FIT, JUSTIFICATION, AND FIDELITY IN CONSTITUTIONAL INTERPRETATION*

AJUSTE, JUSTIFICACIÓN Y FIDELIDAD EN LA INTERPRETACIÓN CONSTITUCIONAL

James E. FLEMING**

Resumen:

Dworkin desarrolló el famoso argumento de que la mejor interpretación de una Constitución se debe ajustar y justificar el material jurídico, por ejemplo, el texto, el significado original y los precedentes. En su libro reciente *Against Obligation*, Abner S. Greene cuestiona esta tendencia de los constitucionalistas de defender dicha fidelidad con el pasado en la interpretación constitucional. Greene rechaza la noción originalista de seguir el significado original al interpretar una Constitución y rechaza la obligación interpretativa de seguir los precedentes. En este ensayo me centro en estos argumentos de Greene, y en sus argumentos de que teóricos como Dworkin y yo le damos demasiada importancia a los elementos de "ajuste" y al precedente, y no la importancia debida al elemento de

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** Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. I have adapted this Essay from a previously published article (James E Fleming, 'Fit, Justification, and Fidelity in Constitutional Interpretation' (2013) 93 Boston University Law Review 1283). I incorporate the eulogy to Ronald Dworkin from another piece (James E Fleming, 'Introduction to the Symposium on Ronald Dworkin's *Religion without God*' (2014) 94 Boston University Law Review 1201). Thanks to Courtney Gesualdi for helpful comments and to Jessica Lees for helpful formatting.

"justificación" y de justicia en la interpretación constitucional. Este ensayo es parte de un libro que actualmente trabajo intitulado *Fidelity to Our Imperfect Constitution* que critica todas las formas de originalismo y desarrolla argumentos que he elaborado previamente en relación a lo que Dworkin llamó la "Lectura Moral de la Constitución" o lo que yo denomino "Teoría del perfeccionamiento de la Constitución" que interpreta la Constitución de manera en que sea lo mejor que pueda llegar a ser. Argumentaré en este ensayo que si tomamos la idea de "ajuste" de manera seria ello no implica un compromiso para seguir el pasado en la interpretación constitucional, bien sea un significado original o el precedente. También argumento que si tomamos la noción de fidelidad en serio, ello tampoco implica dicho compromiso. La fidelidad, más bien es una actitud de compromiso para hacer que las cosas funcionen y desarrollarlas, construirlas con el paso del tiempo para realizar sus fines y aspiraciones, hacer pues, de la Constitución lo mejor que pueda llegar a ser. Contra los argumentos de Greene referentes a que la justificación tiene preferencia sobre el ajuste en la interpretación constitucional, sostengo que tanto ajuste como justificación son del mismo peso e importancia, los dos nacen del objetivo básico de desarrollar las mejores interpretaciones.

Palabras clave:

Interpretación constitucional, teoría constitucional, moral, fidelidad, precedentes judiciales, prácticas judiciales.

Abstract:

Abstract: Ronald Dworkin famously argued that the best interpretation of a Constitution should both fit and justify the legal materials, for example, the text, original meaning, and precedents. In his recent book, Against Obligation *(Harvard University Press, 2012), Abner S. Greene provocatively and creatively bucks the tendencies of constitutional theorists to profess fidelity with the past in constitutional interpretation. He rejects originalist understandings of obligation to follow original meaning in interpreting the Constitution. And indeed he rejects interpretive obligation to follow precedent. In this Essay I focus on Greene's arguments against interpretive obligation to the past, in particular, his argument that even constitutional theorists like Dworkin and I give too much deference or weight to 'fit' and precedent, and not enough primacy to 'justification' and justice, in our approaches to constitutional interpretation. This Essay is part of my book in progress entitled Fidelity to Our Imperfect Constitution, which will criticize all forms of origi-*

nalism, and it will further develop my arguments in previous books for what Dworkin called a 'moral reading' of the Constitution and what I have called a 'Constitution-perfecting theory' that would interpret the Constitution so as to make it the best it can be. In the Essay, I argue that taking fit seriously does not entail a commitment to interpretive obligation to follow the past, whether concrete original meaning or precedent. I also argue that taking fidelity seriously does not entail such a commitment. Fidelity, rather, is an attitude of commitment to making the scheme work and to further developing it, building it out over time in ways to better realize its ends and our aspirations: to make the Constitution the best it can be. Finally, as against Greene's argument that justification has primacy over fit in constitutional interpretation, I argue instead that fit and justification are co-original and of equal weight: both stem from the basic aim of developing the best interpretation.

Keywords:

Constitutional Interpretation, Constitutional Theory, Morality, Fidelity, Judicial Precedents, Judicial Practices.

