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AGREEMENTS WITH HELL AND OTHER OBJECTS OF OUR FAITH

J.M. Balkin*

INTRODUCTION

YOU might think that at a conference devoted to constitutional fidelity, the first question to address is whether the Constitution deserves our fidelity. Therefore, there is some irony in the fact that the question is raised in a panel at the very end as we are all getting ready to go home.

Yet I think that this placement is symbolically appropriate. Fidelity to the Constitution is something that most constitutional lawyers—and indeed most citizens—take for granted as an important political value. Of course one wants to be faithful to the Constitution. What judge, lawyer or law professor wants to be thought of as unfaithful to the Constitution? Who wants to be known as a constitutional adulterer? It reminds me of Jordan Steiker's comment when a student asked him whether he believed in a living Constitution: "Yeah, like I'm going to be in favor of a dead one!"1

I was tempted, in fact, to entitle this Article "In Praise of Constitutional Adultery." But that is not my real goal. I am not here to bury constitutional fidelity, much less to praise it. As I shall argue in more detail momentarily, it's not really possible to be against fidelity if one is seriously interested in interpreting the U.S. Constitution. Fidelity is the whole point of the enterprise. What we can ask ourselves is what this enterprise does to us. Fidelity, I shall argue, is not simply a property of an interpretation. Fidelity is a feature of a self who disciplines 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 one's self to be shaped by this practice. Fidelity is an interpretive attitude that produces psychological pressures on us and affects us for good or for ill.

If we think of fidelity as a property of a good interpretation, there can be no question whether fidelity is a good thing or a bad thing. Only when we understand fidelity in psychological and sociological terms—only when we see it as a practice of socialization and a discipline of thought that does something to us and to our society—can we ask the question whether the Constitution deserves our fidelity.

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1. Quip on file in the author's memory.

1703
The practice of constitutional fidelity creates social and psychological pressures on us because the Constitution exists in a political system that is certainly not completely just and may in fact be very unjust. Recognizing that the Constitution we are faithful to might be an evil Constitution would create enormous cognitive dissonance, because we face enormous pressures for fealty to the Constitution both as a national symbol and as the basis of our legal system.

The social and psychological pressures that arise from the practice of fidelity create three basic kinds of ideological effects. The first is that we will tend to see the Constitution as standing for whatever we believe is just, whether it does or not, and whether it ever will be so. In this way the "true" Constitution can be separated from any evils of the existing political system. This is a matter of conforming the Constitution to our ideas of justice, and so we might call it interpretive conformation.

The second possible effect is that we will accept what we think the Constitution requires as being just, or at least not too unjust. In this case we conform our beliefs about justice to our sense of what the Constitution means, and not the other way around. We might call this interpretive cooptation. It allows us to pledge faith to the Constitution because we decide that things are not really so bad after all.

Finally, the practice of constitutional fidelity can affect us in a third way. Immersing ourselves in this practice makes it seem natural for us to talk and think about justice in terms of the concepts and categories of our constitutional tradition. In this way, the practice of constitutional interpretation can actually skew and limit our understandings about justice, because not all claims are equally easy to state in the language of that tradition.

I. THE PROBLEM OF CONSTITUTIONAL EVIL

Within our legal culture the idea of fidelity to the Constitution is seen as pretty much an unquestioned good. Each member of the bar takes an oath to uphold the Constitution, and any federal judicial nominee who professed no interest in fidelity to the Constitution would soon find him or herself with no political support and no job. I also suspect that we would find similar sentiments among the general public, who do not have judges' obligations of role morality, and who may go through their entire lives without having to swear an oath to uphold the Constitution.²

Lawyers also do not see the question of fidelity as on the table for debate; no one who practices law claims to be uninterested in being faithful to the Constitution. Rather, they are concerned about how to be faithful. People talk and make arguments in terms of what is faith-

². That is, unless they are naturalized citizens or are inducted into the armed forces.
ful to the spirit or the letter or the history or the traditions of the Constitution, even if other people believe that they are not being faithful. Moreover, one gains a decisive rhetorical advantage against one's opponents if one can show that they are not being faithful to the Constitution; faced with such an accusation, they must respond by showing why they are being faithful after all. For the same reason, constitutional theorists take great pains to demonstrate the fidelity of their favored constitutional doctrines and their favored methods of constitutional interpretation. It is not enough that a theory or a doctrinal innovation is a really good idea; enormous efforts must be expended to show that it is also a faithful interpretation of the Constitution.

It is not accidental that fidelity is seen as a basic and unquestioned norm, not only at conferences like this one devoted to constitutional fidelity, but in all constitutional law and virtually all discussions of constitutional theory. Fidelity is not a virtue but a precondition. It's 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 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.3

If fidelity is an inherent norm in the practice of constitutional interpretation, what could possibly be wrong with it? I think there are two basic objections one could make to the idea of constitutional fidelity. The first is that it is impossible and the second is that it is undesirable. Often claims of impossibility presuppose a controversial notion of what fidelity is. So someone who thinks that fidelity means only fidelity to the Framers' intentions could argue that fidelity is impossible because with respect to many important questions these intentions cannot be known for certain. One way to respond to such objections is to question their assumptions about the nature of fidelity. We could reply that fidelity requires more than just adherence to text or intentions. That, of course, is the burden of most of the other papers in the present symposium. They all hope to explore the ways in which one can be faithful to the Constitution.4

3. Indeed, even when we criticize the Constitution, we are in some sense offering what we believe to be a faithful interpretation of it. We are saying that this is what the Constitution really means and we find it wanting for reasons of social justice or some other desideratum.

4. A more interesting version of the claim of impossibility would be a claim that the Constitution is incoherent. We cannot be faithful to the Constitution, the argu-
My major concern, however, is with the second question—whether fidelity is undesirable. This is the problem of constitutional evil. The problem of constitutional evil is the possibility that the Constitution is responsible, directly or indirectly, for serious injustices. The argument from constitutional evil against constitutional fidelity is that the Constitution does not deserve our fidelity because the Constitution is either unjust or permits and gives legal sanction to serious injustices. When we engage in the practice of constitutional fidelity, the argument goes, we further and help legitimate those injustices. Fidelity should be offered only to those practices and institutions that are just; it should not be extended to those that are wicked. This criticism of constitutional fidelity is really a criticism of the social practice of constitutional interpretation. It argues that it is a practice that sucks us into something deeply unjust and directs our energies to its perpetuation.

Now of course, it is possible to argue that only certain parts of the Constitution are wicked, and that we only have to be faithful to the ones we admire. However, this seems a fair-weather sort of fidelity. It’s like saying “Well, I’ll only be faithful to the Constitution as long as it’s convenient to me or as long as it doesn’t upset my political scruples.” When phrased in this way, it seems clear that being a little bit unfaithful is like being a little bit pregnant. If one is to exercise the virtue of constitutional fidelity, it must be to the entire document, not just a part. Of course, in practice it’s quite possible that judges and lawyers exercise selective fidelity to the Constitution. They do so by

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6. The Constitution can be responsible for injustices because it permits them (e.g., slavery and police abuse), or because it prohibits government from engaging in reforms necessary to ameliorate them (e.g., the use of the Tenth Amendment to prohibit child labor laws).
conveniently overlooking or disregarding parts of the Constitution that they find unpalatable. But for the purposes of this Article, I want to be forthright about what constitutional fidelity requires of us. And the question of constitutional evil arises in just this case: If the Constitution, or parts of it, permits or even requires great evils, why does it deserve our fidelity?

This is not a hypothetical question. Even today there are features of our Constitution that sanction great injustices. Of course, if we began to list them, we would no doubt end up disagreeing about what they were. Some would point to the ability of legislatures to throttle economic liberty with regulations, others would point to the ineffectual protection of minority rights, still others would decry the Constitution’s grant of a right to slaughter the unborn, and still others would point to its protection of the power of money to corrupt the political process. I do not wish to enter into the details of these debates here. Rather, I want to talk about the general consequences of fidelity to an unjust Constitution, whatever the parameters of its perfidy. That is because, as I shall describe later, most citizens have an emotional stake in the basic justice of our Constitutional institutions, even if they disagree about marginal elements. Thus it is often difficult for many Americans to confront the problem of pervasive constitutional evil directly. It is far easier to pick an example from our constitutional past that most people today would agree was a profound example of constitutional evil: the constitutional protection of slavery.

One of the great debates of the first half of the nineteenth century was the extent to which the Constitution protected the institution of slavery. Although the Constitution made oblique references to slavery at several places, the protection of slavery was very much built into its structure. First, the South was permitted to count slaves as three-fifths of a person for purposes of bolstering its representation in the House of Representatives and the Electoral College. Thus, slavery was not only condoned, it was used to buttress the political power of the slave-holding states. At several points in the antebellum era key legislation affecting the rights of slave-holders was passed or de-

7. Cf. Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 639-42 (1989) (arguing that the academic consensus has conveniently overlooked this part of the Constitution).

