³

The Constitution can also anchor politics by establishing government structures that organize political systems in a way that improves government's quality. For example, the separation of powers provides a structure that is thought to improve the operation of government by dividing the exercise of legislative, executive, and judicial power among the three branches. This improved decision-making structure can be substantially weakened, however, if the branches are permitted to change this distribution.¹²⁴ Similarly, the constitutionally established structure of federalism leads to beneficial competition among the states.¹²⁵ But such competition can be undermined if the federal government is allowed to enforce a cartel among the states, as it arguably tried to do with the statute invalidated in *New York v. United States*.¹²⁶

Yet, Balkin downplays this well-known anchoring function of constitutions, because he embraces constitutional provisions that have indeterminate meaning. Instead, he argues that abstract provisions can serve a similar function. Balkin writes:

123. Without addressing the constitutional or normative issues, there have been many examples in U.S. history where the government took actions that infringed free speech principles that operated to protect the government from being criticized, such as passage of the 1798 Sedition Act, the 1918 Sedition Act, the Smith Act, and Lincoln's prosecutions of dissenters during the Civil War.

124. See, e.g., J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 65–67 (1991) (expressing concern that bargains among the branches to trade their powers can weaken protections of liberty generated by separation of powers).

125. See John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 107–08, 121 (2004) (arguing that federalism distributes power between the federal government and the states for the benefit of the people).

126. *New York v. United States*, 505 U.S. 144 (1992).

Abstract rights provisions are valuable even if their contours are not fully determined in advance. They shape the way that political actors understand and articulate the values inherent in the political system; they shape the beliefs of political actors about what they can and cannot do, what they are fighting for and what they are fighting against.¹²⁷

But rights are less valuable, indeed not really valuable at all as precommitments, if their meaning is indeterminate. A comparison of two famous cases—*Home Building & Loan Ass'n v. Blaisdell*¹²⁸ and *District of Columbia v. Heller*¹²⁹—powerfully illustrates this point. In *Blaisdell*, the Court interpreted the contracts clause precisely as Balkin would have us do, as an abstract principle about the value of protecting contract obligations rather than as a requirement not to violate them.¹³⁰ The Court, in fact, specifically rejected the argument that the clause was “to be read with literal exactness like a mathematical formula.”¹³¹ It expressly endorsed Balkin’s view that constitutional principles so abstractly defined may be read radically differently from one generation to the next:

If by the statement that what the Constitution meant at the time of its adoption it means [today], it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.¹³²

Finally, the Court embraced the notion that the values referenced by a principle construed abstractly should be balanced against other considerations, in this case the perceived need to solve a foreclosure crisis. The result of such an approach was to gut the contract clause, eliminating its precommitment against impairing the obligations of creditors during a time of economic crisis—precisely the time that precommitment was most valuable. And the contract clause has never recovered to impose substantial limitations on state actions to reduce preexisting obligations.

In contrast, the *Heller* Court showed how interpreting constitutional rights as fixed guarantees rather than abstractions provided far greater protections to the right at issue. In *Heller*, the Court held that the Second Amendment’s right to keep and bear arms guaranteed the right to keep a handgun in one’s home for self-defense.¹³³ The Court expressly rejected the reasoning in Justice Breyer’s dissent, which would have treated the right as an abstract principle to be balanced against other

127. BALKIN, *supra* note 2, at 25; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 555 (2009).

128. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

129. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

130. *See Blaisdell*, 290 U.S. at 443–44, 447.

131. *Id.* at 428.

132. *Id.* at 442–43.

133. *Heller*, 554 U.S. at 635.

considerations like the District of Columbia's perception of the effect of gun ownership on public safety.¹³⁴ In his opinion for the Court, Justice Scalia repudiates this view and with it the idea that rights interpreted as abstract principles are as valuable as those interpreted with the scope they were framed to have: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."¹³⁵

Comparing *Blaisdell* and *Heller* without understanding the historical context of the cases in fact understates the difference in effect between treating rights as abstractions and treating them as specific guarantees. In *Blaisdell*, the Court was interpreting a right that had been repeatedly enforced by the Court for more than a century of jurisprudence.¹³⁶ In *Heller*, the Court was interpreting a right the Court had not previously enforced and indeed was arguably in tension with prior precedent.¹³⁷ The difference in context underscores how much is lost by the process of abstraction. Understanding a right as a relatively clear precommitment can revive it, despite a century of neglect. Understanding one as an abstract principle can undermine it, even after a century of enforcement.

