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## Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation

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Michael S. Lewis

## Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation

18 U.N.H. L. REV. 261 (2020)

**ABSTRACT.** This review assesses three recent books on the subject of originalism. Each approaches the question of originalism from a different angle. None of the books confronts the raw challenge to the authority of the framers leveled by Justice Thurgood Marshall in his speech upon the bicentennial of the United States Constitution. Marshall argued that the founding generation was too morally compromised, too bereft of information we now have as a result of the existence and experiences of millions of Americans since the close of the 18th century, and too imperfect in their efforts to design a sustainable government, to justify the devotion to their perspective originalism demands. In the face of this critique, originalism, which is a devotional doctrine, and originalists, its devotees, nevertheless insist that we should obey the founding generation and ignore, among other things, the "the reality that a nation putatively based on the principle of human equality was actually a prison house in which millions of Americans had virtually no rights at all." This review demands that advocates for an originalist methodology confront the full brunt of our past, both good and evil, in promoting their interpretative approach. The failure to do so has deep moral, political, sociological and legal ramifications. "Law writes the past, not just its own past, but the past for those over whom law seeks to exercise its dominion." To the extent that law writes a past that covers-up, papers-over, ignores or subverts the evil aspects of history, it engages in abuses that we would condemn if perpetrated by other nations as denial.

As a methodology, this review rejects originalism as a presumptively justifiable methodology. It goes further. It proposes a canon of constitutional construction that would proscribe the use of originalism in any of its variants unless certain prophylactic historical facts are established or negated by the proponents of any form of originalism. Broadly speaking, this canon would require any party in any litigation or legal dispute seeking to offer or rely upon the perspective of the founding generation in any dispositive fashion to demonstrate that the clause or clauses to be interpreted and the history to be deployed bears no supporting relationship to the evils of our national past and would not further principles underlying those evils. Specifically, such a canon would require proponents of the originalism methodology to demonstrate that, before adopting originalism as a method to resolve a case, such an interpretation would not support or extend original principles that perpetuated the institution of slavery, supported the expulsion and mass extermination of Native Americans as a national policy, buttressed the terrorism of Redemption upon the collapse of Reconstruction, entrenched the political and personal subjugation of women

and children, or permitted the use of governmental force to suppress political speech in the forms present during any of the historical periods from which the evidence is drawn. If the proponents of originalism are not able to overcome this burden, the canon would require that they rely upon the many methodological approaches to constitutional interpretation that are not originalism, that have developed over the course of American history, and have been embraced and incorporated into our law as a matter of historical practice.

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Cambridge University Press, 2017, PP. 158

*Originalism as Faith*

By Eric J. Segall

Cambridge University Press, 2018, PP. 241

*The Second Creation*

By Jonathan Gienapp

The Belknap Press of Harvard University Press, 2018, PP. 451

*Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.*<sup>1</sup>

*Justice Thurgood Marshall (May 6, 1987)*

## INTRODUCTION<sup>2</sup>

The methodology called “originalism” appears to be more ascendant now than ever before.<sup>3</sup> It would demand obedience to the original public meaning of today’s Constitution drawn from the understanding and interpretation of the generation that ratified the Constitution of 1789.<sup>4</sup> It would do so despite the passage of so many

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<sup>1</sup> Hon. Thurgood Marshall, Assoc. Justice, U.S., Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association: The Bicentennial Speech (May 6, 1987), <http://thurgoodmarshall.com/the-bicentennial-speech/> [<https://perma.cc/T7YB-EzBN>].

<sup>2</sup> A brief word about citations: This review is heavily footnoted on purpose. It is so because it takes a controversial position regarding a revered perspective. But more importantly, it cites to many sources of history to demonstrate the availability of information that should be considered by those who seek to defend or critique the use of history in the construction and application of federal constitutional law.

<sup>3</sup> See, e.g., NEIL GORSUCH, *A REPUBLIC IF YOU CAN KEEP IT 10* (2019) (“For me, respect for the separation of powers implies originalism in the application of the Constitution and textualism in the interpretation of statutes.”); *Bucklew v. Precy*, 587 U.S. \_\_\_, slip op. at 6 (April 1, 2019) (“The Constitution allows capital punishment . . . In fact, death was the standard penalty for all serious crimes at the time of the founding.”) (citations and internal quotations omitted); see also Ian Wurman, *Originalism’s New Critics, Part 1: Fixing Fixity*, CLAREMONT REV. OF BOOKS (Jan. 16, 2019), <https://www.claremont.org/crb/basicpage/originalisms-new-critics-part-1-fixing-fixity/> [<https://perma.cc/4TXR-8FA8>] (“Brett Kavanaugh’s ascension to the United States Supreme Court is sure to thrust originalism center stage in the debates over constitutional interpretation.”); Symposium, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1912 (2011) (“JUDGE KAVANAUGH: I think on the history—and when I say history, we’re talking about what happened in the summer of 1787 as well as the English history, where it came from and also going into the ratification debates, to try to figure out what the words meant.”).

<sup>4</sup> The “Constitution of 1789” is the document that went into effect in March 1789, after it was ratified by New Hampshire, the ninth and definite state, on June 21, 1788, after the constitutional convention approved it through delegates from the states on September 17, 1787. On September 25, 1789, Congress adopted the Bill of Rights and sent them to the nation for ratification. Ratification of ten of the amendments occurred at the end of 1791. See NCC Staff, *The Day the Constitution was Ratified*, NAT’L CONST. CTR.: CONST. DAILY (June 21, 2019), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/2V77-MWZ3>]. Some refer to the Constitution of 1789 as the Constitution of 1787. See, e.g., Paul

years and the great changes to the Constitution that have occurred in the intervening period.<sup>5</sup>

If deployed to its greatest effect, originalism would undo decades of standing constitutional law, law that Americans have come to view as bedrock to our national identity.<sup>6</sup> The implications have caused a number of scholars to give attention to

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Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 (1999) (“The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies.”). For a review of the timeline and content of the ratification debates, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788* (2010) (“The drama formally began on September 17, 1787, when the Constitutional Convention . . . adjourned and released to the public the Constitution it had written in secrecy.”). Two scholars claim that the United States Constitution is the same as it was in 1789. See Evan D. Bernick & Christopher R. Green, *What is the Object of the Article VI Oath?*, (forthcoming) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234) [<https://perma.cc/D2VD-XRMC>] (last visited Nov. 5, 2019) (“Our thesis here takes an additional step: when officers . . . use the term “the Constitution in relation to the job for which the Article VI oath was a condition, they refer to the *same entity that the Founders did* when they constructed the republic. Our Constitution is the same as their Constitution.”). This point seems obviously wrong and ignores all of the amendments to the United States Constitution.

<sup>5</sup> See *infra* note 6; the definition of “originalism” is quite variously described. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 3–10 (2013) (describing variants of “originalism” as well as deficits in justifications of the methodology); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 18 (2006) (“The principle that the meaning of the Constitution shall remain the same until it is properly changed is simply another way of describing original public meaning.”) (internal quotations omitted); see also Jamal Greene, *Selling Originalism*, 97 GEO. L. J. 657, 662–63 (2009) (describing originalism as an “inconsistent term” subject to inconsistent and sometimes unintelligible descriptions of it, including by its primary advocates). At least one scholar has pointed out the difficulty of discovering and determining the mechanism for constitutional change set forth by constitutional text. See LAWRENCE LESSIG, *FIDELITY AND CONSTRAINT* 9–10 (2019). The same scholar notes that the Constitution of 1787 came to existence by means that violated an earlier, more restrictive, textual limitation on constitutional change. See *id.* at 11–18.

<sup>6</sup> See LEE J. STRANG, *ORIGINALISM’S PROMISE* 9 (2019) (acknowledging that nonoriginalist methodologies have dominated American federal jurisprudence for most of the 20<sup>th</sup> century) (2019); MCGINNIS & RAPPAPORT, *supra* note 5, at 1 (“How can an originalist jurisprudence address the hundreds of judicial decisions inconsistent with original meaning that are now deemed the law of the land?”). Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 (1997) (arguing that originalism would repudiate *Brown v. Board of Education*); but see John O. McGinnis & Michael B. Rappaport, *Originalism and Precedent*, 34 HARV. J.L. & PUB. POL’Y 122 (2010) (arguing to the contrary). See also J.M. BALKIN AND SANFORD LEVINSON, *LEGAL CANONS* 35–36 (2000) (citing a “list” of canonical decisions in the area of constitution law, some of which remain law). In part,

originalism in book-length publications. This review assesses three recent books on the subject.

Each of the three books under review approaches originalism from a different angle. None confronts the raw challenge to the authority of the founding generation leveled by Justice Thurgood Marshall in his speech upon the bicentennial of the United States Constitution. Marshall argued that the founding generation was too morally compromised, too bereft of information we now have as a result of the existence and experiences of millions of Americans since the 18<sup>th</sup> century, and too imperfect in its efforts to design a sustainable government, to justify the devotion to its perspective originalism demands. In the face of this critique, originalism, which is a devotional doctrine,<sup>7</sup> and originalists, its devotees, insist that we should obey the founding generation and ignore a great deal about our past, including “the reality that a nation putatively based on the principle of human equality was actually a prison house in which millions of Americans had virtually no rights at all.”<sup>8</sup>

Drawing on this and other more complete descriptions of our history, this review demands that advocates for an originalist methodology confront the full brunt of our past, both good and evil. Very few do. The failure to do so has deep moral, political, sociological, and legal ramifications.<sup>9</sup> “Law writes the past, not just

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this depends upon the generality of the “originalist perspective.” See Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 487 (2017) (“Did the framers of the Fourteenth Amendment understand it to prohibit laws interfering with a woman’s right to use birth control or to obtain an abortion? Almost certainly not. But would a hypothetical reasonable, well-informed person in 1868 have understood the Fourteenth Amendment to offer protection in matters of family and child rearing? Likely so.”) (offering no citation for either supposition).

<sup>7</sup> Cf. JOHN GARDNER, *Law as Leap of Faith*, in LAW AS LEAP OF FAITH 11–12 (2012) (“By virtue of the *Grundnorm*, their authorization entails their rightness and their rightness entails their authorization.”); Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 1 (2009) (“Don’t we *have* to be faithful to what the lawmakers were doing?”); see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006) (“During the Reagan Presidency . . . ‘originalism’ emerged as a new and powerful kind of constitutional politics in which claims about the sole legitimate method of interpreting the Constitution inspired conservative mobilization in both electoral politics and in the legal profession.”).

<sup>8</sup> ANDREW DELBANCO, *THE WAR BEFORE THE WAR 2* (2018).

<sup>9</sup> SUSAN NIEMAN, *LEARNING FROM THE GERMANS, RACE AND THE MEMORY OF EVIL* 37 (2019) (“Seen in another [light], what’s clear is what the similarities [between German and American racist histories] can teach us about guilt and atonement, memory and oblivion, and the presence of past in preparing for the future. . . . When pasts fester, they become open wounds.”).

its own past, but the past for those over whom law seeks to exercise its dominion.”<sup>10</sup> To the extent that law writes a past that covers-up, papers-over,<sup>11</sup> ignores, or subverts the evil aspects of history,<sup>12</sup> it engages in abuses that we would condemn if perpetrated by other nations. We would call it denial.<sup>13</sup> This review requires us to remember, and not forget, our history when using history to provide content to our law.<sup>14</sup> It describes originalism as taking the contrary perspective. It maintains that

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<sup>10</sup> AUSTIN SARAT & THOMAS R. KEARNS, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, in HISTORY, MEMORY AND THE LAW 3 (2002 ed.) (footnote omitted); see also Jesse Green, *Review: Can a Play Make the Constitution Great Again*, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/theater/what-the-constitution-means-to-me-review.html> [<https://perma.cc/TX68-DB6Z>] (reviewing a play that suggested to the reviewer: “If you are not a white, male landowner as envisioned by the founding fathers, the Constitution has little to offer you.”).

<sup>11</sup> Cf. Gillian Brockwell, *George Washington Owned Slaves and Ordered Indians Killed. Will a Mural of that History be Hidden?*, WASH. POST (Aug. 25, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/08/25/george-washington-owned-slaves-ordered-indians-killed-will-mural-that-history-be-hidden/> [<https://perma.cc/Q85N-UD4R>] (describing debate over whether to cover over an artistic depiction of George Washington’s racist and racial, violent, brutality, two murals “depicting the great injustices of early American history: slavery and the genocide and dispossession of the first people.”) (internal quotation omitted).

<sup>12</sup> “Evil” is used here, at least, in the sense it was used by Hannah Arendt in her assessment of the evil perpetrated by Nazi bureaucrats. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 287–88 (2006 ed.) (describing the normalcy and thoughtlessness of the most destructive evil-doers); see also *The Concept of Evil*, STAN. ENCYCLOPEDIA OF PHIL. (2018), <https://plato.stanford.edu/entries/concept-evil/> [<https://perma.cc/Y8TG-SK6F>] (last visited Aug. 20, 2019) (surveying “The Concept of Evil” and noting Arendt’s observations about how the greatest criminals may be totally normal and commit great evil through incredible, self-serving, thoughtlessness). Constitutional scholars have used the word “evil” to describe our constitutional past. JACK BALKIN, *CONSTITUTIONAL REDEMPTION* 7 (2011) (“Two problems haunt us and threaten our constitutional faith. The first is the problem of constitutional evil.”).

<sup>13</sup> Michael S. Lewis, *Confronting a Monument: The Great Chief Justice in an Age of Historical Reckoning*, 17 U.N.H. L. REV. 315, 337 (2019) (quoting speech by the late-Justice Scalia on the importance of memory as a means to prevent catastrophe); see also IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 9 (2019) (“Denial is the heartbeat of racism, beating across ideologies, and nations. It is beating within us.”); BRONWYN LEEBAW, *JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE* 1 (2011) (“In recent decades, institutions designed to recover such stories, and to challenge efforts to consign evidence of past atrocities to ‘holes of oblivion,’ have proliferated to numerous countries around the world . . . An International Criminal Court has been developed to hold individuals accountable for egregious violations of human rights and humanitarian law.”).

<sup>14</sup> See SUSAN NEIMAN, *EVIL IN MODERN THOUGHT* 66 (2002) (“Rousseau also pointed out that such doctrines [the denial of evil] lead to quietism. If evils are merely apparent, and everything is

originalism engages in a methodology that undermines a central feature of litigation under our rule of law: the goal of finding truth through processes that seek to advance accurate findings of fact.<sup>15</sup> Stepping back even further, this review takes the position that the effects of deploying originalism in this manner would threaten to entrench, as a defining genetic feature of our constitutional law, a poisoned strain drawn from a poisoned history that would weaken, rather than strengthen, the moral, political, and legal standing of our constitutional law.<sup>16</sup>

To inoculate<sup>17</sup> our law against this threat, and, relatedly, to facilitate truthful results in litigation in the face of remarkable inertia to the contrary,<sup>18</sup> this review

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the best that it could be, there's no need to do anything about them. Indeed, any action might count as impious—as many authorities used traditional theodicy to argue.”); *see, e.g.*, Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) (“Even though the quest for the vote spanned generations and provoked the most sustained dialogue about women’s position in the constitutional community that the nation has ever conducted, the Nineteenth Amendment has been utterly excluded from the constitutional canon.”).

<sup>15</sup> See SARAT & KEARNS, *supra* note 10, at 11 (“The sole question with which the law should concern itself is whether, according to the evidence presented and the rules of proof, someone ‘did’ what they were accused of doing or some event did or did not happen.”).

