THE POLITICS OF CONSTITUTIONAL FIDELITY

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In this Article, the author praises Jack Balkin's new book, Living Originalism*, for advancing normative constitutional theory in two interlocked ways: (1) by demonstrating that many long-thought conclusions central to originalist ideology are simply not required by the original meaning of the Constitution's text, and (2) by explaining constitutional authority and fidelity in a manner consistent with a systems-level understanding of the judicial role. The author links these advancements by noting that insofar as the major constitutional controversies of the day are disputes over constitutional construction and not of constitutional interpretation, attention is naturally directed to the political systems that elaborate new constitutional constructions.*

Yet in the author's view, the book inadequately develops standards for assessing those politics. Balkin's criterion of democratic legitimacy is simply too capacious. The author supplements Balkin's work with her own work on "processualism," which attends to the role institutions play in conferring normative legitimacy. Because processualist values are enforced by partisan officials, however, using processualism as a standard of fidelity will require theorists to adopt positions that register as partisan even while assessing systems-level processes. Making use of processualism's analytic leverage would require Balkin to give up the aspiration toward a nonpartisan systems-level approach to constitutional fidelity.

I. WHAT IS A FAITHFUL POLITICS?

Jack Balkin has written an engaging, provocative, and substantial book, *Living Originalism*, which significantly alters the landscape of contemporary normative constitutional theory in at least two ways. First, the book argues that many conclusions long thought central to originalist ideology are simply not required by the original meaning of the Constitution's text. Beyond his well-known originalist defense of the right to abortion,[1] Balkin argues that an originalist reading of the commerce

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1. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

clause can justify the New Deal administrative state; that the Fifth Amendment is a perfectly reasonable legal resource for the integration of Washington, D.C. public schools (*Bolling v. Sharpe*);[2] and that the modern civil rights regime is a reasonable construction well within the original meaning of the Fourteenth Amendment, notwithstanding some of its Framers' regressive views about race and sex. None of these outcomes are required by originalism, and none are barred by it either. Living originalism does not take sides on most of our current constitutional controversies. Balkin argues that the central debates we associate with originalism are not debates over interpretation at all, but are rather controversies about which *construction* of constitutional meaning should be endorsed by a democratic public.[3] In other words, they are essentially partisan interpretive positions vying for the endorsement of a democratic public.

A second important contribution is that the book seeks an account of constitutional authority and fidelity that is consistent with a systems-level understanding of the judicial role. Like other scholars of the "new originalism," Balkin is clear that legitimate practices of constitutional construction happen in all three branches, including the judiciary.[4] These constitutional constructions happen as a normal part of everyday politics as the political branches communicate their goals to one another, and as they communicate to the judiciary through appointments and lawmaking. Balkin's contribution is to theorize these politics as a process of faithful redemption of the constitutional project. Most normative constitutional theorizing asks how individual agents can be faithful and presumes that the constitutional system will be faithful if all of its officials are. But Balkin is skeptical about the extent to which interpretive theories will discipline constitutional agents, especially in comparison with the structural features of their offices. For example, a judge may be far more constrained by the need to achieve consensus on a multimember body than by the requirements of originalism or any other interpretive theory. I would add that constitutional assessment already requires a scholarly capacity—one not at all well-developed in the literature—to handle the interpretive work of groups, because the Supreme Court and Congress are institutions whose behavior is never a simple function of the faithfulness of any one individual. Hence, Balkin appropriately emphasizes that fidelity must be assessed in a systemic, not only individual, fashion.[5] For

2. 347 U.S. 497 (1954).

3. JACK BALKIN, LIVING ORIGINALISM 3–6 (2011). The distinction between interpretation and construction is central to the new originalism. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

4. This was not clear in Keith Whittington's *Constitutional Interpretation*. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5–14 (1999). *But see* Randy E. Barnett, *An Originalism for Nonoriginalists: Textual Meaning, Original Intent, and Judicial Review*, 45 LOY. L. REV. 611, 641–42 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 612 (2004).

5. BALKIN, *supra* note 3, at 292.

this task Balkin turns to structure, not outcomes. Faithful constitutional governance is achieved when officials behave in accordance with the hardwired (determinate) features of the Constitution (which they most often do), when democratic politics validates constructions of constitutional meaning that are appropriate for the time, and when judges translate those constitutional politics into a relatively autonomous realm of constitutional law. Balkin does not offer these as partisan standards of interpretive fidelity; the implication of the book is that officials and publics can neutrally assess whether these structural conditions are intact, and the rhetoric of the book suggests that usually, they are. For all their debates about privacy and abortion, Republicans and Democrats agree that the presidential veto is subject to a two-thirds override.

