

DIALOGIC FIDELITY: THE FOURTEENTH AMENDMENT, HISTORICAL MEANING, AND APPROPRIATE SCRUTINY FOR SEX DISCRIMINATION

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I. INTRODUCTION

Last Term, the Supreme Court confronted constitutional issues of sex discrimination and search and seizure. First, in *Atwater v. City of Lago Vista*,¹ the Court held that the Fourth Amendment creates no bar to the warrantless arrest of a citizen for a misdemeanor criminal offense. Then, in *Nguyen v. INS*,² the Court upheld against an equal protection challenge a statute that imposed different requirements for the acquisition of citizenship by a child born outside the United States to a United States citizen and non-citizen, depending on whether the citizen parent was the child's mother or father. The Court decided each case by only a five-to-four majority, but the manner in which each majority delivered its opinion was strikingly different. A comparison of the two majorities' respective methodologies frames the problem this Article will consider: interpretive fidelity to the Constitution.

In *Nguyen*, Justice Kennedy began the majority opinion by explaining the facts and procedural background of the case. Next, he detailed the challenged statute. Then he initiated the Court's constitutional analysis as follows: "For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives For reasons to follow, we conclude § 1409 satisfies this standard."³ Facially, these assertions did not attempt to reckon with the historical meaning of the Constitution for sex-based discrimination. In-

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1. 532 U.S. 318 (2001).

2. 533 U.S. 53 (2001).

3. *Id.* at 60 (citation and internal quotation marks omitted).

stead, the Court stated a rule from a case decided five years earlier and then reasoned from the rule.⁴

In *Atwater*, by contrast, the constitutional analysis of Justice Souter's opinion for the majority opened by considering in great detail the Founding-era common law of search and seizure for misdemeanor offenses. This inquiry accords with the methodology of originalism that has emerged over the last twenty years: to discover the meaning of constitutional text, ascertain what people generally thought that text meant at the time it was ratified. Justice Souter's opinion was particularly careful here. It examined the relation of the constitutional text and legal issue to a variety of other texts from the relevant time period. The majority summarized, "We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace."⁵ Based on only this, *Atwater* should clearly be more appealing to originalists than *Nguyen*.

The *Atwater* opinion, however, did not conclude with the above statement. Instead, Justice Souter began the next section of the opinion by stating, "Nor does *Atwater*'s argument from tradition pick up any steam from the historical record as it has unfolded since the framing."⁶ Having identified a particular relationship between the Fourth Amendment and warrantless seizures for misdemeanors at the time of the Founding, the *Atwater* Court proceeded to examine how previous courts have configured that relationship from the Founding to the present. This is a fascinating maneuver because the Court had already concluded its originalist analysis. What is the purpose of the additional history? Nothing in the secondary literature on constitutional interpretation satisfactorily answers that question. I hope to do so in what follows.

In this Article, I will attempt to show that if we are interested in fidelity to the Constitution, *Atwater* is an opinion to embrace. *Nguyen*, obviously enough, made no attempt to grapple with history. It is perhaps less obvious that had *Atwater* concluded after its originalist analysis, that opinion too would have failed to engage the historical meaning of the Constitution.

My argument in this Article proceeds as follows. First, I accept as a premise that the goal of constitutional adjudication is to determine and apply the meaning of the Constitution. Second, I assume, without significant hesitation, that originalists are correct in arguing that we should determine the Constitution's meaning historically. While many, many articles have attempted to locate the correct data for historical inquiry, here I will focus on getting the *method* of historical inquiry right. To do so, I examine the method articulated by intellectual historian Dominick LaCapra. I take this approach not because LaCapra himself has any legally cogni-

4. This should have been anathema to the Court's most ardent originalists, Justices Thomas and Scalia, but they joined the majority opinion with little comment, perhaps because they remained skeptical that the Court had authority to order the requested relief in any event. See *id.* at 2066 (Scalia, J., concurring) ("I remain of the view that the Court lacks power to provide relief of the sort requested in this suit.").

5. *Atwater*, 532 U.S. at 340.

6. *Id.*

zable authority, but instead because his theory is persuasive historiographically.⁷ This examination suggests a manner of inquiry concerned with the relationships of the Constitution to various pertinent contexts. It is a theory that recognizes, among other things, that sometimes interpretations by past judges and justices can alter the Constitution's meaning in ways that current judges and justices must respect. *Atwater* recognizes this implicitly. This approach locates fidelity not in any particular, substantive result, but rather in the process of examining how the relationships of the Constitution to relevant contexts have changed over time, thereby configuring possibilities for the present and the future.

