

Spring 2015

## Fidelity To Our Living Constitution

James E. Fleming  
*Boston University School of Law*

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

James E. Fleming, *Fidelity To Our Living Constitution*, 50 *Tulsa L. Rev.* 449 (2015).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol50/iss2/20>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [daniel-bell@utulsa.edu](mailto:daniel-bell@utulsa.edu).

## FIDELITY TO OUR LIVING CONSTITUTION

James E. Fleming\*

BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION* (2014). Pp. 432. Hardcover \$ 35.00.

### INTRODUCTION

In recent years, Bruce Ackerman has become increasingly dismayed about the state of our constitutional democracy as well as that of our constitutional theory. First came *The Failure of the Founding Fathers* in 2007.<sup>1</sup> There followed *The Decline and Fall of the American Republic* in 2010.<sup>2</sup> Now comes *We the People: The Civil Rights Revolution* in 2014.<sup>3</sup> Though this title does not sound as ominous as his previous ones, Ackerman decries the Roberts Court's "shattering judicial betrayal" of our living constitution's Civil Rights Revolution.<sup>4</sup> Worse, he excoriates Justice Antonin Scalia's and Justice Clarence Thomas's originalism—as against his own living constitutionalism—as the "judicial battering ram for obliterating the achievements of the twentieth century."<sup>5</sup> Those were the achievements of *We the People* operating through the procedures of higher lawmaking outside the formal amending procedures of Article V, which Ackerman argues legitimated the New Deal and the Civil Rights Revolution.<sup>6</sup>

Furthermore, Ackerman criticizes scholars and judges for their narrow conception of the canon of constitutional law, which fails to recognize these achievements as higher lawmaking changing our Constitution instead of ordinary lawmaking.<sup>7</sup> This narrow conception, he laments, reduces *We the People* to "Pygmies" with respect to popular sovereignty compared with the supposed "Giants" who walked the earth during the Founding and Reconstruction.<sup>8</sup> While the legal profession "tell[s] a story of the decline and fall of popular sovereignty in America" in the twentieth century,<sup>9</sup> Ackerman develops an account

---

\* Professor of Law and Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. I wish to thank my research assistant, Michael DiMaio, for helpful comments.

1. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2007).

2. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

3. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION* (2014) [hereinafter ACKERMAN, *CIVIL RIGHTS REVOLUTION*].

4. *Id.* at 334.

5. *Id.* at 329.

6. *Id.* at 11.

7. *Id.* at 3.

8. *Id.* at 16, 311.

9. *Id.* at 19.

of higher lawmaking outside Article V that preserves the very possibility of popular sovereignty in our time.<sup>10</sup>

What remedies does Ackerman propose? He argues for a broader conception of the constitutional canon: the higher law of the Constitution includes not only formally adopted provisions but also “landmark statutes” and judicial “superprecedents,” such as those of the New Deal and the Civil Rights Revolution.<sup>11</sup> He also argues for a broader conception of popular sovereignty: We the People manifest our will not only through the formal amending procedures but also through the higher lawmaking procedures outside Article V that he elaborates.<sup>12</sup> He puts forward and substantiates six phases of higher lawmaking as having operated in the New Deal and the Civil Rights Revolution: (1) signaling (that consideration of constitutional change is underway), (2) proposal, (3) triggering election, (4) mobilized elaboration, (5) ratifying election, and (6) consolidation.<sup>13</sup> He wants to establish the Civil Rights Revolution as a constitutional revolution—not merely some ordinary, though important, legislative and judicial developments.<sup>14</sup> The upshot would be that the landmark statutes and judicial superprecedents of the Civil Rights Revolution may not be repealed or “erased” by ordinary lawmaking or ordinary judicial decisions.<sup>15</sup> Instead, repudiating its core changes and commitments would require going through the elaborate six-phase process of higher lawmaking. If we fail to adopt his account, we risk forsaking fidelity to our living constitution and getting lost in an originalist “fog of ancestor worship.”<sup>16</sup>

*We the People: The Civil Rights Revolution* is a magisterial and magnificent third volume of Ackerman’s *We the People* project, which began with Volume I: *Foundations* in 1991,<sup>17</sup> followed by Volume II: *Transformations* in 1998,<sup>18</sup> and will be continued by Volume IV: *Interpretations* in the future.<sup>19</sup> I can imagine three general tacks in reviewing Ackerman’s book. One would be to assess his account of the Civil Rights Revolution itself: What does he contribute to our understanding of its animating principles, the legacy of *Brown v. Board of Education*,<sup>20</sup> the relationship between courts, legislatures, executives, and social movements in bringing about constitutional and social change, and the like? A second would be to analyze the constitutional theory and framework for constitutional change put forward in Volume III in relation to that already advanced in Volume I: *Foundations* and Volume II: *Transformations*: How is Ackerman’s theory as a whole playing out, has he refined it for the better, does he deliver on the promises or remedy the shortcomings of previous volumes, and so on? A third tack would be to relate Ackerman’s

---

10. *See id.* at 16-17, 19.

11. *Id.* at 32-36.

12. *Id.* at 8-9.

13. *Id.* at 44-46.

14. *Id.* at 6-7.

15. *Id.* at 19, 328-37.

16. *Id.* at 340.

17. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME I: FOUNDATIONS* (1991) [hereinafter ACKERMAN, FOUNDATIONS].

18. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME II: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, TRANSFORMATIONS].

19. ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 3, at 336 (referring to projected Volume IV, *WE THE PEOPLE: INTERPRETATIONS*).

20. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

theory to the state of constitutional theory today, including the debates between originalism and living constitutionalism concerning fidelity and change. I imagine that most reviewers will take the first tack (as do most of the contributors to the *Yale Law Journal* symposium on the book and Sidney Tarrow's essay in this issue).<sup>21</sup> I shall take the third, though not without some observations bearing on the first and second.

Ackerman offers stinging criticisms of conventional forms of originalism. And he makes cogent advances over previous versions of living constitutionalism. Most importantly, he exhorts us to fidelity to our living constitution: to preserve and extend the commitments "hammered out" through the processes of popular sovereignty during the Civil Rights Revolution: for example, the anti-humiliation principle of *Brown*, narrowing the state action requirement, pruning back of state autonomy limits on national power in order to protect fundamental rights like voting, and the expansion of the commerce power to promote national goods.<sup>22</sup> He also scolds originalists who reject those commitments—such as Scalia, Thomas, and the Roberts Court more generally—for their "erasure" of the achievements of the Civil Rights Revolution<sup>23</sup> or their "shattering judicial betrayal" of We the People's products of popular sovereignty<sup>24</sup>: constitutional changes wrought by the Supreme Court, President, and Congress working through a collaborative constitutionalism (or coordinate constitutionalism) to secure equal citizenship for all.<sup>25</sup>

This essay is part of my forthcoming book, *Fidelity to Our Imperfect Constitution*,<sup>26</sup> in which I reject all forms of originalism and recast the best forms of living constitutionalism. Instead, I defend what Ronald Dworkin has called a "moral reading" of the Constitution<sup>27</sup> and what Sotirios A. Barber and I have called a "philosophic approach" to constitutional interpretation.<sup>28</sup> By "moral reading" and "philosophic approach," I refer to conceptions of the Constitution as embodying abstract moral and political principles—not codifying concrete historical rules or practices—and of interpretation of those principles as requiring normative judgments about how they are best understood—not merely historical research to discover relatively specific original meanings. I argue that the moral reading, not any version of originalism or living constitutionalism, is the most faithful to the Constitution's commitments.

