Fidelity, Indeterminacy, and the Problem of Constitutional Evil

Fordham Law Review

Volume 65 | Issue 4 Article 27

1997

Fidelity, Indeterminacy, and the Problem of Constitutional Evil

Michael J. Klarman

FIDELITY, INDETERMINACY, AND THE PROBLEM OF CONSTITUTIONAL EVIL

*Michael J. Klarman**

INTRODUCTION

PROFESSOR Balkin contends that the principal problem posed for fidelity is that of "constitutional evil."[1] That is, how can the Constitution deserve our fidelity when it "is either unjust or permits and gives legal sanction to serious injustices"—for example, the original Constitution's support for the institution of slavery?[2] Having thus diagnosed fidelity's main problem, Balkin argues that fidelity's principal vice is its insidious "psychological and sociological" effect on the constitutional faithful.[3] Specifically, Balkin believes that constitutional fidelity forces us to think about questions of justice in terms of confining constitutional "concepts and categories."[4] Moreover, in order to reduce "cognitive dissonance," fidelity induces us to suppress recognition of those serious injustices that plainly are beyond the Constitution's reach.[5]

I believe that Balkin has misdiagnosed the fundamental problem of constitutional fidelity, which is one of indeterminacy, not evil. Indeed, it is the relative indeterminacy of the constitutional text that largely mitigates any problem of constitutional evil; why interpret the Constitution to safeguard an evil practice when it is so easy to construe it otherwise? Balkin's diagnostic error, in turn, leads him to exaggerate the deleterious psychological consequences of constitutional fidelity in an unjust world. After attempting to establish these points, I shall briefly sketch out what is for me the principal problem of constitutional fidelity—the nonexistence of any viable middle ground between the deadhand problem of originalist constitutional interpretation and the judicial subjectivity problem of nonoriginalist interpretation.

I. THE PROBLEM OF CONSTITUTIONAL EVIL

Balkin rightly observes that "[w]ithin our legal culture the idea of fidelity to the Constitution is seen as pretty much an unquestioned good."[6] The problem for fidelity, according to Balkin, is how to confront the possibility of constitutional evil—the Constitution's respon-

* Professor of Law, University of Virginia.

1. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1706 (1997).
2. *Id.*
3. *Id.* at 1703.
4. *Id.* at 1704.
5. *Id.*
6. *Id.*

sibility "for serious injustices."[7] One solution, which Balkin considers but then largely rejects, is "interpretive conformation"—that is, the practice of "conforming the Constitution to our ideas of justice."[8] Through this practice, we create for ourselves an "ideal Constitution," distinguishable from the "past interpretations of the Constitution and past actions done in the name of the Constitution," and thus avoid the problem of constitutional evil.[9]

Balkin largely rejects this approach for two reasons. First, "the Constitution is not merely a document," but also a "cultural and political tradition" with "doctrinal glosses"; we cannot escape this tradition, which "weighs on us, even if we do not feel its weight."[10] Second, the Constitution's "abstract ideas," such as liberty and equality, are "historically embedded" concepts, which have had "ideological" and "legitimating" functions; ignoring that aspect of the Constitution is "hiding one's head in the sand."[11] For these two reasons, Balkin believes that "interpretive conformation" at best can only partially solve the problem of constitutional evil.

I believe that Balkin significantly understates the malleability of the Constitution. American constitutional history reveals an almost limitless creativity among lawyers and statesmen in construing the Constitution to serve their particularistic purposes, thus enabling them to avoid confrontation with the problem of constitutional evil. The historical example that drives Balkin's paper—slavery—is quite unrepresentative in this regard. The Constitution is a model of clarity on the slavery question, at least in comparison with most controverted issues in American constitutional history. Several constitutional provisions plainly secure the institution of slavery,[12] and no reasonable observer at the time of the Founding would have believed that Congress possessed a delegated power to interfere with slavery in existing states.[13] Thus, it is unsurprising that most northern opponents of slavery did not feel free to question the institution's constitutional status.[14] Drawing general lessons about the Constitution's relative determinacy

7. *Id.* at 1706.
8. *Id.* at 1704.
9. *Id.* at 1709.
10. *Id.* at 1711-12.
11. *Id.* at 1712-14.
12. U.S. Const. art. I, § 2, cl. 3 ("three-fifths" clause for apportioning the House of Representatives); *id.* at art. I, § 9, cl. 1 (temporary ban on congressional interference with the foreign slave trade); *id.* at art. IV, § 2, cl. 3 ("fugitive slave clause").
13. *See* James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 Cardozo L. Rev. 2023, 2025 (1996) (James Madison); *id.* at 2035 (Charles Pinckney); *id.* at 2045 (Tench Coxe).
14. *First Inaugural Address*, *in* 2 Abraham Lincoln: Speeches and Writings 215, 215-16 (Don E. Fehrenbacher ed., 1989); *Republican Party Platform of 1860* § 4, *reprinted in* National Party Platforms 1840-1972, at 31, 32 (Donald B. Johnson & Kirk H. Porter eds., 5th ed. 1973); *see* Don E. Fehrenbacher, The *Dred Scott* Case: Its Significance in American Law and Politics 548 (1978) [hereinafter Fehrenbacher, *Dred Scott*]; David M. Potter, The Impending Crisis 1848-1861, at 423, 532, 550 (1976).

from its slavery provisions is risky business, though, as a quick canvass of constitutional history reveals.