To see the novelty of such an approach, let us take a moment to map the various positions in the debate over constitutional fidelity.

A. *The Question of Fidelity*

Debate over constitutional fidelity addresses the following question: What does it mean to read the Constitution consistently with a practice of interpretive fidelity? Judges have always claimed that their decisions in constitutional cases were faithful to the text, but anyone who tries to evaluate such claims will immediately encounter problems. The historical record reveals many instances of changed readings. If the Supreme Court now reads the Fourteenth Amendment as invalidating certain forms of sex discriminatory state action, but the Court did not so read the same Amendment one hundred years ago, must one of the two readings be wrong?

B. *Mapping Existing Answers to the Question of Fidelity*

The literature on constitutional interpretation furnishes at least three answers to that query. The originalist answer is the simplest: yes. Further, since the earlier reading was closer to the time of ratification, it is more likely correct,⁸ and the new reading is wrong. Anti-originalists might answer yes or no.⁹ Since antioriginalist inquiry is unconcerned with past readings, the issue is rather moot. If we insist, however, an antioriginalist could argue that since the current reading is correct, the older one must be wrong. Or she could argue that the meaning of the Constitution has changed with changing times. So both readings are right. Third, one might argue that the Constitution has a single meaning, but that the context in which it's read has changed. Therefore, if the text means one thing in one context, and the context changes, then the reading must change to preserve the same meaning.

7. Particularly if a desire to constrain is an important reason for the judicial turn to history, we should conduct historical inquiry in a manner that makes sense on historiographic terms. Otherwise, if judges use history in ways that help them but do not cohere historiographically, the constraint of history is illusory.

8. Depending on one's version of originalism (intent vs. understanding), one might consider the earlier reading *ipso facto* correct.

9. I use the term "antioriginalist" to refer to any theoretical position on constitutional interpretation that rejects originalism. I do not mean to suggest that there is any particular antioriginalist school of thought.

C. *Problems with Existing Answers*

None of these answers is satisfying. Neither antioriginalist response pretends to fidelity in any recognizable way, and the originalist and contextualist responses, to different degrees and in different ways, adopt unrealistic methodological presumptions. What they miss is this: there is no neat separation of text and context. To proceed on the contrary assumption leads to a reduced understanding of the Constitution's meaning, or to the idea that adjudication cannot itself legitimately alter constitutional contexts.

To illustrate the problems with these approaches, consider how their assumptions might play out in the interpretation of a very different text, Shakespeare's *Othello*. In an 1835 article John Quincy Adams summarized the central meaning of that play in a sentence. "The great moral lesson of *Othello*," he concluded, "is that black and white blood cannot be intermingled without a gross outrage upon the law of Nature; and that, in such violations, Nature will vindicate her laws."¹⁰ Was Adams right about the meaning of the play? Against what should we assess his account?

One possibility would be to engage in period reconstruction. What does available evidence tell us Shakespeare intended his play to mean? Or, perhaps more generally, what did the play's first audience understand its meaning to be? If we were to proceed in this manner, our inquiry, as near as we are able to complete it based on existing artifacts, might tell us that Adams's fears of miscegenation played only a small part, or none at all, in the original audience's understanding of the play's meaning. Yet such an account of meaning would be grossly unsatisfactory for a complex text like *Othello*. For it is surely possible, for example, that the original audience understood the play with reference to a system of beliefs that the play itself undermined. We would have to discard, in addition, centuries of scholarly attention to the intricacies of the play, as well as to its relations with norms of society that changed over time. Indeed, *Othello* was not the last play Shakespeare authored. The relationship of these later plays to *Othello* undoubtedly shapes in part the meaning of *Othello* itself.

Pointing out these limitations of a reconstructive approach to *Othello*'s meaning does not leave us without authority to confront Adams's interpretation. From the fact that the understanding of the original audience does not determine the totality of the play's meaning, it does not follow that the play has no ascertainable meaning outside the naked preferences of the interpreter. History shapes the contours of its meaning.

One *might* object that the original audience's understanding of the play *is* its history, but that would be an extraordinarily narrow and poor understanding of history. Would anyone seriously contend that to write the history of *Othello* one need only document how its first audience understood it? That's not history; it's historicism.¹¹ Historical study is a

10. Tilden G. Edelstein, *Othello in America: The Drama of Racial Inter-marriage*, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 179, 185 (J. Morgan Kousser & James M. McPherson eds., 1982) (quoting John Quincy Adams, *Misconceptions of Shakespeare upon the Stage*, NEW ENGLAND MAG., 1835, at 252).