Below I shall interpret or reconstruct Ackerman's living constitutionalism as a moral reading of the Constitution. Ackerman's theory is more grounded in fit with our constitutional history and practice, and more rooted in popular sovereignty, than Dworkin's own moral reading. But Ackerman's is nonetheless a moral reading in which faithful interpretation requires normative judgments about the best understanding of our constitutional commitments as we have built them out over time. Ackerman's theory is also a moral

---

21. Sidney Tarrow, *The People Maybe? Opening The Civil Rights Revolution to Social Movements*, 50 *TULSA L. REV.* 415 (2015).

22. ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 3, at 10, 328.

23. *Id.* at 328-35.

24. *Id.* at 334.

25. *Id.* at 107-09, 152, 162, 320-21; *see also id.* at 4-5, 9, 11, 312.

26. JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (forthcoming 2015).

27. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2-3 (1996).

28. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* xiii, 155 (2007).

reading in the sense that he believes it is necessary to adopt and apply it in order to make the Constitution the best it can be (to recall Dworkin's famous formulation)<sup>29</sup> or redeem its promises (to invoke Jack Balkin's formulation).<sup>30</sup>

#### I. ACKERMAN'S CONCEPTION OF FIDELITY AS QUESTING FOR INTERGENERATIONAL SYNTHESIS AND HONORING OUR LIVING CONSTITUTION

In *Foundations and Transformations*, Ackerman developed his well-known theory of constitutional change outside the formal amending procedures of Article V. He exhorted us to break up the monopoly that Article V of the Constitution has held on our vision of constitutional amendment. He urged us to move "beyond Article V" and to embrace a pluralist understanding of the sources of higher lawmaking.<sup>31</sup> Only by doing so, he argued, will we be able to comprehend the processes of unconventional adaptation outside Article V whereby We the People have transformed the Constitution through the Founding, Reconstruction, and New Deal. Nothing less, Ackerman admonished us, will preserve and realize both "the possibility of popular sovereignty" and "the possibility of interpretation" under our Constitution.<sup>32</sup> In developing this theory of constitutional change, he implicitly elaborated a theory of constitutional fidelity. In putting forward this theory of fidelity and change, Ackerman has tried to answer the most common objections to living constitutionalism: (1) that it is not faithful to the Constitution; (2) that it is undemocratic in the sense that it involves "judicial updating" of the Constitution in derogation of popular sovereignty; and (3) that it entrusts judges with a responsibility that is not interpretation, but rather updating or improving.

Conventional originalists such as Robert Bork and Antonin Scalia have asserted a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original understandings or meanings of, the framers and ratifiers of the Constitution.<sup>33</sup> Bork and Scalia said that the originalists are the ones who care about fidelity in constitutional interpretation, and all those other folks – the "revisionists" and "non-originalists"—do not.<sup>34</sup>

In 1996, I co-organized a symposium at Fordham on "Fidelity in Constitutional Theory."<sup>35</sup> One aim of the symposium was to challenge the conventional originalists' claim to a monopoly on concern for fidelity in constitutional interpretation. It did so by featuring several competing conceptions of fidelity that were decidedly not conventional originalist conceptions: (1) Dworkin's understanding of fidelity as pursuing integrity with the moral reading of the Constitution;<sup>36</sup> (2) Ackerman's understanding of fidelity as questing for

29. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986).

30. JACK M. BALKIN, *LIVING ORIGINALISM* 74-99 (2011).

31. ACKERMAN, *FOUNDATIONS*, *supra* note 17, at 58-80; ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 15-17.

32. ACKERMAN, *FOUNDATIONS*, *supra* note 17, at 131-62; ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 119.

33. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854, 862-63 (1989).

34. BORK, *supra* note 33, at 187-240; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37-47 (Amy Gutmann ed., 1997); Scalia, *supra* note 33, at 852-56, 862-64.

35. Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

36. DWORKIN, *supra* note 27, at 73-76; RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT*

“intergenerational synthesis” across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal;<sup>37</sup> (3) Lawrence Lessig’s understanding of fidelity as translation across generations;<sup>38</sup> (4) Jack Rakove’s understanding of fidelity as keeping faith with the founders’ vision;<sup>39</sup> and (5) an early formulation of Jack Balkin’s conception that ultimately became his method of text and principle, with its argument for fidelity to abstract original public meaning.<sup>40</sup> At the time, I observed that Ackerman, Lessig, and Balkin had taken the tack of attempting to beat conventional originalists at their own game: they advanced fidelity as synthesis, fidelity as translation, and the method of text and principle as broad, abstract, or “living” forms of originalism that were superior—as conceptions of originalism—to conventional originalism.<sup>41</sup>

In this essay, I shall assess the progress that Ackerman has made in this project of developing a conception of fidelity that is superior to those of conventional originalists. Again, Ackerman urges us to aspire to fidelity to our living Constitution. On his view, originalists who urge fidelity to the original meanings of the Constitution of 1787 (the Founding) or even those of 1868 (Reconstruction) are betraying our living Constitution.<sup>42</sup> We need not only to quest for “intergenerational synthesis” with the past constitutional moments or regimes,<sup>43</sup> but also to “honor” the fundamental changes that have occurred or are occurring outside Article V through the procedures of popular sovereignty, most notably, the Civil Rights Revolution or Second Reconstruction.<sup>44</sup> Thus does he attempt to turn the tables—the tables of fidelity—upon the conventional originalists. He paints them with the vices of betrayal, erasure, or rewriting—the very vices with which they typically tar living constitutionalists.

The aspiration to fidelity, as I have argued elsewhere,<sup>45</sup> raises two fundamental questions: (1) *Fidelity to what?* and (2) *What is fidelity?* The short answer to the first—fidelity to the Constitution—poses a further question: *What is the Constitution?* The short answer

---

ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 125-29 (1993); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1253 (1997).

37. See ACKERMAN, *FOUNDATIONS*, *supra* note 17, at 88-89, 159-62 (developing an understanding of fidelity as questing “multigenerational synthesis” or “interpretive synthesis” across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519-20 (1997) (advancing his conception of fidelity as pursuing intergenerational synthesis).

38. See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1367-68, 1371-76 (1997) (arguing for an understanding of fidelity as “grounded in a practice of translation”); see also Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1263-64 (1993) (arguing for a conception of fidelity as translation).

39. See Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1605-09 (1997) (discussing “fidelity to history” and its superiority to originalism, which is a kind of “fidelity through history”); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3-22 (1996) (discussing the “perils” of conventional originalism).