8. Dorothy Roberts has pointed out that the felt need to have faith in the Constitution depends very much on one’s position in society. Dorothy E. Roberts, The Meaning of Blacks’ Fidelity to the Constitution, 65 Fordham L. Rev. 1761 (1997). The cognitive pressures on different groups may be different: It may be more difficult to imagine one’s self as complicit in and faithful to a fundamentally unjust system than to imagine one’s self as the victim of such a system. Many members of oppressed groups who have watched the Constitution’s promises of social equality repeatedly go unfulfilled may feel no strong psychological need to pledge faith in the Constitution. They may have less difficulty accepting the possibility that the American system of government is fundamentally flawed and unjust. I am indebted to Professor Roberts for these and many other insights in her fine paper.
feated only because of the South's additional votes. Second, one of the two unamendable constitutional provisions according to Article V was Article I's requirement that the slave trade could not be abolished in this country before 1808. Third, the Fugitive Slave Clause protected the rights of slave owners in slave states by guaranteeing that free states would act to return slaves to their "lawful" owners. In *Prigg v. Pennsylvania*, the Supreme Court, in an opinion by Justice Story, held that the Fugitive Slave Clause was self-executing, and authorized slave holders to use self-help to recapture escaped slaves even in free states. The Court also upheld the Fugitive Slave Act of 1793, which authorized federal judges to return escaped slaves to their masters. Finally, in *Scott v. Sandford*, Chief Justice Taney, relying on his view of the original understandings of the Constitution, held that blacks, even free blacks, were not citizens for purposes of the diversity clause of Article III. The history of slavery in the United States and the constitutional responses to that institution raise the issue of constitutional evil in its most profound form. It was for this reason that William Lloyd Garrison, one of the leading white abolitionists, described the Constitution as "a covenant with death, and an agreement with hell."

Nevertheless, cases like *Dred Scott* and *Prigg* complicate the question of constitutional evil, for they are admittedly doctrinal glosses on the Constitution. Indeed, what does it mean to say that the Constitution itself is evil? Perhaps this is merely an objection that people have used and interpreted the Constitution in the past to justify serious evils and disguise or legitimate great injustices. Perhaps people speaking in the name of the Constitution, or even clothed with the authority of interpreting the Constitution (like judges), have used the symbolic and legal power of the Constitution to justify an unjust status quo or to move the country in an even more unjust direction. But this does not mean that the Constitution itself is evil or unworthy of our fidelity. It simply means that bad interpretations of the Constitution, which are themselves unfaithful to its spirit, are evil or unjust. The Constitution itself (i.e., the best interpretation of it) could still be deserving of our respect and fidelity. One might point out that some members of an extremist militia think that the Constitution permits or even requires

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11. *Id.* at art. IV, § 2, cl. 3.
14. *Id.* at 403-19.
15. The phrase comes from a resolution Garrison introduced before the Massachusetts Anti-Slavery Society in 1843: "That the compact which exists between the North and South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled." Walter M. Merrill, *Against Wind and Tide: A Biography of Wm. Lloyd Garrison* 205 (1963).
that all Jews and blacks be expelled from the United States, but this
does not make the Constitution evil; it merely shows that these militia
groups have the wrong interpretation of it. Similarly, Justice Taney’s
infamous opinion in *Dred Scott*, which held that blacks were not citi-
zens for purposes of the diversity clause, was not an example of constitu-
tional evil but of an evil and wrong interpretation of the Constitution,
even if that interpretation was, for a time, incorporated into the positive law of the United States. In short, just because peo-
ple have used the Constitution for bad ends in the past does not mean
that the Constitution itself is evil or undeserving of our fidelity.

This response solves the problem of constitutional evil by differenti-
ating an ideal Constitution from past interpretations of the Constitu-
tion and past actions done in the name of the Constitution. It tries to
separate the true Constitution or the best interpretation of the Consti-
tution from its various historical interpretations and manifestations. It
hopes to separate the Constitution from parts of the constitutional tra-
dition and even from positive constitutional law. We might call this
project Ideal Constitutionalism.16

Ideal Constitutionalism is an example of what I call interpretive
conformation. It solves the problem of fidelity to an unjust Constitu-
tion by conforming the object of interpretation to our sense of what is
just. This practice is an exaggeration of a perfectly normal feature of
interpretation, and so it is hard to tell where interpretation ends and
conformation begins. When we interpret a text, we must try to under-
stand how the text makes sense; we must try to see the true and good
things in it. Otherwise we cannot be sure that the falsity, evil and
incoherence we find in the text is due to the text itself or our inability
to understand it fully. We might think of ideal constitutionalism as an
overextension of this charitable attitude. Nevertheless, it is a charity
that begins at home, for it conforms the meaning of the Constitution
to our own sense of what is fair and just.

The most extreme example of this tendency is Frederick Douglass,
the leading black abolitionist before the Civil War. Douglas rejected
the conventional view that the Constitution sanctioned slavery. He
argued that the antebellum Constitution made slavery unconstitu-
tional.17 It is difficult to know what to make of Douglass’s bold claim:
One simultaneously wants to admire its audacity and cleverness and
note its importance as a piece of progressive political rhetoric at the

16. Similarly, Mark Graber calls “Perfect Constitutionalism” the position that
“the Constitution requires that our society conform to the best principles of human
governance.” Mark A. Graber, Our (Im)Perfect Constitution, 51 Rev. Pol. 86, 86
(1989). The phrase (and the title) are taken from Henry P. Monaghan’s famous cri-

17. See Frederick Douglass, The Constitution of the United States: Is It Pro-Slav-
ery or Anti-Slavery?, 2 Life and Writings of Frederick Douglass 467-80 (P. Foner, ed.,
1950), reprinted in Paul Brest & Sanford Levinson, Processes of Constitutional Deci-
same time that one wants to dismiss it legally as off the wall. Eventually Douglass was proved right—the Constitution now does prohibit slavery. But it took a Civil War and an explicit constitutional amendment to do it.

Over the years, students of the Constitution have attempted something very much like Frederick Douglass—although usually to a much lesser degree and without the moral authority and social influence that Douglass possessed. They have tried to offer theories of interpretation that produce a “Shadow Constitution” that remedies the positive law of the Constitution of its existing defects. This Constitution is likely never to see the light of day, but that does not stop constitutional theorists, who believe either that the mere force of argument will change the meaning of the Constitution or that the political forces of the future will somehow vindicate them. Sometimes these gambits are modest attempts at reform. Sometimes they border on self-parody.

At the same time, a small cottage industry has grown up among constitutional theorists concerning how cases like *Dred Scott* or *Prigg* should have been decided. These cases continually trouble constitutional scholars because they lay bare the connection between constitutional theory and the problem of constitutional evil. People use cases like *Dred Scott* and *Prigg* as litmus tests for the worth of their theories and as means of attacking competing theories. Thus, they say that *Dred Scott* and *Prigg* were wrongly decided because they used the wrong theory of constitutional interpretation, whether that be original intention, formalism or substantive due process. Some say the prob-

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18. Few American lawyers at the time questioned the legality of slavery; indeed the Constitution’s protection of slavery was for many the most powerful indictment of existing American legal and political institutions. The legal consensus that slavery was protected by the Constitution produced thorny questions about compensation for former slave-holders and led to the felt need for a Thirteenth Amendment to the Constitution rather than subsequent judicial construction.

The best interpretation of Douglass’s remarks is that they are part of a tradition of oppressed groups attempting to hold the Nation responsible for its failed promises. See infra note 28; Roberts, *supra* note 8, at 1766-69. Douglass was a public personality, one of the most prominent opponents of slavery of his time and a leading figure in a significant social movement. Thus, his aspirational rhetoric was part of a conscious strategy to influence social attitudes. In this sense, however, his social position was quite different from that of most contemporary law professors and his political influence was significantly greater.


21. For example, Robert Bork and Orrin Hatch, among others, have argued that the problem with Taney’s opinion in *Dred Scott* was its use of substantive due process, the theory underlying Roe v. Wade, 410 U.S. 113 (1973). See Robert H. Bork, The
lem with the decisions is their judicial activism, others insist that these cases show the folly of judicial restraint. These alternative theories of constitutional interpretation are refuted precisely because they lead to unjust results; they can be rejected precisely because they force the issue of fidelity to constitutional evil.

The assumption implicit in all of these arguments is that when one has the right interpretative theory of the Constitution, the result is usually morally appropriate. Such a view is based on the conceit that the ideal Constitution, using the right methods of interpretation, might somehow skirt the problem of constitutional evil. In this way, one can be faithful to the Constitution rightly interpreted, rather than the positive law of the Constitution, and the problem of constitutional evil does not arise.

Unfortunately, this gambit cannot be completely successful. We cannot divorce previous interpretations of the Constitution from the best reading of that document for two reasons:

First, the Constitution is not merely a document; it is also an institution and a cultural and political tradition. Indeed, we might say that the document has legal and political significance because it is embedded in an ongoing set of institutions and an ongoing cultural and political tradition. These institutions and this tradition have assimilated and built upon the constitutional interpretations of the past, both noble and ignoble, good and evil. For this reason it is hard to formulate many constitutional questions, let alone answer them, except against the background of existing institutions, cultural understandings and doctrinal structures. Previous doctrinal glosses make it possible for us to think about certain constitutional problems as constitutional problems. These doctrinal glosses and the history of past interpretations of the Constitution create the conceptual apparatus that is the common language for raising and recognizing constitutional problems.

For example, we understand the Equal Protection Clause in the way that we do because of the way it was previously interpreted and the doctrinal glosses given to it. Our concepts of "heightened scrutiny," or "discrete and insular minorities" come from this constitutional tradition, not from the text of the document or the intentions of its Fram-

Tempting of America: The Political Seduction of the Law 28-34 (1990); Transcript to Confirmation Hearings of Justice Ruth Bader Ginsburg, Fed. News Serv., July 22, 1993, available in LEXIS, Legis Library, Fed. News Serv. File (remarks of Senator Hatch). Christopher Eisgruber, on the other hand, has argued that Taney's opinion was based on a "dogmatic originalism" which looks only to the understandings of the past while being unconcerned with their injustices. Eisgruber, supra note 20, at 62-63. Robert Cover famously criticized Justice Story's decision in Prigg as a "retreat to formalism" that allowed Story to abdicate responsibility for perpetuating injustice. See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 241 (1975). Yet Story's decision—striking down Pennsylvania's fugitive slave law and holding that the Fugitive Slave Clause was self-executing—could just as easily have been described as an unsound exercise of judicial activism.
And these doctrinal glosses are not always so easily removed. The Constitution is like a building whose later additions respond to the design limitations placed upon it by the work of earlier architects. It is like a painting that has been repeatedly touched up by later artists with a paint that mixes with the old colors. Doctrinal glosses, like paint, tend to become stuck to the Constitution and can be removed only with great difficulty. Hence, if we ask the question of whether homosexuals are protected from discrimination, for example, we conceptualize the question and answer it in terms of categories derived from these doctrinal glosses. We ask whether sexual orientation is a suspect classification, or whether homosexuals are exercising a fundamental right. And these glosses have their limitations; indeed, they may actually tend to subvert what is just or hide injustices from our view. In such a way the discourse of equality has been used not only to further egalitarian norms but to perpetuate and preserve racial hierarchy.