The concern that an abstract Constitution would provide insufficient protection against the infirmities of ordinary politics is not some abstract fear but one that actually motivated the Framers of both the original Constitution and the Fourteenth Amendment. For instance, James Monroe wrote of his hope that the Constitution would protect liberty against the less favorable political climate that he expected sometime in the future: "The spirit of the times might secure the people of America [perhaps] for a great length of time against [oppression]; but fundamental principles form a check, even when the spirit of the times hath changed, indeed they retard and contro[l] it."¹³⁸

But we do not have to be content with general sentiments: key provisions of the Constitution were built around the fear of future politics. For instance, the Bill of Rights was a concession to the Antifederalists whose great anxiety was that federal politics would encroach on important traditional rights of citizens in the states.¹³⁹ They were concerned

134. *Id.* at 682 (Breyer, J., dissenting).

135. *Id.* at 634-35.

136. For a discussion of the history of the contract clause before *Blaisdell*, see Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987).

137. See *United States v. Miller*, 307 U.S. 174 (1939) (holding that the Second Amendment does not prohibit a firearms conviction).

138. James Monroe, *Observations on the Constitution* (May 25, 1788), available at <http://teachingamericanhistory.org/library/index.asp?document=1799>. For discussion, see Gillman, *supra* note 97, at 198.

139. DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT* xv (1992).

that, despite the claim that the enumerated powers were limited, the federal government would seize on provisions like the necessary and proper clause to take these rights away and consolidate power into the national government.¹⁴⁰ Put differently, the Antifederalists were concerned that ordinary politics would be dominated by a federal elite that would transform the republic into an oligarchy.

Given this background, understanding rights as simply abstract principles that help articulate values and shape beliefs would have been woefully insufficient to protect against the Antifederalist's fears. If ordinary politics could supply the meaning of abstract provisions, the Bill of Rights would not serve its function as a check on future federal majorities. Thus, Balkin's preference for abstract meanings appears to be inconsistent with the historical bases of the Bill of Rights.

The background of the Fourteenth Amendment is similar in this respect. The drafters of the Fourteenth Amendment had just fought a war against people who believed in slavery and hardly wanted to extend equal rights to African Americans. These drafters well understood that vagaries of ordinary politics might undermine the principles for which men died and for which the union had come to stand.¹⁴¹ They did not have to imagine such politics. They had seen that politics in the antebellum South in all its awfulness. They had also seen how southern states exercised influence at the national level. Thus, once again, an amendment that simply articulated values in a political climate that they had every reason to believe could radically change for the worse would be too feeble to withstand the challenges of degenerated politics.

And they were right to be concerned, because a racial backlash did arise. Supporters of this backlash offered in *Plessy v. Ferguson* an understanding of equality that permitted the former Confederate states to require that blacks use separate accommodations if whites also were required to use separate accommodations.¹⁴² This understanding of equality is plausible if the Fourteenth Amendment is understood abstractly—divorced from the context which gave rise to it. It becomes much less plausible if the Fourteenth Amendment were understood to authorize the Civil Rights Act of 1866, which stated that citizens of different races should have the same rights.¹⁴³ As John Harrison has pointed out, “separate but equal” does not provide whites and blacks with the same rights.¹⁴⁴ Moreover, the context of the Fourteenth Amendment suggests that the purpose of the amendment was to eliminate caste legis-

140. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 351 (2004).

141. See Bret Boyce, Heller, McDonald and Originalism, 2010 CARDOZO L. REV. DE NOVO 2 (noting the Fourteenth Amendment was passed against concern that southern states would deny rights to newly freed slaves).

142. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

143. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1458 (1992).

144. *Id.* at 1458–59.

lation.¹⁴⁵ That purpose clarifies that separate but equal is not the correct understanding of equality in the Fourteenth Amendment, even if it is one possible interpretation of equality considered abstractly.