40. See Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1708-09 (1997) (distinguishing between fidelity to the “true Constitution or the best interpretation of the Constitution [and] its various historical interpretations and manifestations”). Balkin subsequently reworked and incorporated this piece in JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 103-38 (2011), the companion book to BALKIN, *supra* note 30, at 3-5 (arguing for fidelity to abstract text and principle).

41. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1337 (1997).

42. ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 3, at 311-40.

43. *Id.* at 336.

44. *Id.* at 81.

45. Fleming, *supra* note 41, at 1335.

to the second—being faithful to the Constitution in interpreting it—leads to another question: *How* should the Constitution be interpreted? Ackerman recognizes that these questions of *What* and *How* are the central questions of constitutional fidelity. He writes: “Once we get clearer about *what* we should be interpreting, the debate over *how* to interpret the canon will take a different shape.”<sup>46</sup> Ackerman argues that we need “to build a [broader] canon . . . based on the truth of the entire American experience.”<sup>47</sup> Again, it would include not only the formally adopted provisions, but also landmark statutes and judicial superprecedents. He suggests that broadening the canon promises to break the “impasse over interpretation” between originalists and living constitutionalists.<sup>48</sup> He goes so far as to say that a redefined canon “would create . . . strange allies in the ongoing conversation that is our Constitution.”<sup>49</sup> Or, that adversaries “at least would be talking to one another.”<sup>50</sup>

This formulation seems to presuppose that the impasse between originalists and living constitutionalists concerns *how to interpret the Constitution*, and that introducing a broader conception of *what the Constitution is* will break that impasse. I am not so hopeful. Contrary to Ackerman, I believe that the basic disagreements between these views are as much over the question *what is the Constitution* as over the question *how to interpret it*. Originalism is one conception of what the constitutional canon includes. Living constitutionalism is a fundamentally different conception. For this reason, originalists are going to resist his attempt to “build a [broader] canon . . . based on the truth of the entire American experience.”<sup>51</sup> They are going to deny that what Ackerman views as landmark statutes and superprecedents are part of the canon of constitutional law. Indeed, they are going to argue that much of the experience Ackerman celebrates as the great achievements of the New Deal and the Civil Rights Revolution is at best constitutionally gratuitous, or at worst constitutionally forbidden. The majority opinion in *Shelby County* (Voting Rights Act) and the dissents in *Sebelius* (Affordable Care Act) and *Windsor* (Defense of Marriage Act) are proof of that.<sup>52</sup> Such originalists are going to resist “talking to” the living constitutionalists like Ackerman, if you will.

Relatedly, at one point, Ackerman suggests that his disagreement with Scalia is not over originalism, but over the constitutional canon and Article V exclusivity.<sup>53</sup> But Scalia-style originalism is a conception of Article V exclusivity—a conception of *what the Constitution is*. Hence, Ackerman’s disagreement with Scalia over Article V exclusivity *is* a disagreement over originalism.

## II. IS ACKERMAN AN ORIGINALIST OR A LIVING CONSTITUTIONALIST?

In thinking about fidelity and change in constitutional interpretation, many have

---

46. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 36.

47. *Id.*

48. *Id.* at 35.

49. *Id.* at 36.

50. *Id.*

51. *Id.*

52. *Id.* at 309-10, 330, 335 (discussing *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)); *id.* at 27, & 343 n.3 (discussing dissent in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)); *id.* at 308-09 (discussing dissent in *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

53. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 329.

framed the basic choice as being between originalism and living constitutionalism. This formulation puts originalism on the side of fidelity and living constitutionalism on the side of change. In this vein, we might ask, “Is Ackerman an originalist, or a living constitutionalist?” We also might ask whether his theory is an advance over available versions of originalism or living constitutionalism?

It would seem that Ackerman is a proud, avowed living constitutionalist. After all, he titled his Holmes Lectures—which he reworks in Chapters 1-4 of *The Civil Rights Revolution*—“The Living Constitution.”<sup>54</sup> He painstakingly develops a conception of the living constitution, with six phases for constitutional amendment outside the formal procedures of Article V. Furthermore, a recurring refrain throughout the Lectures and the book is to celebrate the dynamics of the higher lawmaking system and the commitments of living constitutionalism hammered out over time by the Supreme Court in collaboration with the President and Congress.

What is more, Ackerman is second to none in blasting Scalia’s and Thomas’s originalism as a “judicial battering ram [against] the achievements of the twentieth century,” including the New Deal and Civil Rights Revolution<sup>55</sup>—the achievements, that is, of the living constitution as Ackerman conceives it. Furthermore, he warns against betrayal of the living constitution through getting lost in the “fog of ancestor worship.”<sup>56</sup> He also chastises originalists for their assumption that constitutional creativity and change—higher lawmaking—was done by the “Giants” at the Founding and Reconstruction, and that We the People have been “Pygmies” ever since, not accomplishing much rising to the level of higher lawmaking.<sup>57</sup> More generally, he castigates the originalists like Scalia and Thomas and the Roberts Court more generally for trying to erase or betray the achievements of the New Deal and the Civil Rights Revolution, the greatest achievements of our system of popular sovereignty/higher lawmaking outside the formal procedures of Article V.<sup>58</sup>

Yet, Ackerman says at the end of his book: “I am the originalist, not [Scalia or Thomas].”<sup>59</sup> In prior work, I have noted that some have asked, “Are We All Originalists Now?”<sup>60</sup> Many have answered “Yes.”<sup>61</sup> If anything would support that answer, it would be living constitutionalists like Ackerman clothing their theories in the garb of originalism. Or claiming to be “the [real] originalist.”<sup>62</sup> For 329 pages, Ackerman had demonstrated the development of a living constitution. At every turn, he had shown that the Civil Rights Revolution was not built from originalism (whether through a quest for fidelity to the original meanings of the Founding or to those of Reconstruction). And he had criticized originalists for erasing the achievements of the living constitution: what We the People have hammered out through the procedures of popular sovereignty outside Article V.

---

54. Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

55. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 329.

56. *Id.* at 340.

57. *Id.* at 16, 311.

58. *Id.* at 19, 328-37.

59. *Id.* at 329.

60. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1786 (2013).

61. *See, e.g.*, ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 3 (2011).

62. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 329.



Moreover, he had applauded the leading cases of the Civil Rights Revolution—e.g., *Brown* and *Loving v. Virginia*—for being avowedly anti-originalist.<sup>63</sup> Finally, he went on to argue that “the Constitution is a work of many generations,”<sup>64</sup> not just the Founding or Reconstruction generations.