Thus, when we interpret the Constitution, we are always faced with the question of what the best interpretation of the Constitution is given the past we have already had, the institutions we have already grown up in, the wars we have already fought. We must understand the Constitution in terms of the history of its authoritative readings, decisions around which expectations have been created and institutions have grown. We live in a world created by the products of previous constitutional good and constitutional evil. This tradition weighs on us, even if we do not feel its weight. It is our constitutional patrimony, or to invoke Philip Bobbitt's phrase, our Constitutional Fate.

Second, even if we equate the Constitution not with its doctrinal glosses but with a set of abstract ideas, like liberty, equality or due process, we must face the fact that these ideas are historically embedded abstractions. An historically embedded abstraction is an idea that people have identified with their own practices and used to justify them, even though it is always possible to say that they have fallen short of their own ideals. Thus, the Constitution offers us a complex of abstract ideas like due process or equal protection in the same way that concepts like liberalism or democracy or Christianity offer us abstract ideas. The problem is that one cannot fully divorce what people have made of these abstract ideas from the meanings of these ideas, even though we recognize at the same time that they have not always lived up to them. In the world of ideas as in the world of persons, one tends to be known by the company one keeps.

23. On this phenomenon see the interesting discussion in Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2174-88 (1996).
The proof of the worth of liberalism, for example, must lie in part in the actual experience of states that claim to be liberal; the proof of the actual wisdom of democracy must be understood in terms of the actual experience of democratic nations, and so on. Theorists sometimes resist this idea. They want to claim that liberal states and democracies are merely imperfect reflections of these ideas, and that liberalism and democracy cannot therefore be held accountable for their failings. This leads to a sort of illicit intellectual bookkeeping: all of the beneficial features of liberal democracies get attributed to their being liberal and democratic, while all of their failures are assigned to their illiberal or antidemocratic aspects.

I believe this approach is mistaken. I think we have to understand liberalism as not simply a set of abstract principles, but as a set of historically emergent ideas that people have used to justify certain political practices, including some particularly unjust political practices. All injustices, even the grossest ones, are usually defended by some set of historically developed ideas, whether they be democracy, civilization, manifest destiny or Christian salvation. Human beings just seem to be designed to use such abstractions to defend their actions. We can laugh at or see through their pretensions, but this does not mean that these historically emergent ideals cannot be complicit in these injustices. Rather, we judge the moral worth of such abstractions in large part by the ways they have been used in the past by people who claimed to be following them.

To put the matter another way, we must come to terms with the fact that political ideas and ideals have an ideological content and function—that ideas are not just ideals for emulation and attainment but also the means by which injustices like caste, status hierarchy, violence, aggression and oppression are justified by those who perpetuate them, both to themselves and to those who must suffer the consequences. Thus, in judging the benefits and detriments of an historically embedded abstract idea like democracy or liberalism, we must necessarily take into account its ideological uses and effects, and these can only be understood through the ways the idea has actually been wielded in existing historical institutions. We cannot judge the idea wholly on its historical implementations (for that leaves no room for its ability to effect beneficial improvement), but neither can we disregard them.

This fact is much easier to see with ideas that have existed in the distant past, or those in which we do not have a personal stake. It is much easier for us to identify the doctrine of the Divine Right of Kings with the foibles of the historical monarchies it was used to justify, but that is because we have no particular stake in legitimating monarchies or debating the intricacies of their governing ideologies. I suspect that many people on the right will laugh skeptically at the claim that socialism and communism cannot be adequately judged by
the experience of socialist and communist regimes because socialist and communist ideas have never been adequately implemented. What better way, they will say, to know what the practical meaning of socialism or communism is than to look at the historical experience of these countries? Some secular people on the left who are appalled by certain doctrines of Catholic Church regarding women's rights will no doubt have a similar judgment about Catholicism. Despite George Bernard Shaw's famous quip that the only problem with Christianity is that it had never been tried, they will insist that they have at least some evidence by now of what Catholicism means in practice.

People use historically embedded ideals to justify past and current practices. Within a tradition people refer to that tradition's ideals and symbols to give moral and political authority to what they want to do. The more hallowed the term—like liberty or democracy—the greater its ability to lend practices some undeserved measure of legitimacy and authority. We cannot close our eyes to this fact. This point is even stronger in the case of an ongoing political institution like the Constitution when the Constitution itself is held up as a venerated symbol of all that is good about America. The strengths and weaknesses of the Constitution necessarily are bound up with the actual injustices of our current society which claims to be governed by it. We must recognize and come to terms with the fact that the Constitution, and hence fidelity to the Constitution, has an important ideological component and ideological function.

We are not doomed to be slavish dupes of this ideological function. We can and must be critical about it. But we can only be critical about it if we pay attention to it, if we recognize that the practice of fidelity to the Constitution cannot be fully separated from what the Constitution has been used to justify or permit in the past and what it is currently used to justify or permit. Claiming that ideological uses of the Constitution to legitimate injustice are irrelevant to what it means to be faithful to the Constitution is hiding one's head in the sand. We cannot simply dismiss the argument that the Constitution does not deserve our respect because there is an ideal Constitution that does deserve it. That is because even though we can imagine ideal Constitutions, we are not in control of what the Constitution means. Even though individuals can have influence over the meaning of the Constitution, not all individuals have equal influence. The meaning of the Constitution is determined in large part by the social institutions and actors who create social meanings, including the judges who create doctrinal glosses. If you doubt this fact, look at how law professors still scurry like rodents to digest the table scraps of Supreme Court precedents handed to them by judges whom they may no longer respect and may even openly despise. Even law professors' criticisms of these doctrinal glosses betray the power of these glosses in shaping the terms of the debate over the meaning of the Constitution.
The burden of my remarks so far is to head off the response to the problem of constitutional evil that identifies the Constitution with a Shadow Constitution that has never existed. One then can pledge faith to this Shadow Constitution and avoid the problem of constitutional evil. I hope I have shown that this is too easy a solution. Nevertheless, I do not wish to reject completely the practice of idealizing the Constitution (or certain parts of the Constitution) and holding this ideal up as the "real" Constitution or the "true spirit" of the Constitution. On the contrary, this idealization is an important way that constitutional change occurs under the name of faithful interpretation. It is to some degree what debates about faithful interpretation are all about. We continually invoke principles and ideals that we see emanating from the Constitution but imperfectly realized (in our view) in the body of existing doctrinal glosses and historical traditions. We attempt to persuade others that we are adverting to the true spirit of the Constitution even as our opponents claim that we are being faithless. This process is the process of constitutional interpretation; it is what constitutional fidelity involves. Through this process fidelity is manufactured. I use this expression without disrespect or cynicism. Fidelity is activity, process, coming into being. To be faithful involves the continuation of a tradition, which is then read back into the tradition retroactively as having always been a part of it. And to some extent the continuation always was part of the tradition, for it was one of the possible lines of continuation. But it is only partly true, for the continuation of any tradition must necessarily kill off other possible lines of development, and relegate them to the margins or brand them as heretical. That is the sense in which tradition is also extradition.

Because faithfulness is the continuation of a tradition, it always involves variation as well as conformity. The conceit of tradition is its disguise of change under the name of continuity, its mask of permanence hiding the work of transfiguration. The problem of fidelity is precisely the problem presented by living and working within such a tradition. It is how to reconcile our sense of the ideals emanating from the Constitution with our Constitutional Fate: the history of glosses and glosses on glosses, the embedded practices and understandings, the injustices and evils that form our ambivalent inheritance. This predicament—how to reconcile the ideals we see in the Constitution with the evils we cannot close our eyes to—is the predicament of fidelity. It is the happy but deluded person who sees only

these ideals but not the evils; it is the cynic who sees only the evils but not the ideals; it is the wise person who sees both and feels the tug that both exert on the spirit. She alone understands the true price of fidelity.

The Constitution cannot be a perfect document. It was fashioned by imperfect people in imperfect times and entrusted to future generations for its interpretation; and the people and the times have gotten no more perfect since. Although we should be suspicious of a theory of constitutional interpretation that sanctions great evils, we should be equally suspicious of any theory of constitutional interpretation that always avoids their possibility.

One might think that this is a criticism of an aspirational theory of constitutional interpretation—a theory that sees the Constitution as containing elements that aspire to a more just society. It is not. Indeed, my own views of constitutional interpretation are largely aspirational. Even under an aspirational view of the Constitution, one must still face the problem of constitutional evil. Indeed, I would argue that an aspirational approach must accept the problem of constitutional evil most clearly and forthrightly.


28. Members of oppressed groups often speak about the Constitution in aspirational terms. For some this is an act of faith in a Constitution that they believe will eventually vindicate their fidelity and grant them full and equal citizenship. But even for those who lack such faith, this rhetoric serves an important function as a demand for justice. For this latter group of nonbelievers the Constitution is more like a person who has repeatedly refused to pay a debt, or a spouse who has repeatedly been unfaithful. At some point one simply wants to insist that deadbeats and philanderers end their hypocrisy and live up to the obligations they have assumed. Thus the attitude of many who have been left out of the promises of the Constitution may not be one of belief in the ultimate goodness of the American constitutional system. It may rather be an attitude of "speaking truth to power"—making a demand that the Constitution should live up to its promises of justice and equality.