Moreover, Jim Crow was not only consistent with the abstract quality Balkin assigns to rights, it provides a disturbing example of the manner in which social movements give meaning to those abstractions. The Ku Klux Klan was an important social organization that contributed to Jim Crow and its new notion of equality.¹⁴⁶ When the Ku Klux Klan faded from respectability because of its violence, the more diffuse and intellectual “lost cause” movement pressed understandings of the Fourteenth Amendment that did no less damage to civil rights in the twentieth century.¹⁴⁷ Sadly, other national movements also supported separate but equal. The Progressive movement was not unsympathetic to the social engineering of the kind the doctrine reflected.¹⁴⁸ Thus, to recount the dismal constitutional history of Reconstruction is to see a possible result of Balkin’s theories.

Like other progressives, Balkin may think that precommitments are mistakes, because he is enthusiastic about ordinary politics or because he thinks ordinary citizens, in the march of civilization, will make progressively better decisions. But these are substantive political positions—in fact, the substantive commitments that motivated early twentieth century progressives to advocate discarding a Constitution they believed imposed a straitjacket on societal development. Although Balkin’s position thus appears faithful to progressivism, that does not make it faithful to the Constitution’s original meaning.

C. *Supermajority Rules and Delegations to the Future*

Balkin also claims that the use of supermajority rules in the constitution-making process leads to provisions that delegate to the future. Balkin writes:

Precisely because laws passed by a supermajority must appeal to a broad range of people, framers will sometimes use abstract and general language to paper over disagreements that would emerge if more specific language were chosen. In the alternative, constitu-

145. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 162 (1998) (understanding the Fourteenth Amendment as an attempt to prevent restoration of racial caste).

146. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 66–67 (2001) (conceding the dark side of social movements represented by the Ku Klux Klan).

147. The “lost cause” movement was an intellectual movement that promoted a historical view of the antebellum South and Reconstruction that justified segregation. See Michael Coblenz, *Not for Entertainment Only: Fair Use and Fiction as Social Commentary*, 16 UCLA ENT. L. REV. 265, 313–14 (2009).

148. See Richard A. Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2004–2005 CATO SUP. CT. REV. 11, 32–33.

tional framers will remain silent about particular issues to avoid destroying a supermajority coalition.¹⁴⁹

This Section argues, to the contrary, that supermajority rules are unlikely to lead to open-ended delegations. First, we maintain that citizens are risk averse concerning constitutional provisions, because so much is at stake. Thus, it is doubtful that they will create broad delegations about such matters. Instead, if the people cannot agree on a provision, they are more likely to leave such matters to the democratic process, where no decision will be entrenched against change. Second, we contend that the main provisions that are likely to pass under strict supermajority rules are those that are supported by a consensus of the people. Such provisions have existed in the past and would not require delegations to the future. Third, even if different groups were unable to agree on a precise provision, it would still not follow that they would delegate its meaning to future interpreters, because that would permit judges to choose a meaning that none of the groups would desire. Finally, if it does turn out that different groups cannot agree on a precise meaning, that does not suggest the language should be interpreted as a delegation. Instead, we argue that the language they enacted should be interpreted according to existing interpretive rules, which as discussed above did not appear to favor abstract meanings.¹⁵⁰

First, supermajority rules are unlikely to lead to constitutional delegations to the future. The main problem is that citizens are risk averse when it comes to constitutional provisions,¹⁵¹ because a great deal is at stake in the choice of important entrenchments that cannot be easily repealed.¹⁵² Thus, embedding provisions that might lead to bad results as perceived by the Framing generation would have particularly large costs.

Moreover, this risk aversion is likely to be expressed in the constitutional enactment process, because opponents of the proposed constitutional provision can play upon the fears of citizens in this regard. The Equal Rights Amendment (ERA) is a case in point. One of the reasons why the ERA failed to be enacted was that the broad language, combined with nonoriginalism interpretive methods at the time,¹⁵³ caused

149. BALKIN, *supra* note 2, at 28.

150. To be clear, in this Subsection we are not arguing that it is logically impossible that citizens create delegations to the future in a constitution, just that supermajority rules do not encourage such delegations and that the risk aversion of citizens discourages it.

151. There are studies of risk aversion in finance, showing that an overwhelming majority of people are risk averse with financial investments. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 245–46 (9th ed. 2004). Balkin has provided no reason to believe they would feel otherwise in political investments, like a constitution.

