Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption

CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD.


Reviewed by Lawrence B. Solum *

I. Introduction

Contemporary scholarly debates about originalism and living constitutionalism are filled with claims about the political valence of these two theories. Here are some examples: “Originalism remains even now a powerful vehicle for conservative mobilization . . .”1 “[L]iving constitutionalism . . . has been at the core of progressive constitutional thought since the 1970s.”2 “[A]ny reasonably well-informed observer knows that the term ‘living Constitution’ encodes liberal sympathies, just as originalism encodes conservative ones . . .”3 “[O]riginalism cannot easily be appropriated to progressive constitutional arguments.”4 The conventional wisdom associates originalism with the right and living constitutionalism with the left.

But are these claims correct? Could there be a progressive constitutional theory that is consistent with the core premises of originalism? This essay will answer these questions with a focus on the views of Jack

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2. Id. at 568–69.


Balkin as they were developed in *Constitutional Redemption* and *Living Originalism*. Here is the roadmap. Part II will address the question, “What is fidelity to the original meaning of the Constitution?” by laying out a brief history of originalist theory, identifying the core of originalist thought, and then explicating the idea of constitutional fidelity. Part III will address the question, “What is faith in the possibility of constitutional redemption?” by explicating the notions of redemption, faith, and possibility. Part IV will then explore the widely held view that belief in progressive constitutional redemption is impossible, and will assess Jack Balkin’s arguments for a reconciliation of progressive faith and constitutional fidelity. Part V concludes.

II. What Is Fidelity to the Original Meaning of the Constitution?

What is “fidelity” to the “original meaning” of the United States Constitution? And how does fidelity to the original meaning relate to the idea of a “living constitution”? These are not easy questions because the term “originalism” has contested and evolving meanings. We can begin to tackle these difficult questions by taking a look at the evolution of originalist constitutional theory. Once we understand originalism (or, more modestly, some of the core originalist ideas), we can proceed to an examination of living constitutionalism and then to the idea of constitutional fidelity.

A. The Evolution of Originalist Constitutional Theory

One of Jack Balkin’s two recent books is titled *Living Originalism*, but what does the notion that “originalism” could be “living” really mean? Let us start with the term “originalism.” Where does it come from and what does it signify? We do not know when the first oral use of the term occurred, but we do know that the first occurrence in legal databases was in an article by Paul Brest published in 1981. Brest had already used the term in a law review article published in 1980, which just missed inclusion in the Westlaw database. He seems to have coined the word and defined it as follows: “By ‘originalism’ I mean the familiar approach to constitutional adjudication that

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9. E-mail from Paul Brest, Professor of Law, Emeritus and Former Dean, Stanford Law School, to Lawrence B. Solum, John Carroll Research Professor of Law, Georgetown University Law Center (Dec. 2, 2009) (on file with author).
accords binding authority to the text of the Constitution or the intentions of its adopters.”\textsuperscript{10} Two features of Brest’s definition warrant comment. First, Brest’s definition is disjunctive: originalism is textualism \textit{or} intentionalism. Second, this passage reveals that Brest assumed that his audience (primarily legal scholars) was already familiar with the interpretive approach that he named by coining the word “originalism.” Many other scholars adopted Brest’s new term of art; “originalism” and variations appear frequently in the law reviews from 1981 on.\textsuperscript{11} A variety of related phrases appeared earlier: for example, “original meaning”\textsuperscript{12} and “original intentions”\textsuperscript{13} were used by legal scholars in 1938 and “original understanding”\textsuperscript{14} appeared in 1949. These phrases seem to have entered the judicial vocabulary somewhat later. “Original meaning” was used by Justice Black in his dissent in \textit{Harper v. Virginia Board of Elections}\textsuperscript{15} in 1966.\textsuperscript{16} “Originalist” appears in a 1995 dissent by Justice;\textsuperscript{17} the word “originalism” did not appear until 2005, when it was used in a dissenting opinion by Justice Stevens.\textsuperscript{18}

The words “originalism” and “originalist” are ambiguous and used by scholars, lawyers, judges, and the public in a variety of different ways. This ambiguity goes back to the beginning—Brest’s definition equivocates between intention and text. Moreover, “originalism” is a term invented to refer to evolving judicial practice and adapted for use to describe a family of academic theories. “Originalism” simply does not have a settled meaning fixed by convention. It applies to a variety of academic theories and judicial practices.

For this reason, unpacking Jack Balkin’s idea of fidelity to the original meaning of the text of the Constitution\textsuperscript{19} requires us to situate Balkin’s version of originalism within the evolution of contemporary originalist thought. The conventional version of the history of originalism as an academic theory traces the contemporary version of originalist theory to

\textsuperscript{10} Brest, Misconceived Quest, supra note 8, at 204.

\textsuperscript{11} For example, a search on Google Books’ Ngram Viewer reveals no use of the term before 1980 and a steady increase in the use of the word “originalism” in books published after the early 1980s. NGRAM VIEWER, GOOGLE BOOKS, http://books.google.com/ngrams/graph?content=Originalism\&year_start=1975\&year_end=2008\&corpus=0\&smoothing=3 (search “originalism” from 1975 to 2008 in the “English” database on Google Books).

\textsuperscript{12} Edwin Borchard, The Supreme Court and Private Rights, 47 YALE L.J. 1051, 1063 (1938).

\textsuperscript{13} Howard Jay Graham, The “Conspiracy Theory” of the Fourteenth Amendment: 2, 48 YALE L.J. 171, 189–90 (1938).

\textsuperscript{14} Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding, 2 STAN. L. REV. 5, 5 (1949) (exploring the meaning of the Fourteenth Amendment’s clauses “at the time the Amendment was adopted”).

\textsuperscript{15} 383 U.S. 663, 670 (1966) (Black, J., dissenting).

\textsuperscript{16} Id. at 671–72.

\textsuperscript{17} Roper v. Simmons, 543 U.S. 551, 626 (2005).

\textsuperscript{18} Van Orden v. Perry, 545 U.S. 677, 729 (2005) (Stevens, J., dissenting).