However, the trope of the unfulfilled debt also appears in the language of the constitutionally faithful. I believe that Frederick Douglass's aspirationalism is best understood in this light. By reading the Constitution "literally," and in light of the principles of the Declaration of Independence, Douglass was attempting to hold white Americans responsible for the promises they made in the Constitution. Douglass was attempting to collect on a moral debt, so to speak, created at the founding of the United States. See Roberts, supra note 8, at 1768. Roberts is correct that one does not have to believe in the essential justness of the Constitution to collect on such a debt, any more than one has to believe in the essential creditworthiness of a deadbeat when one demands that he or she pay up. However, the language of debt is often mingled with the language of faith: Martin Luther King's famous "I Have a Dream" speech invokes the metaphor of debt while also pledging faith in the eventual justness of American constitutionalism:

So we've come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every
The best version of an aspirational account, I think, is one that recognizes that the Constitution is an imperfect document fashioned as a result of political compromise and limited vision, but that it nevertheless contains features and concepts that urge us to make our own institutions more just. The most obvious candidates for these concepts are the most abstract ones: hence the general phrases of "due process" and "equal protection" seem to possess an aspirational character. Yet we can read less general phrases aspirationally as well. The First Amendment states merely that Congress shall make no law abridging the freedom of speech; yet I think the best interpretation of this clause is as a general protection of freedom of expression, political activity and conscience, deeply tied to emancipatory processes of self-governance. This example shows that it is sometimes reasonable to give a limited text a more general and aspirational character. I think a similar point could be made about the Privileges and Immunities Clauses, the Republican Government Clause, the Title of Nobility Clauses, and the Bill of Attainder Clauses, although I recognize that this has not happened in the doctrinal tradition.29

Even though it is possible to read certain portions of the Constitution aspirationally, there are large parts of the text that resist such an interpretation. I do not merely mean the structural guarantees and provisions that set up the general housekeeping of the Republic. There are any number of clauses in the Constitution that seem to reflect the concerns of an earlier age. They exist even in the hallowed Bill of Rights.

We tend to forget that the original Bill of Rights was originally twelve articles, not ten. The other two proposed amendments are important because they give us a greater sense of the Bill's structure. They are by no means foreign to the spirit of the Bill of Rights but help us to see more clearly what that Bill was. The second of the original twelve articles concerned compensation for Senators and Representatives; it was eventually enacted as the Twenty-Seventh

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American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

Martin Luther King, Jr., I Have a Dream, Address at March on Washington, D.C., for Civil Rights (Aug. 28, 1963), in A Testament of Hope: The Essential Writings of Martin Luther King, Jr., at 217, 217 (James M. Washington ed., 1986).

29. But see Daniel A. Farber, "Terminator 2 1/2": The Constitution in an Alternate World, 9 Const. Commentary 59 (1992) (showing how absent the Bill of Rights these clauses could have been turned into basic guarantees of human rights).
Amendment. The first article of amendment ensured an upper limit on the size of Congressional districts as the population grew. Thus, our First Amendment was really the Third.

These provisions reveal more clearly that the Bill of Rights was and is not merely a charter of abstract liberties. It contains structural guarantees of federalism like those in the Tenth Amendment. It refers to specific procedural mechanisms—like the grand jury and the warrant—that are peculiar to the traditions of Great Britain and need not form a part of a just society. Indeed, many people think that some of these guarantees—the basic structure of an adversarial system in criminal cases and the requirement of trial by jury in all federal civil cases over twenty dollars—hamper the pursuit of justice.

Finally, we come to the Second and Third Amendments. Most people think that the Third Amendment is of limited relevance because it seems to address only the question of quartering troops in people's homes. Thus, Ronald Dworkin gives it as a prime example of a clause that cannot be aspirational, because it is too specific in its origins. I am not sure about that; I do not see how its level of specificity is that much different from the First Amendment or the Titles of Nobility Clauses. Yet I need not press that point here. The Third Amendment presents few problems for aspirationalists because at worst it seems innocuous and unlikely to do much mischief. The Second Amendment, on the other hand, presents greater difficulties, especially for present day liberals who support gun control. Hence, as Sanford Levinson has argued, the Second Amendment is an embarrassment, which is largely ignored in contemporary constitutional law casebooks and theoretical discussions. When it cannot be ignored, it is domesticated to the fullest extent possible. This may be fidelity to the Constitution, but I doubt it.

This is not to say that there cannot be aspirationalist interpretations of the Second Amendment. I am most intrigued by the possibility that the Second Amendment is actually designed to guarantee every American the right to serve in the Armed Forces and thus gain the rights of full citizenship that traditionally have attached to the assumption of this responsibility. Under this interpretation, a blanket

31. Id. at 530-31; Creating the Bill of Rights: The Documentary Record from the First Federal Congress 3 (Helen E. Veit et al. eds., 1991).
33. And, read aspirationally, it might be thought to impose a general duty of government to act according to law even during time of war. I am indebted to Sanford Levinson for this point.
34. Levinson, supra note 7, at 639-42.
35. See Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1162-73 (1991); Carl Riehl, Uncle Sam Has to Want You: The Right of Gay Men and
exclusion of gays from the military would violate the Second Amendment because by denying them the opportunity to serve their country, it also denies them their right to establish themselves as full and equal citizens. Nevertheless, this egalitarian and aspirationalist interpretation is tied to a view of the world in which bearing arms and inflicting violence on others is part of one’s duty as a citizen. It is unclear that this interpretation can fully separate itself from the more violent aspects of American civic republicanism. It too cannot free itself from the problem of constitutional evil.

Clauses like the Second Amendment repeatedly poke holes in our pretensions to Grand Constitutional Theory. They show us what we should have already known, that no theory of constitutional interpretation can make the Constitution perfect, or can postpone or avoid the possibility that the Constitution does not require that we be good and that our institutions be just. Our theories of the Constitution are makeshift attempts, reflecting the concerns of our era, but dressed up as timeless claims about interpretation. *Roe* and *Brown* have produced their own idiosyncratic problematics, as *Lochner* did in an earlier era, and with different results. The constitutional theories we offer are usually inspired by and designed to solve the doctrinal problems of our present age; they are usually embarrassed when we apply them to constitutional provisions not currently in view or transfer them to the constitutional questions of a different era. Imagine a legal process interpretation of the Fugitive Slave Clause, for example, or a fundamental rights approach to the Second Amendment. Conversely, as the constitutional approaches of the past are repeated in the present, their political valence changes, producing awkward and embarrassing results for the constitutional theorist. This ideological drift is not accidental. It is the result both of the imperfect nature of the intellectual tools we use to interpret the Constitution as well as the imperfect nature of the document we interpret.

How, then is this realization consistent with an aspirationalist vision of the Constitution? Not only is it consistent with it, it is the aspirationalist vision. In the aspirationalist view, we, our institutions and our Constitution, always exist in a “fallen condition.” We begin as sinners, and we hope for redemption. Our Constitution, which offers the hope of redemption, is no less imperfect than we are, even for all of its grand promises. We, too, are imperfect, and we too make promises. Our Constitution is like ourselves, imperfect, a collection of

Lesbians (And All Other Americans) to Bear Arms in the Military, 26 Rutgers L.J. 343 (1995).

moral and political compromises, yet with the urge and the ambition to become better than it is now. To be an aspirationalist is not to view the Constitution as a perfect thing but as an imperfect thing begging us to take its promises seriously. The point of aspirationalism is not to overlook the Constitution's faults but to recognize them honestly and accept them as the premise upon which aspiration must build. The aspirationalist vision is one of redemption. There can be no redemption without the recognition of sin.

Thus, even at the moment when we want to read the Constitution as aspiring to great justice, we must soberly reflect on its evils, both potential and realized. Indeed, I tend to think that theories of the Constitution that do not recognize the presence of constitutional evil, that tend to make everything come out happily in the end, are not truly aspirational. Nor do I think that they show fidelity. I think they are apologetic and self-deluding. When we have faith in others in down-trodden circumstances—a drug addict, a criminal or an alcoholic—we do not simply pretend that they are something they are not: physically and spiritually healthy. We must understand them for what they are now, and see the possibilities of what they could be. This is what it means to have faith in them: to recognize the promise within, a promise that hopes to burst forth from the misery of their condition and the darkness of their souls. When we pretend that everything is all right with them, we engage in happy talk. This happy talk comes not from faith but fear of facing reality. True faith involves being willing to see evil flourishing while still hoping for the eventual growth of the good.

II. FIDELITY AND THE LEVINSONIAN WAGER

The problem of constitutional evil becomes even more obvious when we consider how constitutions come about. When we watch other countries form their constitutions, we are often struck by the many compromises they must make with prior regimes and the injustices of those regimes. Consider, for example, the problems of constitution making in Eastern Europe, South Africa or the former Yugoslavia. The production of these new constitutions requires distasteful compromises with previous evils and gerrymandered features designed to smooth the transition from the old regime to the new.40 Such constitutions are messy and untidy, so compromised that many of the drafters often wish they did not have to sign them. They are unsure whether signing is a great act of statesmanship or an even greater act of betrayal. Yet what we are witnessing is the normal case of constitutional politics. And looking at these new constitutions should remind us that everything we see in them is true of our own Constitution. Our own Constitution was also the result of an escape
from a previous regime, a revolution with its own compromises and inadequacies. The States, big and small, North and South, had to be persuaded to join the Union; the interests and concerns of different property owners—including both mercantile interests and slave-holders—had to be assuaged. We might make a similar point about the compromises necessary to reorganize the Union and the Constitution after the Civil War. The injustices of the status quo are always continued in a new constitution even as it seeks to remedy some of them. All constitutions are agreements with hell.