Thus, Ackerman sounds a false note when he says: “I am the originalist, not [Scalia or Thomas].” He certainly is not a conventional originalist. His scorn for the originalism of Scalia and Thomas—“who are at war with the twentieth century”<sup>65</sup> and who accordingly would erase or obliterate the great achievements of our constitutional practice of popular sovereignty—matches that of moral readers like Dworkin and me. I have two further observations about Ackerman’s discordant bow to originalism. One, these moves show the grip of what I have called the “originalist premise” on the minds of even the most anti-originalist and most avowed living constitutionalists: the premise or assumption that the only way to profess fidelity to the Constitution, rather than to betray it, is through originalism, if only we could articulate the best or “real” form of originalism.<sup>66</sup> Two, the better way to put this point is simply for Ackerman to say that he is more faithful to the Constitution, properly understood as (1) including the constitutional commitments we have “built out” (as Balkin says)<sup>67</sup> or “hammered out” (in Ackerman’s formulation)<sup>68</sup> through our practice of living constitutionalism (which originalists reject), rather than as (2) including merely the relatively specific original meanings and expectations of the framers and ratifiers (which originalists insist exhausts the constitutional canon).

To recapitulate: Ackerman is developing a living constitutionalism—with a broader canon,<sup>69</sup> as he says, or a broader conception of *what* and *how*, as I would put it, than conventional originalists hold. He is also claiming to be more faithful to the Constitution (rightly understood as including the landmark statutes and superprecedents like those of the New Deal and Civil Rights Revolution) than they are. The originalists would say that we have an obligation to be faithful to the original meanings of the Constitution, and thus to erase any statutes or precedents that purport to have changed those meanings: to wit, the very achievements celebrated by Ackerman’s living constitutionalism.

### III. ACKERMAN’S CONTRIBUTIONS TO THE TRADITION OF LIVING CONSTITUTIONALISM

To this point, I have argued that Ackerman is better understood as a living constitutionalist, not an originalist. Next I shall ask, what does he contribute to the tradition of living constitutionalism? I hasten to observe that living constitutionalism today is not your mother or father’s living constitutionalism. Once upon a time, “the living constitution” was a hackneyed idea. Proponents of living constitutionalism characteristically were pragmatic, instrumentalist, and forward-looking in their approach to constitutional interpreta-

---

63. *Id.* at 129 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); *id.* at 300-01 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

64. *Id.* at 336.

65. *Id.*

66. Fleming, *supra* note 60, at 1795.

67. BALKIN, *supra* note 30, at 3.

68. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 10, 328.

69. *Id.* at 36.

tion and, as such, tended to be anti-fidelity. Though, truth be told, most living constitutionalists who supposedly think this way are fabrications created in the minds of originalists like Chief Justice Rehnquist (see his “The Notion of a Living Constitution”)<sup>70</sup> and Justice Scalia (see his discussion of “the Living Constitution” in his *A Matter of Interpretation: Federal Courts and the Law*).<sup>71</sup>

Disparaging the tradition of living constitutionalism as a mess, Scalia wrote in “Originalism: The Lesser Evil” in 1989 that the only thing the motley group of living constitutionalists can agree upon is their rejection of originalism.<sup>72</sup> But, he continued: “You can’t beat somebody with nobody.”<sup>73</sup> Or, as others have put it: “It takes a theory to beat a theory.”<sup>74</sup> He asserted that living constitutionalism is not a viable theory to beat originalism (in whatever form). Furthermore, originalists—like Bork and Scalia (and, more recently, John McGinnis and Michael Rappaport)<sup>75</sup>—criticize hackneyed versions of living constitutionalism as nothing more than “judicial updating” of the Constitution, an illegitimate alternative to the legitimate method for constitutional change through the formal procedures of Article V. They object: (1) that such living constitutionalism does not involve judicial “interpretation” (but updating) and (2) that it is not consistent with popular sovereignty (but is a judicial end-run around Article V’s requirements for the expression of popular sovereignty through formal constitutional amendments).

I am a longstanding critic of both originalism and living constitutionalism.<sup>76</sup> But I want fairly to assess the state of living constitutionalism today. Living constitutionalism is far more sophisticated today than it was when Scalia wrote in 1989. David Strauss and Bruce Ackerman have given living constitutionalism far more defensible formulations that respond to the two criticisms noted above: (1) Strauss assimilates it to ordinary common law interpretation and (2) Ackerman shows it to be a practice of popular sovereignty.

Strauss has framed living constitutionalism as a common law constitutional interpretation rather than simply a forward-looking program for changing or updating the Constitution.<sup>77</sup> He convincingly shows the extent to which: (1) common law constitutional interpretation, rather than originalism, has been our practice; (2) common law constitutional interpretation provides better constraints upon judicial decision making than does originalism; and (3) common law constitutional interpretation, rather than the formal procedures of Article V, has been our procedure for change.<sup>78</sup> He gives living constitutionalism a grounding, rigor, and structure that it previously lacked.

Ackerman also has developed a form of living constitutionalism that is a compelling alternative to originalism. Most importantly, his account of the living constitution is not court-centered, but is “regime-centered.” He constructs an understanding of constitutional change through a collaborative constitutionalism engaging not only the Supreme Court but

70. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

71. SCALIA, *supra* note 34, at 37-48.

72. Scalia, *supra* note 33, at 855.

73. *Id.*

74. See, e.g., BENNETT & SOLUM, *supra* note 61, at 73-74.

75. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 81-82, 100-01 (2013).

76. See, e.g., James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515 (2014).

77. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

78. *Id.* at 33-49, 77-92, 115-39.

also the President and Congress in hammering out our constitutional commitments in the regimes of the Founding, Reconstruction, and the New Deal—and now the Civil Rights Revolution.<sup>79</sup> As such, Ackerman’s theory offers an effective retort to originalist complaints about living constitutionalism as being nothing more than “judicial updating” of the Constitution. Also, he develops an account of popular sovereignty that is superior to that of the originalists. He shows that the New Deal-Civil Rights Regime’s constitutional practice is not problematically undemocratic: it is not a violation of popular sovereignty but a fulfillment of it! Ackerman emphasizes the popular sovereignty credentials of living constitutionalist higher lawmaking. Indeed, he presents Article V as an archaic method of higher lawmaking, inferior in popular sovereignty credentials to the “modern” collaborative model of higher lawmaking engaging the President, Congress, and Supreme Court working together.<sup>80</sup>

Needless to say, Scalia (not to mention McGinnis and Rappaport) would deny that what Ackerman describes is higher lawmaking. They likely would reduce all of these “landmark statutes” and “superprecedents” to (1) ordinary lawmaking and (2) judicial updating. They would argue that the Supreme Court is justified in rejecting much of what Ackerman regards as the great achievements of the New Deal and Civil Rights Movement, made in the name of We the People, as unconstitutional. Ironically, those who object to “judicial updating” of the Constitution and “judicial activism” are in this respect the most court-centered and most “judicial activist” of all—the originalists who would have courts throw out what Ackerman celebrates as the achievements of popular sovereignty in the name of their formal, court-centered understanding of the constitutional canon and of fidelity versus change.

I want to observe a similarity between Strauss’s and Ackerman’s versions of living constitutionalism and then some differences. The major similarity is that both downplay the relevance of formal constitutional amendments in their accounts of constitutional change.<sup>81</sup> But they differ in their conceptions of the engines of change. Strauss presents living constitutionalism as common law constitutional interpretation by judges. When McGinnis and Rappaport decry “judicial updating” of the Constitution, they presumably have versions of living constitutionalism like Strauss’s in mind.