Although the antebellum Constitution was understood plainly to protect slavery in existing states from congressional interference, there was no similar consensus on the Constitution's ramifications for congressional power over slavery in *the federal territories*. By the 1850s, all of the dominant policy positions on this question had been converted into constitutional interpretations. Most southerners believed that the Fifth Amendment's Due Process Clause protected slavery in the territories from congressional interference (John C. Calhoun's "common property" doctrine). Republicans argued that the very same Due Process Clause required Congress to bar slavery from the territories, because slavery was a denial of "liberty" (the "free soil" position). Northern Democrats argued that Congress was barred from resolving the slavery-in-the-territories issue one way or the other because of the limited scope of its Article IV power to govern the territories (Stephen A. Douglas's "popular sovereignty" position). Apparently, the only constitutional position without significant support by the 1850s was the one most plausibly attributable to the Constitution's framers—that Congress had the power, but not the obligation, to forbid slavery in the federal territories. So much for constitutional determinacy![15]

One can illustrate this point about constitutional malleability with a seemingly infinite variety of examples. Southerners by 1860 generally believed that secession was a constitutional right; virtually all northerners disagreed.[16] The Constitution has been interpreted at times to bar wealth redistribution; other times it has been construed to permit or even (qualifiedly) to require the same.[17] At times the Constitution has permitted de jure racial segregation; more recently it has not.[18] Poll taxes used to be perfectly constitutional—not any longer.[19] The Equal Protection Clause was interpreted for most of its history to deny equality claims based on sex or sexual orientation; this has

15. For the doctrines discussed in this paragraph, see Fehrenbacher, *Dred Scott*, *supra* note 14, 152-87; Robert R. Russel, *Constitutional Doctrines with Regard to Slavery in Territories*, 32 J.S. Hist. 466 (1966).

16. *See* Jesse T. Carpenter, The South as a Conscious Minority, 1789-1861, at 200-13 (1930); Potter, *supra* note 14, at 479-84.

17. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (approving wealth redistribution as a "public purpose"); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring the state to pay for defense counsel of indigents in all felony cases); Coppage v. Kansas, 236 U.S. 1 (1915) (denying the constitutional permissibility of state redistributive ends).

18. *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954) *with* Plessy v. Ferguson, 163 U.S. 537 (1896).

19. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) *with* Breedlove v. Suttles, 302 U.S. 277 (1937).

changed dramatically in recent years.[20] Not that long ago, legislative malapportionment was deemed to be a nonjusticiable political question; since the early 1960s, the Court not only has intervened, but has applied a stringent rule of one person, one vote.[21] The Justices changed their minds within a twenty-year period as to whether indigent defendants in noncapital cases were entitled to state-appointed counsel.[22] It took less than a decade for the Court to change its mind as to whether a compulsory flag salute violated the First Amendment[23] or whether a political party's racial restrictions on membership violated the Equal Protection Clause.[24] The meaning of the "commerce" power has been revolutionized in the twentieth century, without a constitutional amendment,[25] as have the meanings of the Contract,[26] Due Process,[27] and Free Speech Clauses.[28]

Many more examples might be cited, but the point seems evident: the principal constraints on constitutional interpretation derive from social and political context, not from constitutional text or tradition. Thus it is no mystery why few people are preoccupied with the problem of constitutional evil. If the Constitution plausibly can be invoked on either side of most contemporary public policy debates, why would disputants create needless cognitive dissonance for themselves by conceding the existence of a gap between their constitutional interpretations and their views of social justice? The real problem of fidelity is not constitutional evil, but rather constitutional indeterminacy—a point to which I shall return shortly.

Balkin understates the malleability of the Constitution because he overstates the constraining force of constitutional tradition. Balkin is

20. *Compare* Reed v. Reed, 404 U.S. 71 (1971) (sex) *with* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Romer v. Evans, 116 S. Ct. 1620 (1996) (sexual orientation) *with* Bowers v. Hardwick, 478 U.S. 186 (1986).

21. *Compare* Reynolds v. Sims, 377 U.S. 533 (1964) *and* Baker v. Carr, 369 U.S. 186 (1962) *with* Colegrove v. Green, 328 U.S. 549 (1946).

22. *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) *with* Betts v. Brady, 316 U.S. 455 (1942).

23. *Compare* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) *with* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

24. *Compare* Smith v. Allwright, 321 U.S. 649 (1944) *with* Grovey v. Townsend, 295 U.S. 45 (1935).

25. *Compare* Wickard v. Filburn, 317 U.S. 111 (1942) *and* United States v. Darby, 312 U.S. 100 (1941) *with* Carter v. Carter Coal Co., 298 U.S. 238 (1936) *and* Hammer v. Dagenhart, 247 U.S. 251 (1918).

26. *Compare* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) *with* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

27. *Compare* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (economic substantive due process) *with* Lochner v. New York, 198 U.S. 45 (1905); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporation of the Bill of Rights) *with* Twining v. New Jersey, 211 U.S. 78 (1908); Griswold v. Connecticut, 381 U.S. 479 (1965) (substantive due process right to privacy) *with* Buck v. Bell, 274 U.S. 200 (1927).

28. *Compare, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) *with* Dennis v. United States, 341 U.S. 494 (1951) *and* Schenck v. United States, 249 U.S. 47 (1919).

right to note that constitutional interpretation is constrained; not any interpretation is plausible at any particular point in time. No court is about to hold in 1997 that animal rights are protected under the Equal Protection Clause. Balkin, however, does not adequately consider the possibility that the boundaries on plausible constitutional interpretation are set more by the social and political context than by constitutional traditions. *Brown v. Board of Education*[29] became a plausible interpretation of equal protection in 1954 because a host of political, economic, social, and ideological forces inaugurated or accelerated by World War II were impelling the nation toward more egalitarian racial norms.[30] The interpretive constraints imposed by constitutional tradition were burst asunder by these exigent extralegal forces.[31] The women's movement and the gay rights movement likewise experienced relatively little difficulty surmounting obstacles posed by constitutional tradition once social mores had shifted sufficiently in their direction.[32]

Because social mores usually evolve incrementally, great departures in constitutional tradition generally are not required to convert positions in contemporary public policy disputes into plausible constitutional claims. For example, as social mores grew increasingly tolerant of contraceptive use in the post-World War II era, it became possible for the Court in *Griswold v. Connecticut*[33] to constitutionalize such a right on a limited basis; the Court relied, *inter alia*, on *Skinner v. Oklahoma*,[34] which itself had reflected changing social attitudes toward procreation rights.[35] Then, as the burgeoning women's movement spawned increased public support for abortion access, the Court in *Roe v. Wade*[36] could build upon the *Griswold* precedent in con-

29. 347 U.S. 483 (1954).

30. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 13-71 (1994) [hereinafter Klarman, *Racial Change*].

31. I do not deny that several of the justices in *Brown* entertained doubts about jettisoning traditional constitutional concepts such as original intent and precedent; in the end, though, those doubts were unanimously overcome. *See* Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 Geo. L.J. 433, 436-46 (1994). *But see* Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961, at 187-95, 194 (1994) (arguing that the justices in *Brown* were simply "talking through their concerns about what they knew they were going to do").

32. *See* Romer v. Evans, 116 S. Ct. 1620 (1996); Reed v. Reed, 404 U.S. 71 (1971).

33. 381 U.S. 479 (1965). Departures from constitutional tradition may be more easily accomplished when the Court's decision simply constitutionalizes a dominant national consensus and deploys it against a local outlier. *Griswold* certainly fits this description, as do many of the Court's celebrated "countermajoritarian" interventions. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 16-17 (1996).

34. 316 U.S. 535 (1942) (invalidating an Oklahoma statute authorizing the sterilization of recidivist criminals).

35. *Griswold*, 381 U.S. at 485.

36. 410 U.S. 113 (1973).

structing a constitutional right to abortion.[37] As the gay rights movement gained social legitimacy soon thereafter, those Justices sympathetic to the cause had *Roe* available as a doctrinal building block for establishing a substantive due process right to private, consensual, adult sexual relations.[38] It seems unlikely that the Court's rejection of such a right in *Bowers v. Hardwick*[39] was more attributable to the constraining effect of constitutional tradition than to the conservative predispositions of a majority of Burger Court Justices situated within the social and political context of 1986. With the passage of an additional decade in which the gay rights movement was able to broaden and deepen support for its cause, constitutional tradition failed to inhibit the Court in *Romer v. Evans*[40] from ignoring *Bowers* and protecting gay rights on the basis of some creative doctrinal adjustment.[41] Thus, while Balkin is right that constitutional interpretation is constrained, he is wrong to locate the principal source of that constraint in constitutional "concepts and categories" rather than in the contemporary social and political context. What this means is that constitutional interpretation with regard to seriously contested contemporary policy issues is relatively unconstrained.

The crux of Balkin's contribution is his analysis of the deleterious "psychological and sociological" consequences of constitutional fidelity in an unjust world. He emphasizes two such effects. First, fidelity "requires us to speak and think" in language of "constitutional tradition and its characteristic concepts and categories,"[42] thus creating "a sort of tunnel vision"[43] or "servitude"[44] by artificially constricting the ways in which we think about questions of social justice. Second, because "fidelity to the Constitution cannot be jettisoned,"[45] and because "[o]ur fidelity to the Constitution requires us to believe that it is a basically good and just document,"[46] we suppress any possible "cognitive dissonance" by treating injustices not plausibly addressed by the Constitution as "not seriously and profoundly great injustices."[47] Although both of these proffered consequences of fidelity are plausible, their significance strikes me as marginal at best. We already have explored the reason why: the Constitution's malleability permits dis-

37. *Id.* at 152-55.
38. *See* Bowers v. Hardwick, 478 U.S. 186, 199, 204-06 (1986) (Blackmun, J., dissenting).
39. 478 U.S. 186 (1986).
40. 116 S. Ct. 1620 (1996).
41. The doctrinal creativity of *Romer* is deftly explored in Louis M. Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 Sup. Ct. Rev. (forthcoming 1997).
42. Balkin, *supra* note 1, at 1727.
43. *Id.* at 1726.
44. *Id.*
45. *Id.* at 1731.
46. *Id.* at 1729.
47. *Id.* at 1732.

putants on either side of most controverted policy issues to invoke the Constitution on their behalf. This point requires some elaboration.

Balkin is concerned that constitutional fidelity artificially constrains our thinking about injustice by forcing us into "characteristic concepts and categories. . . . [when] it is by no means clear that everything worth saying about justice and injustice can be said in this language."[48] But the many examples of constitutional malleability noted above would seem to belie this concern. Our constitutional history reveals that most challenges to widely-perceived injustices have been rendered plausible, and often successful, under the Constitution. It is true that success often has come slowly. Yet the relaxed pace at which constitutional interpretations change is more plausibly attributable to the incremental nature of social evolution than to the inhibitory effect of traditional concepts and categories on constitutional argument.[49]

Balkin offers just one concrete example to illustrate his point, and it is unpersuasive. He criticizes "the manner in which the concept of equal protection has been formalized into questions of fundamental right, suspect classification, substantial burden and tiers of scrutiny."[50] This formal doctrine, Balkin contends, "forms a procrustean bed that fails to do justice" and indeed "seems to be more a method of promoting social inequality."[51] One might respond to Balkin by questioning the extent to which equal protection doctrine really has constrained the constitutional decisionmaking of the United States Supreme Court.

For starters, it is noteworthy that the Court has extended equal protection coverage to many new groups in the last quarter century, notwithstanding strong arguments to the contrary grounded in "the constitutional tradition and its characteristic concepts and categories."[52] Women, aliens, nonmarital children, and homosexuals have come to enjoy significant constitutional protection as social mores have changed and constitutional concepts have adjusted accordingly.[53] The Equal Protection Clause has become home not only to new

48. *Id.* at 1727.