Because of the imperfections of all constitutions, the question of constitutional fidelity necessarily becomes a question of constitutional faith. And this is borne out in the etymology of the word itself. The word fidelity 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.

This etymology shows us the deep connections between fidelity and faith: To be faithful to someone or something is simultaneously to have faith in someone or something. Fidelity is a two-way street; it is a relationship between oneself and another. One is faithful to the other in part because one expects the other to be faithful to oneself.

Of course, one does not know that the other will be faithful, and often the other is not. Thus, faithfulness is also faith in the other's fidelity. To be faithful is to be faithful even though one does not know whether the other will live up to the other's obligations. Hence, to be faithful is to trust, to make a leap of faith. Conversely, to be faithless also has a double meaning. It means both to lack faith and to betray a trust. A faithless person both lacks trust and cannot be trusted; she is unreliable and disloyal. Indeed, she may become disloyal precisely because she no longer believes in the institution she once trusted, or because she is emotionally incapable of such trust.

There is an important connection between fidelity and the existential commitment of trust. Often when one loses faith in another, one no longer feels the obligation to be faithful to that person. Of course, this is not always the case. For example, if a person’s spouse is repeatedly unfaithful, one might still be faithful to him or her. But even in that case one still trusts in something—one believes that the sanctity of marriage is valuable, one trusts that marriages are worth preserving for the sake of some greater good, or perhaps one holds out the hope that the other will return from his or her erring ways. Thus, when one is faithful to another, one still has a commitment to something, even if it is no longer to a flesh-and-blood person but to an abstraction or a

moral principle. Faithfulness always requires trust and belief in something, whether it is a person or an institution, a tradition or an ideal.

In the same way, to have fidelity to an institution, one must also believe in it. When one becomes part of an institution, one must make a leap of faith. One must believe that, on the whole, the institution is a good thing, and not a bad thing, and that to further its purposes is also, on the whole, a good thing, and not a bad thing. Even if particular actions one does on behalf of the institution are personally troubling, one must believe that, in the long run, hewing to one's institutional role means that things will work out for the best. This is a very common notion among lawyers, who are often required to make arguments they do not believe and defend clients and causes they do not personally support. Sometimes lawyers think that their representation of clients is a good thing because they believe in their clients' causes. They believe (or convince themselves) that the furtherance of their clients' interest is also the furtherance of the public interest. But more often, they defend their actions on the grounds that the entire practice of legal representation is a basically just one, or more just than any feasible alternative. They make an argument about their role within a larger institutional framework. Role morality is based ultimately on a faith in the value of the institution that creates the role.\textsuperscript{43} If one's role as a lawyer requires one to do a distasteful thing, one can still fall back on the justice of the general system of legal representation. But if one lacks faith in the institution, it becomes harder to justify one's participation in specific conduct that one finds distasteful.

Sanford Levinson closes his book, \textit{Constitutional Faith}, with the question whether one should sign the Constitution of the United States.\textsuperscript{44} In particular Levinson asks whether one should have signed the Constitution of the United States in 1787, given its implicit protection of slavery and its omission of the Bill of Rights. He finds this question extremely difficult.\textsuperscript{45} In the end, Levinson grudgingly admits that he would sign the document, because of a sense of faith that the country would live up to its promise of freedom. He argues that the language of the Constitution and the constitutional tradition is sufficiently flexible to allow amelioration over time, even if some of the necessary interpretations are currently unpersuasive.\textsuperscript{46} Levinson's constitutional faith, for all of its anxieties, is also an optimism—a belief that, despite recurrent adversities and failings, things will work out well in the end. Levinson's gamble is that the story of the U.S. Consti-

\textsuperscript{43} Cf. David Luban, Lawyers and Justice: An Ethical Study 128-32 (1988) (arguing that justification for lawyers' role depends ultimately on justification of institutions lawyers participate in).
\textsuperscript{44} Levinson, \textit{supra} note 41, at 180.
\textsuperscript{45} \textit{Id.} at 180-91.
\textsuperscript{46} \textit{Id.} at 192-93.
tution will ultimately turn out to be a comedy rather than a tragedy, or a story with no determinate end and no clear moral. In every comedy, the hero must encounter obstacles and overcome them, and so the existence of constitutional evil, even profound evil, does not shake our faith as long as we believe that such evils will eventually be eradicated. As the Psalmist says, “when the wicked spring up like grass, and all evil doers flourish, it is that they may be destroyed forever.”

Levinson’s constitutional faith is offered in the face of the possibility and the reality of the Evil Constitution. Thus, we might think of it as a gamble on the future. In this sense, it might seem to resemble Pascal’s famous wager on the existence of God. However, Pascal offered a mathematical proof to demonstrate the reasonableness of the wager, whereas Levinson can offer no such proof. In this sense Levinson’s wager is much more a matter of faith than Pascal’s.

Justice Story’s opinion in *Prigg v. Pennsylvania* also reflects a certain kind of wager. Story believed that by upholding the right of slave owners to regain their slaves he would preserve a greater good, the preservation of the Union and its Constitution. Implicit in Story’s wager is the same assumption: faith that preserving the Union is a good thing, because at the end of the day, there will turn out to be no serious long-term conflict between the Constitution and social justice.

Story’s wager, though, is different from Levinson’s in an important respect. Story was at the time a sitting United States Supreme Court Justice. The vindication of his faith is much more in his hands than it could ever be in Levinson’s. And his practice of offering constitutional interpretations is also importantly different. A good argument about the meaning of the Constitution from Levinson and a good argument made by Story may look identical but they have very different effects: One is merely the musings of a law professor; the other represents one-fifth of the votes needed to change the meaning of the Constitution.

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47. Psalms 92:7.
49. 41 U.S. 539, 623-25 (1842).
50. We might also contrast Justice Story’s situation with the so-called “inferior” court judge who sits in a federal trial or circuit court. It is important to remember that in interpreting the federal Constitution, the work of inferior court judges is almost exclusively doctrinal. They are required to figure out and enforce what the Supreme Court and other higher courts want them to do, regardless of their own views of the justness of higher court precedents. See Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843, 845 (1993). The Supreme Court has been particularly jealous of its power to shape constitutional law. It has repeatedly rebuked lower courts for attempting to change the Constitution by disregarding the Supreme Court’s views: “[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.” Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam).
I emphasize this point because we might think that one answer to
the problem of constitutional evil is to take constitutional idealism se-
riously: By discussing and arguing about the Constitution among our-
selves, legal academics can contribute to the constitutional tradition
and change its trajectory. We can be the masters of our own constitu-
tional destiny.51

This solution to the problem of constitutional evil is appealing be-
cause it envisions legal academics as having a significant effect on the
Constitution. By writing about the importance of justice in constitu-
tional interpretation, by engaging in an ongoing conversation with
others about the meaning of the Constitution, they can actually make
the Constitution more just. Yet this is a fool's errand for most of the
law professors who write and think daily about the Constitution. It is
a confusion of their role with the role of the Supreme Court Justice.52
Even if participating in arguments about the Constitution is a possible
solution to the problem of constitutional faith for Justice Story, it is
not a possible solution for the vast majority of American law profes-
sors, or, indeed, the vast majority of American citizens.

The articulation of constitutional ideals by different parties may
look grammatically identical but its social meaning and social effect is
quite different.53 The construction of constitutional systems by the av-
erage law professor at the average American law school has only a
minuscule effect on the direction of the Constitution's meaning. For
them, as for most Americans, constructing a Shadow Constitution is

51. Consider, for example, Levinson's defense of his faith:
For me, signing the Constitution—and agreeing therefore to profess at least
a limited constitutional faith—commits me not to closure but only to a pro-
cess of becoming and to taking responsibility for constructing the political
vision toward which I strive, joined, I hope, with others. It is therefore less a
series of propositional utterances than a commitment to taking political con-
versation seriously.
Levinson, supra note 41, at 193.

52. On this point, see Pierre Schlag, Clerks in the Maze, 91 Mich. L. Rev. 2053
(1993).

53. This is not a claim about the exclusive power of Supreme Court Justices to
shape the meaning of the Constitution. Rather, it is a more general point about the
social force of arguments about the Constitution made by different people in different
social positions. One can point to many key historical figures who were not judges,
like Abraham Lincoln or Martin Luther King, and who changed the meaning of the
Constitution by their words and deeds. Lincoln was not a judge but a politician, and
King was never elected to any office. But Lincoln was the President of the United
States, and King was one of the most important American political figures of the
twentieth century.

Most legal academics, like most citizens, are neither Supreme Court Justices nor are
they key historical figures like Lincoln or King. They may make statements and offer
arguments that look rhetorically similar to statements by these figures but they will
not have the same effect in shaping the meaning of the Constitution. We must not
confuse the force of reason—the correctness or justness of our arguments about what
the Constitution should mean—with the force of our reasoning: the social power that
our arguments will have because of who we are and what we do.
shadow boxing. It does not avoid the real problems of constitutional faith.

Justice Story's faith in the Constitution is importantly different precisely because he is able to turn the Constitution to the path of what he regards as just. Of course, the very fact that Story was presented with a case like *Prigg* shows that even Supreme Court Justices have limited control over events that affect the Constitution's meaning. And in any case, he does not act alone—he must convince four of his other colleagues. But these limitations on Justice Story simply support the larger point I wish to make: To have faith in the Constitution is to have faith in an ongoing set of institutions whose meaning the individual will not be able to control. Most of us participate only in the great mass of public opinion that eventually affects the meaning and direction of the Constitution; our views are like a drop of water in a great ocean. We cannot mold the object of our faith to our will; its eventual trajectory is largely out of our hands.