\textsuperscript{19} BALKIN, LIVING ORIGINALISM, supra note 6, at ch. 1.
Originalism rose to prominence in part because of a speech before the American Bar Association delivered in 1985 by then-Attorney General Edwin Meese III. These early stirrings of originalism do not amount to much of a theory; rather, they were a loose cluster of ideas with original intent a prominent part of the mixture. It was Paul Brest’s essay, *The Misconceived Quest for the Original Understanding*, that seems to have stimulated the crystallization of originalist thought among legal academics. This is ironic because Brest’s article consisted almost entirely of criticisms of the theory he had labeled. Most of his points are now familiar. For example, he discussed the problems with identifying the institutional intention of a multimember body in general and argued that there was a further difficulty with specifying the level of generality or specificity of the relevant intentions. Brest, along with H. Jefferson Powell, represents the first wave of the now familiar genre of criticism of originalism. The consensus view among scholars of

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25. See, e.g., Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 Nw. U. L. Rev. 923, 929 (2009) (citing Brest’s argument against “original intentions originalism” as an influential voice in legal scholarship); Balkin, *Living Originalism*, supra note 6, at 101–02, (explaining that original meaning originalists sought to address the problems raised by critics, including Paul Brest, “by focusing not on the mental states of framers or ratifiers but on the general and publicly shared meanings of the text at the time of enactment”).


27. Id. at 216–17.


29. This is not an intellectual history of the originalism debates, and I am not claiming that either Brest or Powell articulated the first or best version of the claims they made. No string cite can do justice to the literature. There were many influential critics of original intentions originalism; one of the most important was Ronald Dworkin. See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 470 (1981) (characterizing original intention jurisprudence as a way “of fleeing from substance in constitutional decisions” that is certain to “end in failure”).
the era was that originalism was untenable as a serious theory of constitutional interpretation.  

Early critiques of originalism occurred at about the same time a new version of progressive constitutionalism was being developed by Bruce Ackerman at the Yale Law School. His Storrs Lectures, entitled *Discovering the Constitution*, provided new theoretical foundation for New Deal constitutionalism. The key theoretical move was the notion of dualism, which distinguishes ordinary legislative politics from higher constitutional politics. Ackerman’s grand constitutional narrative identified three constitutional moments: the Founding (the Constitution of 1789), the Civil War and Reconstruction (the Thirteenth, Fourteenth, and Fifteenth Amendments), and the New Deal. Ackerman argued that New Deal constitutionalism was legitimate, because Roosevelt’s transformative appointments were endorsed by “We the People.” This feature of his theory could be seen as anti-originalist, because it endorses fundamental constitutional changes without amendment of the text. But seen from a different angle, Ackerman’s theory seems to require an account of original meaning. Ackerman tied constitutional legitimacy to the actions of “We the People” at particular constitutional moments. Without some theory of the “original meaning” of these moments, judicial enforcement of the Constitution could not be legitimized by democratic constitutional politics. In other words, some version of originalism seems to be the foundation for Ackerman’s progressive version of constitutional theory. Also at Yale, Akhil Reed Amar developed an approach to constitutional interpretation that combined fidelity to the text with progressive political values; his approach has been described as a search for “original meaning.” Jack Balkin joined Ackerman and Amar at Yale as a permanent member of the faculty in 1994. Balkin’s constitutional work, much like that of Ackerman and Amar, can be


32. *Id.* at 1022–23.

33. *Id.* at 1051–52.

34. *Id.* at 1069–70 (arguing that “the struggle between the New Deal Presidency and the Old Court” is “not entirely unprecedented,” but rather “represents a variant on institutional themes that revealed themselves at earlier moments of extreme constitutional stress and great legal achievement”).


37. E-mail correspondence between Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School, and Lawrence B. Solum (on file with author).
seen as an attempt to reconcile progressive constitutionalism with fidelity to the text.

The roots of Balkin’s “living originalism” can also be found in what is sometimes called “the New Originalism” or “Original Public Meaning Originalism.” The new originalism is recent, and there is no comprehensive history of its origins. Nonetheless, there is a conventional story that identifies Justice Antonin Scalia as playing a pivotal role. In 1986, Scalia gave a speech exhorting originalists to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.” This advice seems to have been taken and the phrase “original public meaning” entered contemporary theoretical debates through the works of Gary Lawson and Steven Calabresi. Predating some of the American work on the New Originalism was Jeffrey Goldsworthy’s scholarship addressing the Australian Constitution, which developed with an explicit awareness of the theoretical debates swirling around American constitutionalism. Goldsworthy’s major contribution, *Originalism in Constitutional Interpretation*, was published in an Australian law review in 1997.


40. The account that is offered in the text is correct so far as the author knows, but there is no history of this period of originalism based on interviews with all the major participants.


The work begun by Lawson, Calabresi, and Goldsworthy led to further work by Randy Barnett and Keith Whittington. Both Barnett and Whittington based their theories on a foundation of “original public meaning,” but their views extended originalism in a variety of interesting ways. Whittington and then Barnett both distinguished “constitutional interpretation,” (discovering the communicative content or linguistic meaning of the constitutional text) from “constitutional construction” (the determination of the legal effect to be given to the text).

Jack Balkin’s version of originalism was developed in the context of this evolving body of originalist theory. The views that he expresses in *Constitutional Redemption* and *Living Originalism* were presaged in his earlier 2006 and 2007 essays *Abortion and Original Meaning* and *Original Meaning and Constitutional Redemption*. In these essays, Balkin argued for a reconciliation of original-meaning originalism with living constitutionalism according to a theory that might be called “the method of text and principle.” The meaning of the “text” provides a constraining framework within which constitutional “principles” operate.

### B. The Core of Contemporary Originalist Thought

Originalist thought has evolved historically, and there are a variety of contemporary views that call themselves “originalism.” Nonetheless, it is possible to identify a set of core ideas that are both the product of originalism’s evolution and the common ground between almost all contemporary originalist theories. We can call the common ground “the core of contemporary originalist thought.”

What is the content of originalism’s core? On some matters, originalists are not in agreement: some originalists believe that meaning is determined by framer’s intent, others emphasize the understanding of the ratifiers, or the

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48. See Barnett, supra note 46, at 4 (stating the government’s commitment to a written constitution requires it to adhere to the original meaning of the text); Whittington, Constitutional Interpretation, supra note 47, at 35–36 (stating that one implication of originalism is that the Constitution reflects the public’s understanding of the document, not what the greatest minds of the era hoped or believed it to say).
49. Whittington, Constitutional Interpretation, supra note 47, at 5; Barnett, supra note 46, at 118–20 (discussing the necessity of constitutional construction to determine the meaning of vague text in the Constitution that cannot be otherwise accurately interpreted).
52. Id. at 435.
original methods of interpretation: one particularly prominent form of contemporary originalism focuses on public meaning. Despite these disagreements almost all originalists are united on a distinctive answer to the question, “When is meaning fixed?” The originalist answer to that question is that the meaning of each constitutional provision is determined at the time the text was written and adopted. To the extent that there are variation among originalists on this question, they are minor and without much practical significance. For example, intentionalists might contend that fixation occurs at the moment when each string of text is created (e.g., when the provision is drafted in final form) by an author or group of authors—because the relevant mental states at that moment fix the meaning. Public meaning originalist might emphasize the point in time at which the text is communicated to the public. But these variations are relatively minor, since the relevant moments or periods are close in time and likely to overlap.