Ackerman’s living constitutionalism, by contrast, is emphatically not a court-centered model of “judicial updating” of the Constitution. His collaborative model shows the dialogue of construction between the Supreme Court, on the one hand, and the President and Congress (and ultimately the people), on the other.<sup>82</sup> Through the arduous six phases of higher lawmaking, his theory claims the authority to speak in the name of We the People. It claims to be the expression of popular sovereignty, not judicial supremacy.<sup>83</sup> For this reason, Ackerman’s theory of living constitutionalism may have advantages over Strauss’s theory. Ackerman’s view provides an antidote not only to court-centeredness but also to idolatry of the Warren Court: The heroes of his story of the Civil Rights Revolution

79. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 2.

80. *Id.* at 62-63.

81. Compare *id.* at 10-11, 333, with STRAUSS, *supra* note 77, at 115-39.

82. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 107-09, 152, 162, 320-21; see also *id.* at 4-5, 9, 11, 312 (discussing or illustrating Ackerman’s collaborative model).

83. *Id.* at 317.

are Presidents Lyndon Johnson and Richard Nixon (it turns out that Neil Young was right, “even Richard Nixon has got soul”),<sup>84</sup> Martin Luther King, Jr., and Senator Everett Dirksen, and he exposes the conservatism of the Warren Court.<sup>85</sup>

Other proponents of a living constitution have argued that the Supreme Court is not as “counter-majoritarian” as sometimes feared, but rather stays in touch with “the will of the people,” to invoke the title of Barry Friedman’s well-known book.<sup>86</sup> But unlike Friedman, who does not give an adequate account of how the will of the people actually gets expressed in constitutional law, Ackerman articulates and substantiates a six-step framework through which constitutional changes occur and shows how the will of We the People comes to be expressed in the canon of constitutional law.<sup>87</sup> Through Ackerman’s living constitutionalism, it is plausible to say that We the People have proposed and ratified the constitutional changes, and that those changes are not just judicial updating of the Constitution (not even judicial updating with an ear to the ground concerning the will of the people).

Furthermore, Ackerman and Strauss have different views concerning why formal constitutional amendments are largely irrelevant in our practice of constitutional change. For Strauss, amendments are not relevant because the Constitution already contains general principles that courts can elaborate over time through common law constitutional interpretation.<sup>88</sup> The Constitution, properly interpreted, already contains the principles that have been the subject of formally adopted amendments like the Twenty-Fourth’s abolition of the poll tax in federal elections and of formally proposed amendments like the Equal Rights Amendment. We do not need these amendments because we already have the general constitutional commitment to equal protection.

For Ackerman, by contrast, the irrelevance of constitutional amendments stems from our modern practice of popular sovereignty. Changes come about through the six-step higher lawmaking process in the name of We the People. Ackerman actually goes so far as to claim that changes brought about through this process have superior democratic credentials to Article V amendments. He is at pains to argue that what he calls the modern separation of powers model—of collaborative constitutionalism among the Supreme Court, President, and Congress in hammering out our constitutional commitments—is superior to what he calls Article V’s archaic federalism model—requiring ratification by three-fourths of the states.<sup>89</sup> Strauss, unlike Ackerman, labors under no compulsion to frame the changes of living constitutionalism as having been brought about through popular sovereignty or in the name of We the People.

Finally, Ackerman’s and Strauss’s versions of living constitutionalism differ fundamentally in their attitudes toward fidelity in constitutional interpretation. Living constitutionalists traditionally have not made fidelity a virtue. They have celebrated change. In this spirit, Strauss is dubious about the aspiration to fidelity.<sup>90</sup> Ackerman, like Balkin, is

---

84. Neil Young, *Campaigner*, on DECADE (Warner Reprise, 1977).

85. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 83-104, 295-300.

86. BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009).

87. *See, e.g.*, ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3.

88. STRAUSS, *supra* note 77, at 115-39.

89. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 4-5, 9, 11, 311-12.

90. STRAUSS, *supra* note 77, at 24.

quite different. Both stress the virtue of fidelity.<sup>91</sup> They recognize that living constitutionalists should not forfeit the contest over fidelity to the originalists but rather should develop alternative, superior conceptions of fidelity. Balkin argues that we should quest for fidelity to the original meanings abstractly conceived—the abstract moral principles of the Constitution, not the relatively specific original meanings and expectations of the framers and ratifiers. He conceives fidelity as redemption of the promises of our abstract constitutional commitments.<sup>92</sup> By contrast, Ackerman contends that we should maintain fidelity to our living constitution (to recall my title). Again, he faults Scalia, Thomas, and the Roberts Court generally for their betrayal and erasure of the achievements of the New Deal and the Civil Rights Revolution. Ackerman contends that these changes may not be undone legitimately through ordinary lawmaking and ordinary judicial decisions.

On the one hand, Ackerman grants that constitutional change should be hard—it is not ordinary lawmaking—but contends that it should not be hard in the way that Article V, with its federalism model, makes it.<sup>93</sup> Instead, it should be hard in the sense that it must pass through his six-stage process, as the New Deal and the Civil Rights Revolution have done.<sup>94</sup> On the other hand, he suggests that constitutional change to repeal the New Deal or Civil Rights Revolution should be harder than erasure or betrayal by ordinary lawmaking or ordinary judicial decisions by the Roberts Court (without going through the six-step process).<sup>95</sup>

In sum, Ackerman's theory of living constitutionalism is superior to hackneyed versions of living constitutionalism as well as to originalism.

#### IV. DO WE NEED ACKERMAN'S FRAMEWORK OF LIVING CONSTITUTIONALISM/HIGHER LAWMAKING?

I can imagine a sympathetic reader saying, "Yes, Ackerman's account of the principles of the New Deal and the Civil Rights Revolution is compelling. It is just that we do not need his complex six-phase apparatus of higher lawmaking outside the formal amending procedures of Article V to justify and articulate these principles. We can just reframe his analysis as a compelling account of the interpretation, construction, and redemption of the abstract constitutional commitments of the Fourteenth Amendment, together with those of the Thirteenth and Fifteenth Amendments. I can imagine Dworkin taking this view. Balkin basically takes this view.<sup>96</sup> I can also imagine Strauss doing so. I took this view in prior work on Ackerman's previous two volumes.<sup>97</sup>

91. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 13, 335-37; BALKIN, *supra* note 30, at 3-20.

92. BALKIN, *supra* note 30, at 21-34, 74-99.

93. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 28.

94. *Id.* at 44-46.

95. To be sure, Ackerman does say that he has "no interest in constructing a constitutional canon for eternity," and he concedes that "the leading principles of the civil rights legislation could be repealed by a simple majority of Congress if supported by the President." *Id.* at 80-81. But he argues that: "We the Judges do not have constitutional authority to erase the considered judgments of We the People." *Id.* at 317 (emphases omitted). He also contends that the "New Deal-Civil Rights regime . . . plac[ed] a bipartisan seal of approval on the fundamental principles expressed by the landmark statutes of the new order and put[] their repeal beyond the pale of political possibility." *Id.* at 49.