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> *There is… a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.*
>
> Oliver WENDELL HOLMES, Jr.[1]

I. RONALD DWORKIN: A EULOGY

Ronald Dworkin is widely and rightly viewed as the most important legal philosopher and constitutional theorist of our time, and as one of the leading figures in moral and political philosophy. In the words of Marshall Cohen, Dworkin's *Taking Rights Seriously* 'is the most important work in jurisprudence since HLA Hart's *The Concept of Law* and, from a philosophical point of view at least, the most sophisticated contribution to that subject yet made by an American writer'.[2] And Cohen wrote those words about Dworkin's first book in 1977! Dworkin's many outstanding subsequent books and articles made good on that early, prescient assessment. Dworkin is unmatched and unrivaled in legal philosophy and constitutional theory.

[1] Oliver Wendell Holmes, 'Learning and Science', in OW Holmes, *Collected Legal Papers* (Harcourt, Brace and Company 1920) 139.

[2] Marshall Cohen, 'He'd Rather Have Rights' (1977) 24 [9] *The New York Review of Books* [May 26] (reviewing Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977)).

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Over the years, I have organized a number of conferences in constitutional theory, and Dworkin was often the most appropriate keynote speaker. In conferences at Fordham University School of Law on 'Fidelity in Constitutional Interpretation' and 'Rawls and the Law', and at Boston University School of Law on his book, *Justice for Hedgehogs*, Dworkin delivered powerful and eloquent keynote lectures.[3] The readers of this Essay are likely familiar with the countless accounts of Dworkin's brilliance as a lecturer, of how he spoke without notes and with great flair, making it all seem so graceful and effortless. Even more impressive, in my experience, was how seriously he took his lectures and how energetically he responded to his interlocutors. In the conference at Boston University on the penultimate draft of *Justice for Hedgehogs*, held in 2009 when Dworkin was seventy-eight years old, he demonstrated his characteristic energy by responding extemporaneously to all thirty-one commentators, one panel at a time, and elaborating those initial thoughts in a published response.[4] I had the privilege of writing the biographical entry on Dworkin in the *Yale Biographical Dictionary of American Law*, and closed that entry by stating: 'His work abounds with indefatigable energy, giving the impression that he would not stop making arguments until he put the clamps of reason upon every rational being'.[5] Dworkin substantially revised the draft of *Justice for Hedgehogs* in light of the Boston University Symposium and incorporated many of his responses.

[3] Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 Fordham Law Review 1249; Ronald Dworkin, 'Rawls and the Law' (2004) 72 Fordham Law Review 1387; Ronald Dworkin, 'Justice for Hedgehogs' (2010) 90 Boston University Law Review 469.

[4] Ronald Dworkin, 'Response' (2010) 90 Boston University Law Review 1059.

[5] James E Fleming, 'Ronald Dworkin', in RK Newman (ed.), *The* Yale Biographical Dictionary of American Law (Yale University Press 2009) 179.

Dworkin's work in legal philosophy and constitutional theory was so powerful and fecund that it could inspire many careers wholly dedicated to building upon it and working out its implications. Dworkin (along with John Rawls) has been a powerful inspiration for my own work in constitutional theory. My *Securing Constitutional Democracy: The Case of Autonomy* puts forward a 'Constitution-perfecting' theory that aims, in the spirit of Dworkin, to interpret the U.S. Constitution so as to make it the best it can be.[6] Sotirios Barber's and my book, *Constitutional Interpretation: The Basic Questions*, is a response to Dworkin's call, in *Taking Rights Seriously*, for a 'fusion of constitutional law and moral theory'.[7] And Linda McClain's and my book, *Ordered Liberty: Rights, Responsibilities, and Virtues*, responds to charges that liberals like Dworkin take rights too seriously, developing a civic liberalism that takes responsibilities and civic virtues —as well as rights— seriously.[8]

Dworkin's successor as Professor of Jurisprudence at Oxford University, John Gardner, put it well when he said: 'The loss of Ronnie takes a bit of the sparkle out of life as a philosopher of law'.[9] But those who knew Dworkin and learned from his teaching and writing will never forget the thrill of engaging with him and building upon his work. His sparkling prose, the staggering ambition and monumental achievements of his works, and the flair and gusto of his arguments and insights will never cease to illuminate and inspire. We shall not look upon his like again. Ronald

[6] James E Fleming, *Securing Constitutional Democracy* (University of Chicago Press 2006) 4-6 73-74 210-11.

[7] Sotirios A Barber and JE Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007) xiii (quoting Dworkin, *Taking Rights Seriously* (n 2) 149).

[8] James E Fleming and Linda C McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press 2013) 3.

[9] John Gardner, 'Ronald Dworkin, 1931-2013', University of Oxford (Feb. 15, 2013).

Dworkin made legal philosophy and constitutional theory the best they can be.