We can express this core agreement among originalists as “the fixation thesis.” This thesis is the claim that the original meaning of each provision of the Constitution was fixed at the time of its framing and ratification. It is no surprise that originalists agree on the fixation thesis. The fixation thesis explains why the root word “origin” was used in coining the term “originalism.” The communicative content of the text is fixed at the time the text originates.

A second core idea stems from the fact that almost all originalist theories address the practical question, “How should officials be guided by the Constitution?” In theory, one could imagine an originalist who only claimed that the linguistic meaning of the Constitution was fixed at the time it was written. In practice, almost all originalists claim that the original meaning has important normative implications for officials, including judges, executives, and legislators. In particular, originalists make claims about the contribution that the original meaning ought to make to the content of constitutional doctrine and the effect that it should have on the behavior of officials and citizens.

This second core idea can be expressed informally via the notions of contribution and constraint. Almost every originalist agrees that the original meaning of the Constitution should make a substantial contribution to the content of constitutional law. A minimalist version of originalism might adopt the position that the original meaning is one factor that must be considered in formulating constitutional doctrine or engaging in constitutional practice. Almost all originalists go beyond minimalism. Characteristically, originalists claim that the original meaning should have binding or constraining force. Let us call this core idea “the constraint principle.”

54. Id.
55. See Balkin, Original Meaning, supra note 51, at 444–45 (discussing the development of early originalist theory).
We can make the constraint principle more precise by distinguishing between two ideas: communicative content and legal content. The communicative content of the constitutional text is, roughly speaking, the linguistic meaning of the text. More precisely, the communicative content is the message conveyed by the semantic meaning of the text in the context in which it was written and read. The constitutional text has communicative content (meaning in the linguistic sense), but that meaning is distinct from the text’s legal implications. Because we sometimes use the word “meaning” to describe such implications, the “meaning of the Constitution” can refer to the set of legal rules (the body of constitutional doctrine) that mediates between the text and the decision of particular cases. The legal content of the constitutional doctrine is simply the set of rules developed by courts (and other officials) for the application of the text to particular cases.

The constraint principle expresses the idea that the communicative content of the constitution (fixed at the time each provision was written) should constrain the legal content of constitutional doctrine and thereby should also constrain the way officials behave. But as it has been formulated, the constraint principle is abstract because we have not specified what the constraining force should be. It turns out that different originalists have different views about constraining force. At one end of the spectrum, an originalist might believe that each and every rule of constitutional law must be identical to the original meaning of some provision of the Constitution. According to that view, much (perhaps almost all) of the content of contemporary constitutional doctrine would be illegitimate since wide swaths of constitutional law are judicial creations. A more moderate (but still quite strong) version of originalism might adopt the view that constitutional doctrine cannot contradict the original meaning, but might allow for the development of supplementary rules (for example, constructions of vague provisions). Further along the spectrum, some originalists might adopt the position that the original meaning should constrain constitutional doctrine but allow for circumstances in which exceptions are legitimate. One such exception might focus on the role of precedent: some originalists may believe that the Supreme Court may legitimately adhere to precedents that are at variation with the original meaning of the text, where the restoration of the original meaning would be

56. See BALKIN, LIVING ORIGINALISM, supra note 6, at 102 (describing an early originalist belief that all judicial decisions inconsistent with the Framers’ intentions were illegitimate).

57. See BALKIN, LIVING ORIGINALISM, supra note 6, at 7 (describing Scalia’s view that new phenomena can be incorporated into constitutional law by use of analogy, but acts that were constitutional at the time of adoption cannot not be unconstitutional today).

58. See, e.g., Margaret Talbot, Supreme Confidence, NEW YORKER, Mar. 28, 2005, at 40, 56, available at http://www.newamerica.net/publications/articles/2005/supreme_confidence/ (“Though Scalia says that he would have voted with the majority in Brown, it’s hard to see an originalist justification for it. (He sometimes acknowledges as much, saying that a faulty—that is, a non-originalist—method can occasionally produce good results, a Scalian variation on ‘Even a broken watch is right twice a day.’”).
disruptive, upset justifiable reliance, and so forth.\(^{59}\) An even more modest version of originalism might take the position that the original meaning should govern in cases of first impression, but sanction departures from original meaning whenever a question of legal doctrine has been settled.\(^{60}\) We can think of these disagreements as “versions of the constraint principle.”

There is another important difference within the family of originalist theories. This difference occurs at the level of justification. Originalists vary in the justifications they offer for originalism. In compressed form, some of the major variations offer justifications that focus on: (1) the rule of law,\(^ {61}\) (2) popular sovereignty,\(^ {62}\) (3) the conventions of existing legal practice,\(^ {63}\) (4) the fact that the constitutional text is written,\(^ {64}\) and (5) the quality of outcomes that originalism is likely to produce.\(^ {65}\) This list is not exhaustive, and many originalists rely on multiple justifications.

In sum, we can think of originalism as a family of constitutional theories. Originalists agree that the communicative content or linguistic meaning in context was fixed at the time each provision of the Constitution was framed and ratified—the fixation thesis. Originalists believe that constitutional practice (particularly judging) should be constrained by original meaning—the constraint principle. The fixation thesis and the constraint principle constitute the core of contemporary originalist thought.

This brings us to the question, is “living originalism” or “framework originalism”—Jack Balkin’s theory—a member of the originalist family?

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60. See BALKIN, LIVING ORIGINALISM, supra note 6, at 8 (observing that proponents of applying the original expected application of the Constitution often accept conflicting “nonoriginalist” precedent when it is well established).

61. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856 (1995) (arguing that originalism is attractive because it comports with the belief that rule of law requires judges to follow externally imposed rules; as such, originalist judges defer to already established choices rather than resolving cases in accord with their personal beliefs).

62. See, e.g., BALKIN, LIVING ORIGINALISM, supra note 6, at 22, 54 (describing “framework originalism,” where institutional decisions created within a basic constitutional “framework” and shaped by popular opinion function as the primary constraints on judicial discretion).