And what, then, if our constitutional faith is shaken? What if we come to believe that fidelity to the Constitution will not eventually achieve social justice, but that it will, on the contrary, preserve and even expand pervasive social injustices? It would be like discovering that the God we worshiped was not in fact good but was indifferent or even evil; that He did not care about us or about our well being and might be actively hostile to us. Should we have faith in such a God at that point? Should we even come to doubt His existence? It is no accident that one of the most difficult arguments put forward by atheists against the existence of God is the Argument from Evil. Explaining the existence of evil, and constructing theodicies, has been a constant task for generations of theologians. Of course, there is no question of not believing in the existence of the Constitution. But we might well doubt whether our Constitution deserves our fidelity, just as we might come to wonder whether the god we thought we were worshipping was actually a demon.

III. What Constitutional Faith Does to Us

But constitutional fidelity, I think, is more than simply a gamble on a horse that might not pay off. The practice of constitutional fidelity, like fidelity to other institutions, has important psychological effects on the self. To be faithful to an institution is to enter into a world, to accept a certain way of talking and a certain discipline of thought. It is to adopt a grammar that is not merely a vessel of thought and expression but subtly shapes and forms the processes of thought itself. At its best, fidelity is a virtue; at its worst it is a pathology.

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54. On the connection between legal and theological theodicies, see Levinson, *supra* note 41, at 59-60.
Over time, the word “fidelity” has been extended from a description of a relationship between persons to a relationship between a thing and something else that corresponds to it. Hence, we speak of a faithful likeness or a faithful representation. But this way of talking disguises the existential element in interpretation. Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. It is not simply a matter of proper translation or proper synthesis or even proper political philosophy. Fidelity is not a relationship between a thing and an interpretation of that thing. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relationship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we have towards something we attempt to understand; it is a discipline of a self that is related to the discipline of a larger set of selves in a society. Fidelity is ontological and existential; it shapes us, affects us, has power over us, ennobles us, enslaves us. Fidelity is a form of power exercised over the self by the self and by the social forces that help make the self what it is. As such, fidelity is an equivocal concept, full of both good and bad, mixed inextricably together. Fidelity is the home of commitment, sacrifice, self-identification and patriotism, as well as the home of legitimation, servitude, self-deception and idolatry.

If the Constitution is an evil thing, fidelity to that thing is dangerous. It is dangerous not simply because fidelity furthers the work of evil, but because of what fidelity does to the faithful. Fidelity is a sort of servitude, a servitude that we gladly enter into in order to understand the Constitution. To become the faithful servants of the Constitution, we must talk and think in terms of it; we must think constitutional thoughts, we must speak a constitutional language. The Constitution becomes the focus of our attention, the prism of our perspective. Our efforts are directed to understanding it—and many other things in society as well—in terms of its clauses, its concepts, its traditions. Through this discipline, this focus, we achieve a sort of tunnel vision: a closing off to other possibilities that would speak in a different language and think in a different way, a closing off to worlds in which the Constitution is only one document among many, worlds in which the Constitution is no great thing, but only a first draft of something much greater and more noble. And to think and talk, and focus our attention on the Constitution, to be faithful to it, and not to some other thing, we must bolt the doors, shut out the lights, block the entrances. Fidelity is servitude indeed. But this servitude is not so much something the Constitution does to us as something we do to ourselves in order to be faithful to it.

If we are the sort of people who see constitutional fidelity as an unquestioned virtue, who write articles and make arguments about
whether such and such is a faithful interpretation of the Constitution, who accuse others of infidelity as if this were a serious sin, what does this say about what we are and what we have become? We need to consider what the acknowledgement of fidelity as a constitutional virtue presupposes, not about the nature of language or political philosophy, but about the nature of the self.

One sometimes doubts that lawyers and politicians take the language of fidelity seriously. Perhaps lawyers and politicians do not really believe in the Constitution; perhaps they are being faithful to something else. That is certainly what they constantly accuse each other of, even as they assert that their own interpretations are faithful. But someone in this rhetorical stew must actually think that he or she is being faithful. Not all of these people are opportunists, even if many of them are mistaken. Moreover, even opportunism has a price to pay in its effect on the self and the self's commitments.

The rhetoric of legal and political argument alike is premised on the assumption of fidelity. For a judge to say that fidelity to the Constitution is not important is scandalous; rather she must say that she has a deeper fidelity than the superficial views of her opponents. For a politician to say that she is not faithful to the Constitution is treasonous; rather she must say that she has faith in the deeper political principles that underlie the document and remain even to this day its nourishing source and fountainhead. For a law professor to say that fidelity to the Constitution is unimportant is to admit that she is no longer doing constitutional law; rather, she must say that she is faithful to what the Constitution, properly understood, commands.

In each of these cases, people find it necessary rhetorically to phrase their arguments in terms of what is most faithful to the Constitution. Perhaps this rhetorical strategy is just that. Perhaps people say that they are being faithful to the Constitution without really believing it to be so. Perhaps they say that fidelity is an important good while secretly thinking it not very important at all. But I doubt that this accounts for most people in law, politics or the legal academy. Most of them hope that what they do is faithful to the Constitution. They want it to be so, they need it to be so, even if they sometimes have doubts whether it is so. And the question we must ask ourselves is, what is the meaning of, and the possible dangers in, that hope, that want and that need?

There are several reasons to be worried about the effects of constitutional fidelity on the self. First, fidelity to the Constitution requires us to speak and think in the language of the constitutional tradition and its characteristic concepts and categories. We must phrase our claims about what is just and unjust in terms of this constitutional discourse. And it is by no means clear that everything worth saying about justice and injustice can be said in this language. Some ways of thinking about human rights and self-government can be expressed
only very awkwardly if at all in the language of our Constitution and its distinctive concepts and doctrinal glosses. We may well be unaware of how much the increasing formalisms, the gradual encrustations of constitutional language, hedge and limit our imaginations, obscure our understanding rather than illuminate it. We may be unaware of this precisely because these concepts and categories seem so natural to us as students of the Constitution—because we work with them daily so that they have become the familiar and regular tools of our constitutional understanding.

The language of the Constitution does not merely affect our understanding of it. Many of us are engaged in practices where reference to the Constitution is a standard method of discussing what is just and unjust. People who immerse themselves in the Constitution and its traditions often bring the concepts of that tradition to bear in their other moral and political judgments. In this way the tools of constitutional thinking infect our attitudes towards basic questions of social justice and political philosophy. We find that when we discuss these questions, we turn to the language of the Constitution as second nature. It is a language that warps and limits our imagination about justice. Yet it is a language we cling to because it has become the only way we know how to be just, like a neurotic who finds himself replaying a damaging script in all his relationships because it is the only way he knows how to love and be loved.

There are many examples of these boundaries on our imagination, which themselves could form the subject of another essay. But the one which weighs on my mind most heavily these days is the manner in which the concept of equal protection has been formalized into questions of fundamental right, suspect classification, substantial burden and tiers of scrutiny. These categories see inequality as a question of similarity and difference, view oppression as a question of individual animus, and measure discrimination by inquiries into discreteness, insularity and immutability. This formalism produces a doctrinal edifice worthy of a thirteenth century scholastic: It offers us a structure that is used to consider the legal treatment of both debt adjusters and homosexuals, tax abatements and Mexican-Americans. Not surprisingly, it forms a procrustean bed that fails to do justice to the sociology of groups and the construction of group identities in a culture. In the legal language of our Constitution, it is difficult to talk about caste and stigma without wrenching them from their sociological bases and restating them in five-part tests that manage utterly to miss the point of how status-based injustices are perpetrated and perpetuated. Perhaps with time our law can become more sociological. But for now the constitutional language of equality seems to be more a method of promoting social inequality, the constitutional language of rights seems to be more a means of inhibiting freedom, and the constitutional language of respect for democracy seems to be more a device
for stifling the very possibility of self-governance for the vast majority of people in this country.

Moreover, even when ideas can be expressed in the existing constitutional grammar, some are clearly unpersuasive at any given point in time, given the political and professional consensus of opinion. If our discussions are honestly to be faithful interpretations of the Constitution, we must shut out these implausible claims and considerations; we must regard them as "off-the-wall" for purposes of the constitutional discourse of fidelity. That in itself would not be so bad, except that our commitment to fidelity has a further, and even more disturbing consequence.

To pledge fidelity to the Constitution is not only to think and talk in a certain way, it is also to believe something important about the American system of government. Our fidelity to the Constitution requires us to believe that it is a basically good and just document, and that it frames the legal system of a basically good and just polity. Of course there is no logical contradiction in believing at one and the same time that the Constitution is a basically good and just document but that it is the legal framework for a deeply unjust land. But there is an implicit cognitive dissonance here. There is enormous pressure to believe that the system ordained and established by the document we pledge fidelity to is itself worthy of respect. Indeed, these beliefs are mutually supporting, for it is likely that our patriotism is drummed into us at a much earlier age than our education in the intricacies of the Constitution. Our Constitution is the greatest charter of liberties ever devised by the hand of Man precisely because it is our Constitution, the Constitution of our country.

My point is not a logical one but a psychological one. Nor does it advert to the longstanding debate between natural law and positivism. Lots of people who are positivists, who believe that it is logically possible for law to be unjust nevertheless have a strong psychological stake in the basic justice of the American Constitution and the American system of government. It is surely philosophically possible for the Constitution to be deeply unjust, but the question I am interested is whether it is psychologically possible. Whether natural law advocates or positivists at heart, it is very hard for most Americans, and especially for most members of the American legal profession, to come to terms with and accept the possibility that the American Constitution might actually be profoundly unfair. They might concede that it has pockets of injustice, a few clauses and doctrines here and there that might need reform. Yet the idea that it is, as William Lloyd Garrison said, a "covenant with death, and an agreement with hell"\textsuperscript{55} is simply too difficult for most people to accept. If there are constitutional in-

\textsuperscript{55} Merrill, \textit{supra} note 15, at 205.
justices in our society, they are on the order of mindless bureaucracy and rent control; they are not in the same league as slavery.