<sup>16</sup> See Charles L. Barzun, *Of Origins and Arguments: The Genetic Fallacy and the Idea of Progress* (unpublished manuscript) (on file with author) (noting that historical genealogy is a legitimate concern within American law); *see also* Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a “Suicide Pact”*, 20 WM. & MARY BILL RTS. J. 287, 290 (2011) (“To be a *legitimate constitution*—to actually be worth of such communal sacrifice—the given constitution must be moral; that is, both designed to enforce and actually capable of enforcing the abiding moral duties that demarcate legitimate from illegitimate government.”); *see also* JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME* xix-xx (3d ed. 2018) (“[T]here is a reciprocal relationship between truth about the past and justice in the present. When we achieve justice in the present, remedying some past event or practice, then we can face it and talk about it more openly, precisely because we have made it right.”).

<sup>17</sup> Cf. JOHN STUART MILL, *The Subjection of Women*, in *ON LIBERTY AND THE SUBJECTION OF WOMEN* 140 (6th ed., Penguin Books 2006) (1879) (“History gives a cruel experience of human nature, in shewing exactly the regard due to life, possessions and entire earthly happiness of any class of persons, was measured by what they had the power of enforcing; how all who made any resistance to authorities that had arms in their hands, however dreadful might be the provocation, had not only the law of force but all other laws, and all notions of social obligation against them; and in the eyes of those whom they resisted, were not only guilty of crime, but the worst of all crimes, deserving the most cruel chastisement which human beings could inflict.”).

<sup>18</sup> See, *e.g.*, Siegel, *supra* note 14, at 949 (“Today, the sex discrimination paradigm remains limited, in constitutional legitimacy and critical acuity, by the ahistorical manner in which the Court derived it from the law of race discrimination.”); *see* GERDA LERNER, *WHY HISTORY MATTERS* 205 (1997) (“Selective memory on the part of the men who recorded and interpreted

proposes an approach to constitutional interpretation that acknowledges the evils perpetrated by the founding generation, the limited and flawed perspective of that generation, and the great advances in numerous fields of human understanding that we have accomplished since the founding. It argues that this history and these developments should inform the construction of our fundamental laws. It further argues that developments in our understanding of history and justice should cause us to deploy an interpretive methodology within the domain of federal constitutional law that, at least, opposes interpretive methodologies like originalism if originalism would entrench the evil perspectives of evildoers who engaged in great evil during evil times.<sup>19</sup> It would permit history to be used as a basis for giving content to our law only to the extent that history reflects the better angels of our nature.<sup>20</sup>

As a methodology, this review rejects originalism as a presumptively justifiable methodology. It goes further.<sup>21</sup> It proposes a canon of constitutional construction that would proscribe the use of originalism, in any of its variants, unless certain prophylactic historical facts are established, or negated, by the proponents of any form of originalism. Broadly speaking, this canon would require any party in any litigation or legal dispute seeking to offer or rely upon the exclusive perspective of the founding generation in any dispositive fashion to overcome a prophylactic burden. Such a party would be required to demonstrate that the history to be deployed in that effort bears no supporting relationship to the evils of our national past and would not further principles that underlie those evils.

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history has had a devastating impact on women.”).

<sup>19</sup> Cf. INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* xvi (1991) (describing canons of construction imposed upon German law by the Allies after the fall of the Nazi regime that foreclosed reliance upon Nazi interpretations of law in the Post-War world).

<sup>20</sup> See Abraham Lincoln, *First Inaugural Address of Abraham Lincoln* (March 4, 1861), [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/TT5A-29N7>] (“The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”); see also NIEMAN, *supra* note 9, at 39 (“An open reckoning with the past is a crucial step toward maturity that will allow us to envision a full-bodied future, for a grown-up relationship to one’s culture is like a grown-up relationship to your parents . . . Growing up involves sifting through all the things you couldn’t help inheriting and figuring out what you want to claim as your own—and what you have to do to dispose of the rest of it.”).

<sup>21</sup> In this respect, the proposal contained in this article is a substantial departure from all schools of thought on the issue. See Daniel Farber, *The Originalism Debate: A Guide to the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation”).

Such evils include the institution of slavery,<sup>22</sup> the expulsion and mass extermination of Native Americans as a national policy,<sup>23</sup> the terrorism of Redemption upon the collapse of Reconstruction,<sup>24</sup> the political and personal

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<sup>22</sup> Cf. Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 261 (2000) (“Finally, slavery shaped many of the key decisions of the 19<sup>th</sup> century and led to the creation of doctrine that continues to affect modern Constitutional law today.”).

<sup>23</sup> See JEFFREY OSTLER, *SURVIVING GENOCIDE 4* (2019) (“But, as this book will show, U.S. Officials developed a policy that ‘wars of extermination’ against resisting Indians were not only necessary but ethical and legal.”).

<sup>24</sup> See STEPHEN BUDIANSKY, *THE BLOODY SHIRT: TERROR AFTER THE CIVIL WAR 1* (2009) (“The title of this book refers to a small footnote in the brutal war of terrorist violence that was waged in the American South in the years immediately following the Civil War. The terror began almost as soon as the Civil War ended in 1865; it lasted until 1876, when the last of the governments of the Southern states freely elected through universal manhood suffrage was toppled in a well-orchestrated campaign of violence, fraud, and intimidation—thereby putting an end to Reconstruction, erasing the freedmen’s newly won political rights, and securing white conservative home rule to the South for a hundred years to come.”); see also HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY AND THE RISE OF JIM CROW* 9–10 (2018) (describing the Southern assault on Reconstruction); see also Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122–133 (1994) (describing this phase in history).

subjugation of women<sup>25</sup> and children by law,<sup>26</sup> or the use of governmental force to suppress political speech in the forms present during any of the historical periods from which the evidence is drawn.<sup>27</sup> If the proponents of originalism are not able to overcome this burden, they must rely upon the many methodological approaches

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<sup>25</sup> Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872 (1971) (“Historically, the subordinate status of women has been firmly entrenched in our legal system. At common law women were conceded few rights. Constitutions were drafted on the assumption that women did not exist as legal persons. Courts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of protective personalism.”); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. Q. 161, 162–63 (1979) (“When the post-Civil War amendments were added to the Constitution, women were not accorded the vote, the right now regarded by the Supreme Court as most basic to adult citizenship. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings. The fourteenth amendment left all that untouched. To the nineteenth century jurist, change in women’s status, alteration of laws restricting a woman’s options, was state business, not fit for federal statutory or constitutional resolution.”); see also MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 29 (2019) (“While the framers engaged in exhaustive debate over the most effective means of checking governmental tyranny, they made no effort to address the unchecked power of men over women. The founders were apparently untroubled by the contradiction, expressed so patiently by Abigail [Adams], that ‘whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist in retaining absolute power over Wives.’”) (footnote and citation omitted).

<sup>26</sup> See Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1569–71 (2009) (describing slavery and conditions of slavery in which children lived in early America); Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 12 (2004) (describing U.S. Supreme Court case law establishing a “parental property interest in children” and as “objects” akin to a “form or private property”); see also DAVID ARCHARD, *Children: Rights and Childhood* (1993), in LESLIE J. HARRIS AND LEE E. TEITELBAUM, *CHILDREN, PARENTS AND THE LAW* 9 (2d ed. 2006) (describing views supporting the notion that children are owned by their parents); Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 68 GEO. L.J. 887, 902 (1975) (describing practices permitting indentured servitude of children in colonial America and through the ratification period).

<sup>27</sup> See GEOFFREY R. STONE, *PERILOUS TIMES* 5 (2004) (“In such an atmosphere [the environment of war], the line between dissent and disloyalty is elusive, and often ignored. As we shall see, the United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. Time and again, Americans have allowed fear and fury to get the better of them. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then—later—regretted their actions.”); Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1646–47 (2005) (“In six historical periods, Professor Stone finds that the federal government and the citizenry overreacted, needlessly sacrificing civil liberties at the altar of perceived threats to national security” including at the earliest stages of our history through the Sedition Act of 1798).

to constitutional interpretation that are not originalism that have been developed, embraced, and incorporated into our law over the course of American history.<sup>28</sup>

For the purpose of framing this proposal, Part I describes each of the books under review. Professor Ilan Wurman advertises his *A Debt Against the Living* as an effort to sell originalism to a broad audience.<sup>29</sup> I address the book on its own terms because it engages in the project of mass appeal. Professor Eric J. Segall's *Originalism as Faith* (published by the same publisher) presents the counter-perspective, surveying the history of originalism, evidence that originalism is not a methodology with substantial legal roots in American law, and the ways in which originalism fails to attain its central aims.<sup>30</sup> Professor Gienapp's *The Second Creation*, a more standard history, demonstrates how a central premise of originalism, that the written text of the Constitution had the special status originalists afford it, is not supported by the historical record regarding views on the law in the eighteenth and nineteenth centuries. Each book accepts the authority of the founding generation and deploys the perspective of the framers to support its arguments where Justice Marshall would not. This review rejects that approach in favor of Justice Marshall's perspective and constructs the first part of a methodology to implement his view.

Part II begins this process by incorporating into the discussion about American history a stark, unvarnished description of the inhumanity of the founding generation. It does so through an account of that generation's toleration and

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<sup>28</sup> See STRANG, *supra* note 6, at 152 (“Large swaths of American constitutional law are populated or, in some instances, dominated by nonoriginalist precedent.”); see also Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 789 (2017) (“As I read him, [Justice] Harlan is painting a picture of constitutional norms changing in evolutionary fashion, in response to changes in our polity’s deep commitments.”) (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); see also Noah Feldman, *The Many Contradictions of Oliver Wendell Holmes*, NY TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/books/review/oliver-wendell-holmes-stephen-budiansky.html> [<https://perma.cc/7BRC-SHWZ>] (describing Justice Holmes’ pragmatism); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1188 (2012) (describing and comparing originalist and nonoriginalist approaches to interpretation).

<sup>29</sup> See ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 3 (2017) (“This [book] aims to arm the reader with basing arguments about the legitimacy of our Constitution and our Founding, and to explain the relevance of these arguments to modern debates over constitutional interpretation . . . . It then argues that originalism . . . is the only method of constitutionally discharges this debt. This book is a short introduction to, and defense of, originalism as the Founding”).

<sup>30</sup> See ERIC J. SEGALL, *ORIGINALISM AS FAITH* 14 (2018) (“It is not in vague text or disputed historical accounts of the origins of that text, but in the justices’ characters, judgments, and values, that the American people must ultimately place their faith”).

promotion of slavery, the manner in which the founding generation protected and paved the way for its extension,<sup>31</sup> and the ways in which the political society that grew out of that generation soiled our history with the stain of deep, violent, terroristic, racist and sexist inhumanity.<sup>32</sup> It notes that the cruelty that arose from American legal racism served as an archetype for Nazi Germany and other dystopian societies.<sup>33</sup> It forces an historical accounting of the founding generation's duplicity toward Native Americans, leading to efforts to nearly exterminate an entire race of humans,<sup>34</sup> and it describes how women and children were perceived

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<sup>31</sup> See Mary Elliott and Jazmine Hughs, *Four Hundred Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don't Know the Full Story of Slavery*, N.Y. TIMES MAG. (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html?auth=login-email> [https://perma.cc/QG2E-5XNH] ("Yet the demand for a growing enslaved population to cultivate cotton in the Deep South was unyielding. In 1808, Congress implemented the Act Prohibiting Importation of Slaves, which terminated the country's legal involvement in international slave trade but put new emphasis on the domestic slave trade, which relied on buying and selling enslaved black people already in the country, often separating them from their loved ones. The ensuing forced migration of over a million African-Americans to the South guaranteed political power to the slaveholding class: The Three-Fifths Clause that the planter elite had secured in the Constitution held that three-fifths of the enslaved population was counted in determining a state's population and thus its congressional representation. The economic and political power grab reinforced the brutal system of slavery.").

<sup>32</sup> See, e.g., Greene, *supra* note 5, at 659 ("And if democratic legitimacy is the measure of a sound constitutional interpretive practice, then Justice Scalia needs an account of why and how rote obedience to the commitments of voters two centuries distant and wildly racial, ethnic, sexual, and cultural composition can be justified on *democratic* grounds."); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 371 (1989) ("By the time of the Revolution, slavery and racial discrimination were entrenched in America's economic, social and legal structure. This fact leads to some troublesome conclusions about the intentions of the framers of the Constitution."). JACK N. RAKOVE, ORIGINAL MEANINGS 5 (1996) ("Precisely because the Constitution has always played a central role in American politics, law and political culture, as both a source of dispute and a legitimating symbol of national values, the interpretation of its historical origins and meaning has rarely if ever been divorced from an awareness of contemporary ramifications").

<sup>33</sup> See JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL 4 (2017) ("Awful it may be to contemplate, but the reality is that Nazis took a sustained, significant, and sometimes even eager interest in the American example of race law."); see also ERIC FONER, THE SECOND FOUNDING xxii-xxiii (2019) ("Indeed, it [post-Reconstruction historical distortions] had a powerful impact beyond nation's borders as a legitimization of colonial role over nonwhite people in far-flung places from South Africa to Australia.") (footnote omitted).

<sup>34</sup> See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 427 (1993) ("The history of federal Indian law since Chief Justice Marshall has been filled with tragedy, a story in which the rule of law often

and treated as chattel and suffered as a result.<sup>35</sup> Part II then defends the anti-originalism canon of construction as a justified extension of current American law, which deploys canons of construction to achieve other substantive policy ends for the purpose of protecting the Constitution.

At the heart of this review is the notion that our fundamental laws must be construed in a manner that, at least, blunts the perpetuation of evil and injustice of the sort we now so broadly condemn (slavery, dehumanizing sexism, the injury and abuse of children), and, at best, furthers the interests of justice in even more affirmative ways.<sup>36</sup> In addressing originalism from this perspective, it therefore demands a true and complete historical reckoning.<sup>37</sup>

A special note about the current moment is in order with regard to this project. The very remarkable style of the attack on historical truth that we are living through in the modern age provides a special environment in which to contest the claims set forth in this review.<sup>38</sup> The canon I propose adopts the deeply principled and deeply

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has become a vehicle to rationalize what can only be understood as crimes against humanity.” (footnote and citations omitted).

<sup>35</sup> See *infra* pp. 31–36.

<sup>36</sup> See PLATO, *The Republic*, in THE REPUBLIC OF PLATO (Allan Bloom trans., 2016 ed.) (“Then, my blessed Thrasymachus, injustice is never more profitable than justice.”); see also Lerner, *supra* note 18, at 205 (1997) (“The inability of the U.S. to come to terms with its complicity in slavery has made conflict over race a permanent feature of U.S. political life in the 20<sup>th</sup> century.”); Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123, 124 (1996) (describing how debates over the history of law drive approaches to the resolution of contemporaneous legal problems); see also Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1996) (“After all, lawyers have recognized history for centuries and put it to work in argument, justification, and rationalization. Most of the ways in which lawyers use history are, however, not ‘critical’ in any plausible sense of the term. For lawyers the past is primarily a source of authority—if we interpret it correctly, it will tell us how to conduct ourselves now.”).