63. See, e.g., Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 413 (2009) (arguing that fidelity to the law requires adherence to conventions of existing legal practice, which recognize that the linguistic meaning of the Constitution constrains those who engage in constitutional practice).

64. See, e.g., BALKIN, LIVING ORIGINALISM, supra note 6, at 6–7 (illustrating originalist views on limiting interpretative discretion through adherence to past text).

Balkin is explicit that by “original meaning” he refers to “the semantic content of the words in the clause.” 66 He calls his particular version of originalism “framework originalism,” which he contrasts with “skyscraper originalism.” 67 Here is his simplest statement of the two views:

Skyscraper originalism views the Constitution as more or less a finished product, albeit always subject to later Article V amendment. It allows ample room for democratic lawmaking to meet future demands of governance; however, this lawmaking is not constitutional construction. It is ordinary law that is permissible within the boundaries of the Constitution. Framework originalism, by contrast, views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. The goal is to get politics started and keep it going (and stable) so that it can solve future problems of governance. Later generations have a lot to do to build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework. 68

He then explicates the two different forms of originalism in the context of judging:

In skyscraper originalism, judges are constrained when they apply the original constitutional bargain using the proper methodology for ascertaining it; when they fail to do this, they are unconstrained and are simply imposing their own beliefs. Thus skyscraper originalism views following correct interpretive methodology as the central constraint on judges. Framework originalism also requires that judges apply the Constitution’s original meaning. But it assumes that this will not be sufficient to decide a wide range of controversies and so judges will have to engage in considerable constitutional construction as well as the elaboration and application of previous constructions. Hence, fidelity to original meaning cannot constrain judicial behavior all by itself. 69

And what does constrain judges when the original meaning is insufficient? The most important restraints on judges engaged in constitutional construction will come not from following proper interpretive theories but rather from institutional constraints. These include the moderating effects of multimember courts, in which the balance of power rests in moderate or swing judges, the screening of candidates through the federal judicial appointments process, social and cultural influences on the judiciary that keep judges attuned to popular opinion, and

66. BALKIN, LIVING ORIGINALISM, supra note 6, at 13.
67. Id. at 21–22.
68. Id.
69. Id. at 22.
professional legal culture and professional conceptions of the role of the judiciary.\textsuperscript{70}

Is framework originalism a member of the originalist family? Recall our explication of the core of contemporary originalist thought. Balkin endorses the fixation thesis explicitly: “All forms of originalism claim that something is fixed in place at the time of adoption, that it cannot be altered except through amendment, and that it matters for correct interpretation.”\textsuperscript{71} His particular theory, framework originalism, “argues that what is fixed is the framework.”\textsuperscript{72} This commitment to the fixation thesis is operationalized with respect to particular provisions such as the Commerce Clause.\textsuperscript{73} And what about the constraint principle? Framework originalism is committed to fidelity to the text, but what does “fidelity” mean? Is Balkin’s commitment to fidelity equivalent to the constraint principle found in the core of contemporary originalism?

C. The Fidelity Thesis: Theme and Variations

Balkin professes and endorses fidelity to the original meaning of the Constitution.\textsuperscript{74} We can call his stance on fidelity “the fidelity thesis.” But what is fidelity? We might begin with this statement in \textit{Constitutional Redemption}:

Fidelity is a feature of a self who is socialized in a certain way and who disciplines him- or herself to think and argue in a certain way. Fidelity is the result of entering into a particular practice of language and thought and allowing oneself to be shaped by this practice. Fidelity is an interpretive attitude about the object of interpretation that produces psychological pressures on us and affects us for good or for ill.\textsuperscript{75}

At this point, one might interpret fidelity as a kind of character trait—the kind that moral philosophers call a virtue—roughly, an excellence of mind or character that plays a constitutive role in human flourishing. Theologians discuss fidelity in virtue-theoretic terms.\textsuperscript{76} Fidelity to the Constitution might be a complex character trait that predisposes its possessor to act in ways that accord with the Constitution. But this is not Balkin’s understanding of fidelity:

\textsuperscript{70} Id. at 22–23.
\textsuperscript{71} Balkin, \textit{Constitutional Redemption}, supra note 5, at 228.
\textsuperscript{72} Id.
\textsuperscript{73} Balkin, \textit{Living Originalism}, supra note 6, at 149–59 (citing definitions and usage at the time of adoption as evidence of the semantic meaning of “commerce”).
\textsuperscript{74} Balkin, \textit{Constitutional Redemption}, supra note 5, at 229 (“Fidelity to the Constitution . . . requires fidelity to the original meaning of the text . . . .”).
\textsuperscript{75} Id. at 103–04.
Fidelity is not a virtue but a precondition. It is not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it. Conversely, insisting that one does not care about fidelity does not simply put one at a severe disadvantage in convincing others to one’s point of view; it takes one outside of the language game of constitutional interpretation. It is to announce that one is doing something else—whether it is political theory, economics, or sociology, but most assuredly not constitutional law. When we say that fidelity is not important to us, we are no longer interpreting the Constitution, we are criticizing it.77

This passage suggests that fidelity to the Constitution consists of adherence to the rules of the language game of constitutional interpretation. And in yet another passage, Balkin suggests a third notion of fidelity:

[F]idelity in constitutional interpretation . . . becomes a question of constitutional faith. And this is born out in the etymology of the word itself, which comes from the Latin fides, meaning “trust” or “faith.” Faith, in turn, is defined as a “confident belief in the truth, value, or trustworthiness of a person, an idea, or a thing.” Thus, to have fidelity is to be faithful—literally, to be full of faith, full of confidence in the value of that which we are faithful to.78

This passage suggests that fidelity is a mental state, the content of which is an attitude of confidence in the value of the Constitution.

What, then, are we to make of Balkin’s notion of fidelity to original meaning? There are three possible candidates: (1) a character state that predisposes one to act in accordance with original meaning, (2) an action in compliance with the language game of constitutional interpretation, and (3) an attitude of confidence in the value of the Constitution. Because Balkin does not define the relationship between these related but distinct understandings of fidelity, there are multiple possibilities. One possibility is that fidelity is all of these things. We might explicate the fidelity thesis as follows:

Fidelity to the Constitution entails playing the language game with an attitude of confidence in the value of the Constitution that is produced by a stable character trait (or virtue).

Because Balkin does not define the relationship between these related but distinct understandings of fidelity, this formulation is only one of multiple possibilities. Nonetheless, it seems reasonable to adopt this version of the fidelity thesis, because it includes each of Balkin’s major explicative statements about fidelity.