These two advances are linked to one another. Insofar as the major constitutional controversies of the day are controversies, not of constitutional interpretation, but rather of constitutional construction, attention is naturally directed to the politics whereby constitutional projects are in fact constructed and elaborated. Balkin's systemic, interbranch perspective on constitutional fidelity works well with the new, capacious originalism.

But while Balkin is clear on the pervasiveness of a politics of constitutional construction, his work also exposes a lacuna that is becoming even more pressing. Balkin is crystal clear that the fidelity of constructions, no less than interpretations, *can* be assessed; he repeatedly names some constructions which are congruent with the original public meaning as *more faithful* constructions than others, equally consistent with the original public meaning.[6] If the central controversies of constitutional politics are now framed as debates about "construction," rather than "interpretation," and if constructions can be assessed for their relative fidelity, then the ball has moved in fairly important ways. By what standards should we assess the faithfulness of constitutional constructions?

The standards that the book offers for this project are, I believe, underdeveloped. Like Robert Post, Mark Tushnet, Larry Kramer, Reva Siegel, and Neal Katyal—all of whom share Balkin's concern to theorize the processes of constitutional elaboration outside of the courts and Article V amendment processes[7]—Balkin ultimately relies upon a democratic criterion for evaluating the fidelity of constitutional politics: "The authority of constitutional constructions . . . comes from their direct or long-run responsiveness to popular will as expressed through the processes of democratic politics."[8] This standard, he says, is implicit in the

6. *See, e.g.*, *id.* at 121–22.

7. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (1999); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

8. BALKIN, *supra* note 3, at 55.

Constitution's text.[9] But, like these other scholars, he says little about the processes by which democratic authority can be achieved or expressed.[10] Nor does he distinguish between the *success* of a project of constitutional construction and its *democratic authority*. Is every successful, enduring project of constitutional transformation democratically faithful? And is democratic success the only standard that the Constitution offers for evaluating constructions of constitutional meaning? The problem of assessing the legitimacy of various processes of constitutional change—a central preoccupation of modern normative constitutional theory—is displaced and reframed, but not resolved, in *Living Originalism*.

In his role as systems theorist, Balkin's criterion for "more" or "less" faithful constructions is a democratic one: which constructions are endorsed by the public over time. In his role as citizen-interlocutor, Balkin uses arguments from text, prudence, function, and so forth—the "familiar modalities"[11]—to appeal for certain readings of, say, the commerce clause. The status of his arguments as citizen-interlocutor is the status of all other arguments in public life, namely, the status that the public decides to grant them.[12] To the extent that the public is won over by his argument about the commerce clause, then, Balkin's arguments would become legally relevant as a result of the rich web of normative, professional, and structural constraints that keep judges sensitive to their larger cultural and political environments.[13] He does not theorize the normative status of those professional and structural constraints, but he argues that the constitutional system is faithful precisely to the extent that it maintains vital linkages between politics and law that allow for the arguments of citizens to affect the behavior of officials.[14] So I believe that an implication of the account is that the constitutional system is self-undermining when it produces outcomes that render judges insensitive to the constraints of democratic politics. Implicitly, then, the maintenance of a set of institutions, practices, norms, and audiences that render judges sensitive—but not too sensitive—to democratic politics is one structural condition for the kind of systems-level fidelity Balkin seeks.

This criterion of democratic legitimacy, on its own, is a plausible starting point for assessing the faithfulness of a construction, but it is not enough. In the first place, it is not enough because the Constitution contains other implicit structural conditions that discipline its constitutional politics no less than democracy itself. But it is also not enough because it

9. *See id.* at 4.

10. He writes that "[a] system is *democratically* legitimate to the extent that it allows the members of the political community to govern themselves and makes government action accountable to public will, public values, and public opinion." *Id.* at 65.

11. *See id.* at 129–31.

12. *See id.* at 331.

13. *See id.*

14. *See id.* at 130–33.

is too capacious a standard, given the huge amount of evaluative work it is expected to perform. If all major constitutional controversies are about construction, rather than interpretation; if every successful constitutional project is at least minimally justifiable on democratic grounds (given the supermajoritarian requirements for success in the U.S. representative system); and if democratic authority is to be the only systems-level standard by which constructions are assessed, then it is not only originalism, but also constitutional theory writ large which loses its capacity to judge, discipline, and assess constitutional change.