<sup>37</sup> See LERNER, *supra* note 18, at 203 (“Another aspect of the history of the powerful has been much under public scrutiny and needs to be considered here. This concerns ‘forgetting the past’ and ‘selective remembering.’ After the Holocaust, after Vietnam, genocide in Cambodia, ethnic cleansing in the former Yugoslavia, whole nations, like individuals after trauma, take part in the great forgetting.”); Lewis, *supra* note 13, at 332 (“Moreover, the human need for comprehensive truth as a foundation for justice is as powerful an expression of the human personality as the desire to suppress truth to work injustice.”) (footnote and citations omitted).

<sup>38</sup> See, e.g., Gordon Brown, *Forward* to JOHN SEXTON, *STANDING FOR REASON: THE UNIVERSITY IN A DOGMATIC AGE* ix (2019) (describing a “post-truth world where facts and assertion are equated, where the public’s confidence in the fundamental institutions of government and society is at an all-time low, and where we are witnessing, in an increasingly pervasive way, the devaluation of thought itself.”); cf. SIMON BLACKBURN, *ON TRUTH* 5 (2018) (“In 2016 the blithe

felt cry of “Never Again” in regard to American history.<sup>39</sup> One reader of this article, my UNH Law School colleague Maggie Goodlander, has suggested that the canon could be called the “Never Again Canon.” Such a canon would pit the demand for a just and complete historical reckoning against a perspective on our history that cries “Make America Great Again,”<sup>40</sup> either negligently and without a true perspective regarding the implications of this view, or mendaciously against Americans in the hopes of reestablishing an evil social order that would deprive millions of cherished political and personal rights.<sup>41</sup> The solution this review proposes would require that Americans exhibit the strength and courage sufficient to confront the extraordinarily painful aspects of our past as part of our desire to

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mendacity and sheer carelessness with facts indulged by politicians in Britain and America gave rise to the idea that we somehow live in a ‘post truth’ environment.”).

<sup>39</sup> See Danya Ruttenberg, *‘Never Again’ Means Nothing if Holocaust Analogies Are Always Off Limits*, WASH. POST (June 19, 2019), [https://www.washingtonpost.com/outlook/2019/06/19/never-again-means-nothing-if-holocaust-analogies-are-always-off-limits/?utm\\_term=.9498a455c23f](https://www.washingtonpost.com/outlook/2019/06/19/never-again-means-nothing-if-holocaust-analogies-are-always-off-limits/?utm_term=.9498a455c23f) [<https://perma.cc/MK5J-6KUR>] (explaining the importance of discussing historic atrocities and drawing analogies to present day, systemic, violence); see also Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 286 (2008) (“Legal and political actors tell and re-tell these histories because they seek to persuade audiences of the moral force of their claims . . . . The way we tell the story of slavery and freedom matters to the arguments we make, and those arguments shape the histories we tell.”); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003) (“For all their formal insulation from the demands of popular consciousness, it is primarily the courts that bear the explicit institutional burden of collective memory.”).

<sup>40</sup> Cf. Jamal Greene, *Originalism’s Race Problem*, 88 DEN. U. L. REV. 517, 521 (2011) (“For me, as an African-American, a narrative of restoration is deeply alienating: what America *has been* is hostile to my personhood and denies my membership in its political community.”) (emphasis added).

<sup>41</sup> See, e.g., Tim Hains, *Bill Clinton: “If You’re a White Southerner,” You know What ‘Make America Great Again’ Really Means*, REAL CLEAR POLITICS (Sept. 7, 2016), [https://www.realclearpolitics.com/video/2016/09/07/bill\\_clinton\\_if\\_youre\\_a\\_white\\_southerner\\_you\\_know\\_what\\_make\\_america\\_great\\_again\\_really\\_means.html](https://www.realclearpolitics.com/video/2016/09/07/bill_clinton_if_youre_a_white_southerner_you_know_what_make_america_great_again_really_means.html) [<https://perma.cc/D67E-D7Z9>] (“It means I’ll give you the economic you had 50 years ago and I’ll move you up the social totem pole and other people down.”); see also KENDI, *supra* note 13, at 8 (“When [Donald Trump] decided to run for President, his plan for making America great again: defaming Latinx immigrants as mostly criminals and rapists and demanding billions for a border wall to block them. He promised ‘a total and complete shutdown of Muslims entering the United States.’ Once he became president, he routinely called his Black critics ‘stupid.’ He claimed immigrants from Haiti “all have AIDS,” while praising White supremacists as ‘very fine people’ in the summer of 2017.”).

protect a country we claim we love.<sup>42</sup>

### I. AMERICAN HISTORY — ABRIDGED (IGNORED? SUPPRESSED? ERASED?)

Perhaps it was in response to the deep anxiety over attempts by our government officials to distort our history that, on July 4, 2019, citizens once again recited Frederick Douglass's Speech: "What is the Slave to the Fourth of July."<sup>43</sup> The speech, a remarkable piece of literature, flips the fiction of our triumphalist American history on its head, using it as a foil to critique the dominant narrative of American history and to reassess our history from the perspective of its victims.<sup>44</sup> Recent writing on originalism, including the three books under review, has not incorporated this perspective into assessments of the methodology. And so, in these three books, and in the general discussion about originalism cited within the endnotes of each book, there is no answer to Frederick Douglass's charge in his July Fourth speech:

Fellow-citizens; above your national tumultuous joy, I hear the mournful wail of millions! whose chains, heavy and grievous yesterday, are, to-day, rendered more intolerable by the jubilee shouts that reach them. . . . To forget them, to pass lightly over their wrongs, to chime in with the popular theme, would be treason most scandalous and shocking, and would make me a reproach before God and the world. My subject,

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<sup>42</sup> See NIEMAN, *supra* note 9, at 39 ([O]ur past will continue to haunt us if we do not face it down.") (2019); see, e.g., Patti Davis, *The Ronald Reagan who raised me would want forgiveness for his 'monkeys' remark*, WASH. POST (Aug. 1, 2019), [https://www.washingtonpost.com/opinions/the-ronald-reagan-who-raised-me-would-want-forgiveness-for-his-monkeys-remark/2019/08/01/c3c2b66c-b40c-11e9-951e-de024209545d\\_story.html?utm\\_term=.dd862a33eee1](https://www.washingtonpost.com/opinions/the-ronald-reagan-who-raised-me-would-want-forgiveness-for-his-monkeys-remark/2019/08/01/c3c2b66c-b40c-11e9-951e-de024209545d_story.html?utm_term=.dd862a33eee1) [https://perma.cc/5S5J-3NWX] ("But what I wasn't prepared for was the tape of my father using the word 'monkeys' to describe black African delegates to the United Nations who has voted in a way that angered him. . . . There is no defense, no rationalization, no suitable explanation for what my father said on that taped phone conversation.").

<sup>43</sup> Zoe Mathews, *On Independence Day, People Will Recite Frederick Douglass' Speech: 'What Is the Slave to the Fourth of July?'* WGBH (July 1, 2019) <https://www.wgbh.org/news/local-news/2019/07/01/on-independence-day-people-will-recite-frederick-douglass-speech-what-is-the-slave-to-the-fourth-of-july> [https://perma.cc/V63A-V7EU] ("In recent years, alongside overt displays of patriotism, people have also begun convening to publicly read from abolitionist Frederick Douglass's speech about the slave's perspective of Independence Day, first delivered in 1852.").

<sup>44</sup> See Frederick Douglass, *What to the Slave Is the Fourth of July?*, TEACHING AM. HIST. (July 5, 1852), <https://teachingamericanhistory.org/library/document/what-to-the-slave-is-the-fourth-of-july/> [https://perma.cc/J6YN-9DGB]. But see FONER, *supra* note 33, at 9 (describing Douglass's shifting views on the constitution and his claim that slavery constituted a massive and perpetual violation of the Fifth Amendment's due process clause, a construction authorities would not and did not impose).

then fellow-citizens, is AMERICAN SLAVERY.<sup>45</sup>

The first of the three books I review, *A Debt Against the Living*, by Ilan Wurman,<sup>46</sup> both proposes and promotes originalism without giving any sense that it is aware of what Douglass and many others have told us about American history. *A Debt* is pitched as “An Introduction to Originalism,” whose definition of the originalism methodology is so clearly and transparently stated that it provides the greatest platform by which to level a critique against the approach.<sup>47</sup> Professor Ilan Wurman, an attorney and constitutional law scholar at Arizona State University,<sup>48</sup> claims that his conception of originalism is the best form of constitutional interpretation.<sup>49</sup> He defines originalism as follows:

Originalism is quite a commonsensical idea, after all. It has many flavors, but we can define it broadly as the idea that the Constitution should be interpreted as its words were originally understood by the Framers who wrote the Constitution in 1787 and by the public that ratified it between 1787 and 1789.<sup>50</sup>

The defenses he proposes for originalism are fairly typical.<sup>51</sup> They include the following arguments: that originalism is the only theory consistent with a democratic constitution because it renders official only the views of the citizens who made the law “the law” through the ratification process set forth in the Constitution;<sup>52</sup> that originalism is consistent with the written nature of the Constitution, a special feature of the Constitution that establishes its permanency

<sup>45</sup> *Id.* See also DAVID W. BLIGHT, *FREDERICK DOUGLASS 6–7* (2018) (Describing Douglass’s speech upon the dedication of a monument to President Lincoln, which included a “litany of Lincoln’s sins against the cause of abolition.”).

<sup>46</sup> See WURMAN, *supra* note 29. Ilan Wurman is a constitutional law scholar at Arizona State University Sandra Day O’Connor College of Law. ILAN WURMAN, <https://isearch.asu.edu/profile/3325418> [<https://perma.cc/5PDN-3K6X>] (last visited Dec. 30, 2019). He has also worked for conservative jurists and members of Congress.

<sup>47</sup> Cf. STRANG, *supra* note 6, at 10 (collecting the remarkable, emerging variance among originalism’s proponents regarding the definition of originalism).

<sup>48</sup> See WURMAN, *supra* note 29; ILAN WURMAN, <https://isearch.asu.edu/profile/3325418> [<https://perma.cc/5PDN-3K6X>] (last visited Dec. 30, 2019).

<sup>49</sup> See WURMAN, *supra* note 29, at 6 (“We will thus have answered both questions in our inquiry. We can conclude that we must be originalists because the nature of language and our legal system require it, and that the original Constitution is legitimate and worthy of our obedience because we like what it says.”).

<sup>50</sup> *Id.* at 11.

<sup>51</sup> Cf. LAWRENCE SOLUM AND ROBERT W. BENNETT, *CONSTITUTIONAL ORIGINALISM* 38, 40 (2011).

<sup>52</sup> See WURMAN, *supra* note 29, at 21.

as a fixed series of laws,<sup>53</sup> that the framers were originalists, proof for which he provides by relying upon statements from James Madison and from the *Federalist Papers*;<sup>54</sup> and that originalism is better than other theories of constitutional interpretation which fail to cabin otherwise unfettered judicial policy-making discretion.<sup>55</sup>

In waging this defense, *A Debt Against the Living* exhibits the same remarkable feature of thinking that it shares with the most dedicated proponents of originalism: the failure to understand and describe our history.<sup>56</sup> The feature is remarkable because the interpretive methodology of originalism, in whatever (of the now myriad) of its iterations, purports to rely upon a forensic understanding of our historical past in order to achieve interpretive outcomes it claims are the most just.<sup>57</sup>

Wurman goes further. He puts the American citizen of today in a position of subjugation to the founding generation by claiming that Americans today are under a debt to the founding generation and that debt requires us “to obey and abide by” the Constitution it produced.<sup>58</sup> Wurman’s defense of this definition of this

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<sup>53</sup> *Id.* at 27.

<sup>54</sup> *Id.* at 41–43.

<sup>55</sup> *Id.* at 121–29.

<sup>56</sup> There is irony in this. See McConnell, *supra* note 24, at 115 (“Theory and history have an uncomfortable relation.”). This curious feature even extends to those who theorize about originalism and yet appear unaware that they have entered philosophical territory that long predates them. See Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1330 (2017) (“Yet the authors [two originalism proponents] write as if those debates [about positivist and antipositivist notions about the law] never happened—as if the questions were never raised, let alone answers to them offered and challenged.”).

<sup>57</sup> See SOLUM & BENNETT, *supra* note 51, at 2–3 (“The second idea that forms part of the core of contemporary originalism is that sound interpretation of the Constitution requires the recovery of *original public meaning*. Although the first generation of originalists focused on the original intentions of the framers, contemporary originalists believe that the original public meaning of the Constitution is the meaning that the words and phrases had (or would have had) to ordinary members of the public. So when we read the Constitution of 1789, our question should be, How would an ordinary American citizen fluent in English as spoken in the eighteenth century have understood words and phrases that make up its clauses?”).

<sup>58</sup> See WURMAN, *supra* note 29, at 3. Perhaps Wurman has identified the wrong segment of the population to which we are indebted in light of the extent to which the United States built wealth based upon slave labor. In any case, Wurman does not seem to be aware of claims by historians that “written constitutions often function as ‘weapons of control’ rather than ‘documents of liberation and rights’” nor that such claims have been made in regard to the “original Constitution.” FONER, *supra* note 33, at 2 (quoting historian Linda Colley).

methodology takes form as a survey of the many arguments deployed in favor of originalism as well as a response to some arguments leveled against originalism.<sup>59</sup> But this survey is manifestly incomplete. For instance, Wurman relies upon a limited presentation of the views of James Madison on originalism, without acknowledging that leading constitutionalists, such as Dean John Manning of Harvard Law School, have questioned this approach from one perspective.<sup>60</sup> He also does so without having discovered what Professor Gienapp has uncovered in regard to Madison's views on constitutional interpretation, views that undermine the originalist argument.<sup>61</sup>

More remarkably, Wurman ignores Justice Marshall's obvious historical point about *the Constitution*:<sup>62</sup> that Marshall and Wurman are not even talking about the same legal document.<sup>63</sup> Setting aside Justice Marshall's attack on the wisdom and virtue of the framers and their perspective on sound and moral governance, a theme

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<sup>59</sup> See, e.g., WURMAN, *supra* note 29, at 21 ("Originalism was initially justified . . . on the ground that it is the only theory consistent with the legitimate *democratic* Constitution") (emphasis in original); *id.* at 29 (describing originalism as consistent with the underlying values of reducing a constitution to writing); *id.* at 39 (describing originalism as adaptable to the times); *id.* at 55–57 (responding to critics of originalism like Jack Balkin and John Hart Ely).

<sup>60</sup> See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1338 (1998) ("Because the historical record offers no evidence that *The Federalist* was written or received with the understanding that Publius was declaring the intent of the framers or ratifiers, it could not have been the product of an implicit delegation to Publius to specify meaning outside of the process prescribed by Article VII.").

<sup>61</sup> JONATHAN GIENAPP, *THE SECOND CREATION* 58 (2018).

<sup>62</sup> The very notion of what constituted a "constitution" was subject to uncertainty during the founding period. See LARRY KRAMER, *THE PEOPLE THEMSELVES* 9 (2004) ("The word 'constitution' had several meanings in the seventeenth and eighteenth centuries.").