77. BALKIN, CONSTITUTIONAL REDEMPTION, supra note 5, at 106.
78. Id. at 123.
Fidelity to the original meaning requires that judges, officials, lawyers, and scholars who engage in constitutional argument play by originalist rules motivated by a faith in the Constitution that is an enduring character trait. This sounds quite abstract, but it can be translated into more prosaic language. Fidelity to the original meaning requires that one argue in terms of the original meaning of the text, on the basis of an attitude that values the original meaning and is a stable disposition of one’s character. This means that elegant sophistry, which argues from the text without a sincere and stable belief in its value, does not count as fidelity—even if the argument fits within the conventions of textualist argumentative practice.

The fidelity thesis is abstract. Fidelity to original meaning requires compliance with the language game of originalist interpretation, but what are the rules of that game? Fidelity to original meaning requires a belief in the value of the constitutional text, but what is the precise substance of that belief (or complex cluster of beliefs)? Fidelity to original meaning requires that both the compliance and the belief result from a stable disposition of character, but what is the structure of the virtue of constitutional fidelity? These general questions give rise to more specific inquiries. Can one depart from the text in an emergency? Is the virtue of constitutional fidelity consistent with a virtue of constitutional equity, departing from the letter of the Constitution to better serve its spirit? Should we supplement or modify the text (even when it is clear) when circumstances have changed? Nothing in the idea of fidelity answers these questions. Even if the fidelity thesis is not fully defined, Balkin’s remarks on fidelity are sufficient to enable us to move to the next step, an examination of Balkin’s idea of faith in the possibility of constitutional redemption.

III. What Is Faith in the Possibility of Constitutional Redemption?

Balkin’s constitutional vision includes both the idea of fidelity to original meaning and faith in the possibility of constitutional redemption. What is constitutional redemption? What would count as faith in the possibility of such redemption?

A. The Idea of Constitutional Redemption

Balkin’s idea of constitutional redemption is complex and develops over the course of several chapters in *Constitutional Redemption*. We can begin with his basic notion—that redemption is distinct from reform or improvement:

Redemption is not simply reform, but change that fulfills a promise of the past. Redemption does not mean discarding the existing Constitution and substituting a different one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral
compromise. Through constitutional redemption, the Constitution becomes what it always promised it would be but never was . . . . 79

The second component of his account is the idea that the goal of redemption is expressed as a story or “national narrative of redemption”80:

According to this story our system of government has a point, a trajectory: It works toward the realization in history of the promises made in the Declaration of Independence and the Constitution . . . . The story asserts faith in eventual progress for our country, even though there have been and will be many detours, retreats, and regressions along the way.81

What is the content of the story? At an abstract level, the narrative of redemption is based on the idea that the Constitution always fails to fully realize the ideals or values that it was designed to implement:

The Constitution . . . always exists in a fallen condition. It was made in imperfect times by imperfect people, in the hope that future generations would improve it. It is an unfinished building, and perpetually in need of repair and renovation.82

Of course, Balkin has a particular version of the constitutional narrative of redemption—one that emphasizes values that might be characterized as progressive.83 But the structure of Balkin’s theory does not depend on the precise content of the narrative. One might imagine alternative narratives that emphasize different values—equality in one version, liberty in another, and prosperity in a third.

B.  What Is Faith?

With this account of constitutional redemption in place, we can turn to the notion of “faith.” What does it mean to have faith in constitutional redemption? Recall that Balkin believes that there is a relationship between “faith” and “fidelity”: Fidelity to the Constitution requires faith in the Constitution. And our faith in the Constitution, in turn, depends on the story that we tell ourselves about our country, about our constitutional project, and our place within them.84 Faith in constitutional redemption is thus belief in a story about the Constitution. To be about redemption, the story must acknowledge that the Constitution is flawed, while simultaneously affirming the goodness of the values and principles upon which the Constitution is based, and professing belief that these values have been and will be realized more fully in the course of history.

79.  Id. at 5–6.
80.  Id. at 25.
81.  Id. at 25–26.
82.  Id. at 249.
83.  Id. at 49 (“[T]his is a story about progress within the constitutional system.”).
84.  Id. at 2.
IV. Can Faith and Fidelity Be Reconciled?

Balkin professes faith in the possibility of constitutional redemption and fidelity to the original meaning of the constitutional text. Can faith and fidelity be reconciled? Or are these two commitments in deep tension?

We can begin with the obvious problem: on the surface, it appears that commitments to both faith in redemption and fidelity to the constitutional text are inconsistent. Of course, the degree of inconsistency depends on two things: (1) the specific communicative content of the constitutional text and (2) the nature of the values that organize the narrative of constitutional redemption. There is a general perception that the constitutional text is not fully consistent with a progressive (left–liberal) narrative of national redemption. This perception is fueled by the widespread belief that progressives align with living constitutionalism and that originalists tend to be conservative or libertarian. That alignment suggests a second surface-level problem with the reconciliation of faith and fidelity: the conventional story is that living constitutionalism and originalism are rivals. Let us begin by taking a hard look at the alleged incompatibility of living constitutionalism and originalism.

A. Is Living Constitutionalism Compatible with Originalism?

We already have a working understanding of “originalism,” so our next step is to undertake a similar investigation of “living constitutionalism.”

1. What Is Living Constitutionalism?—The phrase “living constitutionalism” seems to be derived from the title of a book by Howard Lee McBain, The Living Constitution,85 first published in 1927. This slim volume discusses a variety of topics, and it was not intended as rigorous constitutional theory. The following passage illustrates McBain’s notion of a living constitution:

“A word,” says Mr. Justice Holmes, “is the skin of a living thought.”
As applied to a living constitution the expression is peculiarly apt; for living skin is elastic, expansile, and is constantly being renewed. The constitution of the United States contains only about six thousand words; but millions of words have been written by the courts in elucidation of the ideas these few words encase.86

If McBain’s notion of a living constitution seems inchoate, we may find clarification in other formulations. Another source of contemporary living constitutionalism can be found in Chief Justice Hughes’s opinion in Home Building & Loan Ass’n v. Blaisdell87:

86. Id. at 33.
87. 290 U.S. 398 (1934).
It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, 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. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—“We must never forget that it is a constitution we are expounding”—“a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

Hughes does not use the phrase “living constitution” and because of the ambiguities in the word “interpretation,” it is not clear whether he means to claim that the Court can change the Constitution’s semantic content or whether he is arguing for flexible constructions within the constraints imposed by a fixed original meaning.