49. When social mores change quickly, as during wartime, so does constitutional interpretation. *Compare, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (flag salute) *with* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940); Smith v. Allwright, 321 U.S. 649 (1944) (white primary) *with* Grovey v. Townsend, 295 U.S. 45 (1935). When social mores change more slowly, so does constitutional interpretation. *Compare, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (racial segregation) *with* Plessy v. Ferguson, 163 U.S. 537 (1896); Reed v. Reed, 404 U.S. 71 (1971) (sex discrimination) *with* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

50. Balkin, *supra* note 1, at 1728.

51. *Id.* For a similar sort of claim, see San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

52. Balkin, *supra* note 1, at 1727.

53. *E.g.*, Romer v. Evans, 116 S. Ct. 1620 (1996) (homosexuals); Lalli v. Lalli, 439 U.S. 259 (1978) (nonmarital children); Craig v. Boren, 429 U.S. 190 (1976) (women); Graham v. Richardson, 403 U.S. 365 (1971) (aliens).

groups but also to new rights during this period. With scarcely a deferential nod toward constitutional tradition, the Court has interpreted the Equal Protection Clause to guarantee access to the criminal justice system, the franchise, the right to travel, and more.[54] Furthermore, even during an era in which the Court rhetorically invokes the doctrinal structure Balkin laments, numerous cases evince the Justices' willingness to elide the doctrine when it prescribes results in tension with their visceral sense of fairness. The results in *United States Department of Agriculture v. Moreno*,[55] *Cleburne v. Cleburne Living Center*,[56] *Plyler v. Doe*,[57] and *Romer* suggest that the Justices' intuitions about fairness drive constitutional decisionmaking more than do characteristic concepts and categories.[58] To be sure, the Court, invoking traditional doctrinal concepts, sometimes rejects equal protection claims that seem meritorious to many observers.[59] Yet it is difficult to know whether such results indeed are attributable, as Balkin would have it, to the stultifying effect of traditional doctrine, or rather to the more conservative (Burger) Court's lack of sympathy for the underlying equality claim or its greater commitment to the principle of legislative deference.

Balkin identifies a second harmful psychological consequence of constitutional fidelity in an unjust world. This is the pressure people feel to regard injustices not plausibly addressed by the Constitution as relatively insignificant, in order to reduce the cognitive dissonance that would result from acknowledging that we show fidelity to a document that is not "basically good and just."[60] Here, again, the plausibility of Balkin's claim depends on his premise that the Constitution is not sufficiently malleable to bear interpretations responsive to (virtu-

54. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (franchise); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal process).

55. 413 U.S. 528 (1973).

56. 473 U.S. 432 (1985).

57. 457 U.S. 202 (1982).

58. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (invalidating a Colorado constitutional amendment that barred state and local political processes from extending any "protected status" based on sexual orientation); *Cleburne*, 473 U.S. at 450 (invalidating a zoning ordinance that required special use permits for construction of a group home for the mentally disabled); *Plyler*, 457 U.S. at 230 (invalidating a Texas policy denying free public education to children of illegal aliens); *Moreno*, 413 U.S. at 538 (invalidating a provision of the federal food stamp program excluding from participation households containing unrelated individuals).

59. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (rejecting an equal protection challenge to age discrimination on the ground that age is not a suspect classification); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting a constitutional challenge to unequal funding of school districts on the ground that wealth is not a suspect classification and education is not a fundamental right).

60. Balkin, *supra* note 1, at 1729. Mike Seidman has made a similar sort of claim about two of the Court's most famous constitutional decisions. *See* Louis M. Seidman, Brown *and* Miranda, 80 Cal. L. Rev. 673 (1992).

ally) all evils perceived as such by a substantial portion of the population. Yet it seems likely that the reason the Constitution inspires the "idolatry"[61] which Balkin warns against is because it represents all things to all people. The Constitution's meaning is sufficiently indeterminate that both the North and the South claimed the fundamental charter on their side during the Civil War;[62] little had changed a hundred years later as the Justices confronted the School Desegregation Cases.[63] Likewise, does the Constitution bar wealth redistribution, or permit it, or perhaps even require it? The Court has ruled differently at different times,[64] and even today leading commentators cannot agree.[65] It would appear that the examples of constitutional indeterminacy noted above render Balkin's claim suspect. The examples he himself invokes suggest that he plainly is wrong.

Balkin's principal example of this "legitimation" phenomenon involves contemporary attitudes toward the problem of poverty.[66] One important reason people today seem less worried than previously about the poor, Balkin argues, is their perception that the Constitution has nothing to say on the subject. In order to reduce the cognitive dissonance that would flow from acknowledging that the Constitution tolerates fundamental evil, Balkin contends, people face psychological pressure to regard poverty as only a minor injustice. I think Balkin's account must be mistaken for two reasons.

First, for most of this nation's first two centuries, the Constitution was understood to bar some forms of wealth redistribution[67] and not to require any.[68] Yet in the 1960s, America briefly became committed

---

61. Balkin, *supra* note 1, at 1730.

62. *See* James M. McPherson, Battle Cry of Freedom: The Civil War Era 239-40, 246-47 (1988).

63. Southerners after *Brown* reaffirmed their "reliance on the Constitution as the fundamental law of the land," while denouncing the Court's decision as a "clear abuse of judicial power" because the Constitution consistently had been interpreted to permit racial segregation. *See* 102 Cong. Rec. 4515-16 (1956) (Southern Manifesto).

64. *See supra* note 17.

65. *Compare* Frank I. Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) *with* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L.Q. 695 *and* Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 Sup. Ct. Rev. 41.