II. Against Interpretive Obligation to Follow the Past

Dworkin famously argued that the best interpretation of the Constitution should fit and justify the legal materials, for example, the text, original meaning, and precedents.[10] In his recent book, *Against Obligation*, Abner Greene provocatively and creatively bucks the tendencies of constitutional theorists to profess fidelity with the past in constitutional interpretation.[11] He rejects originalist understandings of obligation to follow original meaning in interpreting the Constitution, even of the sort associated with Jack Balkin's abstract living originalism (which aspires to fidelity to the abstract commitments of, rather than the concrete expectations of, the founding generation).[12] And indeed he rejects interpretive obligation to follow precedent, even of the type illustrated by David Strauss's flexible living constitutionalism.[13] Greene provides powerful arguments against views that original meaning and precedent are dispositive of constitutional meaning and decision. He argues that we the people today should decide questions of constitutional meaning, commitment, and justice for ourselves, by our own best lights.

In this Essay I focus on Greene's arguments against interpretive obligation to the past,[14] in particular, his argument that even constitutional theorists like Ronald

[10] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 239.

[11] Abner S Greene, *Against Obligation: the Multiple Sources of Authority in a Liberal Democracy* (Harvard University Press 2012).

[12] Jack M Balkin, *Living originalism* (Harvard University Press 2011).

[13] David Strauss, *The Living Constitution* (Oxford University Press 2010).

[14] Greene (n 11) 169-71, 192-97, 201-04.

Dworkin[15] and I[16] give too much deference or weight to 'fit' and precedent, and not enough primacy to 'justification' and justice, in our approaches to constitutional interpretation. I should begin by observing that both Greene and I are, broadly speaking, Dworkinians, or moral readers. By that I mean that we conceive the Constitution in significant part as a scheme of abstract moral commitments, not a code of concrete historical rules. And we conceive interpretation of the Constitution as requiring judgments about what interpretation best 'fits' and 'justifies' the constitutional document, order, and practice. Interpretation is not a matter of discovering and enforcing historically determined answers provided by the framers and ratifiers (whether original intentions, understandings, or public meanings).

Hence, it is no surprise that I largely agree with Greene's account of the place of fit and justification in constitutional interpretation. And so, in what follows, it may seem like we are having a heated agreement. Even where we disagree, it may seem that we are having a family quarrel. But I do think the engagement is worthwhile, for it provides an occasion for me to clarify and sharpen Dworkin's and my own arguments about fit, justification, and fidelity in constitutional interpretation. This Essay is part of my book in progress entitled *Fidelity to Our Imperfect Constitution* (Fleming forthcoming). This book will criticize all forms of Originalism, and it will further develop my arguments in previous books for what Dworkin called a 'moral reading' of the Constitution[17] and what I have called a 'philosophic approach' to constitutional interpretation[18] and a 'Constitu-

[15] Dworkin, *Law's Empire* (n 10).

[16] Fleming, *Securing Constitutional Democracy* (n 6).

[17] Ronald Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (Harvard University Press 1996).

[18] Barber and Fleming (n 7) 16, 211, 225, 227.

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tion-perfecting theory' that would interpret the Constitution so as to make it the best it can be.[19]

Again, Greene argues against interpretative obligation to the past, whether to concrete original meaning or precedents (as he puts it, whether to 'higher' or 'prior' authorities).[20] He makes cogent arguments against originalism as conventionally understood. His arguments zero in on originalists' assumptions or claims that we are obligated to follow the original understanding or original meaning, concretely conceived as the original expected applications of the framers and ratifiers. His arguments also target originalists' aims or claims to avoid making moral and philosophic choices in constitutional interpretation. Such choices, he rightly argues, are inevitable and indeed desirable. In a nutshell, he shows that originalists unsuccessfully attempt to stress fit to the exclusion of justification.[21]

At the same time, Greene[22] criticizes moral readers like Dworkin[23] and me[24] for conceiving constitutional interpretation as being too constrained by fit —in particular, by interpretive obligation to follow precedents—. It seems that, to Greene, Dworkin and I do not fully acknowledge the primacy of justification over fit. I should say emphatically that I welcome this criticism! Moral readers like Dworkin and me are usually criticized for giving too little room for fit, and too much primacy to justification.[25] Since we are being criticized from both sides, I guess we must be doing something right!

[19] Dworkin, *Freedom's Law* (n 17); Fleming, *Securing Constitutional Democracy* (n 6) 161-63.

[20] Greene (n 11) 161-63.

[21] Ibid 161 165-66 172-81.

[22] Ibid 169-70 192-97 201-04.

[23] Dworkin, *Law's Empire* (n 10).

[24] Fleming, *Securing Constitutional Democracy* (n 6).

[25] Anthony J Sebok, 'The Insatiable Constitution' (1997) 70 Southern California Law Review 419-20.