<sup>63</sup> See WURMAN, *supra* note 29, at 83 ("The Founders helped create the only nation on the face of the earth that was, in Lincoln's words, conceived in liberty and dedicated to the proposition that all men are created equal. They overcame—for the most part—the passions and prejudices of a turbulent time. I can think of no constitution that has been more successful or more enduring."). But see JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 99 (2018) ("The Declaration that Congress did adopt was a stunning rhetorical feat, an act of extraordinary political courage. It also marked a colossal failure of political will, in holding back the tide of opposition to slavery by ignoring it, for the sake of a union that, in the end, could not and would not last."); JOSEPH J. ELLIS, *AMERICAN DIALOGUE: THE FOUNDERS AND US* 14 (2018) ("This is the place to begin, not end, our investigation of the Jefferson legacy, namely with the realization that our most eloquent 'apostle of freedom' is also our most dedicated racist, and that in his mind those two convictions were inseparable."); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* ix (1976) ("We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion.").

that is central to this essay, Justice Marshall noted that if one were to lay out the operative provisions of the Constitution of 2019 next to the Constitution as originally enacted, one would find that it is not the same Constitution that the United States ratified between 1787 and 1789—not even remotely so.<sup>64</sup>

The alterations to the text that Wurman ignores are staggering.<sup>65</sup> They include substantial changes to the text of the governing framework of the United States that took place *after* 1789.<sup>66</sup> These textual alterations include the addition of many substantial individual rights (e.g. the Bill of Rights), each with its own complex and diverse historical foundation.<sup>67</sup> They also include the Reconstruction Amendments

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<sup>64</sup> See, e.g., Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1, 6–8 (2003) (identifying five provisions of the original constitution that “directly sanctioned slavery” and describing additional provisions that “indirectly guarded slavery”).

<sup>65</sup> See, e.g., FONER, *supra* note 33, at xiv–xviii (setting out in full the complete text of the thirteenth, fourteenth and fifteenth amendments). If one were to compound these errors with Wurman’s failure to consider the interplay between state and federal constitutional law, Wurman’s account of the history of American constitutional law becomes even more implausible. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 3 (2018) (describing the “complex interaction between the state and federal constitutions in construing similar state and federal constitutional guarantees.”); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L. J. 1304, 1311 (2018) (“What [Judge Sutton’s] narrations of those issues show is not a proliferation of state-specific discourses, but rather a single discourse in which state and federal courts are jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning.”). The interplay between state and federal constitutions, and between the many other sources of government power, render the question of what is our constitution a far more complicated question than Wurman acknowledges. See GARDNER, *supra* note 7, at 89 (discussing the “possibility of a written constitution” for the UK, which constitutes “three distinct municipal systems” governed by a series of written laws given various priority by the actors who interpret and enforce them.).

<sup>66</sup> See, e.g., FONER, *supra* note 33, at xiv–xviii (setting out in full the complete text of the thirteenth, fourteenth and fifteenth amendments).

<sup>67</sup> See *id.* at xix–xxi (2019) (summarizing the massive effects of the reconstruction amendments on American law, none of which Wurman acknowledges); see also RAKOVE, *supra* note 32, at 9 (“But this latitudinarian attitude becomes less defensible if originalism seeks to provide something more than an informed point of departure. For the argument that original meaning, once recovered, should be binding presents not only a strategy of interpretation but a rule of law. It insists that original meaning should prevail—regardless of intervening revisions, deviations, and the judicial doctrine of *stare decisis*—because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787–88); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 98–99 (1980) (“What has happened to the Constitution in the second century of our nationhood, though ground less frequently plowed, is most instructive on the subject of what jobs we have learned our basic document is suited to. There were no amendments

and the delayed enfranchisement of half of the adult population, women.<sup>68</sup>

These revolutionary changes share at least one common quality: none were presented to the discreet voting-block constituting “the Framers who wrote the Constitution in 1787 and by the public that ratified it between 1787 and 1789” at the conventions preceding the adoption of the Constitution in 1787.<sup>69</sup> Wurman’s approach, an approach that endorses the interpretive methodology of Attorney General Edward Meese in 1985,<sup>70</sup> thus relies on siloed history from one of many important historical periods and so fails to acknowledge the basic historical facts about the Constitution.<sup>71</sup>

One historian has even postulated that the perspective Wurman and Meese would have us obey died more than a century before either sought to resurrect it through originalism.<sup>72</sup> The consequence of this approach to selling originalism<sup>73</sup> is that Wurman is unable to persuasively present to his readers arguments about how the original public meaning of the Constitution in 1789 should interface with a very different Constitution, as it exists today, in 2020.<sup>74</sup> In effect, Wurman would have

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between 1870 and 1913, but there have been eleven since. Five of them extended the franchise” including the extension of the right to vote to women in the Nineteenth Amendment).

<sup>68</sup> *Id.*

<sup>69</sup> WURMAN, *supra* note 29, at 11.

<sup>70</sup> *Id.* (quoting Meese as stating, “Those who framed the Constitution chose their words carefully; they debated at great length the minutest point. The language they chose meant something.”). At least one scholar has pointed out that the framers were purposely “unclear” in regard to constitutional text, even deceptively so. See MICHAEL KLARMAN, *THE FRAMERS’ COUP* 264–65 (2016) (In the place of discussing slavery, the framers “insisted that the document use euphemisms, such as ‘other persons’” causing John Dickinson of Delaware to accuse the document of concealing a shameful principle the framers sought to entrench.).

<sup>71</sup> See Emil Kleinhaus, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 *YALE L.J.* 121, 122 (2000) (“The originalist project, by all accounts, relies heavily on historical analysis.”).

<sup>72</sup> See RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS* 1 (2017) (“In 1865 an older American nation had died, a casualty of the Civil War . . . How the United States at the end of the nineteenth century turned out to be so different from the country that Lincoln conjured and Republicans confidently set out to create is the subject of this book.”).

<sup>73</sup> See Greene, *supra* note 5, at 659 (coining the term and describing originalism as an “item[] of political commerce”).

<sup>74</sup> See, e.g., Siegel, *supra* note 14, at 949 (proposing a synthetic relationship between the 14<sup>th</sup> Amendment and the later enacted 19<sup>th</sup> Amendment); see also LESSIG, *supra* note 5, at 16 (“A constitution is text. Any text gets written against a background. Call that background its context. That includes a host of assumptions that inform any reading of the text. Those assumptions are stuff against which the text has meaning. Those assumptions change. And the one truly difficult

us ignore the voices and perspectives of millions and millions of Americans who lived after 1789, including hundreds and hundreds of thousands of men and women who fought wars to establish, defend, and protect this nation.<sup>75</sup> It is not difficult to see the dishonor in this approach, to say nothing about the manner in which it is deeply undemocratic.<sup>76</sup>

Wurman avoids this history even as he devotes a chapter to discussing whether it is even possible to use history in disputes over the application of constitutional principles.<sup>77</sup> In discussing the subject, Wurman divides the world into originalists on the one hand and historicists and relativists on the other.<sup>78</sup> Wurman frames his approach as standing up for a defense of historical truth, aligning himself with the

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problem of constitutional interpretation is to figure out when the change. Do you read the text as it would have been read originally, imagining yourself back in the original context of interpretation? Or do you read the text as it would be read today, ignoring the changes in these background assumptions? Or do you ignore some changes but recognize others? And you're selective, what rule determines the criteria for selectivity?"

<sup>75</sup> See, e.g., Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, NY TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/E4EV-97QW>] ("Without the idealistic, strenuous and patriotic efforts of black Americans, our democracy today would most likely look very different—it might not be a democracy at all. The very first person to die for this country in the American Revolution was a black man who himself was not free."); see also Vann R. Newkirk, II, *This Land Was Our Land: How Nearly 1 Million Black Farmers were Robbed of Their Livelihood*, THE ATLANTIC 72, 80–81 (Sept. 2019) ("World War II transformed America in many ways. It certainly transformed a generation of Southern black men. That generation included Medger Evers, a future civil-rights martyr; assassinated while leading the Mississippi NAACP; he served in a segregated transportation company in Europe during the war. . . . These men were less patient, more defiant, and in many ways more reckless than their fathers and grandfathers had been.").

<sup>76</sup> See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("It was enough for [the founders] for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.").

<sup>77</sup> See WURMAN, *supra* note 29, at 102 ("Finally, perhaps a more interesting attack on the use of history is the claim that there's no such thing as objective historical knowledge at all. This notion is rooted in two philosophical innovations of the nineteenth and twentieth centuries: historicism and relativism.").

<sup>78</sup> See *id.* at 102–03. See also FRED BAUMANN, *Historicism and the Constitution*, in CONFRONTING THE CONSTITUTION 286 (Allan Bloom, ed. 1990) ("Historicism, which denies the possibility of universal human principles, has incited a number of characteristic American responses.").

political philosopher, Leo Strauss, a powerful critic of historicism and relativism.<sup>79</sup> But he creates a strawman by avoiding the most obvious challenge to his own argument. He fails to consider the perspective of Justice Marshall,<sup>80</sup> an advocate for historical truth<sup>81</sup> and universal principles of liberalism, who delivered a history-based argument against originalism.<sup>82</sup>

In this regard, Wurman's scholarship steps backward from acknowledgements made by prior defenses of originalism, including from scholars such as John O. McGinnis of Northwestern Law School and Michael B. Rappaport of University of San Diego, leaders in this field. Wurman fails to address Justice Marshall's critique even as these scholars raise these issues with deep concern.<sup>83</sup> Having ignored

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<sup>79</sup> See WURMAN, *supra* note 29, at 104–05.

<sup>80</sup> This perspective included living through, and assessing, the nightmare of judicial passivity and its implications for our laws and the standing of traditional due process in the face of a coerced confession elicited after shocking, racist police brutality, a perspective entirely absent from Wurman's account of constitutional history. See Thurgood Marshall, *Lyons v. Oklahoma* (1944), THURGOOD MARSHALL, HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES 3–9 (Mark V. Tushnet ed. 2001) (the United States Supreme Court affirmed the conviction of an African-American man whom Oklahoma officials beat a confession out of under conditions that would constitute torture).

<sup>81</sup> See also LOEWEN, *supra* note 16, at xvii (“When people say to me that there’s no such thing as truth, I sometimes reply with a little schtick: ‘Right And the Civil War begin in 1876, in Nevada. It grew from a pay dispute between the Union Pacific Rail Road and its Chinese workers.’”).

<sup>82</sup> See, e.g., Lucius J. Barker, *Thurgood Marshall, the Law, and the System: Tenets of an Enduring Legacy*, 44 STAN. L. REV. 1237, 1238 (1992) (“To Marshall, the law was animated by aspirations enshrined in the Declaration of Independence; values that transcended the law’s temporal function of regulating behavior vis-à-vis one another.”). See also RICHARD FALLON, JR., LAW, LEGITIMACY AND THE SUPREME COURT 30–31 (2018) (“When we judge the moral legitimacy of political regimes . . . we must consider whether the severe disadvantaging of some group relative to others might make a legal order morally illegitimate—even in what I have called the minimal sense—with respect to members of those disadvantaged groups but not to other members of the community. An example may come from the pre-Civil War legal regime in the United States . . . I would confidently deny that it imposed any of the obligations on enslaved African Americans that we ordinarily regard the notion of moral legitimacy importing. . . . If this conclusion is correct, it has potentially uncomfortable implications for well-off Americans, and especially well-off whites such as me: we need to take seriously the question whether the American legal system is minimally morally legitimate today in its relationship to minorities groups in our society.”).

<sup>83</sup> See MCGINNIS & RAPPAPORT, *supra* note 5, at 9–10 (discussing Justice Marshall's critique as pointing and noting that, “[s]trikingly . . . originalists have not substantially addressed the more pervasive critique—that the original meaning of a document built on exclusion cannot be a guide to constitutional interpretation in a society where that exclusion is almost universally condemned as unjust and is indeed rightly seen as the original sin of the United States.”); see also *id.* at 100–115

philosophical allies, it is not surprising that Wurman fails to face the charge from scholars such as Jamal Greene of Columbia Law School that originalism has a race problem that originalists like Wurman so often ignore.<sup>84</sup>

Perhaps this perspective explains why Wurman also fails to satisfactorily address some of the more profound methodological problems with his thesis. For instance, in the succeeding chapter in which Wurman addresses arguments that originalism is inconsistent with *Brown v. Board of Education*,<sup>85</sup> he leaves Marshall's challenge out of his discussion all together.<sup>86</sup> Of course, Marshall was the architect of that great decision as its lead litigator.<sup>87</sup> The omission is remarkable because

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(discussing responses to this critique, which rest on the desire to uphold supermajoritarian principles the scholars deem consistent with a good constitution). *But see* WURMAN, *supra* note 29, at 147 n. 58 (acknowledging and citing to McGinnis and Rappaport but ignoring their observations). McGinnis and Rappaport offer an unsatisfying defense, themselves. While beginning the process of incorporating evil history into their assessment of originalism, they argue that supermajoritarianism is a value within the constitution that saves it and renders it a "good constitution." They do not address how supermajoritarianism delayed civil rights legislation for almost one hundred years as a result of the operations of the United States Senate. *See* Catherine Fisk and Erwin Chermersinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199–200 (1997) ("Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters [in the United States Senate] played a major role in blocking measures to prohibit lynching, poll taxes and race discrimination in employment, housing, public accommodations and voting."). They do not appear to address concerns about the supermajoritarian "entrenchment" of evil more generally within the U.S. Constitution more generally. *See* PAUL STARR, ENTRENCHMENT 66 (2019) ("Even after slavery had taken root in the colonies, Americans might have abolished it when they achieved independence and framed a new political system ostensibly on the principles of liberty and equality. The Revolution did lead, over several decades, to the emancipation of slaves in the states north of Delaware, but the Constitution entrenched the power of southern slaveholders in the national government and, by doing so, entrenched slaves societies in the southern states.").

<sup>84</sup> Cf. Greene, *supra* note 40, at 521 ("So understood, the divide between originalists and living constitutionalists is between those who believe we are at our best when we are who we have been and those who believe we are at our best when we are who we might become.").

<sup>85</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>86</sup> *See* WURMAN, *supra* note 29, at 108–16. One wonders if this omission illustrates an overall contempt for one of the greatest, most accomplished and courageous attorneys in the history of the United States.

<sup>87</sup> *See* GILBERT KING, DEVIL IN THE GROVE 2 (2012) ("By the mid-1940s, Marshall, the grandson of a mixed-race slave named Thorney Good Marshall, was engineering the greatest social transformation in America since the Reconstruction era. He had already devoted more than a decade of his career to overcoming the 'inherent defects' of a Constitution that allowed, by law, social injustices against blacks who had been denied not only the right to vote, but also equal rights and opportunities in education, housing and employment. With his far-reaching triumphs in

Marshall's most famous accomplishment, *de jure* desegregation through court decisions, stands as the singular counter-monument to the claims of originalism.<sup>88</sup> Perhaps even more remarkable, nowhere in Wurman's book does he discuss the topic of gender discrimination. And so, just as he sidelines the accomplishments of Justice Marshall, he sidelines the remarkable work of Justice Ruth Bader Ginsburg, whose victories in the area of equal protection and gender discrimination pose similar, unanswerable challenges to the originalist methodology as Wurman defines it.<sup>89</sup> Instead, Wurman's writing appears to approach the framers' influence over constitutional methodology as a form of worship, disconnected from the reality of the substantial influence Marshall, Ginsburg, and so many other legal titans of the past century continue to have on our constitutional law.<sup>90</sup>

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landmark cases he argued before the U.S. Supreme Court, Thurgood Marshall would indeed redefine justice in a multiracial nation and become, as one civil rights pioneer described him, the Founding Father of the New America.”); RICHARD KLUGER, *SIMPLE JUSTICE* 563 (2004) (describing Marshall's preparations for oral arguments in the case); *see also* RAWN JAMES, JR., *ROOT AND BRANCH* 230 (2010) (“For a week he had been camped in a Washington hotel room, and for months he had been orchestrating a research campaign that eclipsed the Promethean effort preceding *Brown's* first oral argument one year ago.”).