Another important formulation was provided by Charles Reich in his 1963 article, *Mr. Justice Black and the Living Constitution*:

[I]n a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy. That, indeed, is what has happened to some of the safeguards of the Bill of Rights. A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change.

It is apparent that the word “meaning” in this definition of living constitutionalism is ambiguous. Recall that “meaning” has (1) a communicative sense, referring to communicative content (semantic meaning in context), (2) an applicative sense, referring to applications, and (3) a teleological sense, referring to purposes or functions. Reich could be asserting: “The applicative meaning of the Constitution must change in order for the semantic content to remain the same.” Or he might be asserting: “The semantic content of the Constitution must change in order for the teleological meaning to remain the same.” On the first reading of Black, living constitutionalism would be consistent with originalism; on the second reading, it would not.

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88. Id. at 442–43 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)) (citations omitted).
90. Id. at 735–36.
A third influential formulation of living constitutionalism was offered by Justice William Brennan:

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours.91

Brennan’s formulation could be glossed in a variety of ways. One natural reading is the following: In order to remain faithful to the communicative content of the Constitution, principles (understood as animating purposes or values) must guide the application of vague constitutional provisions to contemporary circumstances. The Framers made the precise formulations of constitutional purposes in the context of specific disputes. When we apply these purposes to contemporary circumstances, we should not be bound by those precise formulations.

But a substantially different reading is possible. The phrase “articulated principles” could refer to the constitutional text itself, in that the text could be the articulation of the fundamental principles. If this is what Brennan meant, then his version of living constitutionalism implies that the communicative content of the Constitution may need to be amended in order to be faithful to the purposes for which that content was articulated. As with Black, the first reading reconciles living constitutionalism with originalism; the second reading renders them incompatible.

Let us return to the main question of this section. What is “living constitutionalism”? The imprecise formulations that we have examined make it difficult to answer the question. Of course, there is one core idea that all the living constitutionalists we have examined would endorse. Distinguishing again between the communicative content of the constitutional text and the legal content of constitutional doctrine, we can formulate the core of living constitutionalism as follows: The legal content of constitutional doctrine should not remain fixed.

But this formulation does not cut much jurisprudential ice. This is a very thin notion of living constitutionalism. Indeed, almost every originalist would agree that legal content changes over time: the evolving nature of the legal content of constitutional doctrine is beyond dispute. Every sensible originalist will agree that judges ought to formulate implementing rules of constitutional law that adapt fixed original meaning to changing

circumstances. When the Supreme Court decides a case that applies the freedom of speech and press to the Internet, it creates new constitutional norms (rules, standard, or principles). It does this even if it feels strongly constrained by the original meaning of the text or the original intentions of the Framers. Even a decision that concluded that the Internet is neither speech nor press would create new legal content (albeit content that could be described as negative); obviously, if the Court were to decide that information on the Internet was a form of speech or press (or that the Ninth Amendment required extension of these provisions to a new and unenumerated type of communication), new legal content would be created.

So living constitutionalism must mean more than this.

Before proceeding further, we need to make an observation about a significant way in which living constitutionalism differs from originalism. “Originalism” is a theoretical term coined by an academic, and academic originalism is a rich and varied family of theories with highly articulated content. On the other hand, while “living constitutionalism” is endorsed by legal academics, it is not the self-identifying label of particular academic theories of constitutional interpretation and construction. There are some exceptions. David Strauss’s book, The Living Constitution, identifies living constitutionalism with a common law (and mostly antitextualist) approach to constitutional interpretation and construction.92 Bruce Ackerman entitled his Holmes Lecture at Harvard The Living Constitution, but his essay does not articulate a theory of living constitutionalism (although it may have implications for such a theory). Indeed, Ackerman’s version of living constitutionalism seems, at least at some points, to be a close cousin to originalism:

For me, the “living Constitution” is not a convenient slogan for transforming our very imperfect Constitution into something better than it is. While the effort to make the Constitution into something truly wonderful is an ever-present temptation, the problem with this high-sounding aspiration is obvious: there are lots of competing visions of liberal democratic constitutionalism, and the Constitution shouldn’t be hijacked by any one of them. The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history, not the commitments that one or another philosopher thinks they should have made. On this key point, I am closer to Justice Scalia than to Professor Ronald Dworkin.93

Ackerman (like Charles Black and William Brennan) is a living constitutionalist who can be read in multiple ways. On the one hand, Ackerman seems to endorse a version of the fixation thesis: “the constitutional commitments that have actually been made by the American

people in history.” On the other hand, the notion of a “constitutional commitment” might be sufficiently flexible so as to allow the living Constitution to depart from “original meaning” understood as communicative content derived from the semantic content of the words and phrases, the grammar and syntax, as enriched by the context of constitutional communication, all of which was fixed at the time each provision was framed and ratified.

Perhaps the solution is to see the phrase “living constitutionalism” as an umbrella term that embraces a variety of theories that emphasize the justification of changing constitutional doctrine. Particular theories would offer different accounts of the methods by which change is accomplished and the theoretical justifications for making or recognizing the changes. This family might include Strauss’s common law constitutionalism, Dworkin’s law as integrity (the method of fit and justification), and Griffin’s pluralist approach.

Is Balkin a living constitutionalist? There is no clear answer to this question because living constitutionalism lacks sufficient theoretical shape to provide criteria for inclusion and exclusion. Balkin calls himself both a “living constitutionalist” and an “originalist.” But can he be both?

2. Is Living Originalism Possible?—Jack Balkin claims to be a “living originalist,” but how is that possible? I will articulate two different accounts of the possible relationships between living constitutionalism and originalism. Both accounts are heavily indebted to the work of Jack Balkin, who should be credited for seeing the possibility of a compatibilist account of the relationship.

How can we reconcile originalism with living constitutionalism? We can begin by recalling the distinction between constitutional interpretation and constitutional construction. Interpretation ascertains the communicative content of the text; construction determines its legal effect. Originalists are committed to the view that constitutional interpretation is constrained by the original meaning of the text; the fixation thesis expresses the idea that the original meaning is fixed at the time each provision of the constitution is framed and ratified. It follows that originalism would be required to reject

94. See STRAUSS, supra note 92, at 3 (discussing the evolution of the constitutional system into a common law system).

95. See Dworkin, supra note 29, at 470, 516 (rejecting originalism and procedural fairness in favor of decisions of principle based upon ideas of equality); see also RONALD DWORKIN, LAW’S EMPIRE 225 (1986) (elaborating upon legal theory and a conception of law as integrity).


living constitutionalism if it were a theory of interpretation. Originalists cannot accept that linguistic meaning or communicative content of the Constitution can or should change without amendment.