To elaborate, I shall sketch the predicament of moral readers like Dworkin and me. In general, no one doubts our commitment to the normative dimension of justification in constitutional interpretation. After all, we argue that constitutional interpretation is a matter of making moral and philosophical judgments about the meanings and implications of our constitutional commitments. The challenge we face is to show that we are not just elaborating our own liberal commitments for a perfect liberal Constitution.[26] We make three basic responses to these 'perfect Constitution' challenges. First, we argue that it is in the nature of constitutional interpretation to strive to interpret the Constitution so as to make it the best it can be.[27] Second, we show that we do not believe that the Constitution, even when construed in its best light, is perfect. For example, Dworkin concedes that the Constitution does not protect welfare rights (rights which his ideal liberal Constitution would protect).[28] And I have acknowledged[29] all manner of constitutional evil, misfortune, stupidity, and tragedy in our constitutional practice. Third, we argue that our liberal constitutional theories fit the constitutional document and scheme. They have a firm footing in our extant constitutional practice and they are not just normative theories that would justify a perfect liberal Constitution.[30]

Enter my first book, *Securing Constitutional Democracy*, which Greene criticizes for giving primacy to fit over justification.[31] Officially, Dworkin's moral reading aspires to construct a theory that best fits and justifies our constitutional

[26] Henry P Monaghan, 'Our perfect Constitution' (1981) 56 New York University Law Review 364.

[27] Dworkin, *Freedom's Law* (n 17) 38; Dworkin, *Law's Empire* (n 10) 255.

[28] Dworkin, *Freedom's Law* (n 17) 36.

[29] Fleming, *Securing Constitutional Democracy* (n 6) 220-21.

[30] Ibid 63, 70, 80-1 92-8.

[31] Greene, *Against Obligation* (n 11) 169-71 192-97 201-04; AS Greene, 'The Fit Dimension' (2007) 75 Fordham Law Review 2926-2948.

document, order, and practice.[32] Yet many critics believe that Dworkin (to use Greene's terms) has given 'primacy to justification'[33] and not enough 'room for fit'.[34] They claim that he has elaborated a perfect liberal constitution but has not done the concrete groundwork necessary to show that his interpretations of the Constitution adequately fit our practice, including original meaning and precedents.[35] In response, I basically say, 'Do as Dworkin says, not as he does'.[36] That is, even if Dworkin himself may not always satisfactorily do the fit work that his own theory calls for, I do take fit seriously in my book. I seek to remedy the deficiency of Dworkin's work by making the fit case for a liberal theory of 'securing constitutional democracy' that protects not only basic procedural liberties associated with deliberative democracy, like the right to vote, but also basic substantive liberties associated with what I called deliberative autonomy, like the right to marry. Instead of simply making a normative argument that justice requires protecting a right to individual autonomy, I undertake an archeological excavation of the legal materials of our constitutional practice and culture, specifically the line of substantive due process cases protecting certain basic liberties associated with privacy or autonomy.[37] I ask: what constitutional theory would best fit and justify these cases? I argue[38] that my 'constitutional constructivism' better fits and justifies these cases than do competing theories of originalism (Justice Scalia's view) or perfecting the processes of representative democracy or deliberative democracy (Ely's and Sunstein's

[32] Dworkin, *Law's Empire* (n 10) 239.

[33] Greene, *Against Obligation* (n 11) 12, 201.

[34] Ibid 204; Greene, 'The Fit Dimension' (n 31) 2946.

[35] Greene, 'The Fit Dimension' (n 31) 2938.

[36] James E Fleming, 'Fidelity to Our Imperfect Constitution' (1997) 65 *Fordham Law Review* 1335, 1349.

[37] Fleming, *Securing Constitutional Democracy* (n 6) 92-8.

[38] Ibid.

views).[39] Yet my taking this 'fit' tack —doing as Dworkin says, not as he does— is evidently what has prompted Greene's criticism[40] that I give too much deference to fit and precedent and fail to give 'primacy [to] justification'.

I make three arguments in this Essay. First, I argue that a commitment to fit (like that in Dworkin's work and in my book, *Securing Constitutional Democracy*) does not necessitate commitment to the view that one has an interpretive obligation to follow the past —whether concrete original meaning or precedents. In short, taking fit seriously interpretive obligation to follow the past. Nevertheless, fit may figure prominently in a sound account of the aspiration to fidelity in interpreting the Constitution.

Second, I argue that interpreters who aspire to fidelity in constitutional interpretation have a responsibility to construct an account that not only justifies but also fits our constitutional document, order, and practice. But the aspiration to fidelity itself does not entail an interpretive obligation to follow the past. In short, taking fidelity seriously interpretive obligation to the past. In this section I will comment in more detail on fidelity without obligation and without originalism, sketching the account of fidelity in pursuit of our aspirations that I am developing in my book in progress, *Fidelity to Our Imperfect Constitution*.

Third, I argue that fit and justification are co-original and of equal weight, instead of justification having 'primacy' over while also leaving 'room for fit'. Here I shall say more about fit in relation to justification and fidelity in constitutional interpretation.