96. BALKIN, *supra* note 30, at 309-12 (discussing differences between his theory and Ackerman's).

97. James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT 355 (1994); James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513 (1998).

Ackerman likely would view this way of putting things as too court-centered. He wants to insist that his theory instead stems from a collaborative model of the Supreme Court working with the President and Congress to hammer out a Second Reconstruction in the name of We the People. And so, he would insist that we *do* need his apparatus, not just elaboration of a moral reading of the Constitution as embodying abstract commitments to equal protection and the like.

But I have a number of responses. One, a moral reading like that of Dworkin or Balkin does not exclude Congress and the President from taking the Constitution seriously outside the Courts. A moral reading is not inherently court-loving or legislature-disparaging (irrespective of what Dworkin may have said on occasion to encourage that view).<sup>98</sup> Two, relatedly, a moral reading does not preclude what Balkin calls “construction” (or “building out” the commitments of the Constitution)<sup>99</sup> or indeed what Ackerman calls a collaborative model of the President and Congress working together with the Supreme Court in hammering out our commitments.<sup>100</sup> Three, Ackerman speaks of “redeeming” our constitutional commitments.<sup>101</sup> That sounds like the Constitution already embodies abstract commitments to principles such as equal protection that have to be hammered out or built out over time. Even on Ackerman’s account, it seems like the Civil Rights Revolution or Second Reconstruction is redeeming or realizing the aspirations of the First Reconstruction. Dworkin and I would say that we are working out a better understanding of our commitments to equal protection, and Balkin would say that we are redeeming its promises. These formulations bespeak moral readings of the Constitution. Ackerman, in offering his complex framework of popular sovereignty, is insisting that We the People have changed our constitutional commitments through the Civil Rights Revolution and that we now should be faithful to or honor those changed commitments.

What is the difference between these formulations? What turns on the difference? Ackerman wants to present the Civil Rights Revolution as a product of popular sovereignty—We the People—not as a product of judicial elaboration of constitutional commitments by We the Judges. And not as an exercise in political philosophy in the seminar room or in the courts (as the “forum of principle”).<sup>102</sup> Ackerman wants to deny that our constitutional commitments were all there in the original meanings of the Fourteenth Amendment from the beginning—as the work of the “Giants” who walked the earth during the First Reconstruction in the nineteenth century.<sup>103</sup> He wants to insist that popular sovereignty has not “perish[ed] from the face of the earth,” to invoke Lincoln,<sup>104</sup> but has thrived in the twentieth century’s New Deal and Civil Rights Revolution.

Thus, Ackerman wants to show that popular sovereignty is alive and well. It operates, not as originalists like Scalia contemplate, in ordinary lawmaking concerning things

---

98. See, e.g., Ronald Dworkin, *The Forum of Principle*, in RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33 (1985).

99. BALKIN, *supra* note 30, at 3.

100. ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 3, at 107-09, 152, 162, 320-21; see also *id.* at 4-5, 9, 11, 312.

101. *Id.* at 43, 198, 312, 337.

102. *Id.* at 160, 170.

103. *Id.* at 16, 311.

104. Cf. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863), in 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 17, 23 (Roy P. Basler ed., 1953).

the Constitution “says nothing about” or leaves open,<sup>105</sup> but instead in the very process of working out our deepest constitutional commitments, as higher lawmaking in the name of We the People. When it comes to higher lawmaking in our time, We the People are not the “Pygmies” to which the originalists would reduce us.<sup>106</sup>

And so, Ackerman would retort, yes, we *do* need his framework of living constitutionalism/higher lawmaking. We need it to protect us against betrayal and erasure: for we can argue that we really have amended the Constitution, and now we should be faithful to that changed Constitution, not just the Founding Constitution or the Reconstruction Constitution. But will his understanding really protect us against such betrayal or erasure?

As Ackerman frames the matter, the originalist enemies of the achievements of the twentieth century do not understand our constitutional practice: that we have a broad constitutional canon and that through a collaborative constitutionalism the Supreme Court, President, and Congress have achieved in the Civil Rights Revolution the functional equivalent of a constitutional amendment in the name of We the People. Because of this failure of understanding, the originalists decry the achievements of our constitutional practice as illegitimate “judicial updating” of the Constitution.

But as I see the matter, these originalists reject Ackerman’s understanding of our constitutional practice and his broad understanding of the constitutional canon. They view what he sees as achievements as instead “rot” or “rewriting.”<sup>107</sup> I daresay that the main reason is that they have a different moral reading, a different substantive vision of our Constitution. They are going to fight for their substantive vision no matter what Ackerman shows us about our actual constitutional practice.

In sum, we have a constitutional war going on: a war of competing substantive visions of the Constitution. What Ackerman sees as fidelity to our living constitution, conservative originalists see as infidelity to the Constitution, more narrowly conceived as what they hold to be its original meanings. What Ackerman sees as realizing our constitutional commitments—the great achievements of the twentieth century—they see as rewriting, repudiating, or destroying them. What Ackerman thinks We the People have repudiated through the New Deal and the Civil Rights Revolution (for example, the older understandings of federalism, the commerce power, state action, and the like), they think We the Judges must restore. And so it goes, on and on, without end. Ackerman’s living constitutionalism will not resolve the “impasse” between originalism and living constitutionalism, and will not usher in a new era in which originalists and living constitutionalists are “talking to” one another.

Finally, I want to address Ackerman’s implicit claim that his living constitution—with its account of the great achievements of the Civil Rights Revolution as having amended the Constitution in the name of We the People—will provide bulwarks against betrayal or erasure by the Roberts Court. Again, Ackerman wants to establish the Civil

---

105. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that the people may legislate restrictions on abortion because “the Constitution says absolutely nothing about it”); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 293 (1989) (Scalia, J., concurring) (stating that the legislature may decline to honor a patient’s wish not to have certain measures taken to preserve her life because “the Constitution says nothing about the matter”).

106. ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 3, at 16, 311.

107. See e.g., SCALIA, *supra* note 34, at 40-41 (“rot”); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) (“rewriting”).

Rights Revolution as a constitutional revolution—not merely some ordinary, though important, statutory developments and judicial decisions. The upshot is that the Civil Rights Revolution may not be repealed or erased by ordinary lawmaking or ordinary judicial decisions. Instead, a President, Congress, or Supreme Court determined to repeal it would have to go through the elaborate six-stage process of higher lawmaking. Thus, his theory of fidelity to the living constitution provides greater bulwarks against betrayal or erasure than do other theories.