Of course, one might object that the reason for this lack of acceptance is that the claim of significant and pervasive constitutional evil is simply unbelievable. But the word unbelievable has two meanings: first that something is false, and the second that one is simply not able to believe it. The fact that many people do not see our system of government as having deep pockets of injustice cannot be a sufficient proof of their nonexistence, because many people felt the same way about American institutions before the Warren Court, before *Brown v. Board of Education*, before the Nineteenth Amendment, and even before the Civil War when the institution of slavery was at its zenith. Faith in the essential justice and goodness of American institutions is not a new phenomenon. Indeed, when William Lloyd Garrison made his famous statement that the Constitution was an agreement with hell, it was hardly greeted with approbation. Half the people thought he was wicked, and the other half thought him insane. And this was at a time when one could make a fairly good argument that the Constitutional system was pretty rotten.57

There is something about the Constitution, the central text of American government, that makes people, and especially lawyers, want to bow down before it. The Constitution invites idolatry.58 And if we cannot bow down to the Constitution as it actually exists, we will bow down to a Constitution of our imagination. In this sense, even the ideal constitutionalist can be an idolator.

I am not enough of a comparativist to know whether other constitutions invite similar degrees of idolatry. I do know that many people tend to think that their systems of government are pretty good, and they tend to see injustices as marginal or exceptional to the political scheme. This phenomenon is part of what social psychologists call “belief in a just world,” and the phenomenon has been observed in lots of places: not only in liberal democracies like the United States but also in more repressive regimes like South Africa during the era of apartheid.59 Many people, it turns out, tend to think that their governments and political systems are basically just, even when to the outside observer they seem very unjust. It is likely that lawyers are caught up in this phenomenon even more than the average citizen.

57. Actually, there were a few Garrisonians who agreed with the resolution, but their numbers were quite small. In the same way there are always a small number of people in any age who understand the Constitution to be a pact with hell. But the wonder is not that they are so few but that they are so many.
For lawyers are practiced adherents of role morality. If the Constitution invites idolatry, lawyers are surely the high priests in the temple.

Quite aside from the natural tendencies of all peoples to chauvinism and belief in a just world, I want to argue that the very attitude of fidelity to the Constitution is partly responsible for this predicament. To pledge fidelity to something and simultaneously believe it to be riddled with evil produces serious cognitive dissonance. That dissonance must be alleviated in some way. One must either change one’s beliefs about the facts or one’s values, or both. If fidelity to the Constitution cannot be jettisoned—because it is the basic assumption of constitutional legal argument and constitutional theory—this leaves only the possibility of reorienting one’s beliefs and attitudes about the situation. There are literally dozens of ways to do this. One can ignore or forget about the existence or extent of injustices or one can grudgingly accept them as bad but not too bad. One can even offer apologies for them. And human minds are sufficiently agile that they can even alternate their attitudes as the occasion demands, one day decrying the injustices of our society and the next day putting them out of our mind as we engage in the practice of constitutional fidelity. Even the most sensitive of us can apply a temporary dose of moral Novocain when we turn to the intricacies of the American Constitution.

Committed as most of us are to constitutional fidelity, we cannot deny the possibility of such psychological pressures at work on us and in our judgments and attitudes about American society. Rather, we must recognize them as an inevitable price of fidelity, of pledging faith in the Constitution. The turn to ideal constitutionalism is simply one way of assuaging the cognitive dissonance produced by fidelity to the Constitution in a world of injustice. By separating the ideal Constitution from positive law and received interpretation, we can blame bad judges and politicians rather than the document we pledge faith to.

Nevertheless, the pressure to reduce cognitive dissonance affects even our views about the best interpretation of the Constitution. For our views about the ideal Constitution are not wholly free from the political consensus of the time in which we live. Whether radicals or moderates, our vision of what the Constitution is and could be is largely derived in response to that consensus and cannot stray too far from it.

Each of us has a sense of what readings of the Constitution are plausible and what readings are “off-the-wall” even for the purposes of a Shadow Constitution. The cognitive dissonance produced by our faith in the Constitution in an unjust world affects this calculus. First, we will tend to minimize or selectively ignore those injustices that cannot be reached by plausible interpretations of the Constitution (including our ideal model). Second, and conversely, we will tend to think that the constitutional reforms necessary to respond to the most
serious problems of injustice do not require "off-the-wall" constitutional arguments. In other words, there are subtle pressures to believe that although injustices remain in this country, and are not reached by the Constitution (including the best interpretation of the Constitution), they are not seriously and profoundly great injustices. This is not an attitude about the constitutional injustices of the past, from which we are suitably distanced and towards which we can be properly shocked and dismayed, but about the injustices of the present, which hit us, as the saying goes, where we live.

One might imagine that the ideal Constitution in our heads, the one that need not hew to precedent or conform to the status quo, the one that we might impose if we were the Chief Justice and all of the Associate Justices together, is somehow freed from the pressures of cognitive dissonance. Yet the problems of constitutional evil haunt us even there. As aspirationalists we can have faith in the Constitution because we believe that some day it will be redeemed, and on the day of its redemption it will live up to its promises of basic justice and decency for all. But what if we were convinced that the day of redemption would be grossly insufficient, that the Constitution will always leave in place serious and profound evils? In that case even the gambit of ideal constitutionalism still produces cognitive dissonance, for it is not clear why such a document deserves our fidelity when even its finest version is so seriously wanting in justice. Therefore the ideal constitutionalist must believe that someday every valley shall be exalted, and every mountain and hill laid low, the crooked straight and the rough places plain, even if that day is far off and requires great struggle to achieve. But the flip side of that faith is that the injustices that the ideal Constitution does not and cannot reach cannot be deep and profound ones; they cannot be of the same magnitude as slavery.

Mark Graber has recently noted that from the standpoint of today's left, the best example of an injustice that the Constitution does not respond to is the distribution of income in this country. When pressed to defend themselves against the charge of judicial activism by giving an example of a situation they find undesirable though not unconstitutional, liberals can happily point to distributional considerations. But this may simply reflect the fact that liberals have given up on pushing for redistributional reforms in the present political era, an attitude reflected both in the generally conservative shift in American politics in the past twenty years and the current constitutional consensus that has responded to this shift. Certainly in the 1960s the consti-


61. See, e.g., Dworkin, supra note 32, at 36 (arguing that the jurisprudential principle of integrity "would bar any attempt to argue" that the Constitution requires economic equality or distributional rights).
tutionalization of welfare rights was very much on the agenda of the liberal academy, even if it was not yet written into the positive law of the Constitution. If the argument for constitutional protection of the poor is "off-the-wall" now, it is because in a conservative age more people (and particularly more elites) seem complacent about the distribution of income.

Indeed, we can flip Graber's point the other way: If we thought that the most serious injustice facing our country today was the distribution of income and the plight of the poor—as opposed to racial or sexual discrimination or the right to abortion—why is the argument that the Constitution forbids this evil clearly "off-the-wall"? Why is this not the greatest problem of constitutional evil since slavery? Why is it not slavery? And if we really believed that it was so evil, and the country that permits this oppression to continue so wicked, why should we respect a Constitution that permits such evils, empowers governments to worsen them and may even prevent some forms of amelioration?

These questions are more troubling for liberals than for economic libertarians and traditional conservatives. The latter groups are not so troubled by maldistribution, because it is a necessary if unfortunate consequence of their vision of social justice. But we liberals (and here I include myself in this category) have been blinded in part precisely by our sense of fidelity to the Constitution and the constitutional tradition to believe that what the Constitution sanctions cannot be as bad as slavery, that there is no serious remaining problem of constitutional evil in the best interpretation of the Constitution, only relatively minor ones.

These positions reflect the psychological pressures that the exercise of constitutional fidelity places upon us. Our fidelity to the Constitution is partly our fidelity to the governing political ideology of our time, and to the political realities it seems to impose on us. Ironically, even the ideals of our time reflect its realities; even the possibilities of utopian constitutional thought uncannily respond to the sense of the politically possible. Utopianism, like so many other features of human thought, is social; often there is nothing so parochial as peoples' visions of what transcends the limits of their society's thinking.

The pressure of constitutional fidelity, coupled with the ideological pressures of our political moment, may cause us to turn our attentions away from injustices we might see around us, and thus hide the very possibility of serious and sustained constitutional evil. In this way, pressures to reduce cognitive dissonance affect not only our attitudes about what is just or unjust, but also our attitudes about what forms

62. See, e.g., Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) (arguing for a constitutional right to minimum welfare); see also Graber, supra note 59, at 12-16 (discussing liberal arguments for constitutionalization of welfare rights).
part of the “Shadow Constitution,” the ideal Constitution of best interpretations that academics hope will someday become the positive law of the Constitution.

If my analysis is correct, it would apply equally well to enlightened constitutional thought during the time of slavery. Fidelity to the Constitution combined with the general recognition that the Constitution protected slavery during the antebellum period probably led many progressives to think that slavery, although an evil, was not so great an evil that it had to be abolished immediately, and that a compromise of some sort could be struck with the South and its “peculiar institution.” And indeed, I have just described the antebellum position of many “progressive” thinkers on slavery, including Abraham Lincoln.63 The

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63. For example, in Lincoln’s October 16, 1854 speech at Peoria, Illinois, he makes no secret of his hatred of slavery and his recognition of it as a serious moral evil. Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria Illinois, in Abraham Lincoln: Speeches and Writings 1832-1858, at 307, 315 (Don E. Fehrenbacher ed., 1989). Yet he too is shaped by the political realities of his time, and he offers this famous equivocation:

> When southern people tell us they are no more responsible for the origin of slavery, than we; I acknowledge the fact. When it is said that the institution exists; and that it is very difficult to get rid of it, in any satisfactory way, I can understand and appreciate the saying. I surely will not blame them for not doing what I should not know how to do myself. . . . I think I would not hold one in slavery, at any rate; yet the point is not clear enough for me to denounce people upon. What next? Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded. We can not, then, make them equals. It does seem to me that systems of gradual emancipation might be adopted; but for their tardiness in this, I will not undertake to judge our brethren of the south.