152. Again there is an analogy to finance: the more equity is at risk, the more risk averse management will be. See Lawrence J. White, *The S&L Debacle*, 59 *FORDHAM L. REV.* S57, S60 (1991).

153. Mark Tushnet, *The Warren Court As History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 17 (Mark Tushnet ed., 1993) (“[T]he justices who formed the core of the late Warren Court . . . found that they had been placed in a position where they had a fair amount of discretion to do what they believed right, and they believed that they were authorized, by virtue of their selection for that position, simply to do what they believed right.”).

people to question what the amendment would cover. People were concerned that the amendment would be construed to require unisex bathrooms and women in combat, results that many found repugnant.¹⁵⁴

Second, given these alternatives, what supermajority rules encourage is not broad delegations to the future, but determinate principles about which there is a broad consensus. If people are risk averse, then it is likely that any provisions that can pass through the supermajority process are those that are determinate and widely supported. Under this analysis, the only way that Balkin could contest the largely determinate character of a constitution would be if he could show that a consensus on a set of important provisions is impossible or unlikely. But it would be surprising if at any time there were not various provisions about which people agreed. These they would enshrine in the constitution.

The Bill of Rights provides an excellent example of how widely accepted provisions can be enacted. To be sure, the Antifederalists demanded these provisions. But James Madison and the Federalist Congress eliminated the provisions that they deemed improper.¹⁵⁵ As a result, the Bill of Rights was not about deeply contested matters. Rather, it represented rights that colonists had fought for and deemed the birth rights of British citizens.¹⁵⁶ One measure of the consensus was the reaction of the Federalists to the initial Antifederalist proposal to put these rights in the Constitution. They did not object by disputing their importance or indeed by quibbling about their content. They argued instead that the rights were already implicitly protected against federal encroachment by the enumeration of powers and that including the Bill of Rights might undermine that protection.¹⁵⁷

Third, let us assume, contrary to what we believe likely, that groups are not able to agree but still choose to enact an indeterminate constitutional provision. Even under these circumstances, Balkin's argument is a nonsequitur, because these groups are unlikely to favor a broad delegation to the future. Let us assume group *A* wants to place principle *A* in the Constitution and group *B* wants to place principle *B*. Because they cannot agree, they enact an ambiguous or vague provision that does not clearly communicate either *A* or *B*. Even in this situation, these groups will not want the provision to be interpreted to mean principle *C*, where principle *C* is neither principle *A* nor principle *B* nor a compromise

154. See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 412 (2000).

155. See, e.g., CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 66, 77–86 (Helen E. Veit et al. eds., 1991).

156. See A.E. Dick Howard, *Rights in Passage: English Liberties in Early America*, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 3, 11 (Patrick T. Conley & John P. Kaminski eds., 1992).

157. See, e.g., Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1537 (2007) (noting Federalist fear that a bill of rights could endanger the Constitution's structural protections for liberties).

among them. But a relatively open-ended delegation would permit the Court to choose such a principle *C*.

To be concrete, let us assume that two groups disagreed on an important application of the contract clause. Group *A* wanted the clause only to be apply to retrospective applications, invalidating only encroachments on contractual terms already agreed upon. Group *B* wanted the clause to apply to prospective applications as well, constraining government's power to regulate the terms parties could be put in contracts even in the future. In fact, it is possible that there was some ambiguity in the scope of the contracts clause as between these two applications. Justices Story and Marshall had a rare disagreement on whether its strictures should be applied prospectively.¹⁵⁸ Justice Marshall thought the clause deprived states of the authority to impose restrictions on future contracts while Justice Story believed the clause prohibited interference only with past contracts.¹⁵⁹

Even given this disagreement, it would be very odd if these two groups would want the clause to be interpreted as some abstract principle of the kind Balkin wants, which is subject to balancing against other considerations. That was indeed the kind of principle applied in *Blaisdell*: the result was a gutting of the clause even against retrospective applications. That would have equally annoyed groups *A* and *B*, because, as Justice Sutherland observed in *Blaisdell*, it would undermine the key purpose of the clause—to prevent the retrospective abrogation of debts by debt relief legislation—a principle both groups *A* and *B* agreed upon. Thus, rational, even if disagreeing, groups would want courts to choose in some way between principle *A* and principle *B* rather than endorse an open-ended delegation.