Consider equal rights for women. The need for a constitutional amendment guaranteeing women's right to political equality was necessary in part because of the Supreme Court's hostile conclusions in *Minor v. Happersett* and *Bradwell v. Illinois*.[15] Balkin argues that these conclusions were not constitutionally required, but were rather constructions in response to a social and political environment where women's political claims had not yet achieved prominence. That environment obviously changed in the 1960s and 1970s. Congress began to pass legislation supporting gender equality, including Title VII of the Civil Rights Act of 1964 and its amendments in 1972.[16] This legislative work for gender justice ultimately expressed itself in the equal rights amendment (ERA).[17] The ERA was sent to the states in 1972, triggering a ten-year battle that ended with defeat by an agonizingly slim margin of thirty-five out of the required thirty-eight states, despite polls showing majorities of Americans favoring the amendment over the entire ten-year ratification process.[18]

Concurrently with the ratification struggle, the Supreme Court began demonstrating some solicitude to women's rights claims. Balkin notes the relationship between the broader political movement and the Supreme Court's new sensitivity; in *Frontiero v. Richardson*, the Court explicitly cited the conclusions of a "coequal branch" on matters of gender justice as "not without significance."[19] And Balkin applauds the outcome: he is clear that judicial solicitude for women's equality was not a constitutional mistake or matter for regret, but rather an "*application*[] of text and principle,"[20] "consistent" with the Fourteenth Amendment, one of the "proudest achievements" of the polity.[21]

Living Originalism, however, says too little about how we should assess the process of constitutional transformation. The history points to

15. 88 U.S. 162 (1874); 83 U.S. 130 (1872) (respectively).

16. *See* Pub. L. No. 89-110, §§ 701-716, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

17. Equal Rights Amendment, H. J. Res. 208, 86 Stat. 1523 (1972) (proposing ERA by joint resolution); *see also* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 8–10 (1986).

18. *See* MANSBRIDGE, *supra* note 17, at 1.

19. 411 U.S. 677, 687–88 (1973); BALKIN, *supra* note 3, at 304.

20. BALKIN, *supra* note 3, at 11.

21. *Id.* at 18, 258.

two lively pathways to women's constitutional equality: (1) through constitutional amendment, or (2) judicial construction. The availability of these twin processes was significant for each. While the Supreme Court was obviously affected by the cultural and political transformation it was witnessing, the ratification struggle was also affected by the Court's new gender-sensitive jurisprudence. Jane Mansbridge has concluded that this jurisprudence was in part responsible for the failure of the ERA.[22] By protecting many of the moderate policy outcomes that feminists were seeking, the Court pushed activists to articulate more and more radical arguments about the likely effect of the ERA, ultimately contributing to the heavy mobilization and ultimate victory of social conservatives.[23] In addition, Balkin notes that the Court's new sex equality doctrine "made the ERA largely superfluous."[24]

Does it matter that the processes of judicial construction may have attenuated the political appeal of the ERA, undermining the political efforts of so many mobilized citizens? Does it matter if women's equal rights are guaranteed at the level of text, versus through judicial construction?[25] The energies of ERA advocates could have been put to better use elsewhere if their goal was achieved as soon as the judiciary was won over. But if the mobilizing process has value, or if it makes a difference when rights are protected through textual amendment versus judicial construction, then perhaps it is the Court which should have focused its energies elsewhere. The Court may even have behaved very badly: entrenching women's civic inferiority when the movement needed support, only then to passively undercut the accomplishment of feminist activists at the pinnacle of a political struggle of several lifetimes. Balkin writes as if the justice of the outcome, and the support of majorities over time for the policy of women's rights, tells us everything we need to know to assess the legitimacy of this process.