66. Balkin, *supra* note 1, at 1732-33. For a similar sort of argument, see Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* Freedom of Contract and the State (Harry N. Scheiber ed., forthcoming 1998).

67. *E.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a statutory ban on yellow dog contracts and declaring that the state cannot have wealth redistribution as its objective); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) (striking down a national income tax as a direct, unapportioned tax); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating a debtor relief law under the contract clause).

68. Among the first instances in which the Supreme Court interpreted the Constitution to require the state to subsidize the poor were Powell v. Alabama, 287 U.S. 45 (1932), holding that a state must provide counsel to indigent defendants in capital

to a war on poverty, and the Supreme Court, also briefly, was drawn along in its wake.[69] How could the nation have come to perceive the maldistribution of wealth as a great evil if, for nearly two centuries, the Constitution was understood either to permit or to require it? In Balkin's view, the need to reduce cognitive dissonance should have impelled Americans to regard wealth inequality as a trivial problem rather than a grave injustice.

Second, it is unclear why Balkin believes that mandatory wealth redistribution would be an "off-the-wall"[70] constitutional argument today. It is vital to Balkin's claim that it be so, for otherwise people would face no psychological pressure to downplay the significance of poverty; cognitive dissonance, Balkin explains, flows only from the belief that the Constitution *cannot plausibly* be interpreted to reach a grave injustice. By the late 1960s, however, the Supreme Court already had mandated mild forms of wealth redistribution and, in the view of many observers, was on the verge of requiring a good deal more.[71] The Justices had intimated the existence of a constitutional right to welfare,[72] suggested that wealth, like race, was a suspect classification,[73] and constitutionally required the state in a few contexts to subsidize the constitutional rights of the indigent.[74] Lower federal courts, urged on by numerous constitutional commentators,[75] had pushed even farther in this direction, declaring the existence of consti-

---

cases, and Griffin v. Illinois, 351 U.S. 12 (1956), holding that a state must provide free trial transcripts, or a reasonable alternative, to criminal defendants appealing their convictions.

69. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating durational residency requirements for welfare); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll tax requirement for voting in state elections).

70. Balkin, *supra* note 1, at 1729.

71. *See, e.g.*, Winter, *supra* note 65, at 42 (asserting that by 1969 the "champions of judicial activism had gathered their forces for a constitutional assault on the distribution of income"); *see also* Martin Shapiro, *Fathers and Sons: The Court, the Commentators and the Search for Values*, *in* The Burger Court: The Counter-Revolution That Wasn't 218, 219 (Vincent Blasi ed., 1983) (suggesting that a faction of the Warren Court, although not clearly a majority, was moving toward constitutionalizing minimum levels of subsistence, housing, and education).

72. *Shapiro*, 394 U.S. 618.

73. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (stating that wealth and race are "two factors which would independently render a classification highly suspect"); *Harper*, 383 U.S. at 668 ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." (citations omitted)).

74. Boddie v. Connecticut, 401 U.S. 371 (1971) (access fees for divorce court); *Harper*, 383 U.S. 663 (poll taxes); Douglas v. California, 372 U.S. 353 (1963) (state-provided counsel for indigent defendants' appeals); Gideon v. Wainwright, 372 U.S. 335 (1963) (state-provided counsel for indigent defendants' felony trials); Griffin v. Illinois, 351 U.S. 12 (1956) (state-provided trial transcripts for indigent defendants' appeals).

75. *E.g.*, Harold W. Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. Rev. 1147 (1966); Michelman, *supra* note 65; Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969).

tutional rights to welfare and to equal educational funding across school districts.[76]

Then the Warren Court came to an abrupt end in 1969 with the departures of Justice Fortas and Chief Justice Warren. The Burger Court immediately and decisively halted these incipient developments.[77] For present purposes, however, the key points are that the constitutional arguments for wealth redistribution were succeeding, that they continued to attract significant support in dissenting opinions by Warren Court holdovers,[78] and that they easily could be resurrected once public opinion becomes more hospitable to the cause. To the extent that constitutional arguments for redistribution seem farfetched today, it is because of the changed social and political context, not anything in the nature of the constitutional text or traditional constitutional doctrine. Would it not be odd if the Supreme Court discovered a constitutional right to welfare just as Congress begins dismantling the modern welfare state? Yet because constitutional arguments for wealth redistribution were taken seriously so recently, it is hard to see why they should be regarded as doctrinally "off-the-wall." And so long as redistributive arguments are constitutionally *plausible,* acknowledging that poverty is a serious injustice creates no cognitive dissonance.

Balkin's other principal example confirms that his legitimation point is either marginal or simply wrong. A general consensus existed in antebellum politics that the Constitution insulated slavery in the existing states from congressional interference.[79] Yet the fact that abolition plainly was understood by mainstream opinion to be constitutionally "out of bounds" did not induce most people to regard slavery as only a minor injustice. On the contrary, by the 1850s slavery had become the nation's dominant political and moral issue, with most northerners committed to limiting the institution's spread, while conceding that the Constitution prevented Congress from interfering with slavery in the states where it already existed.[80] Lincoln, who consist-

76. On welfare, see, e.g., Kaiser v. Montgomery, 319 F. Supp. 329 (N.D. Cal. 1970) (three-judge court); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968) (three-judge court), *rev'd,* 397 U.S. 471 (1970). On educational funding, see, e.g., Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971) (three-judge court) (per curiam), *rev'd,* 411 U.S. 1 (1973).

77. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973) (rejecting constitutional challenge to unequal funding of school districts); United States v. Kras, 409 U.S. 434, 443 (1973) (rejecting constitutional challenge to filing fees for bankruptcy court); James v. Valtierra, 402 U.S. 137, 141-43 (1971) (denying that wealth is a suspect classification); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (denying that welfare is a fundamental right).