<sup>88</sup> *See* STRANG, *supra* note 6, at 21; Hon. David H. Souter, *Harvard Commencement Remarks*, THE HARVARD GAZETTE (May 27, 2010), <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> [<https://perma.cc/4D2M-UN44>] (“For those whose exclusive norm for constitutional judging is merely fair reading of language applied to facts objectively viewed, *Brown* must either be flat-out wrong or a very mystifying decision. Those who look to that model are not likely to think that a federal court back in 1896 should have declared legally mandated racial segregation unconstitutional . . . As I've said elsewhere, the members of the Court in *Plessy* remembered the day when human slavery was the law in much of the land. To that generation, the formal equality of an identical railroad car meant progress.”). Originalist proponents have a hard time respecting even this accomplishment, suggesting that *Brown* is a decision that is part of decisions that litter our jurisprudence as if it is a decision that could be discarded as some sort of trash.

<sup>89</sup> *See* Ginsburg, *supra* note 25, at 162–63 (“When the post-Civil War amendments were added to the Constitution, women were not accorded the vote, the right now regarded by the Supreme Court as most basic to adult citizenship. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings. The fourteenth amendment left all that untouched. To the nineteenth century jurist, change in women's status, alteration of laws restricting a woman's options, was state business, not fit subject matter for federal statutory or constitutional resolution.”); *see also* Siegel, *supra* note 14 (describing the history of the suffrage movement as a “lost chapter of our constitutional history”—a charitable description).

<sup>90</sup> *See* WURMAN, *supra* note 29, at 3 (claiming that his book argues that “the Constitution does form a debt against us—against the living generation—that compels us to continue to obey and

The title of the second book this review assesses, Professor Eric Segall's *Originalism as Faith*, would suggest to the reader a critique of originalism that draws similar parallels between religious devotion and historical and scientific denial.<sup>91</sup> Only the smallest portion of the book is devoted to that sort of analysis.<sup>92</sup> The remainder is largely consumed with describing the academic history of originalism, the various ways in which originalism fails to meet its aims, and the ways in which the various iterations of originalism have rendered the methodology indistinguishable from competing interpretive methodologies.<sup>93</sup> Admittedly, Segall, a constitutional law professor at Georgia State University, alludes to the problem presented by Justice Marshall on the first page of his book.<sup>94</sup> Beyond tracking the development of methodologies, however, his is not a book long on an assessment of American history, and it does not devote substantial time to attacking originalism as a morally and historically compromised method of interpretation, compromised, principally, in the ways Justice Marshall described it.<sup>95</sup> Instead, Segall describes the central flaws in the originalist project in terms that assume the

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abide by it today."); Kleinhaus, *supra* note 71, at 130–31 (exploring parallels between originalism and “Catholic” and “Protestant” strains of interpretation).

<sup>91</sup> See SEGALL, *supra* note 30; cf. BALKIN, *supra* note 12, at 7 (“Why use such religious imagery when the project is clearly secular? The reason is that constitutional traditions have much in common with religious traditions, and especially religious traditions that feature a central organizing text that states the tradition’s core beliefs.”).

<sup>92</sup> See SEGALL, *supra* note 30, at 171 (“The first part of this chapter critically reviews Solum’s testimony [in support of the nomination of Justice Gorsuch’s appointment to the United Supreme Court] while the rest suggests that its dogmatism is consistent with how other originalists try to spread the word and keep the faith.”).

<sup>93</sup> See Ilan Wurman, *Originalism’s New Critics, Part 2: Faith*, Claremont Review of Books (Jan. 16, 2019) <https://claremontreviewofbooks.com/digital/originalisms-new-critics-part-2-faith/> [<https://perma.cc/DX7E-CYKB>] (“Segall’s account of originalism in practice, and also of some modern originalists, is undeniably fair, thoughtful and in many ways accurate. Some schools of originalism may very well be hard to distinguish from living constitutionalism.”).

<sup>94</sup> SEGALL, *supra* note 30, at 1 (“America’s founding fathers owned slaves, denied women most basic rights, and inhabited a world devoid of the modern technologies that shape our everyday life.”).

<sup>95</sup> *But see id.* at 28–29 (discussing arguments over the use of original public meaning evidence in *Dred Scott* and noting that “[t]oday, all we can agree on is that the result in *Dred Scott* is horrific by our modern standards.”); *see also id.* at 66 (describing Paul Brest’s attack on originalism, which included the observation that “women and racial minorities were not allowed to take part in the drafting and ratification of the original Constitution and the Reconstruction Amendments” and commenting that this “creates serious problems of democratic legitimacy.”).

opposite.<sup>96</sup> His critique notes that originalism has never been the exclusive or principal mode of interpretation adopted by the United States Supreme Court.<sup>97</sup> He notes that adopting it, now, to the exclusion of all other approaches, would result in unacceptable outcomes, and that recent iterations of originalism (e.g. “inclusive originalism”) appear to undermine original justifications for it as a doctrine.<sup>98</sup> With regard to this last point, he highlights that newer descriptions of originalism, such as “inclusive originalism,” acknowledge that the constitution yields evidence that the original public meaning of its phrases are susceptible to evolving interpretations, rendering originalism indistinguishable from its rival, living constitutionalism.<sup>99</sup>

Recognizing the need for some alternative approach to addressing the question of how to decide cases in a principled way under some better methodology, Professor Segall proposes a “clear error rule.” This rule would strengthen the power of elected officials by permitting judicial review to invalidate legislation only where a “challenged law or practice clearly violates constitutional text.”<sup>100</sup> This solution, ironically, is one Segall argues is consistent with originalist notions of judicial review.<sup>101</sup>

Segall does not appear to acknowledge that his approach would raise questions about whether landmark decisions would survive efforts by elected officials to undermine established constitutional law through legislation to which Segall would grant a presumption of legitimacy. He would have to answer the question, for instance, “What is clear about the application of *Roe v. Wade* or *Planned Parenthood v. Casey*?”<sup>102</sup> in an environment where state legislatures across the country are proposing legislation designed to challenge the decision at various levels of abstraction.<sup>103</sup>

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<sup>96</sup> *Id.* at 3.

<sup>97</sup> *Id.* at 89.

<sup>98</sup> *See, e.g., id.* at 3–5 (summarizing the book’s aims); *id.* at 52 (describing landmark decisions that could not be squared with originalism); *id.* at 82–121 (comprehensive discussion of numerous iterations of originalism).

<sup>99</sup> *Id.* at 104 (“Baude’s definition of originalism, however, is virtually indistinguishable from the non-originalist, ‘living constitution’ approach that supported the liberal Warren Court decisions that the Original Originalists criticized.”).

<sup>100</sup> *Id.* at 13.

<sup>101</sup> *Id.* at 2 (“the founding fathers thought judges should overturn state and federal laws only when such enactments clearly violated the Constitution.”).

<sup>102</sup> 505 U.S. 833 (1992).

<sup>103</sup> *See* Jenny Jarvie, *Conservative states enact abortion bands in hope of overturning Roe v. Wade*, L.A.

Even more problematic to Segall's solution (and to Wurman's thesis), are the findings presented by Professor Jonathan Gienapp, a History professor at Stanford University. These findings attack the core assumption Segall presents to justify his alternative methodology. Where Segall proposes that the founders viewed judicial invalidation of legislative enactments as justified only where a clear conflict between popular enactment and constitutional text arose, Gienapp reveals that the founders doubted that constitutional text would, or could, ever be clear enough to justify a text-centric approach to constitutional interpretation.<sup>104</sup> According to Gienapp's research, James Madison, himself, criticized popular state lawmaking as having led to "reckless and vicious legislation" which he deplored. He sought to remedy what he observed through the creation of a stronger central government and a constitution whose broader principles would stand in contrast to the text-focused practices of ordinary lawmaking.<sup>105</sup> Gienapp links these views to a liberal tradition that doubted the determinacy of words and text and raised concerns about a legal methodology that placed too great a reliance on written text as a means, alone, for drawing manageable boundaries by which to chart a constitutional order.<sup>106</sup>

Gienapp's history goes further, revealing that despite what originalists believe, the founding generation had little shared, ascertainable sense of what the Constitution and its provisions meant before ratifying those provisions, and that post-ratification debates and conduct were necessary to give our constitutional order understandable structure.<sup>107</sup> The use of post-ratification conduct as an

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TIMES (May 11, 2019 6:37 PM) <https://www.latimes.com/nation/la-na-abortion-bans-states-roe-wade-supreme-court-20190511-story.html> [<https://perma.cc/R35S-WYDR>] ("For years, conservatives in Southern and Midwestern states have been passing laws that restrict women's access to abortion" and describing different approaches taken in this regard.).

<sup>104</sup> See GIENAPP, *supra* note 61, at 58 ("But even though the Convention's energies were focused on writing a new constitution, and even though the particular controversies implicated by expanding federal authority heightened awareness of the text's reach, following Madison's sentiments in the 'Vices,' delegates largely refused to imagine the project of writing a constitution through a textual prism.").

<sup>105</sup> See *id.* at 54. See also GORDON S. WOOD, EMPIRE OF LIBERTY 405 (2009) (recounting the negative experiences of early Americans with "[u]nstable, annually elected, and logrolling democratic legislatures" who drafted "laws proliferate in ever-increasing numbers").

<sup>106</sup> See GIENAPP, *supra* note 61, at 45 ("While more immediately focused on semantics and philosophy, Locke, like the reformers who followed him, acutely appreciated how linguistic instability affected social authority, especially the domains of religion and law.").

<sup>107</sup> See *id.* at 9 ("Even though users of the Constitution after 1788 were not engaged in rewriting the document, by breathing life into certain norms and practices of constitutional justification they nonetheless gave an uncertain governing instrument shape and invested it with distinct

accepted part of constitutional interpretation, of course, threatens a principal justification for originalism, the notion that a Constitution becomes “fixed” at a moment in a manner that causes it to have legitimacy as law.<sup>108</sup>

That notion, Gienapp reveals, is not consistent with the more fluid conception of what a constitution was to a government in the eighteenth century, and to the framers who brought the Constitution into existence. According to Gienapp, Americans had lived under the unwritten constitution of Great Britain and “still imagined constitutionalism as they long had, without many of the distinctions we tend to assume they must have drawn.”<sup>109</sup> Americans assumed that “[w]ithout clear rules, linguistic meaning would be governed by everyday practice, so over time, as that usage changed, so too would the meaning of words.”<sup>110</sup> They were wary of the “rule of words” now so fundamental to the originalism methodology.<sup>111</sup> Gienapp thus proposes that the project originalists engage in, the search for fixed meaning, is not a project that can, or could ever, be accomplished on the terms originalists like Wurman have described.<sup>112</sup> Gienapp’s history is not overtly normative and so it is beyond the scope of Gienapp’s project to determine just how far into the future Americans could travel, post-ratification, while fixing the Constitution through post-ratification thought and conduct. The challenge Gienapp poses to originalism is demonstrated by efforts to bury his work rather than confront it.<sup>113</sup>

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kinds of authority.”).

<sup>108</sup> See WURMAN, *supra* note 29, at 96 (“This ultimate interpretive convention—that of liquidating and fixing indeterminate meaning—was thus the most important convention of them all.”).

<sup>109</sup> See GIENAPP, *supra* note 61, at 35.

<sup>110</sup> *Id.* at 43.

<sup>111</sup> *Id.* at 50. Wurman attempts to address these issues but fails to account for the deep and broad anti-textual history Gienapp presents. See Wurman, *supra* note 93.

<sup>112</sup> See Gienapp, *supra* note 61, at 334 (“The irony of the endless search for the original Constitution is that such an inquiry will never reveal a fixed document. These efforts can only expose—should its inquirers be willing to see it—the story of how a contingent set of practices made it possible thereafter to imagine the Constitution in that way, a narrative about how the activities of fixing ended up producing a fascination with fixity.”); see also JOHN BURT, LINCOLN’S TRAGIC PRAGMATISM (2013) (“The ruling values of the constitutional order . . . restlessly and endlessly become, because they are saturated with an implicitness that no particular development of them, no *conception*, suffices to exhaust.”); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019) (“But precedent and originalism do not exhausted the role of historical argument in constitutional law. Constitutional law is also rife with claims of authority by historical practice.”).

<sup>113</sup> See, e.g., STRANG, *supra* note 6, at 11 n.7 (2019) (consigning Gienapp’s work to the bottom of a lengthy footnote as a “counterargument” though it poses a substantial challenge to most of the scholar’s case for originalism).

## II. BLUNTING THE SPREAD OF EVIL HISTORY

Justice Marshall, of course, approached the subjects addressed in each book from a different angle. His critique is both obvious and, somehow, not given primacy in the sorts of contemporary discussions about originalism set forth in the books under review. Marshall argued, at least implicitly, that the sort of analysis that takes place in all three books ignores (or in Segall's case, mentions, but does not pursue at length) the implications of the deep failures of the founding generation. These books therefore cannot answer Marshall's claim that American history should cause us to reject originalism as a methodology because it would rely on perspectives that could not, and would not, be acceptable to Americans in the modern world, for good reason.

The risks of ignoring Marshall's critique of originalism can be re-described in a hypothetical. Imagine you are constructing a theory of interpretation to assist you in construing a law that would prohibit governmental conduct amounting to "cruelty."<sup>114</sup> You have a general sense that the word has to do with mistreatment of some kind, but you also know that people differ as to whether mistreatment is "cruel" or just mistreatment that is not quite "cruel" and may even be justified. Under those circumstances, you concede that the word depends on peoples' notions of just how bad the mistreatment must get before it is considered "cruel."

In interpreting the word, you get to take a poll. The poll asks for definitions. It also asks for a series of narrative examples of what is "cruel." That process will create the boundary lines for the definition of what is "cruel" as it is defined for the purpose of assessing levels of permissible mistreatment under the law. Here is the catch. You do not get to ask your contemporaries about how they would define the term. You do not even get to ask your grandparents, or great-grandparents, or great-great-grandparents.

Instead, you must ask a limited slice of an ancient generation of adult men.<sup>115</sup> These were men who enslaved other men, women and children.<sup>116</sup> They participated

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<sup>114</sup> This is a word to which Frederick Douglass gave definition as a human who experienced cruelty in his own time. See Frederick Douglass, *supra* note 44 ("What, to the American slave, is your 4<sup>th</sup> of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim.").

<sup>115</sup> See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 2 (2d ed. 2003) ("My question, then, is this: Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveholders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?").

<sup>116</sup> See *infra* notes 144–46; see also SHERYLL CASHIN, *LOVING: INTERRACIAL INTIMACY IN AMERICAN AND THE THREAT TO WHITE SUPREMACY* 5 (2017) ("Over three centuries, our nation was caught in

in the mass removal of a native people through calculated deception.<sup>117</sup> They viewed women and children as property.<sup>118</sup> They viewed homosexuality as criminal and immoral.<sup>119</sup> They had not solved polio or small pox, and had a very short life-expectancy.<sup>120</sup> They were not even aware of how bacteria spread within hospitals because of lack of basic sanitary practices.<sup>121</sup> They did not know about the theory of evolution or the theory of relativity. They could not have envisioned modern genetic medicine, game-theory,<sup>122</sup> public choice theory,<sup>123</sup> advances in cognitive

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a seemingly endless cycle of political and economic elites using law to separate light and dark people who might love one another or revolt together against supremacist regimes the economic elites created.”).