But, if I learned anything from reading Ackerman's book (as well as the two previous volumes), it is that there is no sure bulwark that can preserve progressive changes from erasure by determined defenders of older constitutional orders. Not changes through the formal amending procedures of Article V: just consider Ackerman's chilling analysis of how the Supreme Court promptly erased the First Reconstruction in *Slaughter-House* and *Civil Rights Cases*.<sup>108</sup> Thus, Ackerman acknowledges that not even formal amendments to the Constitution ostensibly adopted through Article V are secure against erasure or betrayal. Why should we expect anything different with respect to functional equivalents of constitutional amendments outside Article V through his stages of higher lawmaking? Even now the Roberts Court is erasing the progressive changes wrought by the New Deal and the Civil Rights Revolution.

Thus, even if the Civil Rights Revolution does rise to the level of higher lawmaking changing the Constitution, that would not be a sufficient bulwark to preserve change and prevent erasure—any more than the Reconstruction Amendments were a sufficient bulwark to realize change and avoid erasure. Neither formal amendment nor the functional equivalent thereof can protect us against erasure or betrayal when movement judges are determined to obliterate the achievements of a constitutional regime. Again, what Ackerman presents as achievements, they view as rot or rewriting. They want, as the slogans go, to take their Constitution and their country back. They will do this by invalidating the statutes, overruling or reinterpreting the precedents, or reinterpreting the amendments. They will deny that the new developments Ackerman calls achievements—e.g., the withering away of the requirement of state action and the idea that state autonomy limits national powers—really changed anything. Or, if those developments did, they are unconstitutional and must be repudiated. As Randy Barnett put it, he aims to “restor[e] the lost constitution.”<sup>109</sup>

Balkin and I appreciate this—and Dworkin certainly did—about the struggle with conservative originalists. We understand that we have to engage in substantive moral arguments about which interpretations best fit and justify our constitutional text, history, tradition, and practice—to elaborate a moral reading of the Constitution. Ackerman implicitly understands this, but in places he presents himself as a living constitutionalist historicist who is simply putting forward an historical narrative that fits the historical facts and who, as such, seems to resist the moral reading.

---

108. *Id.* at 31, 150-51, 209, 213, 214, 329.

109. RANDY BARNETT, RESTORING THE LOST CONSTITUTION 357 (2004).



V. RECASTING ACKERMAN'S LIVING CONSTITUTIONALISM  
AS A MORAL READING OF THE CONSTITUTION

It is commonplace for living constitutionalists to pit originalism against the moral reading and then to say that they are closer to originalists than to moral readers. Balkin did this in defending his “living originalism.”<sup>110</sup> So does Ackerman. On the one hand, Ackerman criticizes conventional originalists like Scalia. On the other hand, he distances himself from moral readers like Dworkin. Then he says he is “closer to Justice Scalia than to Professor Ronald Dworkin.”<sup>111</sup> Yet clearly, Ackerman is much closer to Dworkin than to Scalia. His account of the substantive principles of the Civil Rights Revolution (even if not his full apparatus of popular sovereignty) would be embraced by Dworkin and rejected by Scalia.

Why does Ackerman say he is closer to Scalia than to Dworkin? More generally, why does he resist the moral reading? In prior work, I have suggested several reasons, including the “turn to history” and the “democratic turn” in liberal constitutional theory.<sup>112</sup> By the “turn to history,” I mean that he presents his theory as rooted in historicism rather than in normative political philosophy.<sup>113</sup> In distancing himself from Dworkin, and saying he is closer to Scalia, Ackerman clearly aims to establish his historicist credentials—the historical fit of his living constitutionalist enterprise with our constitutional practice—while implying that moral readers like Dworkin are ahistorical philosophers who read their own vision of political utopia into the Constitution.<sup>114</sup> By the “democratic turn,” I mean that he presents his theory as the expression of popular sovereignty rather than of courts articulating abstract commitments in “the forum of principle.” In criticizing Dworkin’s idea that courts are “the forum of principle,”<sup>115</sup> and in defending a collaborative constitutionalism, Ackerman plainly aims to demonstrate his democratic credentials—while suggesting that moral readers like Dworkin are court-lovers who disparage our practice of popular sovereignty.

In both instances, I believe Ackerman is using Dworkin as a rhetorical foil to deflect common criticisms of liberal constitutional theory in general and living constitutionalism in particular. In the “turn to fit,” he is saying that he looks to our history and practice to decide what our constitutional commitments are, not to abstract normative liberal political philosophy. He is implying that Dworkin did the latter. He is saying: If you think I am reading normative liberal political philosophy into our Constitution, you have got the wrong person. You want Dworkin, not me. He thus stresses that his account is historicist, not philosophical: that is what he means when he says he is closer to Scalia than to Dworkin. In the democratic turn, Ackerman is saying that he believes in a collaborative model of popular sovereignty, whereby the President, Congress, and the Supreme Court ultimately speak in the name of We the People, not a court-centered “forum of principle” that merely speaks in the name of We the Judges. He also is saying: If you think I have a

---

110. See James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 679-80 (analyzing Balkin’s rhetorical strategy in differentiating his position from the moral reading of Dworkin).

111. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 35.

112. Fleming, *supra* note 41, at 1345-53.

113. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 34-35, 71.

114. Fleming, *supra* note 41, at 1345-51.

115. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 160, 170.

court-centered theory of living constitutionalism that advocates “judicial updating” of the Constitution, you have got the wrong person. That person is Dworkin, not me. In this way, he emphasizes that the democratic/popular sovereignty credentials of his theory are superior to those of Dworkin’s moral reading (and, for that matter, Scalia’s originalism).

But we should not be fooled into thinking that Ackerman is just a historicist who is unpacking the commitments that happened to be adopted by a certain people at a certain time and in a certain place, working through certain procedures that he has described in a legal positivist spirit. In the New Deal or the Civil Rights Revolution, We the People were not discovering or elaborating historicist facts about the original meanings of the Constitution or the developments of our constitutional practice. We the People were building out our constitutional commitments through normative judgments in the crucible of experience. What was going on in hammering out these functional equivalents of a constitutional amendment other than the realization of a moral reading of the Constitution’s commitments? Surely it was not the realization of historicist facts concerning original meanings or political and doctrinal developments.

Putting aside the rhetorical maneuvering regarding Scalia and Dworkin, Ackerman is arguing that his account better fits our constitutional practice, as it has developed over time, than do competing accounts. He also is saying that it offers a normatively superior understanding both of popular sovereignty and of our substantive constitutional commitments themselves. To put it in Dworkin’s famous formulation of the two dimensions of the best interpretation<sup>116</sup>: Ackerman is claiming that his account provides the best *fit* with and *justification* of our constitutional practice. That is why I have argued for recasting his living constitutionalism as a moral reading of the Constitution. Again, through his rhetorical move of claiming to be closer to Scalia than to Dworkin, Ackerman demonstrates that even some living constitutionalist critics of originalism are in the grip of the “originalist premise”—the premise or assumption that the best understanding of fidelity (here, to our constitutional practice, not to original meanings) is necessarily originalist.<sup>117</sup> But, I have argued, the aspiration to fidelity to our living constitution as Ackerman conceives it is the aspiration of a moral reading, not an originalism.