Finally, if the enactors of a constitutional provision did, in fact, fail to agree on its meaning, that still does not mean that judges should view it as a delegation. As we have written elsewhere, constitutional provisions are enacted against a background of interpretive rules.¹⁶⁰ The interpretive rules that the constitutional enactors deemed applicable to the Constitution determine the original meaning of the constitutional provision. Thus, even if the enactors could not agree on the meaning of a provision, judges would still be required to interpret the provisions based on the interpretive rules. Unless those rules required that judges consider the actual understandings of the differing factions, judges would be required to ignore those disagreements and instead consider the matters that the interpretive rules required, such as text, structure, and evident

158. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354 (1827).

159. *Id.* (Marshall, C.J., dissenting) (“That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective operation.”); *id.* at 231 (Story, J.) (noting that a contract is necessarily formed within the confines of the laws of the state, incorporating its requirements).

160. McGinnis & Rappaport, *supra* note 36, at 752–53.

purpose. Thus, failures to agree on meanings would not necessarily lead to delegations to the future to decide on the meaning of provisions.

Thus, we do not believe Balkin has shown that supermajority provisions for constitution making naturally lead to delegations to the future. Such delegations are inconsistent with risk aversion and would open proposed entrenchments to withering attack. There is an alternative when groups cannot agree: leave out controversial principles and entrench only consensus ones. Even in the rare instances where groups disagree and nevertheless would like a provision to be put in the Constitution, a delegation to the future would not represent a likely rational compromise because it would increase risks for everyone involved.

IV. NORMATIVE ARGUMENTS

Balkin also makes normative arguments for his view that constitutional provisions are often best interpreted as abstract principles providing substantial discretion to future interpreters. He argues that constitutional law must serve three functions as basic law, higher law, and our law.¹⁶¹ Moreover, Balkin claims that these three functions can be realized only through an interpretive methodology that favors interpreting constitutional provisions as abstract principles permitting delegation to the future.¹⁶² Like his argument from purpose and structure, his more expressly normative argument is designed to make more plausible his specific arguments that particular constitutional language should be interpreted as abstract delegations.

Our response is similar to our argument as to purpose and structure. We maintain that Balkin's normative arguments are not well-grounded in the Constitution and do not offer a normatively attractive position. His conception of the Constitution as higher law provides no reason to believe that this law would actually promote human welfare rather than being dependent on unpredictable social movements of the future. His conception of the Constitution as our law provides no reason to believe it would be the law of the people as a whole rather than the social movements that happen to be preferred by the unelected judiciary of the time.

Instead of Balkin's conception, we argue in favor of an alternative conception of higher law and our law that promotes human welfare but does not embrace abstract delegations. Under our conception, the Constitution is higher law because it is higher in quality than ordinary law and it is our law, because we Americans make it through the deliberate process of constitution making, either through the process by which it was originated or amended. Moreover, these descriptions of the Constitution as higher and our law come directly from the text, structure, and original understanding and do not depend on Balkinian concepts, like

161. BALKIN, *supra* note 2, at 59–73.

162. *Id.*

redemption, that are not explicit or implicit in American constitutional law. And unlike in Balkin's framework, basic law, higher law, and our law are always identical—the determinate provisions of the Constitution as written.

A. *Basic Law*

Balkin argues that the Constitution as basic law must serve as a foundational legal framework for a society “that promotes political stability and allocates rights, duties, powers, and responsibilities.”¹⁶³ This argument is unexceptionable, as far as it goes, but it is in tension with his understanding of higher law and our law, which emphasize that the Constitution is sufficiently open-ended that successive generations of social movements can transform its operation. If basic law becomes identical with these other extremely flexible conceptions of law, the stabilizing function he recognizes as essential to the concept of basic law, not to mention the rights protection function, will be gravely undermined. On the other hand, if the basic law is not identical to higher law and our law, it becomes unclear how to be faithful to the Constitution, because there becomes more than one kind of constitutional law available to follow.