78. *E.g., Rodriguez,* 411 U.S. at 70 (Marshall, J., dissenting); *Dandridge,* 397 U.S. at 508 (Marshall, J., dissenting).

79. *See supra* notes 13-14.

80. *See* McPherson, *supra* note 62, at 117-69; Potter, *supra* note 14.

ently conceded that Congress could not abolish slavery in the states, nonetheless insisted that "slavery is an unqualified evil."[81] One cannot show conclusively that Balkin is mistaken in his belief that the need to reduce cognitive dissonance impels us to discount the gravity of injustices not plausibly redressable by the Constitution. But certainly the course of antebellum politics on the slavery issue does nothing to corroborate his claim.[82]

Indeed if Balkin's legitimation point is of more than marginal significance, it is difficult to understand how any social movement challenging the political and constitutional status quo succeeds. If ever a constitutional claim was "out of bounds," it was, until the last decade or two, that of gays and lesbians seeking anti-discrimination coverage under the Equal Protection Clause. Yet the psychological imperative to reduce cognitive dissonance by treating injustices not plausibly addressed by the Constitution as relatively insignificant apparently has not inhibited the creation of a robust gay rights movement. Precisely the same point applies to the women's movement. The fact that nobody in the early twentieth century plausibly could claim that the Constitution required women's suffrage did not inhibit the creation of a mass public movement demanding that reform. Examples easily might be multiplied, but the point appears evident. Even if there is something to Balkin's legitimation point—and I think there is *something* to it—he surely overstates its effect. Fidelity's most significant vice is not its deleterious psychological and sociological effects on the constitutional faithful.

Balkin's principal claim apparently locates him within a larger school of thought that emphasizes the symbolic or educational effect of Supreme Court decisions.[83] This body of scholarship tends to emphasize the obverse of Balkin's position: when the Supreme Court holds that the Constitution *does* condemn a particular practice, public opinion is educated in a positive direction. Most notably, conventional wisdom holds that *Brown* had a significant influence of this sort.[84] Yet the accuracy of this claim regarding the educational or

81. *E.g.*, Abraham Lincoln, Speech at Edwardsville, Illinois, *in* 1 Abraham Lincoln: Speeches and Writings, *supra* note 14, at 580, 581-82; *see also* Abraham Lincoln's Reply in the Seventh Lincoln-Douglas Debate, *in* 1 Abraham Lincoln: Speeches and Writings, *supra* note 14, at 807-08 (observing that the great difference between Democrats and Republicans is that only the latter regard slavery as "a moral, social and political wrong").

82. In addition, to the extent that northerners were prepared to make concessions regarding slavery, it probably was their fidelity to the Union rather than the need to suppress cognitive dissonance that induced them to minimize the injustice of the institution. *See, e.g.*, R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 377-78 (1985).

83. *E.g.*, Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961 (1992).

84. *See, e.g.*, David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 Va. L. Rev. 151, 152-53 (1994); C. Herman Pritch-

symbolic effect of Supreme Court decisions is as contestable as Balkin's obverse contention.

First, it is not obvious that even *Brown* had a dramatic effect of this sort. Note that this causal claim is different from the one that *Brown* inspired blacks to press their civil rights grievances in court. African-Americans fully appreciated the injustice of Jim Crow without Supreme Court instruction; *Brown* simply made it clear that lawsuits challenging segregation were now likely to be victorious.[85] Rather the claim about *Brown*'s educational influence is principally one regarding its effect on white opinion. And here the historical record is far more ambiguous than conventional wisdom would have it. In the South, *Brown*, if anything, crystallized southern resistance to changing the racial status quo.[86] In the nation as a whole, opinion polls conducted in the years after *Brown* registered only minor movement in attitudes toward racial segregation—a gradual shift in opinion that plausibly could be attributable to political, social, economic, and ideological trends inaugurated or accelerated by World War II as much as to *Brown*.[87]

There is little reason to believe that Supreme Court decisions in politically controversial cases often have the sort of legitimizing effect that Balkin implicitly, and others explicitly, ascribe to them; indeed, there is some reason to believe that Court decisions have precisely the opposite effect. *Scott v. Sandford*[88] hardly convinced Republicans that their party was, as the Court had declared it to be, built upon an unconstitutional platform; if anything, the decision probably converted at least some additional northerners to the Republican cause.[89] Today's conventional understanding of *Roe v. Wade*[90] is that, far from reconciling abortion opponents to a woman's fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist.[91] Finally, is it plausible to believe that any substantial number of gay and lesbian Americans (or other supporters of their rights) came to question the morality of their

ett, *Equal Protection and the Urban Majority*, 58 Am. Pol. Sci. Rev. 869, 869 (1964); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 Va. L. Rev. 173, 175-77 (1994).

85. *See* Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 Va. L. Rev. 185, 187-89 (1994).

86. *See* Klarman, *Racial Change*, *supra* note 30, at 75-150.

87. *See id.* at 78.

88. 60 U.S. (19 How.) 393 (1856).

89. *See* Fehrenbacher, *Dred Scott*, *supra* note 14, at 561-67 (concluding that the combination of *Dred Scott* and the furor raised over the Lecompton Constitution probably explains the momentous Republican gains in the lower North between 1856 and 1858, which ultimately enabled Lincoln to win the presidency in 1860).

90. 410 U.S. 113 (1973).

91. *See* John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 354-59 (1994); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 188, 341-42 (1991); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1205 (1992).

sexual orientation on the basis of *Bowers*? On the contrary, I think it probable that *Bowers* was one of the most important factors in mobilizing today's gay rights movement.