[39] John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980; Cass R Sunstein, *The Partial Constitution* (Harvard University Press 1993).

[40] Greene, *Against Obligation* (n 11) 12.

III. Taking Fit Seriously Interpretive Obligation to Follow the Past

Do Dworkin's and my commitment to taking fit as well as justification seriously entail a commitment to interpretive obligation to follow the past, whether concrete original meaning or precedent? In making the 'fit' case for my theory, I present precedents in the line of substantive due process decisions as bones or shards of a constitutional culture, as provisional fixed points that a constitutional constructivist archaeologist, or interpreter, has a responsibility to fit and justify.[41] I argue that a constructivist interpreter would not be free to cast out the substantive shards and bones in the way that an originalist or process-perfecter would.[42] This is not to say that judges, much less citizens, have an obligation to follow the past. Rather, it is to say that our pictures of our constitutional practice will be more recognizable —and be better accounts— if we can work up an account that fits and justifies the durable lines of doctrine.

I do not offer a theory of precedent or stare decisis as such, nor do I justify following precedent for any of the reasons people commonly offer to justify this practice —reasons that Greene considers and rejects as inadequate—.[43] As a matter of fact, I do not believe that anyone has a strong sense of obligation to follow precedent as such in constitutional interpretation.

Fidelity to our imperfect Constitution, I would argue —and thanks to Greene I now see this more clearly— entails rejecting any obligation to follow original meaning or precedent. As I have argued elsewhere, if our Constitution were conceived merely as consisting of original expected applications or precedents, it would not deserve our fidelity.[44]

[41] Fleming, *Securing Constitutional Democracy* (n 6) 93.

[42] Ibid 94.

[43] Greene, *Against Obligation* (n 11) 190-99.

[44] Fleming, *Securing Constitutional Democracy* (n 6) 226-27.

The Constitution, to be worthy of our fidelity, must reflect our aspirations to realize the ends proclaimed in the Preamble. For the Constitution to do that, we must reject any idea of an obligation to follow original expected applications or precedents as such. Fidelity to our imperfect Constitution entails fidelity in pursuit of our constitutional aspirations and ends.

What is more, I do not see fit as I practice it as imposing an obligation to follow the past in a way that Greene would find objectionable. The dimension of fit basically does two things. First, it screens out purely utopian interpretations that have no claim on us by insisting upon showing the footing of the interpretation in *our* constitutional practice. Hence, even if we are constructing a moral reading —and even if we are giving primacy to justification— we give room for fit to show that the interpretation is an interpretation of *our* constitutional practice, not that of a perfectly just Constitution. Second, fit screens out off-the-wall interpretations (which are not necessarily utopian). Indeed, fit indicates that the proffered interpretation has a footing in our practice.

Furthermore, if one conceives constitutional interpretation and justification as constructivist, as I do, one sees our principles as manifested in and growing out of our constitutional commitments and practice, not abstract ideas of what justice requires.[45] Within constructivism, one sees the dimension of fit as bound up with the dimension of justification: we are trying to work up the best justification for the extant materials of the constitutional practice.

In response to Greene's argument that Dworkin and I give too much deference or weight to precedent, I should clarify my views about the place of precedent in constitutional interpretation. I would say that, if one thinks of precedents as good-faith efforts to work out the best understanding of our constitutional commitments, one should give them some weight and approach them with some hu-

[45] Ibid 6, 62, 66, 92-94.

mility. I hasten to add that, to accept this approach, one need not and should not embrace a thoroughgoing Burkeanism. Greene aptly criticizes Burkean justifications for following precedent as such.[46] One need not give precedents presumptive weight or 'deference', to use Greene's formulations.[47]

Ironically, moral readers and common law constitutionalists may give more weight to precedent than do originalists. For one thing, originalists officially give greater weight to concrete original meaning and are dubious about precedents they see as inconsistent with concrete original meaning.[48] Indeed, some originalists, like Gary Lawson, reject precedent altogether.[49] Others, like Justice Scalia, make a 'pragmatic exception' to originalism to accommodate precedent.[50] By contrast, moral readers and living constitutionalists (more precisely, common law constitutionalists) conceive the Constitution as a frame of government and scheme of abstract powers and rights, the meaning of which must be elaborated over time. They deny that the framers and ratifiers resolved our problems for us. Accordingly, they may give greater weight to interpreters' good-faith efforts to work out the frame or scheme over time. I say 'ironically' because living constitutionalists always emphasize flexibility and change, and argue against being tied down by the past. Yet they may be more tied down by precedent than originalists are. This is so in part because they conceive of precedents as part of the constitu-

[46] Greene, *Against Obligation* (n 11) 194-95.

[47] Ibid 192-93 197-98.

[48] Balkin (n 12) 14.