B. *Higher Law*

For Balkin the Constitution is higher law, because it permits the Constitution “to grow and improve.”¹⁶⁴ It needs to grow because there are many evils in the world and the Constitution in fact “contains compromises with evil and injustice.”¹⁶⁵ Because of this function, the Constitution is best interpreted as containing abstract principles that provide substantial discretion to future interpreters, as it must serve as a repository of ideals capable of critiquing practices that were not widely understood to be evil at the time the Constitution was passed.

We agree that the Constitution is higher law, but we disagree with Balkin's interpretation of what higher law is. To begin with our negative critique, the use of Balkin's interpretive methodology does not provide any substantial reason for thinking that his notion of higher law will result in an increase in human welfare. Lest this seem too harsh, this is Balkin's own view. The Constitution functions as higher law because it requires “faith in the ability of future generations to work out and develop the Constitution's guarantees over time.”¹⁶⁶ Balkin is correct in this at least: a constitution consisting of abstractions is a document based on faith, because it is impossible to predict how various social movements in the future will spin these abstract guarantees. Indeed, Balkin himself be-

163. *Id.* at 59.

164. *Id.* at 62.

165. *Id.*

166. *Id.*

believes that some of the ways that social movements have spun abstract principles created evils rather than ameliorated them. For instance, as we have discussed above, *Plessy* construed the abstract principle of equality in a way that permitted separate but equal and did so in response to the social movements of its time.¹⁶⁷

In contrast, under our approach, the Constitution is higher law because it is of higher quality than the ordinary legislation that it displaces when the two conflict, and it is higher in quality not because of its abstract principles but because of the process with which it was made. Elsewhere, we have argued that appropriate supermajority rules tend to produce desirable entrenchments and that the Constitution and its amendments have been passed in the main under appropriate supermajority rules.¹⁶⁸ Thus, the norms entrenched in the Constitution tend to be desirable and the likelihood of their desirability justifies judges in displacing ordinary law with higher law.¹⁶⁹ Our understanding of the Constitution as higher law also has the virtue of being based on features actually in the Constitution—the supermajoritarian process for constitution making.

Moreover, our argument shows why there is an identity between basic law and higher law. Because the Constitution is higher law in virtue of the consensus that gave rise to it, it should be interpreted as it originally would have been—according to the interpretive rules the Framers’ generation would have deemed applicable to it. Thus, there is no need, as Balkin suggests, to interpret the Constitution to have a different meaning than it had when enacted. Nor is there a need to interpret it in a manner that is fundamentally different from other written law. Its high quality is bound up within what Hamilton and others saw as its amenability to being enforced according to traditional methods of legal interpretation.¹⁷⁰ Elsewhere, we have shown these methods include using context, structure, and intent to resolve ambiguity and vagueness.

C. *Our Law*

For Balkin, the Constitution is our law because judges and other political actors under the influence of social movement can interpret its abstract provisions in accordance with one view of its meaning at the time.¹⁷¹ In his view, such discretionary acts of interpretation allow each generation to make the Constitution their own.

167. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

168. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695–96, 1703–04 (2010). While there is one significant way in which those supermajority rules were not appropriate—the exclusion of African Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect has rightly been removed. *Id.* at 1757–64 (discussing consequences of this constitutional failure).

169. We discuss our theory at somewhat greater length below. See discussion *infra* Part IV.D.

170. See *supra* note 81 and accompanying text.

171. BALKIN, *supra* note 2, at 7.

We agree that the Constitution is our law, but it is our law by virtue of the fact that the Founding generation made the Constitution, and each generation can amend the Constitution, under largely the same supermajority rules. It is thus constitutional politics that makes it our law.

We believe this is a superior understanding of “our law” and not just because, as we will discuss shortly, the process of making the Constitution ours will render it normatively superior to Balkin’s. It is also superior under Balkin’s terms, because it is much clearer that using the amendment process results in a law of “We the People.” The amendment process is a democratic and deliberative process, where constitutional amendments are passed after extensive national debate, in which everyone has a chance to participate.

In contrast, a process in which social movements, refracted through the judiciary, remake our Constitution gives greater weight to the social movements that are favorites of the judiciary. It has been well-argued that the judiciary favors elite interests, such as those of knowledge workers and the upper middle class. To be clear, we are not making an ideological point. Sometimes, elites of the time favor the interests generally associated with the right.¹⁷² At other times, they favor interests associated with the left.¹⁷³ But the kind of social movements that the Court chooses to heed are much more likely to have elite support than those that do not. A great drawback of Balkin’s claim that his mode of interpretation makes the Constitution our law is that the “We the People” who will count the most are elites.