A theory of constitutional fidelity should be able to speak in a more fine-grained way to the legitimacy of these processes of constitutional change. Doing so requires us to look in part to the function, role, and substantive values associated with the various institutions. For example, if the role of the judiciary is to "take the lead on questions of rights, justice, and constitutional structure," and to protect minorities when political majorities are unwilling to do so,[26] then the Supreme Court's performance in this example is dismal. But Balkin himself cashes out the role of the judiciary as to "represent and protect, in as legally principled a way as possible, the constitutional values of temporally extended majorities, and to prevent drastic changes in those constitutional values unless

22. *See* MANSBRIDGE, *supra* note 17, at 46.
23. *See id.* at ch. 6.
24. BALKIN, *supra* note 3, at 304.
25. *See* Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243 (2006).
26. BALKIN, *supra* note 3, at 321–22.

there has been extended and sustained support for change."[27] If this is the Court's role, then its performance around women's rights was not bad. The major cases protecting equality and due process for women were professionally respectable, and they certainly translated into constitutional law the values of an extended majority on behalf of equality for women. At stake is the way or ways we read the function, role, and substantive values associated with the judicial institution. Both ways of reading the judiciary are plausible.[28] The choice to read the judiciary in one way rather than another is a substantive interpretive choice with inevitable implications for how theorists assess and engage partisan politics.

What is true for the judiciary is no less true for the other branches. All three branches can be described in terms of competing functions and values. Legislators and Presidents, as well as citizens, live within professional worlds that are thick with norms. One task of constitutional theory should be to engage and assess those constitutional politics as they are encountered by those who inhabit them.[29] An overly capacious understanding of constitutional fidelity loses its capacity to serve as a resource for officials who must navigate this thick web of normative, political, and institutional demands.

II. PROCESSUALISM

One of the book's appealing qualities is its emphasis on the role of institutional constraints in disciplining the constitutional constructions of the branches. Balkin makes this point with reference to the Supreme Court. He writes:

> The most important restraints on judges engaged in constitutional construction will not come from following proper interpretive theories but rather from *institutional* constraints . . . [including] the moderating effects of multimember courts . . . the screening of candidates through the federal judicial appointments process, social and cultural influences on the judiciary . . . and professional legal culture and professional conceptions of the role of the judiciary.[30]

Balkin offers this as a simple observation about why it is appropriate to consider fidelity at the structural level. And he seems to imagine that maintaining these institutional constraints will not require officials to "follow[] proper interpretive theories."[31] But, if we consider the parallel

27. *Id.* at 328; *see also id.* at 326.

28. *See, e.g.*, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 123 (2004).

29. Consider the role of the American Political Science Association Committee on Congress in the reorganization of Congress in the 1946 Legislative Reorganization Act. *See* John Roos, *Thinking About Reform: The World View of Congressional Reformers*, 25 POLITY 329, 341 (1993).

30. BALKIN, *supra* note 3, at 22–23.

31. *See id.* at 22.

institutional constraints which discipline other constitutional actors, then it becomes clear that that hope is chimerical. My own research emphasizes not only the positive roles of institutions in constraining constitutional interpretation, but also their *normative* roles—the legitimacy-conferring possibilities when an institution fully mobilizes its structural capacities on behalf of the task at hand. I call this a criterion of "processualism."[32] For law professors to criticize the Supreme Court when it behaves without judicial integrity is an example of an audience enforcing processual values. But other institutions should also be subject to processual criticism and to projects of institutional reform if or when their capacity to deliver governance that can be defended on processual grounds begins to fray. If Congress is interpreting the meaning of the Fourteenth Amendment, is it doing so in a way that fully mobilizes its own institutional strengths? What *are* the institutional strengths of Congress in its politics of constitutional interpretation? Is the function of a legislature to enact simple majoritarianism, to deliberate upon the particularities of legislation from many different points of view, or to "check" executive power? Does the filibuster support the cultivation of those strengths or undermine them?[33] Likewise, when the President deliberates over the contours of his powers under the Commander-in-Chief clause, does he do so on the basis of an appropriate mobilization of the political and institutional resources of the executive branch? Should he rely on the Office of Legal Counsel (OLC), and should the OLC be accountable to the President himself, or perhaps to the judiciary?[34]

To demonstrate the value of processualism as a standard, I would like to use an example of constitutional construction in the domain of war powers. In the early twentieth century, Theodore Roosevelt articulated an international police power that allowed him to roam the Western Hemisphere policing small nations to block the possible intervention of European nations.[35] The Monroe Doctrine, he believed, called for this

32. Mariah Zeisberg, *Democratic Processualism*, 41 J. SOC. PHIL. 202 (2010) (reviewing STEPHEN ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON (2010)).

33. *See* Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041 (2011); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011); David R. Mayhew, James Madison Lecture, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31 (2003); *see also* GARY MUCCIARONI & PAUL J. QUIRK, DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS 208–09 (2006).

34. BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87–88, 144–45 (2010); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 468–79 (2003).

35. *See* JAMES R. HOLMES, THEODORE ROOSEVELT AND WORLD ORDER: POLICE POWER IN INTERNATIONAL RELATIONS 102–06 (2006). In his 1904 State of the Union address to Congress, Theodore Roosevelt famously stated:

> If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Mon-

enforcement of U.S. interests.[36] He also believed that the effort toward global governance would be enhanced if the U.S. exercised military force on its behalf.[37] The honor of the United States meant that it could be trusted with this awesome power of both judging and punishing transgressions of international order. The presidency's experience with using a police power to "pacify" the West and (in Roosevelt's time) intervene in labor disputes meant that the presidency was institutionally well-positioned for this task.[38] This conception of executive power lay behind many legislatively unauthorized military interventions, and the repeated violation of the sovereignty of Latin American nations, profoundly affecting the destiny of those nations as well as U.S. moral authority in the twentieth century.[39] Congress did not protest this behavior and often urged the presidency toward even more bellicosity.[40] This behavior was democratically endorsed: the presidential election of 1900 had been almost a referendum on imperialism, resulting in the victory of William McKinley (with Roosevelt as vice president) over anti-imperialist William Jennings Bryan.[41] Theodore Roosevelt's election in 1904 confirmed the public's orientation toward imperialism.[42] Executive bellicosity was endorsed again and again through elections, support for naval development, treaty ratification and appointments, and popular and journalistic acclaim.[43] This construction of presidential power was also effectively endorsed by the Supreme Court in a series of decisions that supported the imperialist project.[44]

Just fifty years later, Harry Truman articulated the same kind of police power as the basis for his intervention in Korea.[45] This time, the argument was wildly controversial. Truman's deployment of forces to Korea explicitly violated the U.N. Participation Act, which specified that no

> roe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.

Theodore Roosevelt, State of the Union Message (Dec. 6, 1904), available at http://www.theodore-roosevelt.com/images/research/speeches/sotu4.pdf (articulating what historians would later refer to as the Roosevelt Corollary).

36. *See* HOLMES, *supra* note 35.

37. *See id.* at 90.

38. *See id.* 37–51, 66–68.

39. *See id.* at 157–91 (providing case studies in violations of Latin American sovereignty).

40. *See, e.g.*, ROBERT E. HANNIGAN, THE NEW WORLD POWER: AMERICAN FOREIGN POLICY, 1898–1917 (2002); Thomas A. Bailey, *The Lodge Corollary to the Monroe Doctrine*, 48 POL. SCI. Q. 220 (1993).

41. *See* JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM 14–17 (2010); E. Berkeley Tompkins, *Scylla and Charybdis: The Anti-Imperialist Dilemma in the Election of 1900*, 36 PAC. HIST. REV. 143 (1967).

42. *See* ZELIZER, *supra* note 41, at 19; David H. Burton, *Theodore Roosevelt: Confident Imperialist*, 23 REV. POL. 356 (1961).

43. *See* GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 299–336 (2008).

44. *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 240–41 (1996).

45. Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1245 (1997).

forces would be made available to the United Nations except through congressionally sanctioned special agreements.[46] But fifty years later, background institutions of international law, including the United Nations and NATO, had developed.[47] The existence of these *institutions* made his claim to be enforcing global normativity more reasonable than the similar claims of Theodore Roosevelt had been. The critical role of U.S. leadership in creating those institutions as a response to war made the link between maintaining those institutions, and U.S. security, a plausible one. Moreover, Congress itself had been a primary agent constructing those international institutions, had been well aware of the constitutional ambiguities involved in the passage of the relevant treaties, and after the U.N. Participation Act, it repeatedly declined to limit the President's war powers.[48] Over time, Senator Robert Taft's effort to restrain the presidency floundered in Congress, as the public continued to vote for internationalist legislators, and as Eisenhower's election confirmed the public's desire for presidential leadership in global security.[49] The very existence of controversy made it plausible that the public knew what was at stake, constitutionally, when it elected internationalist legislators and Presidents. Truman's construction of presidential power became entrenched in the twentieth century.