Originalists are also committed to a view about constitutional construction. Almost all originalists are committed to the constraint principle; they believe that the original meaning of the text should constrain the legal effect of the Constitution. So originalists characteristically believe that the legal content of constitutional doctrine must be consistent with the communicative content of the constitutional text.

Some originalists may believe in a more demanding version of originalism. One might believe that the legal content of constitutional doctrine must be identical to the communicative content of the constitutional text: call this “the identity claim.” Originalists of this sort must reject living constitutionalism altogether. For them, there is no sense in which the constitution ought to be living; they believe in a dead constitution. For these originalists, constitutional construction is simple: one translates the linguistic meaning of the Constitution into identical doctrines of constitutional law; those doctrines then decide cases.

But some members of the originalist family reject the identity claim. For example, one might believe that the Constitution contains general and abstract provisions that are vague or open-textured. A word or phrase is vague if it admits of borderline cases; open texture can be thought of as a multidimensional form of vagueness. If a constitutional provision is vague, then the linguistic meaning of the provision cannot fully determine its legal effect. For example, assume that the three great grants of national power—executive, legislative, and judicial—are vague. These provisions may have a core—some things are clearly judicial in nature—and a penumbra—some things are neither clearly judicial nor clearly legislative. Take another example: some actions may clearly constitute infringements of the freedom of speech, but other actions may be borderline cases. An originalist who took this view regarding the meaning of these provisions could not believe that the linguistic meaning of the text determines the content of constitutional doctrine or the legal effect of the text.

We might call these borderline areas “the construction zone.” Within the construction zone, the content of legal doctrine cannot be fixed by the linguistic meaning of the Constitution. Instead, we need some method or theory of construction to do the necessary work of determining legal content and effect. This view is consistent with the constraint principle. The constraint principle commits originalists to the constraining force that the constitutional text actually has. But when the original meaning of the text is

98. See supra note 56 and accompanying text.
vague or open-textured, then the constraint principle does not determine the result within the construction zone. Within the construction zone, originalists who reject the identity thesis could affirm a role for a constrained version of living constitutionalism.

We can express the idea of constrained living constitutionalism via the notion of a “hard core.” Let us call this kind of living constitutionalism “hard core living constitutionalism.” Of course, there are other living constitutionalists who may deny that there is a hard core. They might believe that even the core of constitutional law is malleable and subject to manipulation. That is, they might assert that the living constitution has a “soft core.” Living constitutionalists who believe that there can and should be inconsistencies between constitutional doctrine and the constitutional text can be called “soft core living constitutionalists.”

Jack Balkin’s framework originalism accepts the idea of a hard core; Balkin’s is a notion of fidelity to the framework that is fixed by the linguistic meaning of the text. At the level of constitutional theory, Balkin’s affirmation of compatibilism provides the foundation for his reconciliation of faith in constitutional redemption and fidelity to the original meaning of the constitutional text. But this foundation is only theoretical. Full reconciliation requires that the communicative content of the text is consistent with the normative content of Balkin’s narrative of constitutional redemption. Roughly speaking, the question is whether the specific content of the constitutional text can be reconciled with values specified by a progressive constitutional narrative.

B. Is a Progressive Narrative of Constitutional Redemption Consistent with the Original Meaning of the Constitutional Text?

Is progressive originalism possible? Much of Living Originalism is an attempt to show that the original meaning of the text is broadly consistent with the New Deal legislative program and landmark decisions of the Warren Court. This essay cannot hope to provide a comprehensive assessment of this aspect of Balkin’s work. He offers new readings of the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause. These readings are surely impressive, and they are already controversial.

As an example, consider Balkin’s interpretation of the Commerce Clause. Balkin calls his theory of the clause “the interaction theory.” Balkin argues that the original meaning of “commerce” was very broad:

100. BALKIN, LIVING ORIGINALISM, supra note 6, at ch. 9.
101. Id. at ch. 10.
102. Id. at ch. 11.
103. Id. at 155.
Today we associate commerce with economics, trade, and business, but at the time of the founding, commerce included far more than purely commercial activity. It meant “intercourse”—that is, interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation. Economic transactions were only a special case of social intercourse. To have commerce with someone meant to converse with them, mingle with them, associate with them, or trade with them.104

Let us assume, arguendo, that Balkin is at least partially correct, and that one sense of the word “commerce” is captured by the social interaction theory.

Randy Barnett has argued that the evidence suggests that the word “commerce” had a second sense, approximately equivalent to “trade in goods.” He writes:

This suggests that “commerce” is ambiguous in that it has two distinct senses: one sense concerning the trade or interchange of things from one place to another, and another sense of social interaction. If so, in discerning the original meaning of “commerce” in the Constitution, one does not simply combine the one distinct meaning with the other, but asks which of the multiple meanings is the one that a reasonable reader would think was being conveyed in the relevant context, here in Article I, Section 8.105

Barnett goes on to argue that the context of constitutional utterance suggests that the public meaning of the clause is better captured by the trade theory.106

Balkin replies to Barnett on the merits but the most interesting and illuminating part of his response comes near the beginning, where he frames the disagreement:

[The] differences [between Barnett and Balkin] on the question of federal power are worth noting because they show how two scholars using similar methods can nevertheless arrive at very different conclusions. I regard this as a feature, and not a disadvantage, of the method of text and principle. As I argue in Living Originalism, the point of a theory of interpretation is not simply to resolve all controversies, but to offer a platform for persuasion about the Constitution by people with different points of view.

The meaning of “commerce” in the Constitution is ambiguous; it might refer to several different concepts, and so we must bring the traditional lawyer’s tools—text, history, structure, precedent, ethos,
and consequences—to bear to decide on the best account of its
meaning.107 Balkin then goes on to deploy the tools (“text, history, structure, precedent, ethos, and consequences”) to marshal a case for the social interaction theory.108 Balkin’s list of tools is borrowed from Philip Bobbitt’s influential work.109

It is at this point that many originalists will become nervous. Assume that Balkin is correct and that the Commerce Clause contains a substantial semantic ambiguity such that the word “commerce” had two related but distinct semantic meanings roughly equivalent to the meanings of “trade-in-goods” and “social interaction.” What should an original-public-meaning originalist do in the face of semantic ambiguity? At this point, the distinction between semantic content (the conventional semantic meaning of the words) and communicative content (the message conveyed by the words in context) becomes important. Expressions that contain semantic ambiguity are not necessarily ambiguous once we consider context.