Our conception of our law also has the great advantage of making its content coextensive with basic law and higher law. Some of the basic law was enacted by the original Constitution, and the rest was enacted by the similarly stringent process of constitutional amendment. Thus, all constitutional law viewed from any perspective has the same procedural guarantees of quality and the same degree of public participation. It is simultaneously basic law, higher law, and our law.

D. Normative Considerations

But perhaps the most problematic aspect of Balkin’s discussion of the Constitution as basic law and higher law is that it is not normatively attractive. Balkin does not furnish any reason to believe the results of his constitutional mechanisms are going to be beneficial. Abstract principles have little constraining power precisely because they are abstract. Thus the question is whether a process by which Justices reconstruct the principles anew by sifting through widely varying constructions proffered by different social movements is a good one. Balkin does not show that his

172. See Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 86 (2006).

173. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1754 (2001).

method of interpretation will be good in any systemic way. Instead his normative defense of his interpretive method expressly rests on faith—faith that the principles so sifted and instantiated through the course of U.S. history are likely to redeem previous constitutional evil.

We will briefly summarize our theory and argue that ours is the proper way to defend a constitutional theory—by showing that it produces better consequences than its rivals. A faith-based defense of constitutionalism in general and of a specific interpretative theory is not persuasive, because, like other appeals to revelation, it resorts to claims that reasonable people need not accept. Balkin may have faith, but others may or may not share it. To be persuasive, a defense of an interpretive approach should appeal to normative considerations that are broad enough to persuade people in a pluralistic society, like our own. Indeed, we find Balkin's normative defense of his theory somewhat puzzling. Defending the notion that the Constitution is best interpreted as abstract delegations to the future on the basis of faith may have some virtues. It allows a lot of scope for defending a vision of the Constitution close to one's personal view of justice. But it is not well-designed to persuade others of its normative attractiveness.

We believe the right way to update the Constitution is not through social movements interpreting abstract principles but through the amendment process. The amendment process is the appropriate way because its supermajoritarian structure is likely to lead to good constitutional provisions.¹⁷⁴

Such a supermajoritarian process promotes the consensus and bipartisan support for constitutional provisions that is important to providing the allegiance to a constitution that desirably regulates politics and society.¹⁷⁵ It affords the deep deliberation that helps correct for some of the difficulties that legislators and citizens alike have in framing constitutional provisions that are designed to endure into the future. Finally, it creates a limited veil of ignorance that helps promote rights for minorities.¹⁷⁶ A veil of ignorance provides citizens with greater incentives to protect minority rights by depriving citizens of concrete knowledge of whether they and their descendants will be in the majority.¹⁷⁷ A supermajority entrenchment rule helps create a limited veil because its requirement of a supermajority both to enact and to amend makes it difficult to change constitutional provisions.

In contrast, Balkin's method of judicial selection from the interpretations of abstract principles of various social movements is not likely to yield good results. First, it does not make it likely that the chosen interpretation will represent a consensus. Social movements can be powerful

174. See McGinnis & Rappaport, *supra* note 168, at 1695–96.

175. *Id.* at 1706.

176. *Id.* at 1702, 1708.

177. *Id.* at 1708–10.

even without being majoritarian, let alone representing a consensus. Moreover, the Supreme Court rules by a majority vote, and even that majority does not have to represent majority sentiment. The Justices' views may also have changed since they were nominated by the President and confirmed by the Senate. Supreme Court Justices tend to represent elite opinion once in office,¹⁷⁸ which also militates against any assurance that they represent the majority of the people.

Second, social movements do not in and of themselves represent a deliberative process. They may in fact be divisive and refuse to compromise with opponents. They can in some cases be relatively ephemeral, representing a passionate response to an event that fades in significance. Thus, making social movements the prime movers of constitutional revisions is not as likely to assure deliberation as is the two-stage national process of constitutional amendments.