[49] Gary Lawson, 'Mostly Unconstitutional: the Case Against Precedent Revisited' (2007) 5 Ave Maria Law Review 4; Gary Lawson, 'The Constitutional Case Against Precedent' (1994) 17 Harvard Journal of Law and Public Policy 24.

[50] Antonin Scalia, 'Response', in Amy Gutmann (ed.), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 140.

tional practice that we are trying to carry on in a principled, coherent way.

In my observation, though, no one, or hardly anyone, believes that we have a strong obligation to follow precedents as such. And this is as it should be. At any given time, a body of law will be riven by competing substantive ideals and competing approaches to interpretation. Proponents and opponents of a given view will win some cases and lose others. The conflicting views are embodied in the cases as they develop. And so, one cannot operate under a strong obligation to follow precedents as such and still make defensible decisions.

Furthermore, as Sotirios Barber and I have argued, we cannot make recourse to precedent to avoid making moral and philosophic choices in constitutional interpretation.[51] Instead, we use precedent and argument concerning its implications as a site on which to do battle over and choose among competing views. Thus, precedent is a site or battleground for making moral and philosophic choices. The precedents themselves do not settle the questions and make the choices for us.

I do not consider it a weakness of precedent that people are willing to disregard it when they believe a previous case was wrongly decided, instead of adhere to it. Or, more likely, they argue that the precedent in its implications supports what they think is the best interpretation and the best moral and philosophic choice in the case before them. That is the strength of precedent! We argue about and from precedents, not because we have an obligation to follow them or because they decide our cases for us; instead, we do so to elaborate the meaning and best understanding of our constitutional commitments. We ask whether the precedent was rightly decided because we are striving to make our constitutional commitments the best they can be. Precedents inform our judgment and they provide evidence of the best understanding of our commitments, but *they do*

[51] Barber and Fleming (n 7) 135-40, 190.

not themselves make those judgments for us. We have to make those judgments ourselves: that is why we cannot and do not simply stand as decided.

IV. Taking Fidelity Seriously Interpretive Obligation to the Past

In my book in progress, *Fidelity to Our Imperfect Constitution*, I argue in the spirit of Dworkin that, if we aspire to fidelity to the Constitution, a moral reading is superior to originalism (at least all varieties of originalism besides Balkin's abstract living originalism, which I interpret as a moral reading).[52] The aspiration to fidelity raises two fundamental questions: *Fidelity to what?* and *What is fidelity?* The short answer to the first —fidelity to the Constitution— poses a further question: *What* is the Constitution? For example, does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules? ... The short answer to the second —being faithful to the Constitution in interpreting it— leads to another question: *How* should the Constitution be interpreted? Does faithfulness to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts or prohibit it and instead require historical research to discover relatively specific original understanding or meaning? And does the quest for fidelity in interpreting the Constitution exhort us to make it the best it can be or forbid us to do so in favor of enforcing an imperfect Constitution?[53]

Let's begin with the question, *Fidelity to what?* My answer is fidelity to our abstract constitutional aspirations, including ends, principles, and basic liberties. Fidelity to our as-

[52] James E Fleming, 'Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution' (2012) 92 Boston University Law Review 1175-1177; JE Fleming, 'The Balkinization of Originalism' [2012] (3) University of Illinois Law Review 675-79.

[53] James E Fleming, 'Fidelity to Our Imperfect Constitution' (1997) 65 Fordham Law Review 1335.

pirations does not entail obligation to follow the past in the sense of either concrete original meaning or precedents. That would enshrine an imperfect Constitution that falls short of our aspirations and does not deserve our fidelity. We should treat precedents as evidence, factors, or resources, but not as obligations. They are to be taken into account, but followed only to the extent that they accord with our best understanding of our aspirations.

Next, let's consider the other question, *What is fidelity?* It is not fealty, or subservience. It is not following the authority of the past in the manner of an authoritarian originalism. Furthermore, it is not obligation to the concrete past, whether original meaning or precedents. Rather, fidelity is honoring our aspirations and pursuing our commitments by furthering our best understandings of them. The concrete original meaning and precedents are evidence of good-faith efforts to pursue those aspirations, but they are not the aspirations themselves. They have no doubt fallen short of our aspirations. If following those sources from the past dishonors our aspirations and undermines our commitments, we have good reasons to reject them in order to pursue our aspirations and commitments.

Moreover —to return to the question, *Fidelity to what?*— we should aspire to fidelity to our scheme as an ongoing frame of government pursuing the ends of the Preamble, not as a set of concrete original meanings or a string of precedents. Again, I do not say that we have an obligation to follow the concrete past, though I do say that we aspire to fidelity to the Constitution. How can we honor fidelity while rejecting obligation to the concrete past?