<sup>117</sup> See COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON* 13 (2018) (“From cradle to grave Washington inhabited a world built on the labor of African people and on the land of dispossessed Indian people.”); *id.* at 12 (“Washington, more than most, had a hand on the scales and was instrumental in the dispossession, defeat, exploitation and marginalization of Indian peoples.”).

<sup>118</sup> See *supra* notes 25–26; see also CATHERINE MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 116 (2005) (“No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live.”).

<sup>119</sup> See Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J. L. & SOC. CHANGE 237, 263–65 (2013) (describing anti-homosexuality laws in early America); *but see* William N. Eskridge Jr., *The Nineteenth Annual Frankel Lecture: Address: Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1094 (2015) (“In 1868, there was no anti-gay or anti-homosexual caste regime, because there was no social class of gay or homosexual persons.”)

<sup>120</sup> Michael Lewis, *Old Age and Judging*, 47 N.H. B.J. 42, 43 (2006) (describing substantial alterations to life expectancy after 1860 and that almost half of the population born in that year died before reaching the age of 65) (footnote omitted) (citations omitted).

<sup>121</sup> Oliver Wendell Holmes, *The Contagiousness of Puerperal Fever*, 1 NEW ENG. Q.J. OF MED. & SURGERY 503, 503–30 (1843).

<sup>122</sup> Randal C. Picker, *An Introduction to Game Theory and the Law*, (Coase-Sandor Institute for Law & Econ., Working Paper No. 22, 1994) (“Game theory has emerged to augment the standard, polar approaches of pure competition and monopoly . . . . A definition might be useful; as a rough cut, try: *game theory is a set of tools and a language for describing and predicting strategic behavior.*”).

<sup>123</sup> See Daniel Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 873–75, 878–79 (1987) (providing general discussion of the subject).

psychology,<sup>124</sup> or information technology.<sup>125</sup> They lived by candlelight<sup>126</sup> and traveled by horse. They adopted views of international law and the behavior of public actors that would justify conduct we would now consider war crimes.<sup>127</sup> They did not have the benefit of any lessons about human behavior arising from the Civil War, the Industrial Revolution, the Gilded Age,<sup>128</sup> Jim Crow, World War I, the American eugenics movement,<sup>129</sup> the Holocaust, World War II, Japanese American

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<sup>124</sup> Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 LOY. U. CHI. L.J. 1377, 1377–78 (2013) (implications of research to classic rationalist modes of thinking); Linda Hamilton Krieger, *The Content of our Categories*, 47 STAN. L. REV. 1161, 1164–65 (1995) (arguing that failures in anti-discrimination law “stems from the assumption that disparate treatment discrimination, whether conscious or unconscious, is primarily motivational rather than cognitive, in origin.”).

<sup>125</sup> See Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*, 130 HARV. L. REV. F. 61, 61 (2016) (“The history of privacy is deeply intertwined with the history of technology.”).

<sup>126</sup> Cf. Elizabeth Palermo, *Who Invented the Light Bulb?*, LIVE SCIENCE (Aug. 17, 2017), <https://www.livescience.com/43424-who-invented-the-light-bulb.html> [<https://perma.cc/Y8JJ-VNGA>] (describing the history of the light bulb, which did not become commercially successful until the late 19<sup>th</sup> century).

<sup>127</sup> OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS* xvi, 11–12, 24 (2017) (describing the “old world order” as advocating “might is right” in international relations).

<sup>128</sup> WHITE, *supra* note 72, at 2–3 (“[T]he Gilded Age begins in 1865 with Reconstruction and ends with the election of William McKinley. This period for a long time devolved into historical flyover country. . . . Such neglect has changed with recent scholarship that has revealed a country transformed by immigration, urbanization, environmental crisis, political stalemate, new technologies, the creation of powerful corporations, income inequality, failures of governance, mounting class conflict, and increasing social, cultural and religious diversity.”).

<sup>129</sup> See DANIEL OKRENT, *THE GUARDED GATE* 8 (2019) (“The scientific colossus that eventually blossomed in Cold Spring Harbor, and that, along the way would develop the intellectual arguments for limiting immigration to the United States by country of origin, began life in 1890 as the biological laboratory of the Brooklyn Institute of Arts and Sciences. . . .”); NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 34 (2006) (“Perhaps the eugenics movement’s most successful initial inroads into American society involved the forced sterilization of the mentally ill.”); DANIEL J. KEVLES, *IN THE NAME OF EUGENICS* (1995 ed.) (“The specter of eugenics hovers over virtually all contemporary developments in human genetics. . . . During the heyday of eugenics—much of the first half of the twentieth century—social prejudice often overwhelmed scientific objectivity in the investigation of human genetics. Social distinctions of race and class were commonly attributed to differences in biological merit.”); see also Andrew Solomon, *The Dignity of Disabled Lives*, NY TIMES (Sept. 2, 2019) <https://www.nytimes.com/2019/09/02/opinion/disabled-human-rights.html> [<https://perma.cc/8VT6-8QV4>] (“The eugenic movement spearheaded by Francis Galton in England in the late Victorian period reached a culmination in the view that if you got rid of the misfits, you could breed a pure, advantaged race.”).

Internment, the Korean War, the Civil Rights movement, the Vietnam War, the wars in Iraq and Afghanistan, Russian incursions into our democracy that threaten our national security,<sup>130</sup> and efforts by our executive branch to deploy foreign leaders in the Ukraine to prosecute political opponents.<sup>131</sup>

A critique of originalism leveled from Marshall's perspective might ask: Do you believe that such a poll that would ignore all of this information, evidence, and all of the perspectives from all of the people who contributed to advances in so many fields (including some hard won through great wars and movements) would yield opinions that you would want to live by?<sup>132</sup> Would it yield interpretive consequences you could justify with respect to principles of justice?<sup>133</sup> His answer would appear to be "no." Yet this is the very paradigm originalists demand of Americans as they interpret concepts like "cruelty" in the most fraught legal situations we see presented to our courts.<sup>134</sup>

Consider Justice Gorsuch's observation in *Bucklew v. Precythe* last term, where he used as evidence of the constitutional status of capital punishment, that "death

<sup>130</sup> David E. Sanger & Catie Edmondson, *Russia Targeted Election Systems in All 50 States, Report Finds*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/russian-hacking-elections.html> [<https://perma.cc/VH8J-3ZHC>].

<sup>131</sup> At least one conservative justice has mocked this notion. See David Gans, *Justices Scalia, Alito Square Off on Originalism*, BALKINIZATION (Nov. 4, 2010) <https://balkin.blogspot.com/2010/11/justices-scalia-alito-square-off-on.html> [<https://perma.cc/Q3CK-JZXV>] ("Mocking Justice Scalia's approach, Justice Alito shot back, telling California's Deputy Attorney General that 'what Justice Scalia wants to know is what James Madison thought about video games' and 'if he enjoyed them.'"). See Andrew E. Kramer, *Ukraine's Zelensky Bowed to Trump's Demands, Until Luck Spared Him*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/world/europe/ukraine-trump-zelensky.html> [<https://perma.cc/7KZ4-VM8J>].

<sup>132</sup> Cf. Rosa Brooks, *Constitution in Crisis, Has America's Founding Document Become the Nation's Undoing*, HARPER'S, Oct. 2019, at 26 ("After everybody has a chance to talk about how great it is that the United States has this very, very old written constitution, I ask [my students] how they would feel if their neurosurgeon used the world's oldest neurosurgery guide, or if NASA used the world's oldest astronomical chart to plan space-shuttle flights, and they all get quiet.").

<sup>133</sup> To say nothing of the choices you might make if you were, as you may be, consigned to some level of disadvantage in this world. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (1971) (Discussing the "original position" and its "justification."); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 183 (2013 ed.) ("A *Theory of Justice* is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy . . . Political philosophers now must either work within Rawls' theory or explain why not.").

<sup>134</sup> Cf. JILL LEPORE, *THIS AMERICA: THE CASE FOR THE NATION* 47 (2019) ("Also, looking to the question of African slavery, he wondered what other nation in the world was guilty of stealing the people of another nation 'to till their grounds, and welter out the days under the lash with hunger and fatigue.'") (quoting William Apess, *An Indian's Looking-Glass for the White-Man* (1833)).

was ‘the standard penalty for all serious crimes’ at the time of the founding.”<sup>135</sup> Nothing in Justice Gorsuch’s methodology permits the further observation that a similar approach was deployed in Nazi Germany by Nazi legal theorists.<sup>136</sup> So nothing in his opinion weighs whether such information would or should impact his reliance on practices at the time of the founding.<sup>137</sup> The methodological choice he made in order to invoke originalism, which is also a moral choice given the methodological alternatives to Gorsuch’s originalism,<sup>138</sup> is to ignore this information in rendering legal conclusions that impact the lives of his contemporaries.<sup>139</sup>

Disturbingly, Justice Gorsuch, applying originalism, appears to revel in facts about the pain the founding generation inflicted on its fellow humans, which he describes in visceral detail.<sup>140</sup> In the process, Justice Gorsuch makes no room for the special, racial symbolism of hanging in this country even though lynching<sup>141</sup> has

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<sup>135</sup> See *Bucklew*, slip op. at 3.

<sup>136</sup> Brief of Respondents at 42–43, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151).

<sup>137</sup> See HERLINDE PAUER-STUDER & J. DAVID VELLEMAN, *KONRAD MORGAN: THE CONSCIENCE OF A NAZI JUDGE* 26–28 (2015) (describing the undifferentiated approaches to sentencing for crimes promoted by Nazi theorists). It is also a moral choice that was rejected by state constitutionalists. See N.H. CONST. part I, art. 18 (“No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguished severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses.”).

<sup>138</sup> As distinguished from other formulations. Cf. CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* 5–6 (2018 ed.) (“One further point: it is the cardinal principle at least of American constitutional interpretation that the Constitution is to be interpreted so as to be workable and reasonable. This principle does not collide with respect for the ‘intent of the Framers,’ because their transcendent intent was to build just such a Constitution.”).

<sup>139</sup> See Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 *FORDHAM L. REV.* 905, 913 (2015) (“Perhaps most pernicious, though, ultimately more readily detected, is a further misuse of history that I more recently termed history ‘bullshit.’ . . . Applied to originalism, the idea means an assertion about the past that ultimately has no concern for whether the claim is correct or incorrect, but instead considers whether the claim offers the kinds of originality, boldness, and cleverness that lead either to academic or Article III life tenure.”).

<sup>140</sup> *Bucklew*, slip op. at 11 (“More often it seems the prisoner would die from loss of blood flow to the brain, which could produce unconsciousness usually within seconds, or suffocation, which could take several minutes.”).

<sup>141</sup> See Michele Norris, *So you want to talk about lynching? Understand this first.*, *WASH. POST* (Oct. 23, 2019), <https://www.washingtonpost.com/opinions/so-you-want-to-talk-about-lynching->

provided our most barbaric and upsetting evidence (including through disturbing photographic images) of racial violence.<sup>142</sup> For Justice Gorsuch, nothing that we have learned, since, about ways to execute people without suffocating them to death over a period of minutes, would cause him to discount this information in shaping our law.<sup>143</sup>

The choice to rely upon the values and perspectives of the founding generation faces an even more pervasive moral challenge ignored by Wurman, Gorsuch, and (largely) by other originalists. The problem of American slavery, and the fact that the founding generation was “inextricably bound up in it,” is a problem that looms so large, exerting so much pressure upon our celebration of that time, that it is not altogether surprising that so many choose to ignore it.<sup>144</sup> Yet the constitutional bargains that the founders made<sup>145</sup> and which the founding generation ratified, set

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understand-this-first/2019/10/23/c5a5fd2a-f5ae-11e9-ad8b-85e2aa00b5ce\_story.html [https://perma.cc/XF9D-84TV] (“A lynching was often accompanied by long-term amnesia. The people behind those acts would eventually forget this history, forget that this is what transpired in the town square or tobacco field, forget that they were engaged in what would now pass as evil because, jeez, who would want to claim that?”).

<sup>142</sup> See, e.g., Randall Kennedy, *Foreword* to THURGOOD MARSHALL, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES 8 (2001) (“Some of the evils against which Marshall railed are safely interred in American history. One of these is the ghastly phenomenon of lynching—murder perpetrated by a group to punish people for perceived violations of law or custom. Between the 1880s and the 1930s, particularly in the South, white supremacists deployed lynching as a weapon of racial intimidation.”).

<sup>143</sup> He is not alone among originalists in applying a particularly brutal approach to constitutional law. See COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 15 (2019) (“[Justice] Thomas’s is a voice that unsettles. His beliefs are disturbing, even ugly; his style is brutal.”). For a compelling analysis of the connection between original constitutional practice and devastating modern governmental human rights abuses, see Jamal Greene & Elora Mukherjee, *What Slavery Can Teach Supreme Court Justices About DACA*, L.A. TIMES, (Nov. 13, 2019), <https://www.latimes.com/opinion/story/2019-11-13/daca-supreme-court-slavery-constitution> [https://perma.cc/E4VW-LE2Q] (drawing analogy between antebellum slave capture and the detention of children by U.S. Homeland Security officials).

<sup>144</sup> See DELBANCO, *supra* note 8, at 11 (“It begins with the nation’s founding because the founding fathers themselves were inextricably bound up in it. It has a large and varied cast of characters, starting with such architects of the Republic as James Madison, Alexander Hamilton, and Benjamin Franklin as well as Washington and Jefferson.”); see also PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 3–35 (2014) (tracking the history of the United States Constitution to the desire to perpetuate slavery as a legal practice with political benefits to the American South).

<sup>145</sup> See KLARMAN, *supra* note 70, at 264 (describing how slavery played an “enormous role” in the proceedings of the Constitutional Convention).

the stage for the expansion of slavery<sup>146</sup> and the failure of our political system to eliminate slavery through political means.<sup>147</sup>

The root and branch of the American history of slavery is a study in human devastation. According to one account: “British formed settlements in North America, and in the West Indies; and these were stocked with slaves. From 1680 to 1786, two million, one hundred and thirty thousand negroes were imported into the British colonies!”<sup>148</sup> The means by which slaves were imported into the colonies constituted the very height of ignominy.<sup>149</sup> The number of African slaves would rise to 12.5 million by some accounts.<sup>150</sup>

As the United States developed out of the Revolution, and moved toward the adoption of the original Constitution, slavery dug itself even deeper into on American soil. A generation of great political leaders whose views, according to originalists (like Wurman) we would be bound to follow in 2020, would have been expected to remedy, rather than extend, what we would now call crimes against humanity.<sup>151</sup> That did not happen.

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<sup>146</sup> See *id.* at 302–03 (“The best evidence of how contemporaries viewed the Constitution with regard to slavery lies . . . in what was *not* said. In South Carolina and Georgia, which were the states most strongly committed to the indefinite perpetuation of slavery, very few voices criticized the Constitution as insufficiently protective of the institution.”).