Third, the judicial construction of abstract principles from possibilities offered by social movement does not provide much of a veil of ignorance. If Justices recognize their decisions are constructions of abstract principles, they also recognize that they can be distinguished or changed by a revised construction. As a result, Justices will understand that their constructions are unlikely to constrain themselves or subsequent Justices from making decisions that are in their interest or of the subsequent social movements they happen to favor.

Finally, spinning out constructions of abstract principle through social movements not only tends to produce worse results than the amendment process would, but also tends to supersede that process. As we have argued elsewhere, judicial decisions that update the Constitution can undermine the constitutional amendment process by preventing an amendment from passing but still not being the update that would have been enacted by the supermajoritarian process.¹⁷⁹ Moreover, people will become less willing to organize to make constitutional amendments if they can get what they want by creating a social movement that will persuade judges. Finally, citizens who want to put more concrete principles in the Constitution will not be as likely to resort to the constitutional amendment process if they believe that the court will interpret the provisions as an abstract principle delegating interpretive discretion to the future.

We believe that it is a substantial weakness of Balkin's entire theory that he spends so little time talking about the constitutional amendment process. He might be among those who believe the supermajoritarian process is too stringent, but he does not attempt to demonstrate its inadequacy. We have argued elsewhere that it is adequate.¹⁸⁰ Citizens can

178. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1537 (2010).

179. McGinnis & Rappaport, *supra* note 168, at 1741–48.

180. McGinnis & Rappaport, *supra* note 168, at 1723–28.

change the Constitution about issues that matter and have done so through amendments like the Sixteenth, Seventeenth, and Nineteenth. While there will be some provisions that are inferior and cannot be easily changed, like the provision permitting only “natural born” citizens of the United States to be President,¹⁸¹ this is a relatively small price to pay for a process that makes it likely that the provisions that are put into the Constitution are high quality ones. Moreover, as we have discussed above,¹⁸² the Constitution offers many other political processes both at the state and federal level that can be used to try out social norms before making the weighty decision to enshrine them in the Constitution. Given the adequacy of the process of constitutional amendment, an interpretive theory that constructs a presumption in favor of interpreting the Constitution as abstract principles is not necessary to make the Constitution higher law and our law. All it will do is make it worse law.

V. AFTERWORD: OUR POSITION ON EXPECTED APPLICATIONS

We read with interest Jack Balkin’s response to this Article. While we would not normally comment on a response, we do so because Balkin’s description of our position appears to seriously misrepresent our view on the issue of expected applications. Balkin says that we “equate original meaning to something very close to original expected applications.”¹⁸³ We are not sure whether Balkin here is misinterpreting our view or using the term “original expected application” in a very broad way that conveys a misleading impression of our view. But in either case, we thought it prudent to clarify the matter.

On the one hand, Balkin may be suggesting that we believe that expected applications are entitled to enormous weight. But that claim is untrue. We do not say that the meaning of words or the content of original methods are constituted by original expected applications, nor do we believe that they have to remain close to any particular expected application or set of applications. Instead, expected applications offer some evidence of the original meaning. They provide insight into word meanings and the content of the original interpretive rules. Depending on the reasoning that supports an expected application and the extent to which it was held, an expected application may be very informative of the original meaning. But expected applications frequently should be disregarded when other evidence outweighs them. In particular, we should be quick to depart from such applications when they conflict with strong evidence of word meanings or interpretive rules.

On the other hand, Balkin may be using original expected applications in an unusual way that is markedly differently than the way we use

181. U.S. CONST. art. II, § 1, cl. 5.

182. See *supra* notes 109–13 and accompanying text.

183. Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 826.

the term. Balkin believes that an interpretation properly based on the original interpretive rules, taking into account the materials at the time but not later materials, is an original expected application. Put differently, an interpretation reached by a reasonable person with knowledge of the law, properly applying the interpretation rules applicable to the Constitution, would not be part of the original meaning but merely an expected application.¹⁸⁴ If Balkin wants to use the term in that way, that is certainly his prerogative. But that is not how we understand original expected applications. Once one accepts the original interpretive rules as constitutive of original meaning, as we do, the best application of those rules would be the original public meaning. By contrast, under our view, an original expected application in these circumstances would be an interpretation reached by one or more persons at the time on a particular issue—an interpretation that might or might not be correct.

184. *Id.* at 826–27.