If we conceive the Constitution as a frame of government, to be lived under and worked out over time, we can approach it with an attitude of fidelity but without an obligation of obedience to concrete expected applications or precedents. Fidelity on this understanding entails a commitment to making the frame of government work, to learning from

experience, and to interpreting the Constitution so as to further its ends and realize its aspirations.

Fidelity? Yes. *Commitment?* Yes. *Obligation or obedience in an authoritarian sense to original expected applications or precedents?* No. Fidelity is not obedience to decisions already made for us in the past by people who are long dead and who were ignorant of the challenges and problems of our age. Fidelity, rather, is an attitude of commitment to making the scheme work and to further developing it, building it out over time, as Balkin puts it, in ways to better realize its ends and our aspirations.[54] Or, as Dworkin and I put it, to making the Constitution the best it can be.[55]

V. Fit and Justification in Constitutional Interpretation

Finally, I shall assess Greene's formulations about the 'primacy of justification' and 'room for fit'. Greene argues against interpretive obligation to follow the past, but he allows 'room for fit'.[56] He acknowledges that in particular cases there can be good reasons for following past decisions. As Balkin puts it, evidence of concrete original meanings and precedents serve as a resource, not a constraint, in constitutional interpretation.[57] Similarly, Greene says that they serve as a factor, not an obligation.[58]

I agree completely with Greene's conception of 'room for fit'.[59] Yet he says that people like Dworkin and me want to treat fit as more than a factor.[60] Greene conceives of a presumption of deference as lying on the terrain between fit

[54] Balkin (n 12) 5.

[55] Dworkin, *Law's Empire* (n 10) 255; Fleming, *Securing Constitutional Democracy* (n 6) 16, 211, 225, 227.

[56] Greene, *Against Obligation* (n 11) 201-06.

[57] Balkin 2011, pp. 256-59.

[58] Greene, *Against Obligation* (n 11) 192, 197, 206.

[59] Ibid 204-06.

[60] Ibid 192-93 196-97.

being a factor and fit being an obligation and situates Dworkin and me at that point. I think that Dworkin and I give similar room for fit, and we similarly treat fit as a factor though not an obligation. If I appear to treat fit as more than a factor, I suspect that it is simply because I have attempted to provide a corrective to Dworkin's work – to do as he says, not as he does. I suspect that most readers outside our family quarrel would argue that Dworkin and I, like Greene, *do* give primacy to justification over fit (or indeed that we give too little room for fit).

I would resist framing the issue in terms of whether fit or justification has primacy. Both dimensions enter into interpretation, and they are intertwined. There is no raw or bare fit that is prior to or apart from justification, nor is there any justification divorced from fit that has any purchase on us.

What is more, I do not believe that Greene has made the case for the primacy of justification over fit. He has, admittedly, made the case for the unavoidability of justification as well as fit, and the inextricable connection between them. I would argue instead that fit and justification are co-original and of equal weight.[61] Both are inherently involved in constitutional interpretation. Both stem from the basic aim of developing the best interpretation.

In places, Dworkin almost seems to regret drawing the distinction between the two dimensions of fit and justification.[62] Doing so is important for analytical clarity, but it may lead people to see the two dimensions as more distinct than they are, as if they correspond to a two-step process. And it may lead them to view the two dimensions as sequential rather than as dimensions of a holistic judgment:

[61] I apply the idea 'co-original and of equal weight' in analogous contexts (John Rawls, 'Reply to Habermas' (1995) 92 *The Journal of Philosophy* 132, as cited in Fleming, *Securing Constitutional Democracy* (n 6) 78.

[62] Dworkin, *Law's Empire* (n. 10) 65-66.

as in, first we fit and then we justify.[63] And it may lead them to argue that one or the other is primary. For example, they might argue that 'fit is everything', to the exclusion of justification.[64] Or, even if fit is not everything, that fit has primacy over justification. Or, to the contrary, that justification has primacy over fit. This is what Greene argues.[65]

In *Securing Constitutional Democracy*, I spoke of the best interpretation as that which provides the best fit with and justification of the constitutional document, order, and practice.[66] Thus, I purposely avoided splitting up these two dimensions. Having said that, I should acknowledge that I do make a *fit* case for my theory of securing constitutional democracy. But I hasten to add that, at the same time, I make the case that my theory *justifies* our constitutional document, order, and practice.

In writing the book, *Constitutional Interpretation: The Basic Questions* with Sotirios Barber, I initially wanted to refer to the two dimensions of fit and justification, but Barber insisted that we avoid this distinction. For him, interpretation is just a matter of giving the best account of honoring constitutional commitments and furthering constitutional ends. I have come to see the wisdom of this view of fit and justification as inextricably bound together in the idea of giving the best account.

At the same time, I should emphasize that there is analytical power and clarity in distinguishing fit and justification and acknowledge that I myself have distinguished the

[63] Lawrence B Solum, 'The Unity of Interpretation' (2010) 90 Boston University Law Review 553-54.