Whether or not this "backlash thesis"[92] is correct, the case for the legitimizing effect of Supreme Court decisions (or, obversely, Balkin's claim for the *de*legitimizing effect of Supreme Court *non*decisions) has not been established. It is implausible to believe that the nation's apparent relative indifference to poverty in the 1990s is significantly attributable to the Court's refusal to recognize a constitutional right to wealth redistribution a quarter century ago.

II. THE REAL PROBLEM OF CONSTITUTIONAL FIDELITY

The missing variable that causes Balkin to overstate the harmful psychological consequences of fidelity is, it turns out, also the real problem of fidelity: the malleability of the constitutional text. Constitutional evil is a minor problem because the Constitution generally—except perhaps with regard to slavery—is sufficiently malleable to permit non-evil interpretations. American constitutional history suggests that almost any practice perceived as unjust by a sufficient percentage of the population eventually will be subjected to a (plausible) constitutional challenge. Yet herein lies the real problem with constitutional fidelity. If most controversial social issues plausibly can be converted into constitutional disputes, and the document's text is indeterminate as to how those disputes ought to be resolved, how do we show fidelity to the Constitution without subjecting ourselves to uncabined judicial rule? Balkin's paper says not a word about the countermajoritarian difficulty posed by judicial review; yet this is fidelity's principal problem—or at least half of it. The other half is the deadhand problem of constitutionalism.

The purest form of constitutional fidelity would appear to be some version of originalism. Yet originalist constitutional interpretation creates an enormous deadhand problem: why should today's generation be governed by decisions made two hundred years ago by people who inhabited a radically different world and held radically different ideas and values? To the extent that originalists bother to defend their interpretive methodology, they tend to offer a comparative justification: originalism is superior to its most plausible alternative, which is some form of relatively uncabined judicial value creation.[93] In other words, originalists often assert that it is antidemocratic for unelected, remotely accountable judges to invalidate democratically-

92. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. Am. Hist. 81 (1994).

93. *See* Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 Harv. J.L. & Pub. Pol'y 283, 288 (1996); Jonathan R. Macey, *Originalism as an "ism"*, 19 Harv. J.L. & Pub. Pol'y 301, 306 (1996); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

enacted legislation on the basis of their own subjective value judgments.[94] One might retort, however, why isn't it equally antidemocratic for a contemporary majority to be governed by values enshrined in the Constitution over two hundred years ago? That is, haven't constitutional originalists simply substituted a deadhand problem for a judicial subjectivity problem?[95] Both interpretive methodologies are susceptible to the charge of being antimajoritarian.

Most efforts to locate a middle ground between the polar positions of deadhand rule and uncabined judicial subjectivity have embraced some version of a "living Constitution,"[96] "moderate originalism,"[97] or "translation."[98] However labeled, the idea is that one can avoid the vices of both deadhand control and uncabined judicial subjectivity by taking the Framers' concepts and "translating" them into modern circumstances. The obvious problem with the enterprise is one of indeterminacy—doesn't translating old concepts into modern contexts inevitably implicate the very sort of unconstrained judicial subjectivity that translation's proponents seek to avoid? I have endeavored elsewhere to show that the answer is "yes"—the translation enterprise is quite hopeless.[99] To briefly summarize, there are a couple of distinct problems.

First, translation fails to accomplish its objective of avoiding deadhand control. When we translate old constitutional concepts to accommodate new circumstances, the deadhand problem persists, because it is always possible that an unconstrained modern decisionmaker would simply conclude that the old concept has outlived its usefulness. Translators ask, for example, how the Framers' commitment to federalism principles should be adjusted to reflect the reality

94. *See, e.g.*, Robert H. Bork, The Tempting of America: The Political Seduction of the Law 256-59 (1990).

95. *See, e.g.*, Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 Harv. J.L. & Pub. Pol'y 351, 353 (1996); *see also* Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 Harv. J.L. & Pub. Pol'y 293, 296 (1996) (observing that constitutionalism raises a deadhand problem and judicial review a countermajoritarian problem).

96. *E.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976) (criticizing the concept).

97. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 205 (1980).

98. *E.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995) [hereinafter Lessig, *Understanding Changed Readings*].

Even conservative originalists play this game when doing so is politically imperative, though they like to pretend otherwise. *See, e.g.*, Bork, *supra* note 94, at 81-82 (seeking to justify *Brown* by elevating the level of generality at which the intention of the Fourteenth Amendment's drafters is stated); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1103-04 (1995) (same).

99. *See* Michael J. Klarman, *Anti-Fidelity*, 70 S. Cal. L. Rev. (forthcoming Mar. 1997) [hereinafter Klarman, *Anti-Fidelity*]. For another affirmative answer, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 798-804 (1983).

of a modern, industrial, highly integrated economy.[100] Perhaps the right question to ask, however, is whether the Framers would retain their commitment to federalism at all in light of these radically changed circumstances. After all, at least some of the Founders embraced federalism less out of political principle than political necessity—that is, the fact that the state legislatures, which could not be entirely cut out of the Constitution's ratifying process, would be loath to relinquish too much of their power.[101] This is not to deny that federalism retains many of its virtues even today. For example, it fosters experimentation, encourages competition between states, arguably maximizes preference satisfaction in a geographically diverse nation, enhances citizen participation in government, and ensures the existence of competing governmental power sources.[102] Yet federalism also has many disadvantages, some of which are simply the flip-sides of its advantages. Federalism permits races to the bottom, prevents realization of efficiencies of scale, frustrates efforts to create an economic common market, arguably creates greater opportunities for minority oppression (the converse of Madison's point in *Federalist No. 10*) and obstructs implementation of federally-guaranteed rights (think of massive resistance to *Brown*). Plainly, balancing the competing virtues and vices of federalism is a complicated enterprise. My only point here is that freed from the political reality that made federalism commitments unavoidable, and apprised of the massive political, social, and economic changes that arguably render federalism obsolete, it is entirely plausible that the transplanted Founders would choose to reject federalism altogether rather than translating it.