<sup>147</sup> See DELBANCO, *supra* note 8, at 2 (“This book tells the story of how that composite nation came apart. There were many reasons for the unraveling, but one in particular exposed the idea of the “united” states as a lie. This was the fact that enslaved black people, against long odds, repeatedly risked their lives to flee their masters in the South in search of freedom in the North. Fugitives from slavery ripped open the screen behind which America tried to conceal the reality of life for black Americans, most of whom lived in the South, out of sight and out of mind for most people in the North.”). The problem of American slavery was simply too difficult for the pre-Civil War generation to solve. See *id.* at 10 (“‘Humanity cries out against this vast enormity,’ Herman Melville wrote in 1849, ‘but not one man knows a prudent remedy.’”).

<sup>148</sup> LYDIA MARIA CHILD, *AN APPEAL IN FAVOR OF THAT CLASS OF AMERICANS CALLED AFRICANS* 3 (1833).

<sup>149</sup> *Id.* at 4 (“Houses are broken open in the night, and defenseless women and children carried away into captivity. If boys, in the unsuspecting innocence of youth, come near the white man’s ships, to sell vegetables or fruit, they are ruthlessly seized and carried to slavery in a distant land.”).

<sup>150</sup> See ANDRES RESENDEZ, *THE OTHER SLAVERY* 5 (2016); see also FONER, *supra* note 33, at 1–2 (“There were a little under four million slaves . . . in the United States in 1860” and describing the dominance of slavers among the delegates to the Constitutional Convention of 1787).

<sup>151</sup> Cf. Hannah Natanson, *Two Centuries Ago, University of Virginia Students Beat and Raped Enslaved Servants, Historians Say*, WASH. POST. (Oct. 6, 2019), <https://www.washingtonpost.com/history/2019/10/06/two-centuries-ago-university-virginia-students-beat-raped-enslaved-servants-historians-say/> [https://perma.cc/BF2A-VWWN].

Instead, the founding generation built into the original constitution protections by which slave owners could enter free states and steal human beings back into bondage; a compromise that was “an abject appeasement of the South by the North.”<sup>152</sup> The outgrowth of this appeasement was a system by which these thefts could be accomplished with no due process and through the most brutal and inhumane means.<sup>153</sup> That system accommodated efforts within the United States Congress to suppress discussion of freedom on the floor of the United States House of Representatives through waves of violent threats and bullying by pro-slave forces against abolitionists.<sup>154</sup> It drove the country into a devastating Civil War.<sup>155</sup>

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<sup>152</sup> See DELBANGO, *supra* note 8, at 7.

<sup>153</sup> See *id.* (describing the Fugitive Slave Act, the statute designed to enforce the fugitive slave clause of the United States Constitution, as “an act without mercy. To those arrested under its authority, it denied the most basic right enshrined in the Anglo-American legal tradition—habeas corpus—the right to challenge, in open court, the legality of their detention. It forbade defendants to testify in their own defense. It ruled out trial by jury. Except for proof of freedom such as emancipation papers signed by a former owner, the Fugitive Slave Act disallowed all forms of exonerating evidence, including evidence of beatings, rape, or other forms of abuse while the defendant had been enslaved.”); see also MITCH LANDRIEU, *IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY* 48–49 (2018) (“I was barely twenty when I visited Auschwitz. I clearly remember the suitcases stacked high bearing the names of people gassed to death, men and women and children who never knew their meager belongings would one day signify their lives. The mounds of hair, hairbrushes, false teeth, prosthetics, the stacks of eyeglasses, they carried a moral weight heavier than anything I had ever felt. To read about the Holocaust from afar is to get a grasp of history and that unspeakable horror. It also allows denial to creep in—*That was then, this is now. It is not us. This can never happen in the United States . . .* And then the realization came that we had done something like this in America with slavery. The systematic evil of Nazism was the closest thing to the Southern society that relied on slave labor. I was torn by the connection between these two realities of history, different in time and place, but with a common root, a warped sense that some people are superior to others, a supremacy trapped in its own frozen heart.”).

<sup>154</sup> See JOANNE B. FREEMAN, *THE FIELD OF BLOOD* 113–15 (2018) (describing the congressional implementation of a gag rule in 1837 prohibiting members of Congress from advocating for abolition and freedom).

<sup>155</sup> It continues to be remarkable that scholars like Wurman trumpet the original constitutional government without concerning themselves with the fact that the same government could not prevent the American Civil War, the most violent conflict in terms of the lost of American lives in the history of the country. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING* xi (2008) (“The number of soldiers who died between 1861 and 1865, an estimated 620,000, is approximately equal to the total American fatalities in the Revolution, the War of 1812, the Mexican War, the Spanish-American War, World War I, World War II, and the Korean War combined. The Civil War’s rate of death, its incidence in comparison to the size of the American population, was six times that of World War II. A similar rate, about 2 percent, in the United States today would mean six million

It could not assure a peaceful resolution of a central moral conflict for the nation with only one defensible moral solution: emancipation.<sup>156</sup> It produced politicians at the highest levels who advocated for the worst kinds of violence and barbarity in defense of slavery.<sup>157</sup> It is a blight on our history that compares with the Holocaust.<sup>158</sup>

This was not the only evil perpetrated by early Americans. Americans aggressively pursued a policy of forced removal of Native Americans.<sup>159</sup> The same

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fatalities.”).

<sup>156</sup> See RAKOVE, *supra* note 32, at 58 (“The second compromise, which enabled southern states to count three-fifths of their slaves for purposes of representation in the House, is more difficult to endorse, much less celebrate. Scholars still debate whether the success of the Convention required so abject an acknowledgement of the brutal reality of chattel slavery; nor can we avoid wondering whether the framers’ failure to act against slavery doomed their deepest aspirations for a more perfect Union to the horror of civil war.”); Lewis, *supra* note 13, at 329 (“In the end, Chief Justice Marshall and his contemporaries were simply unable to exert the moral strength to overcome the greatest moral travesty of their time.”) (footnote and citations omitted).

<sup>157</sup> DAHL, *supra* note 115, at 16 (“That it took three-quarters of a century and a sanguinary civil war before slavery was abolished should at least make us doubt whether the document of the Framers out to be regarded as a holy writ.”); see also ALLEN W. TRELEASE, *WHITE TERROR* xli (“Men of every station sanctioned lynch law when it suited their purpose. Jefferson Davis once told a New York audience that Northern politicians who proclaimed a higher law than the Constitution, condemning slavery on moral grounds, ‘should be tarred and feathered, and whipped . . . . The man who . . . preaches treason to the Constitution and the dictates of all human society, is a fit object for a Lynch law that would be higher than any he could urge.”).

<sup>158</sup> See NEIMAN, *supra* note 9, at 28–29 (2019) (“Germans were not the only ones to compare their own racist crimes with those of others. In the early ‘60s, before the Holocaust became sacrosanct, many African Americans did so too. When W.E.B. Dubois visited the Warsaw ghetto in 1949, he was shaken by the parallels he drew with what he’d called the century’s greatest problem, the color line . . . . Tellingly, no African American I met while researching this book found the comparison problematic.”); see also Michael Gorra, *A Heritage of Evil*, N.Y. REV. OF BOOKS at 11 (Nov. 7, 2019) (“W.E.B. Du Bois saw a parallel between the color line and the Warsaw ghetto, and Ta-Nehisi Coates has recently suggested that the reparations Germany paid to Israel in the early 1950s might serve as a model for this country. Bryan Stevenson of the Equal Justice Initiative in Montgomery, Alabama, has been explicit in appealing to the example of Germany as a way to understand our own history of systemic racism . . . .”); Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 453–54 (1998) (analogizing the case for reparations to the European Jewish community to the case for reparations for the descendants of African slaves in the United States).

<sup>159</sup> See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434 (2005) (“De Tocqueville . . . saw the dark side of this nation-building, however: ‘The expulsion of the Indian often takes place at the present day in a regular and, as it were, a legal manner, involving great evils . . . [that] appear to me to be irremediable.’”) (citation and footnotes

generation of drafters and ratifiers were committed to the wholesale subjugation of women and countenanced violence against women as the virtually unrestricted province of men.<sup>160</sup> Women had no status under the Constitution of 1789 and no power whatsoever to influence its provisions.<sup>161</sup> Children had no independent legal status.<sup>162</sup> Most people in the United States did not have the right to vote. There was no Bill of Rights protecting free speech or privacy, including in one's home. Life expectancies were short.<sup>163</sup> Literacy rates were low by comparison to today.<sup>164</sup> Wide-spread public education was almost non-existent by contemporary

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omitted).

<sup>160</sup> See Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking*, 78 MARQ. L. REV. 79, 88–91 (1994) (describing Early American views toward women and their legal rights); see also ANGELA DODSON, REMEMBER THE LADIES 31 (2017) (describing degraded legal status of women in Early America).

<sup>161</sup> See Mary Beth Norton, *The Constitutional Status of Women in 1787*, 6 LAW & INEQ. 7, 7 (1988) (“I am tempted to make this presentation on the constitutional status of women in 1787 extremely brief. That is, I could accurately declare that ‘women had no status in the Constitution of 1787’ and immediately sit down and to listen to the comments of the rest of the panelists here this morning.”); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 465 (1995) (“In the 1780s, the United States Constitution was ordained and established by men. As a rule, women did not participate in the conventions that framed and ratified the Constitution. Women did not vote for convention delegates. And women—as women—did not publicly participate in constitutional debates in the press, in pamphlets, and so on.”); see also Hon. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 18 (1988) (“Women’s status under the law continued largely unaltered at the Constitution’s centennial 100 years ago. In 1887, women were still thirty-three years away from securing the right to vote. And the fourteenth amendment, added to the Constitution in 1868, despite its grandly general, growth-susceptible equal protection clause, did not inspire feminists of that day. Rather, the amendment alarmed them; for its second section added to the Constitution for the very first time the word ‘male,’ and linked that word to ‘citizens.’”) (footnote and citation omitted).

<sup>162</sup> See *supra* note 26.

<sup>163</sup> See Max Roser, *Twice as long – life expectancy around the world*, OUR WORLD IN DATA (Oct. 8, 2018) <https://ourworldindata.org/life-expectancy-globally> [<https://perma.cc/84YV-3UD2>] (“Demographic research suggests that at the beginning of the 19<sup>th</sup> century no country in the world had a life expectancy over 40 years . . . . Almost everyone lived in extreme poverty, we had very little medical knowledge or understanding of disease burden, and in all countries our ancestors had to prepare for an early death.”).

<sup>164</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT (1993) at 9, <https://nces.ed.gov/pubs93/93442.pdf> [<https://perma.cc/J34J-826M>] (last visited Oct. 8, 2020) (describing increased functional literacy through the 20<sup>th</sup> century).

measures.<sup>165</sup> Education, generally, at the most basic levels, was reserved for the smallest segments of American society and excluded women.<sup>166</sup> This was not a good time for most people.<sup>167</sup>

The framers, themselves, recognized the nature of the human condition in which they lived, and their conclusions reflected an absence of faith in their own goodness. Madison's defense of constitutional government, famously, acknowledged the need for the government he proposed to be a reflection of realities regarding human nature.<sup>168</sup> Men, as he knew them, were not angels.<sup>169</sup> Madison's absence of faith in human nature caused him to build a government with structures he believed would counteract those evils.<sup>170</sup> The evils of his own generation were manifest and known to his contemporaries.<sup>171</sup>

Far from grounding a constitutional methodology in the perspective of a generation whose notions of justice were immoral and unjust (as Madison did on

<sup>165</sup> See Grace Chen, *A Relevant History of Public Education in the United States*, PUB. SCH. REV. (Dec. 7, 2018), <https://www.publicschoolreview.com/blog/a-relevant-history-of-public-education-in-the-united-states> [<https://perma.cc/CCX6-TY4Z>] (“After the Revolutionary War, Thomas Jefferson argued that there should be a formal education system, and taxpayer dollars should be used to support it. However . . . that request went unheeded for nearly a century.”).

<sup>166</sup> See *American Public Education: An Origin Story*, EDUC. NEWS (Apr. 16, 2013), <https://www.educationnews.org/education-policy-and-politics/american-public-education-an-origin-story/> [<https://perma.cc/M4MQ-5LKH>] (describing public education in America before the 19<sup>th</sup> Century); see also James Carpenter, *Thomas Jefferson and the Ideology of Democratic Schooling*, 21 DEMOCRACY AND EDUC. 1, 7 (2013) (“First, while valuing the people as guardians of personal liberty, Jefferson also saw a social hierarchy that precluded equality of status.”).

<sup>167</sup> FONER, *supra* note 33, at 5–6 (2019) (“As Alexis de Tocqueville observed, a passion for equality animated American democracy. But the concept of equality before the law—something enjoyed by all persons regardless of social status—barely existed before the Civil War.”).

<sup>168</sup> THE FEDERALIST NO. 51 (James Madison) (“It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government, itself, but the great of reflections on human nature? If men were angels, no government would be necessary?”).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

<sup>171</sup> William Voegeli, *Left, Right, and Human*, 14 CLAREMONT REV. OF BOOKS 12, 13 (Oct. 30, 2014), <https://www.claremont.org/crb/article/left-right-and-human/> [<https://perma.cc/Q6R3-2LQJ>] (Ascribing to Madison a view of humans that as “dangerous[ly] selfish”). Madison, himself, was no angel. See KLARMAN, *supra* note 70, at 264 (“Madison owned nine slaves (and would inherit more than a hundred upon his father’s death in 1801)” and he “[rejected] a plea in 1791 that he support a gradual emancipation scheme in Virginia”).

other grounds), this record challenges whether we would ever be justified in importing such a perspective, wholesale, into our approach to constitutional law today if we have, as we do, the choice not to do so.<sup>172</sup> Put another way, this record should cause us to ask whether we should import only the best aspects of that perspective into our interpretations of the law, while protecting our constitutional law from threats that an exclusively backward looking interpretive methodology could, or would, extend the evils of our history from the past into the future.

Given what we know about the past, this review proposes that the perspective of the founding generation should go to great lengths to prove that it is worthy of our obedience today to the extent that it is proposed to the exclusion of all other perspectives.<sup>173</sup> An originalist approach, like the one depicted by Justice Gorsuch, which appears to embrace a stomach-turning account of a cruel past to justify cruelty as a matter of law, would not meet this standard. This review proposes that protecting the Constitution from this flawed approach may be accomplished through a canon of constitutional interpretation. This canon would serve prescriptive purposes that are methodologically consistent with the character of other approaches to constitutional interpretation presented by scholars-past.<sup>174</sup> As scholars have noted, the United States Supreme Court relies upon canons to enforce policy values it reads into the Constitution where constitutional tensions arise.<sup>175</sup> Canons of construction are, and have been, a part of the “interpretive regime” of United States Supreme Court jurisprudence throughout its history.<sup>176</sup>

Such a regime can include “clear statement rules” and “presumptions” designed

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<sup>172</sup> Cf. Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century*, 40 SUFFOLK U. L. REV. 383, 397 (2007) (“Some advocates of originalism are revisionist when it comes to acknowledging the significance of the slavery-protective features of the original Constitution. Fearful of ever inviting natural law to override text, these writers fail, in my judgment, to appreciate the revolutionary insult that slavery was to humanity.”).

<sup>173</sup> See Baude, *supra* note 112, at 6 (“But history, it has been wisely observed, is neither self-interpreting nor self-enforcing. Rather, constructing precedents and principles out of historical events requires a framework to tell us which events are relevant and why. In the context of judicial precedent, such frameworks are ubiquitous, widely taught, and widely studied.”).

<sup>174</sup> See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–39 (2018) (describing prescriptive approaches to interpretation as guiding official conduct, separate and apart from the approach of determining what the constitution, in fact, means).