Some of the tools that Balkin identifies are relevant to the discovery of the original communicative content of the Commerce Clause. Text provides content because the immediate context of the Commerce Clause is the rest of the Constitution; we might be able to resolve the semantic ambiguity (trade or social intercourse) by looking at the role the clause plays in Section Eight of Article One, or the role that Section Eight plays in the Constitution as a whole. The contextual role played by surrounding text relates to structure. The structure of the Constitution is itself part of the context of the word “commerce.” History provides context because the Constitution itself was framed and ratified in a historical context. Given that context, members of the public might have understood commerce as trade rather than social intercourse—or vice versa.

But the remaining three tools (precedent, ethos, and consequences) appear to be tools for constitutional construction and not constitutional interpretation. Judicial interpretations of the word “commerce” might themselves contain evidence of the meaning of the word, but their status as “precedent” goes to the legal content of constitutional doctrine. The word “ethos” appears only twice in Balkin’s reply to Barnett, and its meaning is

108. Id.
109. See BALKIN, LIVING ORIGINALISM, supra note 6, at 341 n.2 (attributing the tools or “the modalities of constitutional argument” to Bobbitt); see also PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE] (articulating, in Book I, five modalities to act as the archetypes of constitutional argument); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (using six modalities of constitutional argument to provide an analytic perspective on the traditional problems of American constitutional law).
not transparent. To the extent that Balkin borrows the term from Philip Bobbitt, it refers to an argument based on the ethos or ethical culture of contemporary America. "Ethos" in this sense may be relevant to constitutional construction, but it simply does not bear on the determination of communicative content. And the same is true, obviously, about "consequences." The fact that the social-interaction interpretation of "commerce" would produce better consequences does not bear on the question whether the word "commerce" in context conveyed social interaction as a matter of original public meaning.

Balkin himself seems to recognize the difficulty with incorporating Bobbitt’s approach into a theory that adopts a principle of fidelity to the constitutional text. He writes:

Bobbitt argues that these modalities of argument are equal in importance; where they conflict, individuals must rely on their conscience to decide between them. My view is slightly different. Interpretations and constructions may not contradict original meaning, therefore once we know the original meaning of the text, it trumps any other form of argument. Nevertheless, people can and should use all of the modalities of argument to resolve any uncertainties or ambiguities in original meaning and to build constitutional constructions that are consistent with original meaning.

Originalists should agree with Balkin in this passage until the word “nevertheless” appears. From an originalist perspective, the original meaning of the text must constrain constitutional construction. Balkin assumes that semantic ambiguity requires construction, but that is not necessarily or even usually the case. If semantic ambiguity can be liquidated by reference to the context of constitutional utterance, then the original meaning (or communicative content) of the Constitution is not ambiguous. There may be special cases of irreducible ambiguity—where resort to context is insufficient to yield clear communicative content. In those special cases, we are in the construction zone, and originalists might concede that precedent, ethos, and consequences are relevant. (This will depend on one’s theory of constitutional construction—a topic outside the scope of this essay.)

110. See Balkin, supra note 107, at 824 (“Lawyers may . . . make appeals to national ethos . . . .”); id. at 868 (“[W]e must bring the traditional lawyer’s tools—text, history, structure, precedent, ethos, and consequences—to bear to decide on the best account of [the meaning of ‘commerce.’”].

111. See Walter Benn Michaels, The Fate of the Constitution, 61 TEXAS L. REV. 765, 770 (1982) (reviewing PHILIP BOBBITT, CONSTITUTIONAL FATE, supra note 109) (describing Bobbitt’s “American ethos” as an alternative to “constitutional ethos” where a dilemma arises because “ethical argument is already an account of the meaning historical argument is supposed to help you locate”).

112. BALKIN, LIVING ORIGINALISM, supra note 6, at 341–42 n.2.
It seems likely that many originalists, perhaps including Barnett, will not agree with Balkin about the ambiguity of the word “commerce” once context is taken into account. And they are then likely to disagree with Balkin about the relevance of precedent, ethos, and consequence to the interpretive enterprise—although many originalists will agree that these factors are relevant to construction. What might Balkin say about this objection? At this point, Balkin’s text runs out and we are left to speculate. My view is that the deep structure of Balkin’s theory would require him to revise his argument for the social-interaction theory of the Commerce Clause. It seems likely that Balkin would argue that the contextual factors (the surrounding constitutional text, the structure of the Constitution as a whole, and the publicly available historical context in which the Constitution acquired public meaning) support the social-interaction theory. That is, Balkin would try to argue that the social-interaction theory best captures the communicative content of the Commerce Clause.

But suppose that Balkin is wrong about this. And further suppose that he were convinced that the original public meaning of the Commerce Clause was better captured by the trade-in-goods theory. Of course, that would not be the end of the matter, because it might be that the Necessary and Proper Clause would save the New Deal and Great Society legislation that a progressive narrative of constitutional redemption requires. But suppose that the Necessary and Proper Clause could not play this function. Other powers might be invoked, the tax and spending powers come to mind. But suppose that at the end of the day, the public meaning of the text (the “framework” in Balkin’s terminology) could not support the constitutionality of much of the social legislation passed during the New Deal and Great Society eras? What then?

V. Conclusion

We are now in the realm of speculation. Jack Balkin is committed to both fidelity to the original meaning of the constitutional text and to faith in the possibility of constitutional redemption. Constitutional Redemption and Living Originalism together make the case that the surface tensions between these commitments can be reconciled. At the level of constitutional theory, that reconciliation is accomplished via Balkin’s version of originalism: framework originalism provides the theoretical space in which fidelity to the text can be made consistent with belief in a progressive narrative of constitutional redemption. In my opinion, this part of Balkin’s enterprise should be judged a success—and that is no mean feat. At the level of constitutional substance, reconciliation depends on the success of Balkin’s brilliant and ambitious arguments for the compatibility of original public meaning with New Deal and Great Society legislation and with the jurisprudence of the New Deal, Warren, and Burger Courts. The jury is still out on the second part of the enterprise. If it succeeds, then Balkin will have succeeded where so many others have failed—an accomplishment of the
very highest order and the noble dream of generations of progressive constitutionalists. If it fails, then Balkin will need to face squarely the central dilemma of contemporary constitutional theory. If faith in constitutional redemption cannot be reconciled with fidelity to the constitutional text, then which shall yield?