Nor does translation solve the problem of uncabined judicial rule. There are two distinct problems. First, when translating, how do we know which circumstances to hold constant and which to vary—that is, when asking what the Framers would have done under modern circumstances, which aspects of their world do we vary and which do we leave in place? Second, assuming we can answer this question of which changed circumstances are relevant to the translation, how do we calculate what the Founders would have done in light of those changes?

---

100. *E.g.*, Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 Sup. Ct. Rev. 125; Lessig, *Understanding Changed Readings*, *supra* note 98.

101. *See, e.g.*, Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 162, 169-70 (1996). Madison had to sacrifice many of his nationalist aspirations—the national veto on state laws, the open-ended grant of national legislative power, the constitutional mandate of lower federal courts—to accommodate political reality.

102. *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 Mich. L. Rev. 752, 774-84 (1995); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1498-99 (1994); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 Sup. Ct. Rev. 341, 380-414.

Consider first the question of which changed circumstances to incorporate into the translation. A rather large problem immediately presents itself: If we treat *all* changed circumstances as relevant variables, then we simply will have converted the Framers into us, and asking how they would resolve a problem is no different from asking how we would resolve it. Yet a decision to treat some changed circumstances as variables and others as constants seems entirely arbitrary. For example, it is wholly uncontroversial to vary the existing state of technology when translating the congressional power to regulate interstate commerce. I am aware of nobody who argues that Congress cannot regulate airplanes because they did not exist when the Constitution was adopted; airplanes are a modern analogue of ships, so certainly Congress can regulate their interstate movement. Yet in translating Congress's Commerce Clause power, why is it any less justifiable to treat as relevant variables all of the other changed circumstances that might influence one's attitude toward federalism—for example, the modern proliferation of national and international markets, the transportation and communications revolutions, the nation's growing international role, the increased mobility of the American population, and so forth?

Even if we could agree on which changed circumstances are relevant, we still would need to figure out whether the extent of the change has been sufficient to justify a translation. For example, Lawrence Lessig has argued that by the 1930s changed circumstances—both conceptions of the nature of law and political and social variables, the most notable of which was the Great Depression—justified the Supreme Court's repudiation of the *Lochner* era's commitment to laissez-faire economics and limited national government power.[103] Lessig's empirical claim about changed circumstances seems convincing. The pathologies of a complex urban, industrial society plainly did reduce the allure of laissez-faire and increase support for national government regulation by the 1930s. Yet a court charged with the complex task of translating the Framers' intentions needs to know more than the general direction of changing circumstances; it needs to identify with precision the point at which those changes have become sufficient to justify a translation. The problem is that at any particular point in time, reasonable people will disagree about whether the change in circumstances has been sufficient to justify a translation of the Framers' intentions. As late as 1937, the Four Horsemen still had not spotted sufficient changes in circumstance to justify translation of laissez-faire and federalism concepts.[104] On the other hand, as early as 1905-1910 some justices and scholars already had identified suffi-

103. Lessig, *Understanding Changed Readings*, *supra* note 98, at 443-70.

104. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 76 (1937) (McReynolds, J., dissenting); West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (Sutherland, J., dissenting).

cient change to warrant a translation.[105] Furthermore, it is difficult to believe that one's view of the sufficiency of changed circumstances does not reflect, to a substantial degree, one's normative commitments. The Four Horsemen, for example, would have been unconvinced of the sufficiency of changed circumstances in 1937 largely because they liked things better the old way.[106] Measuring the extent of changed circumstances and assessing whether they are sufficient to justify a translation are tasks certain to yield controverted conclusions. One can phrase this in terms of translation—would the Framers have considered the changed circumstances sufficient to justify altering their constitutional commitments? Since the answer to that question, however, is so obviously indeterminate, it appears that the real ground of controversy is over what *we* think should be done, rather than over what the Framers would have done in our changed circumstances. Translation solves the judicial subjectivity problem no better than it does the deadhand problem.

CONCLUSION

The real difficulty with fidelity is not that of constitutional evil; the relative malleability of the Constitution largely eliminates that problem. Rather, the quandary for fidelity is how one can remain faithful to the Constitution without succumbing to either of the twin pathologies of deadhand rule or judicial rule, neither of which seems like a particularly attractive way to run a democracy. It is easy to understand the urge to seek a middle ground between these polar pathologies. Yet it turns out that the search is hopeless. Translation does not work; it eliminates neither the deadhand problem nor that of judicial subjectivity. The problem of constitutional fidelity is irresolvable. Perhaps we should reconsider our premises. Is it clear that constitutional fidelity really is such a good thing?[107] Perhaps we should give "constitutional adulter[y]"[108] a try.

105. *E.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain."); Learned Hand, *Due Process and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 506-07 (1908) (noting changed conceptions of property and contract rights that allow for greater social regulation); Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454, 464 (1909) (criticizing substantive due process decisions as relying on a formalistic conception of law that "contrast[s] with the social conception of the present"); *id.* at 467 (noting "new conditions in business and industry" of which legislatures should be able to take account in regulatory legislation).

106. They also may have considered changed circumstances irrelevant to constitutional interpretation. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448-49 (1934) (Sutherland, J., dissenting) ("A provision of the Constitution . . . does not mean one thing at one time and an entirely different thing at another time.").

107. I have argued against constitutional fidelity in Klarman, *Anti-Fidelity*, *supra* note 99, and explored non-constitutional, majoritarian uses of judicial review in Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. (forthcoming Feb. 1997).

108. Balkin, *supra* note 1, at 1703.