These rhetorical strategies and deflections are certainly understandable. Nonetheless, I shall suggest that Ackerman’s living constitutionalism is illuminatingly understood as a moral reading of the Constitution (in a general sense, if not in Dworkin’s specific sense), not merely a historicist account of our constitutional development.

I mean a moral reading in two basic senses. First, Ackerman’s theory is a moral reading in the sense that, under it, faithful interpretation requires normative judgments about the best understanding of our constitutional commitments as we have built them out over time. Ackerman conceives the Constitution as a scheme of normative commitments, not historicist facts. This comes out most clearly in his criticism of Justice White’s opinion in *McLaughlin v. Florida* for stating that the meaning and central purpose of the Equal Protection Clause is a “historical fact.”<sup>118</sup> Although Ackerman says his account is historicist, he is making an argument about what normative constitutional commitments were

---

116. DWORKIN, *supra* note 29, at 239.

117. FLEMING, *supra* note 60, at 1795.

118. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 296-97.

hammered out in the Civil Rights Revolution. He clearly understands that those commitments are not simply discovered as historicist facts through historical research. To decide what they are, Ackerman has to make interpretations requiring normative judgments. He also makes clear that interpreting and applying those commitments—“redeeming” them, as he sometimes says—requires normative judgments, not just marshaling historical facts.

Ackerman half disguises this point in speaking of Chief Justice Warren’s opinion in *Brown* as embodying a “sociological jurisprudence” or requiring “situation sense”<sup>119</sup>—that it requires making common sense judgments about whether real world practices in certain contexts manifest “institutionalized humiliation” so as to deny equal protection.<sup>120</sup> I say “half disguises,” because “sociological jurisprudence” may not sound like normative moral judgments. For that matter, “situation sense” or common sense may not sound like normative moral judgments either. To be sure, they are not the normative moral judgments of abstract political philosophy. But they are normative moral judgments about the social meaning of laws and practices—whether they embody institutionalized humiliation and deny dignity. More generally, elaboration of *Brown*’s “anti-humiliation principle”<sup>121</sup> and application of its “logic of spheres”<sup>122</sup> will require normative moral judgments concerning what practices, in what contexts, humiliate and deny dignity. Moreover, his development of the meaning of popular sovereignty in our constitutional practice will require normative judgments. Indeed, all of Ackerman’s judgments about what holdings are faithful to the New Deal and Civil Rights Revolution and what holdings betray them will require normative judgments. None of these matters can be decided as a matter of historicist fact. In short, Ackerman’s living constitutionalism will require complex normative judgments; accordingly, it will be a moral reading of the Constitution.

Second, Ackerman’s theory is also a moral reading in the sense that he believes we must adopt and apply it if we are to make the Constitution the best it can be (to recall Dworkin’s famous formulation)<sup>123</sup> or redeem its promises (to invoke Balkin’s formulation).<sup>124</sup> Ackerman contends that “the possibility of popular sovereignty” under our Constitution depends upon our accepting his theory of unconventional adaptation and transformation outside Article V.<sup>125</sup>

What does he mean by this claim? He seems to be making both a justificatory claim and a hortatory claim. The justificatory claim is that our Constitution—notwithstanding the text of Article V in the Constitution itself—presupposes a theory of popular sovereignty in light of which Article V is incomplete, a compromise, or even a mistake (if it purports to prescribe the exclusive procedures for making higher law). Therefore, in order for the Constitution to be able to realize its commitment to popular sovereignty, and indeed for it to be legitimate, We the People must be free to amend and transform it outside the

---

119. *Id.* at 129, 131.

120. *Id.* at 128.

121. *Id.*

122. *Id.* at 129-33.

123. DWORKIN, *supra* note 29, at 255.

124. BALKIN, *supra* note 30, at 74-99.

125. ACKERMAN, TRANSFORMATIONS, *supra* note 18, at 119; *see also* ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 16-17, 19. In this section, I draw from Fleming, *We the Unconventional American People*, *supra* note 97, at 1529-30.

formal procedures of Article V, including through the model of transformation that Ackerman develops. Otherwise, we are not a properly self-governing People.

The hortatory claim is that We the People are more likely to live up to the rights and responsibilities of self-government if we believe that the People, as recently as the New Deal and Civil Rights Revolution, rose to the occasion of transforming the higher law of the Constitution. After all, if We the People have done so only once (or perhaps twice) in American history, and not since the Founding (or possibly Reconstruction) at that, what is the hope of the People accomplishing anything great by way of higher lawmaking in our time? Other theories, including those of Article V exclusivity, denigrate the constitutional creativity of We the People, and thus may demoralize or debilitate the People, undermining the possibility of popular sovereignty.

Through advancing the idea that “the possibility of popular sovereignty” requires us to supplement or even override Article V, Ackerman proves to be a popular sovereignty-perfecting theorist.<sup>126</sup> That is, he is arguing that the Constitution presupposes a theory of popular sovereignty in light of which Article V—evidently a fixed point or foundational text—can be seen to be incomplete, a compromise, or even a mistake. And he is arguing for interpreting the Constitution so as to perfect it from the standpoint of his theory of popular sovereignty, even to the point of supplementing or overriding provisions of its text. In terms of Dworkin’s well-known formulations, Ackerman is calling for interpreting the Constitution so as to make it the best it can be and putting forward a moral reading of the Constitution.

#### VI. CONCLUSION: RECONCEIVING THE MORAL READING AS A BIG TENT THAT INCLUDES ACKERMAN’S LIVING CONSTITUTIONALISM

In my essay in the Fordham symposium on “Fidelity in Constitutional Theory,” I applauded Ackerman for developing a conception of fidelity in constitutional interpretation that is an alternative to that of conventional originalists. But I criticized him for resisting the moral reading. I argued that we should conceive the moral reading as a big tent that can encompass broad originalist, living originalist, or living constitutionalist conceptions such as those developed by Ackerman and Balkin. I urged Ackerman as well as Balkin to reconceive his project as being in support of a moral reading, not as offering an alternative to it. For constitutional theorists like Ackerman and Balkin can provide firmer ground than Dworkin has offered for the moral reading in fit with historical materials and our constitutional practice.<sup>127</sup>

We should conceive Ackerman as developing a moral reading (in a general sense, not Dworkin’s specific sense), not merely a historicist reading. And we should acknowledge that he has provided an account that splendidly fits with and justifies our constitutional practice, with all its imperfections. He has put forward an account of a living constitution that is worthy of our fidelity. It deserves not to be betrayed or erased by

---

126. Cf. JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 16, 210-11 (2006) (putting forward a “Constitution-perfecting theory” by analogy to the “process-perfecting theory” developed in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

127. Fleming, *supra* note 41, at 1353.

Scalia's and Thomas's originalism, the "judicial battering ram for obliterating the achievements of the twentieth century"<sup>128</sup> and for thwarting the progress of the twenty-first century. We need moral readings of the Constitution for the twenty-first century that can offer hope and provide effective tools for resisting and even overcoming such originalist battering, and Ackerman has provided a powerful, imaginative, and magnificent one.

---

128. ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 3, at 329.