<sup>175</sup> See William N. Eskridge and Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 81 (1994) (“One way in which the Court can appropriately perform its stabilizing role is to apply clear statement canons to prevent congressional enactment from unnecessarily traversing constitutional values.”).

<sup>176</sup> *Id.* at 66.

to implement substantive policies.<sup>177</sup> The United States Supreme Court has even designed “super-strong clear statement rules” to protect “constitutional values that are virtually never enforced through constitutional interpretation” — otherwise known as “underenforced constitutional norms.”<sup>178</sup> At one point in the Court’s history, the Court deployed these devices to protect the interests of African Americans, a class recognized as meeting the definition of a group in need of judicial protection, within the *Carolene Products* case.<sup>179</sup> At an earlier point in history, Chief Justice John Marshall deployed canons of construction to buttress the sovereignty of Native American tribes against the full-brunt of “might makes right” colonial force.<sup>180</sup> To the extent that originalists and others claim that accurate American history supplies a basis for determining the content of our laws, the canon this review proposes will ensure that the underenforced constitutional norm of principled, historical accuracy is given constitutional status in the face of the mountains of unqualified praise heaped upon the founding generation by originalists and non-originalists, alike.<sup>181</sup> It also provides a legal mechanism that

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<sup>177</sup> See *id.* at 68; see also William N. Eskridge and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–97 (1992) (“That is, unlike the linguistic canons or the referential canons, the substantive canons are not policy neutral. They represent value choices by the Court.”).

<sup>178</sup> Eskridge & Frickey, *supra* note 177, at 597.

<sup>179</sup> See *id.* at 612 (discussing the “*Carolene* canon”).

<sup>180</sup> See Frickey, *supra* note 34, at 412 (“In both *McCulloch* and *Worcester*, Chief Justice Marshall went to great lengths to immunize a constitutive document from a construction that would violate its purposes. As explained below, he essentially created a clear-statement rule of interpretation, under which only crystal-clear text could trump the spirit of the document under construction . . . *Worcester* . . . refused to read the ninth article of the Treaty of Hopewell to ‘convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties.’”); see also Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Law*, 47 AMER. J. OF COMP. L. 89 (1999) (describing use of presumptions to provide special protections to Indian women under threat of dowry death).

<sup>181</sup> The roots of this problem run deep and reach back into the American childhood. See Joe Heim, *Teaching America’s Truth*, WASH. POST. (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/teaching-slavery-schools/> [<https://perma.cc/7555-7U3L>] (describing the failure of the American school curriculum to teach the topic of American slavery in public schools); see also NEIMAN, *supra* note 9, at 34–35 (“Until this becomes the kind of knowledge that is mandatory in our classrooms and visible to our public spaces, we’ll continue to hear the refrain: *Slavery ended in the nineteenth century, why are we still talking about it in the twenty-first?*”). For specific instances of the effects, see Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1146–47 (2001) (“The electoral college is of course based in part on the three fifths clause. Thus there is an immediate connection between slavery and the electoral college . . . This lack of discussion of slavery by scholars of the electoral college is surprising, because the records of the

would undo deep distortions in descriptions of American history<sup>182</sup> that can be traced to the institutional distortion and suppression of truth.<sup>183</sup>

The canon this review proposes as a means of protecting our constitutional law from our evil history could be phrased as follows: Evidence or arguments consistent with an originalist methodology will be viewed as presumptively tied to our evil past unless the proponents of originalism are able to clearly demonstrate otherwise. In the absence of such a showing, the Court shall deploy non-originalist approaches to resolving constitutional questions so as to mitigate the possibility that the evils of [choose one or more of the following: slavery, the subjugation of women, the annihilation of Native Americans, the dehumanization of children]<sup>184</sup> shall influence the definition or applications of our fundamental laws.

What would be the effect of such a canon? When considering how to interpret “interstate commerce” or what is “necessary and proper” from the standpoint of Article I jurisprudence, such a canon would not capitulate to evidence from a generation that trafficked in human lives and viewed women as a political subclass (at best) unable to engage, fully, as commercial actors.<sup>185</sup> Instead, the originalism perspective must prove that it should influence a modern construction of our laws

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Convention show that in fact the connection between slavery and the college was deliberate, and very much on the minds of many delegates, including James Madison.”).

<sup>182</sup> See LOEWEN, *supra* note 16, at xix (“Decades ago, in Mississippi, I learned that history can be a weapon. It had been used against my students, to keep them in ‘their place’ . . . . When I moved to Vermont, I came to see that false history was a national problem, not just a southern one. Mississippi exemplified the problem in more extreme form, but the problem was national.”).

<sup>183</sup> FONER, *supra* note 33, at xxiii–xxiv (discussing the entrenchment of the Dunning School in Supreme Court decisions that narrowed and frustrated the aims of the reconstruction amendments and continue to do so to this day); see Eve Fairbanks, *The ‘Reasonable Rebels’*, WASH. POST. (Aug. 29, 2019), <https://www.washingtonpost.com/outlook/2019/08/29/conservatives-say-weve-abandoned-reason-civility-old-south-said-that-too/> [<https://perma.cc/9B2J-AT8V>] (“One reason slavery was not abolished in America through the political process, as it was in Britain, is that abolitionists were rhetorically straitjacketed by the proposition that they were the hard-liners who sought to curtail freedom.”); see also ERNA PARIS, *LONG SHADOWS: TRUTH, LIES AND HISTORY* 170 (2002) (describing the national, ideological fault line between our proclaimed principles and our history of slavery).

<sup>184</sup> See LESSIG, *supra* note 5, at 353 (“This much is clear: America at the turn of the nineteenth century was not a nation that embraced a rich sense of social equality. Everyone recognizes the wrongs done to blacks. But we are less likely to remember the wrongs done to Jews, or Native Americans, or Irish, or Chinese.”).

<sup>185</sup> Cf. *United States v. Morrison*, 529 U.S. 598, 616–17 (2000) (relying upon “the Framers” perspective on interstate commerce to invalidate aspects of the Violence Against Women’s Act).

without entrenching or reifying principles from evil history.<sup>186</sup>

When considering the meaning of “due process,” such a canon would not accept a view of what is “due” as “process” from government in regard to the deprivation of life, liberty and property, if that “due process” concept depended upon, and furthered, the perspective of the intent and mindset underlying the fugitive slave clause of the United States Constitution.<sup>187</sup> That mindset conceived of deprivations of life, liberty, and property with very little, if any, process the United States provided to the humans who lost everything to a system of barbarity.<sup>188</sup> In applying “substantive due process” to questions regarding the right to an abortion, public meaning from a generation that had a vastly different view of the human rights of women than what is acceptable to us, now, would have to overcome this anti-originalist canon.<sup>189</sup> The same is true with respect to the rights of children and whether the state may fail to prevent or mitigate the effects of obvious child abuse

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<sup>186</sup> NEIMAN, *supra* note 9, at 31 (“Until very recently, the amount of material about the darker sides of American history has been far easier to look. The information was there, but it took work to seek it out. Once confined to university libraries and departments of African American or postcolonial studies, the history of slavery and the Jim Crow reign of terror are now part of general history curricula and popular culture.”); *see id.* at 34 (“There are several reasons for American slowness in facing our history, and one is fairly simple: there’s a hundred-year hole in it, and few white Americans are even aware of that.”) and *id.* at 35 (“There are sinister explanations for the presence of this hole in American memory, beginning with the defenders of the Lost Cause narrative of Confederate history, but one explanation is perfectly innocent: Americans prefer narratives of progress.”).

<sup>187</sup> *See* KLARMAN, *supra* note 70, at 301 (“Many southern supporters of the Constitution shared the view that it was strongly proslavery—but they extolled it for this reason. One of their arguments was that the Constitution secured southerners, as Charles Cotesworth Pinckney explained in South Carolina, ‘a right to recover our slaves in whatever part of American they may take refuge, which is a right we had not before.’ Madison made the same point at the Virginia ratifying convention—that the Constitution was a clear improvement upon the Articles in this regard.”) (footnote and citation omitted).

<sup>188</sup> *See* Greene, *supra* note 40, at 519 (“The Constitution included two other direct accommodations for slavery: the Fugitive Slave Clause, which required states to return any escaped slaves and which, as interpreted by the Supreme Court, prevented states from affording due process to their black citizens who were accused of being fugitive slaves.”) (footnote and citation omitted).

<sup>189</sup> *Cf.* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291 (2007) (“Criticisms of Roe have generally proceeded precisely on this ground: the right to sexual privacy is not specifically mentioned in the Constitution, and there is no evidence that the framers and adopters of the 1787 Constitution or of any later amendments expected or intended the Constitution to protect a woman’s right to abortion.”).

that the state has committed to preventing as a matter of law.<sup>190</sup> Original notions of due process from a generation that did not view children as anything more than property would be viewed with deep, legal skepticism.

The effects would not end there. When determining the scope of “equal protection” under the Fourteenth Amendment, the “closed-mindedness” of constitutional draftsmen to the long-standing legal subversion of half of the population would face substantial hurdles when offered as evidence regarding the content of our constitutional law.<sup>191</sup> When considering what sorts of punishments are “cruel” under the Eighth Amendment, judges could not default to the original public meaning of “cruelty” held by a generation of slavers who traded in human lives and, as Gorsuch notes, permitted undifferentiated capital punishment for all forms of crimes.<sup>192</sup>

The application of this canon would exclude or, at least limit, the callous, cruel, and inhumane perspectives of evildoers who accomplished evil ends, and held evil views, in 1789. No version of the Constitution provides, and so no version demands, that Americans and their officials reject this approach.<sup>193</sup> No version of the Constitution even prescribes an interpretive key or road map, and no generation since the founding has ratified one.<sup>194</sup> And of course, no court has ever

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<sup>190</sup> Cf. *DeShaney v. Winnebago*, 489 U.S. 189, 195 (1989) (“But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power not to act, not as a guarantee of certain minimal standards of safety and security . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.”).

<sup>191</sup> Cf. *United States v. Virginia*, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting) (“Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.”).

<sup>192</sup> See, e.g., Greene, *supra* note 188; Bucklew, *supra* note 3.

<sup>193</sup> See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* x (2012) (“Since the written Constitution does not come with a complete set of instructions about how it should be construed, we must go beyond the text to make sense of the text.”).

<sup>194</sup> See, e.g., *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2092 (2018) (“Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”); *Caperton v. A.T. Massey Coal, Co., Inc.*, 556 U.S. 868, 877 (2009) (“As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances

adopted originalism as its primary or exclusive constitutional methodology in major cases regarding the relationship between the government and the law.<sup>195</sup> Opponents of this canon therefore cannot claim that it is explicitly proscribed with reference to the text of the constitution or by an since, interpretive methodology other than originalism.

The canon serves important discursive ends as well,<sup>196</sup> and is a response to the undifferentiated deference to historical perspective originalism demands, while

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which, as an objective matter, require recusal. These are circumstances in which experience reaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” (citations and internal quotations omitted); *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“These decisions underscore the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . Due process is flexible and calls for such procedural protections as the particular situation demands.”) (citations and internal quotations omitted); *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (plurality decision relies upon changed legal framework recognizing and regulating gender discrimination to conclude that “we can only conclude that classifications based upon sex, like classifications based on race . . . must . . . be subject to strict judicial scrutiny.”); *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945) (evolving nature of commerce resulted in changes to due process standards with regard to personal jurisdiction).

<sup>195</sup> See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2352, 2376–86 (2015) (describing numerous, landmark cases, in which originalism was not the law, including cases recognizing rights against discrimination on the basis of race and sex, establishing the right to appointed counsel and establishing a series of rights that fall under the penumbra of the right to privacy); Ginsburg, *supra* note 161, at 17 (“We still have, cherish, and live under our eighteenth century Constitution because, through a combination of three factors or forces—change in society’s practices, constitutional amendment, and judicial interpretation—a broadened system of participatory has evolved, one in which we take pride.”); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 U.C.L.A. L. REV. 217, 279–80 (2004) (surveying reliance on original meaning evidence and finding uses to be “indeterminate”); David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 973 (2011) (“One of the most fundamental facts about American constitutional law is that it changes.”) (documenting the history in case law); see also *Wayfair*, 138 S. Ct. at 2094 (“The Court’s Commerce Clause jurisprudence has eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.”) (quotation omitted); *Int’l Shoe*, 326 U.S. at 316 (“Historically, the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant’s person. Hence, his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him.”) (citing *Pennoy v. Neff*, 95 U.S. 714, 733 (1877)).

<sup>196</sup> See Baude, *supra* note 195, at 2376–86; Ginsburg, *supra* note 161, at 17; Peter J. Smith, *Sources of Federalism*, *supra* note 195, at 279–80; Strauss, *supra* note 195, at 973; see also *Wayfair*, 138 S. Ct. at 2094; *Int’l Shoe*, 326 U.S. at 316.

refusing to scrap the perspective of the founding generation altogether. It would require courts to examine, honestly and completely, statements about history that deny the full extent of our history, and so threaten to import assumptions about the human experience into a reading of the law that are not grounded in reality.<sup>197</sup> In this respect, it creates a legal mechanism that requires our laws and procedures to confront and promote truth in litigation, including difficult truths about ourselves and our national past.

## CONCLUSION

Regardless of whether any specific remedy is deployed to force our country, our courts, and other legal officials with power, to internalize our evil history as part of an official constitutional record, the three books under review operate as if that history plays no role (or very little role in Segall's case) in discussions over originalism. The result is a distorted discussion of American history that cannot answer one of its great and most accomplished critics: Justice Marshall. That such a discussion could, or would, occur given all that we know about our history suggests that the assessment of originalism would otherwise persist in this fashion, including at the highest levels of our judiciary, and that canons such as the one suggested in this review are appropriate to ensure the proper relationship between

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<sup>197</sup> This approach does not resolve disputes between positivists and antipositivists and other schools of thought and does not need to. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1297–1301 (2014) (describing the Standard Picture and other approaches to conceptualizing law). It is, and this author is, sympathetic to the position that “it is essential to legal systems that they are supposed to improve the moral situation” while expressing (unfortunate) concern about whether all legal systems must do so to be legal systems. *Id.* at 1324. Nevertheless, my position assumes that the law, specifically American law, is, in fact, conceptually able to incorporate the canon proposed here and could do so under positivist and antipositivist views of the law. Compare JOHN FINNIS, *NATURAL LAW & NATURAL RIGHT* 319 (2d ed. 2011) (“Still, the reasons that justify the vast legal effort to render the law, unlike the informal social institution of promising, relatively impervious to discretionary assessments of competing values and conveniences are reasons that also justify us in asserting that the moral obligation to confirm to legal obligations is relatively weighty.”), and SCOTT SHAPIRO, *LEGALITY* at 17 (2011) (describing antipositivist views as follows: “The claim that the Nazis did not have law, in other words, is not a truistic *input* to conceptual analysis but rather its theoretical *output*. For example, one might feel that the only way to account for the fact that legal authorities have the legal *right* to rule and are capable of imposing legal *obligations* on their subjects compels us to impute moral legitimacy to them and hence to deny to wicked regimes such as the Nazis the status of law.”), with H.L.A. HART, *THE CONCEPT OF LAW* 163 (1997 ed.) (“Laws may be condemned as morally bad simply because they require men to do particular actions which morality forbids individuals to do, or because they require men to abstain from doing those which are morally obligatory.”).

historical truth and judicial methodology.