> When they remind us of their constitutional rights, I acknowledge them, not grudgingly, but fully, and fairly; and I would give them any legislation for the reclaiming of their fugitives, which should not, in its stringency, be more likely to carry a free man into slavery, than our ordinary criminal laws are to hang an innocent one.

Id. at 316-17. Four years later, in August 1858, Lincoln repeated these words verbatim in the First Lincoln-Douglas Debate. First Lincoln-Douglas Debate, Lincoln’s Reply, in Abraham Lincoln: Speeches and Writings 1832-1858, supra, at 508, 510-11.

Thus, in 1854, Lincoln took the “moderate” position of arguing for the retention of the Missouri Compromise, which prevented the expansion of slavery north of the compromise line. Slavery in the South was not morally unbearable as a cost of preserving the union, although slavery in new territories was:

> Let it not be said I am contending for the establishment of political and social equality between the whites and blacks. I have already said the contrary. I am not now combatting the argument of NECESSITY, arising from the fact that the blacks are already amongst us; but I am combating what is set up as MORAL argument for allowing them to be taken where they have never yet been—arguing against the EXTENSION of a bad thing, which where it already exists, we must of necessity, manage as we best can.

Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria Illinois, in Abraham Lincoln: Speeches and Writings 1832-1858, supra, at 329. He reasserted this view in
enlightened liberal position on slavery, detesting it but doubting its
unconstitutionality and wishing to make peace with the slave-holding
South, is not the attitude of some bygone era. It is the attitude of the
contemporary liberal constitutionalist. It is the attitude of the “en-
lighted” liberal in a conservative age.

Precisely because utopianism is social, the boundaries of utopian
thought may change rapidly when circumstances produce relatively
quick shifts in public opinion. Cataclysmic events like the Civil War
no doubt profoundly influenced the center of American public opin-
ion both in the North and the South, and thus made many things
thinkable that were unthinkable before. Conversely, the strong shift
to the right in American public opinion over the last thirty years has
made many extreme forms of right-wing utopian thought thinkable
and sayable.

The case of homosexual rights is a perfect example of how the pos-
sibilities of utopian constitutional thought are shaped by the existing
political configuration. In the current constitutional politics of the
moment, homosexual rights are something that is “on the table”; they
offer an interpretation of the Constitution that is “on the wall” even
though it is not yet enshrined in positive constitutional doctrine and is
bitterly resisted by many conservatives. Under these conditions, the
left can recognize and even luxuriate in the serious injustice of current
document and its lack of fidelity to the “real” Constitution. The protec-
tion of homosexuals is “not yet” in the positive law of the Constitu-
tion, but it will be some day and deserves to be. On the other hand,
the present generation of liberals has largely given up thinking that
the protection of the poor is “not yet” in the Constitution. They now
tend to think that it just isn’t in there at all, even in the Shadow Con-
itution. For this reason I suspect that there are many more liberals

the First Lincoln-Douglas Debate. First Lincoln-Douglas Debate, Lincoln’s Reply, in
Abraham Lincoln: Speeches and Writings 1832-1858, supra, at 511-12.
64. For example, only nine years after his Peoria speech, in which he judged the
complete abolition of slavery impractical, Lincoln felt it possible to issue the Emanci-
pation Proclamation and free slaves in the rebelling states (although not in the northern
or border states). See Preliminary Emancipation Proclamation and Final
Emancipation Proclamation, in Abraham Lincoln: Speeches and Writings 1832-1858,
supra note 63, at 368, 424. The Civil War made the abolition of slavery thinkable to
large numbers of white Americans. The passage of 25 years from 1969 to 1994 has
had the opposite effect on Frank Michelman’s argument for constitutional guarantees
of minimum levels of assistance. Indeed, the statutory guarantee of minimum assist-
ance has been abolished in the 1996 Welfare Reform Act signed into law by the “lib-
eral” Democratic President William Jefferson Clinton. See Personal Responsibility
and Work Opportunity Reconciliation Act, 110 Stat. 2105 (1996); Francis X. Clines,
A1.
66. 488 U.S. 469 (1989) (striking down affirmative action preferences for govern-
ment contractors).
and *R.A.V. v. St. Paul* are bad constitutional law than those who think that *Dandridge v. Williams* is. This is no doubt reflected in the larger number of recent articles on the former subjects than the latter. The difference between *Bowers* and *Dandridge* is the difference between the recognition of a temporary constitutional evil that we can live with—because we can claim that the "real" Constitution does not sanction it—and the recognition of a more permanent constitutional evil that we cannot live with; hence we have given up believing that the "real" Constitution forbids it.

One might object to this entire line of argument on the grounds that it overlooks an important feature of the American constitutional tradition—the principle of constitutional modesty. The Constitution, it is said, is a document for people of "fundamentally differing views" and different times, made to endure "the various crises of human affairs." The Constitution is not designed, nor can it be designed, to right every evil and social injustice. It merely establishes and protects the basic structures of a democratic state. The enormous number of injustices that flow within such a state are no concern of the Constitution. Only those having to do with basic human rights and basic democratic governance are its concern. Hence we can pledge fidelity to the Constitution if it does those things well and no others, and there is no cognitive dissonance created by that pledge, no need for spiritual compromise or self-deception. We do not expect a plumber to be an electrician, or a doctor to be an engineer. Each has her own virtues; we believe no less in one person’s skill because she lacks the skills of another person doing another set of tasks. In the same way, the test of our fidelity to the Constitution should concern whether it adequately performs the limited set of tasks we expect of it—establishing a democracy and protecting basic human rights. To ask more of it is immature; it is not the demand of fidelity but of aggrandizement.

All of this is true enough. All constitutional scholars subscribe to some version of constitutional modesty; no one thinks that the Constitution rights all wrongs. But the question is rather how we define the contours of the Constitution’s modest set of tasks, and what role the need to reduce cognitive dissonance plays in the setting of these boundaries.

For example, how does the argument for constitutional modesty look when applied to the case of slavery? Would we say that slavery presents no problems for constitutional fidelity because the Constitu-
tion is simply not designed to right that particular wrong? Would we say that it creates no psychological pressures for the reduction of cognitive dissonance because we don’t really expect the Constitution to eradicate all evils? Or would we say, on the contrary, that, as applied to this case, the conclusion that the Constitution was not designed to eradicate all evils is a consequence of the need to reduce cognitive dissonance caused by its sanctioning of slavery?

Of course, one might respond that the case of slavery is quite different from any evils we face today. Fidelity to the Constitution was troubling when the positive law of the Constitution permitted slavery precisely because the existence of that evil threatened basic human liberties and the ideal of democratic self-governance. Slaves are human beings too, and they deserve basic rights and the power of self-governance as much as their putative masters. But this answer shows that the “proper agenda” of the Constitution, the appropriate realm of its modesty, is not fixed, but malleable depending on our understanding of the gravity of the situation before us. The question of what constitutes a serious denial of human rights or democratic self-governance is not given in advance, but must be worked out through reflection and experience. And this activity of reflection and experience is precisely where the psychological pressures I am describing find their home.

If we thought that the conditions of poverty and denial of equal opportunity in this country were so serious as to make a hollow mockery of the Constitution’s promises of human rights and democracy, why would the alleviation of these conditions not be part of the Constitution’s “modest” agenda? If one thought that this country supports and reproduces “savage inequalities” that make the lives of millions of its citizens miserable and relegate millions of its children to lives of unremitting desperation, pain and psychological trauma, why would the argument from constitutional modesty not ring as hollow as it does in the case of slavery? Conversely, to what extent does our disbelief that these inequalities do make a mockery of the Constitution and our calm assurance that there are some evils the Constitution cannot deal with stem not from principled reflection but psychological necessity? Claims of constitutional modesty are not a solution to the problem of constitutional evil; they are a restatement of it.

Some twenty years ago, Barbara Jordan, then a freshman Congresswoman from Texas, made an impassioned statement at the House Judiciary Committee hearings on the impeachment of Richard Nixon. “My faith in the Constitution,” Jordan said, “is whole, it is complete, it is total, and I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.”

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These are stirring words even today, especially moving given that they were uttered by an African-American woman who had endured many hardships and would endure many more in her all too brief life and political career. Like Barbara Jordan, I too want to believe in the Constitution. I want to remain faithful to it, and I want others in the legal profession, government administrators, legislators and judges to remain faithful to it as well. I am deeply saddened and troubled when they betray it and its promises, when they trample on its letter and its spirit for political advantage and personal gain. I believe, moreover, that the Constitution is more than its positive law, that the Constitution has not yet been redeemed, and I hope every day for its eventual redemption. I know that many who read these words join me in this hope. But as you, and I, and all of us expound our faith in the Constitution, we must also understand what our faith does to us. We must recognize that fidelity to the Constitution has a power over us, that fidelity is not only legitimate but that it also legitimates. When we discuss fidelity, we are not discussing a property of interpretation but a predicament of human existence. To be faithful is to gamble, and the stakes we offer are not our property but our integrity, not only our lives and fortunes, but our Sacred Honor. Let us have faith then, but let us have faith that our faith is not in vain.