Theodore Roosevelt and Harry Truman both reconstructed the executive office. Both constructions were democratically sanctioned, in the sense that they managed to win enduring public support. But does it make sense to analyze the relative fidelity of these constitutional constructions without considering the proper role of the presidency in the constitutional order? The standard of processualism would ask us: whose claim was more fully developed in ways that are responsive to the distinctive capacities of the branch of the presidency, for example, that office's obligation to provide for security? Which claim was better supported by international, constitutional, and statutory law, for the President is, after all, an executor of law? And as Balkin suggests, to what extent was it clear that each President was acting as a democratic representative on behalf of those who elected him?[50] These questions are the equivalent to asking whether a judicial opinion is elaborated in a way that meets the standards of professional legal competence. Processualism assesses institutional performance in relationship to the constraints and norms of the office in question.

In relation to Balkin's work, processualism has value for three reasons. First, because it is implicit in the constitutional text, no less than

46. UN Participation Act of 1945, Pub. L. No. 264, § 6, 59 Stat. 621; *see also* Fisher, *supra* note 45, at 1259–60.

47. *See* Fisher, *supra* note 45, at 1237.

48. *See generally id.* (discussing President Truman's, Clinton's, and Bush's successful "side stepping" of Congress).

49. *See* ZELIZER, *supra* note 41, at 114–19.

50. BALKIN, *supra* note 3, at 290.

democracy itself. Second, because it accounts for the particular norms associated with judicial review from a systems-level point of view, while simultaneously giving analytic leverage to the effort to theorize the disciplining capacities of nonjudicial institutions. Third, because it allows for analytic sensitivity to relevant differences in constitutional process that cannot be apprehended solely from the standpoint of democratic legitimacy.

Importantly, however, the standard of processualism—which I believe is already implicit in *Living Originalism*—exposes the difficulties that attend any effort to theorize constitutional fidelity in a way which is both politically useful and which avoids partisan controversy. The rub, in the case of the elected branches, is that it seems very difficult to answer questions about comparative institutional competence without some kind of background judgment on the actual politics that were at stake in the Roosevelt and Truman eras. Did a global police power vested in the presidency make the world safe for the U.S. Constitution in Roosevelt's time, Truman's time, or our time? Or does such a power undermine that Constitution by paving the way for the imperialist rule of a single branch? If the threat from Korea was overblown, and there was no U.S. security interest at stake, then it is difficult to justify President Truman's behavior in terms of security necessity. But if Truman was responding appropriately to a true national threat, then our assessment of the performance of the executive branch will be enhanced. In the context of the presidency, where constitutional issues are intertwined with the ordinary politics of the moment, it seems very difficult to answer the institutional question without taking a stand on the politics at stake; a substantive stand on what the Constitution stands for in that moment.

III. PROCESSUALISM AND INSTITUTIONAL REFLEXIVITY

Processualism is a way of designating a set of structural standards implicit in the Constitution's text and design. But the only way for this standard to be politically efficacious is for the branches themselves to make it so. The Senate itself is responsible for deciding whether the filibuster supports or undermines its capacity to govern constitutionally.[51] Applying processualism means that the branches carry out their own processes of institutional reform in service of the constitutional aims of that branch. This means that processualism, when used as a standard of evaluation, imposes a duty of institutional reflexity on the political branches. The branches are charged with, at a minimum, maintaining their own capacities to govern in ways that are disciplined by their animating constitutional functions. For them to reflexively consider the extent to which their own structures, norms, and audiences support or undermine the effort to achieve constitutional governance is for them to

51. Chafetz, *supra* note 33, at 1006–08.

behave with some orientation toward systemic constitutional fidelity—in short, for them to behave faithfully.

While processualism is not intrinsically partisan, then, it is to be applied in a context where judgment is legitimately structured according to partisanship and other forms of group affiliation. This would seem to violate at least two canons of wise constitutional judgment; namely, that no branch should judge its own case, and that constitutional outcomes should be broadly justifiable. But if we consider actual projects of institutional reform, for example ongoing deliberations about the filibuster, or major moments of legislative reform, then we see that such moments of institutional reflexivity often happen in political contexts that make neutrality a very distant aspiration.[52] Since the constitutional politics of the branches is conducted in partisan ways, we can expect that applying the standard of processualism will lead to conclusions that will register as partisan in the broader political landscape. Just as the old originalism invested its adherents in a series of positions which were partisan within the larger constitutional law landscape, so too does this new way of assessing constitutional fidelity require both officials and scholars to be willing to adopt positions which may be partisan within the larger landscape of constitutional politics.