[64] Michael W McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1997) 65 Fordham Law Review 1292.

[65] Greene, *Against Obligation* (n 11) 201-04.

[66] Fleming, *Securing Constitutional Democracy* (n 6) 5, 63, 84, 92-3 97-8.

two in my own work.[67] As against those who argue that 'fit is everything', I have argued that fit alone is insufficient to resolve the clash between competing interpretations in hard cases. We have to resort to justification to do so. As stated above, my taking fit seriously shows that my moral readings have a firm footing in our constitutional practice. Furthermore, fit enables people to see their aspirations in the Constitution. Finally, fit enables us to criticize others' views as revisionist, radical, or subversive. For example, I can criticize the Tea Party as revisionist, radical, and subversive because they cannot even fit much of our twenty-first century constitutional practice. To be sure, I can also criticize them on normative grounds of justification: they have a deficient, unjust normative theory, one moreover that falls short of or misses the mark on our aspirations in the Preamble to the Constitution.

These uses of fit show the analytical power, in certain contexts, of stressing fit. But that is not to say that, even here, fit is entirely distinct from justification. To recall Greene's formulation, I would say that, in these ways, fit is a factor in constitutional interpretation.[68] In my book, I shall say more about how fit factors in constitutional interpretation – even perfectionist interpretation that aspires to interpret the Constitution so as to make it the best it can be and worthy of our fidelity.

I doubt that Greene would object to what I have said here about fit and justification. To recapitulate: if I seem to give primacy to fit over justification, it is because I strive to show that my theory —though a Constitution-perfecting theory— is a theory of *our* constitutional order, not one of a perfect liberal Constitution. Like Greene, I view fit with original meaning and precedent as a resource for deciding constitutional meaning, as a factor in making constitutional decisions, and as evidence of the content of our commit-

[67] Ibid; Fleming, 'Fidelity to Our Imperfect Constitution' (n 52) 1348-1352.

[68] Greene, *Against Obligation* (n 11) 192, 197, 206.

ments and indeed of political justice. Even though interpreters do not have an obligation to follow the past, they may be more effective in persuading people that their interpretations are faithful to the Constitution's aspirations if they can make an argument that their interpretation both fits with and justifies the constitutional document, underlying constitutional order, and evolved constitutional practice.

Finally, I would like to make an observation concerning Michael Seidman's evident view, in his book *Constitutional Disobedience*, related to fit and justification. If Greene would give primacy to justification over fit, it seems that Seidman would throw out fit altogether and the Constitution along with it.[69] As he titled an op-ed piece in the *New York Times*: 'Let's [g]ive up on the Constitution'.[70] Evidently that would leave only normative arguments about the best thing to do. It is not clear to me that normative arguments without regard to fit with the extant constitutional document, doctrine, and practice will be superior to our current forms of argument. Normative arguments tend to be more persuasive to people when they are cast in terms of realizing our commitments and aspirations than when they are cast simply as arguments for an ideal state of affairs. Similarly, I believe that, to a greater degree than is commonly appreciated, normative argument, at least in our political and constitutional culture, is more constructivist than utopian. It articulates the ideals implicit in our practices. Seidman might say this is a bad thing —that it shows the degree to which the Constitution has constricted our thinking about justice and other good things—. But I believe that our thinking about justice is enriched through constructivism, as compared with what it would be like if we did away with the Constitution or simply asked ourselves what

[69] Louis M Seidman, *On Constitutional Disobedience* (Oxford University Press 2013) 11-28.

[70] Louis M Seidman, 'Let's Give Up on the Constitution' *The New York Times* (New York, 31 December 2012) A19.

justice requires as a utopian matter.[71] Constitutional arguments that fit and justify our constitutional document and practice exert a greater claim on people than do utopian arguments, for the former are arguments about the best understanding of our practices, commitments, and aspirations.

But this is not to say that in keeping the Constitution, instead of doing away with it, we are saying we have an interpretive obligation to follow the past. Similarly, we are not engaging in constitutional disobedience if we reject concrete original meaning or precedents. To the contrary, I would argue that by doing so we are pursuing constitutional fidelity.

In the passage quoted in the epigraph with which I began this Essay, Justice Holmes famously wrote that 'historic continuity with the past is not a duty, it is only a necessity'.[72] I suppose that Holmes meant that somehow there is no avoiding following the past. I do not endorse Holmes's evidently deterministic view. I, like Greene, would agree with Holmes that following the past is not a duty. Unlike Holmes, however, I would say that it is a necessity in the weaker sense that, to be persuasive in our constitutional culture, one generally needs to argue that one's interpretations fit with the past, show the past in its best light (as Dworkin and I put it), or redeem the promises of our abstract moral commitments and aspirations (as Balkin puts it).[73] This is not originalism. It is a moral reading that aspires to fidelity to our imperfect Constitution.

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