Balkin emphasizes that his account of constitutional authority destabilizes conventional understandings about what constitutional argumentation should achieve. He writes that:

> Our Constitution maintains democratic legitimacy because people of different views retain the ability to persuade each other about the best reading of the Constitution . . . . If so, then the best method of constitutional interpretation must be one that many different people could, in theory, use to express their divergent views. It cannot be an algorithm for decisionmaking that would require everyone who uses it to converge on a single correct answer. . . . [i]f a good theory of constitutional interpretation must flow from what makes constitutions legitimate, then we must seriously revise our criteria for what makes an interpretive theory good.[53]

On the one hand, this insight usefully pushes constitutional studies toward a much deeper accommodation of interpretive pluralism than originalism heretofore has been able to accomplish. On the other hand, the book's failure to attend to the theoretical significance of its own structural implications means that Balkin might be too sanguine when he imagines that an emphasis on hard-wired features and democratic structure can save constitutional theorizing from charges of partisanship, least

52. *See, e.g.*, Roger H. Davidson, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357 (1990); John G. Stewart, *Central Policy Organs in Congress*, 32 PROC. ACAD. POL. SCI. 20 (1975).

53. BALKIN, *supra* note 3, at 134.

of all when the branches enforcing these structural requirements are themselves invested in and organized through partisan electoral politics.

Living Originalism represents a significant methodological advance over theories of originalism already on offer. Originalist propositions about the nature of constitutional authority are usually deeply embedded within a juridical perspective.[54] Originalist scholarship emphasizes the legally binding nature of the Constitution;[55] worries about the fit between originalism and the Court's status as a nonelected branch;[56] emphasizes the importance of results being generally justifiable, as opposed to justifiable to fellow partisans;[57] aspires to provide for neutral and predictable decision making over time;[58] and hopes to cabin judicial subjectivity by reference to the supposed facticity of history.[59] Methodologically, originalist scholarship uses as its touchstones the major canons of legal interpretation (i.e., the "plain meaning rule," canons of statutory or contractual construction, the centrality of writtenness to legal decision making);[60] interpretive dilemmas posed as "whether or not" propositions, which is a bimodal form of analysis well-suited to the exercise of a judicial veto;[61] and core examples derived from the Supreme Court's docket, especially due process and equal protection.[62]

Consider how different it would be to develop a constitutional theory around the problems of *designing* statutory law and crafting public policy so as to carry out constitutional aims; that assesses fidelity not in terms of particular cases and controversies, but in light of how integrated public policies support or undermine constitutional governance (i.e., approaching racial integration through careful design of zoning and small-business regulatory systems).[63] Such an approach might well emphasize,

54. Originalism is often simply defined as a jurisprudential, not semantic, theory. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980). For overviews of contemporary originalist theory, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12 (Grant Huscroft & Bradley W. Miller eds., 2011).

55. *See, e.g.*, Brest, *supra* note 54, at 204; John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 372 (2007).

56. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 411–12 (2d ed. 1997); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 683 (2000); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854, 862 (1989).

57. *See* Bork, *supra* note 56, at 5.

58. *See, e.g.*, Bork, *supra* note 56, at 1–2; Scalia, *supra* 56, at 856–57, 863.

59. *See, e.g.*, Brest, *supra* note 54, at 205; McGinnis & Rappaport, *supra* note 55.

60. *See, e.g.*, WHITTINGTON, *supra* note 4, at ch. 3; Barnett, *supra* note 4, at 629–48; Brest, *supra* note 54, at 206–07; McGinnis & Rappaport, *supra* note 55, at 374.

61. *See* Brest, *supra* note 54, at 211–13.

62. *See, e.g.*, Bork, *supra* note 56, at 11–18; Brest, *supra* note 54, at 231–34; McGinnis & Rappaport, *supra* note 55, at 376–81.

63. *See*, *e.g.*, ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010); SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION (2004). Balkin himself is alert to these dimensions of constitutional reasoning. *See* BALKIN, *supra* note 3, at 233 (discussing equal protection).

not predictability between cases over time, but accuracy in the particular context of a moment; the role of the Constitution as aspirational text as much as binding law; and the legitimate role for partiality even at the level of systemic analysis. Balkin's originalism is capable of accommodating this kind of constitutional theory, but does not yet deliver it. *Living Originalism* provides an elegant framework that supports the movement of constitutional studies even more deeply into an integrated research agenda of normative legal and political theory, institutional design, and public policy.