11. This distinction will hopefully become clearer as the Article proceeds. In brief, by "historicism" I mean the view that meanings may be derived exclusively by refer-

much more subtle endeavor, one which does not arbitrarily select one aspect of a text's meaning and then insist that that aspect explains the whole.

Yet precisely these sorts of assumptions undergird the bulk of argument about the historical meaning of the Constitution. Although in practice no one claims that all readings of the Constitution that deviate from the original understanding are invalid, those who believe, as I do, that fidelity is important must apologize for the deviation with reference to other judicial values,¹² or throw up their hands in despair.¹³ This tack is wrong because the assumptions are wrong.

Constitutional readings can change while remaining consistent with a practice of fidelity. Indeed, it seems almost certain that they must. But this recognition derives from an understanding of meaning that is historical, not historicist; from an approach that treats the Constitution as a text, not a mere document; from a sensitivity to the relations of text and contexts, not one or another. This is a notion of fidelity informed by a theory of intellectual history, which I believe is applicable to constitutional theory in a straightforward way. On this view, fidelity is best understood as a process of examining how constitutional text has worked with various pertinent contexts over time, and how it will work with possible contexts in the future.

In what follows I will try to elucidate this notion through two strategies. First, I want to provide a theoretical model of fidelity and locate it with reference to current debate on the subject in the legal literature. Second, I will apply this theory to a persistently vexatious problem of contemporary constitutional jurisprudence: should judges reviewing laws that discriminate on the basis of sex apply a heightened standard of scrutiny? I have chosen this application not only because the question is a live one, but also because it has not received adequate attention from a historical perspective, as *Nguyen* amply demonstrates. In addition, the original understanding of the Fourteenth Amendment provides a rather clear

ence to a particular time and place. (For originalism, that time is the time of enactment or ratification.) I believe this is a relatively standard use of the word in historiographic debate, but it should not be confused with Robert Gordon's explicitly different use. Cf. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1017 n.1 (1981) (explaining his use of "historicism" as a reference "to the perspective that the meanings of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticisms that are suggested by that perspective").

12. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 861 (1989) (calling originalism "[i]n its unadulterated form . . . medicine that seems too strong to swallow" and advancing *stare decisis* as a mediating value).
13. See, e.g., Paul Butler, *The Case of the Speluncean Explorers*, 112 *HARV. L. REV.* 1917, 1922 (1999) (writing as Justice Stupidest Housemaid and concluding that, after reading the Fourteenth Amendment, both *Plessy* and *Brown* seem correct: "So much for the rule of law."); Michael J. Klarman, *Antifidelity*, 70 *S. CAL. L. REV.* 381, 412 (1997) ("We can simply be anticonstitutionalists."). David A. Strauss, too, has looked at changing interpretations of constitutional text and concluded that amendments are themselves irrelevant. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457 (2001). I will explain below, however, that his thesis does not reject fidelity; instead, he recognizes that interpretation is more complicated than simply reading words. See *infra* note 91.

answer. My aim, however, is to demonstrate that if we take constitutional fidelity seriously, we should reject that answer.

II. THEORY

A. *Framing the Project*

The debate between originalists and antioriginalists is both old and exhausted. Scholars from the academy and the bench have produced much thoughtful work on the subject, but the current state of affairs is most characterized by polemic.¹⁴ So antioriginalists argue that originalism is undemocratic or worse, that it is impossible. The historical record is indeterminate! There were multiple original understandings! What about levels of generality! And originalists can easily shout back: We must do our best with a limited record! Take the majority view! Look to practices!

The most powerful antioriginalist arguments have been on the table at least since Paul Brest wrote *The Misconceived Quest for the Original Understanding*¹⁵ in 1980, and various forms of these arguments have a much older pedigree.¹⁶ But originalists have known about them for just as long. One wonders whether antioriginalists really think that if they could just present their case on broadcast television, everyone would agree with them and quit appealing to history. The trouble is, the alternatives typically proposed—a living constitution, common law adjudication—hold no currency.¹⁷

We can better understand the allure of originalism if we briefly rehearse the circumstances of its current incarnation. It is a reaction to the Warren Court. That Court “regularly handed down opinions that have transformed American constitutional doctrine.”¹⁸ It expanded the reach of equal protection and due process, increased protections for criminal defendants, and recognized a constitutional right to privacy. But from whence in the Constitution did these rights and protections derive? The general failure of the Warren Court to answer that question led to the fear

14. For a recent catalogue of antioriginalist argument, as well as a polemical tone, see Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998).

15. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

16. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change, Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30 (1993); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411 (1998).

17. Cf. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 136, 137 (1996) (noting that in the 1980s “[s]uch responses proved a poor match for the calls for originalism from Reagan’s justice department and conservative scholars” and further that “[n]either the law professors’ rejoinders, nor those of historians . . . dispelled the allure of originalism. So what if the surviving record of the Founding was fragmentary?”).

18. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998). One scholar has recently argued that the Warren Court was not itself “revolutionary” in the way I’m rehearsing here; instead, it was one part of the liberal, national politics of the era. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000). In either case, the interpretive concern is the same and must be met on the merits.

that the justices were in fact making it up. And that poses all sorts of problems for the democracy half of constitutional democracy. As Frank I. Michelman has put it, “[T]he people’s enactments contain too small a share, and the moral readings of them by the Brennans contain too large a share, of the total sum of operative constitutional meaning that is to be made.”¹⁹

Originalism addresses these fears for two reasons. First, it is a constraint on judging. Second, it is a constraint bounded by history. Justice Scalia has put both points rather well. If the most invidious error is for judges “to mistake their own predilections for the law,”²⁰ originalism is beneficial because “it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”²¹ And it is important that the constraint be bounded by a historical interpretation of the Constitution because that supports the legitimacy of judicial review of constitutionality.²² Constraint through common law precedent, by contrast, has nothing to do with a written constitution.

This cumulative goal—constitutional interpretation constrained by history—is the right aim. We might also call it fidelity. But if the end of originalism is right, its means might nevertheless be wrong. I believe this is the case, as I will argue below. If the originalist/antioriginalist debate has stalled, and neither is fidelity, where do we turn?

Answering that question has been hindered by the development of the debate, which hinges on a false dichotomy. As the literature has developed, originalism has claimed fidelity, and antioriginalists have argued, not that fidelity is something else, but rather that originalism is impossible. Fidelity then becomes an all-or-nothing game between two poles, as is evident in this “argument” for originalism by Saikrishna B. Prakash: “[W]ithout originalism we have to believe that lawmakers codify words but not meaning and we have to suppose that we can sensibly recognize some set of words as law, but supply our own meaning. These propositions are absurd and that is why we all are (or should be) originalists.”²³ This is wrong on a number of levels. Without originalism we need not believe either of these propositions, nor are they absurd. Understanding that authors cannot control the meaning of their texts does not mean that we supply our own meaning. And the syllogism ignores the crucial fact that the Constitution is a text, not an artifact. If the Constitution was a diagram for constructing a building, we could sensibly assert that it documents one thing only: how to build that building. Quite literally, however, the Constitution is not a diagram, and constitutional order

19. Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 415 (1998); but cf. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 5, 6–7 (1999) (arguing that “when a justice decides in accordance with her personal values” she promotes political representation on the Court, and that a Court composed of such justices “possesses an *instrumental* value in terms of enhancing both the stability of the political system as a whole and the quality of the policymaking process”).

20. Scalia, *supra* note 12, at 863.

21. *Id.* at 864.

22. *Cf. id.* at 854.

23. Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 531 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

is not a building. As I will detail below, reading the Constitution as a text must be a complicated and engaging affair, or else the reader will miss a lot. So while everyone says that the Constitution is a text, I want to press on that claim because I do not think that most interpretive strategies in fact *do* read it as a text. If one recognizes any significance in calling the Constitution a text, as opposed to just calling it that as a matter of fact, conclusions as to right reading follow—about what one needs to be sensitive to when reading, and what one needs to consider.²⁴

Justice Scalia informs us that “the Great Divide with regard to constitutional interpretation is . . . that between *original* meaning (whether derived from the Framers’ intent or not) and *current* meaning.”²⁵ But it would be a mistake to read this descriptive statement, as Prakash would have us do, as completing the universe of interpretive strategies. It just tells us that the debate has not been structured productively. Let us instead put the old debate to one side, then, and ask what a practice of interpretive fidelity might look like.²⁶

To do that, we should consider four related insights articulated by Dominick LaCapra,²⁷ whose work in intellectual history will prove helpful to a conception of constitutional fidelity. First, all texts have both documentary and worklike aspects. Second, any reading of a text that focuses on either its worklike or documentary aspects to the exclusion of the other will be quite reductive of its meaning. Third, the more complex a text, the more it will be reduced, and the more meaning lost. Fourth, thinking about intellectual history as a history of texts allows the historian to engage her texts in more meaningful ways by investigating as problems what more reductive approaches assumed were solutions.

Applying these insights to the history of the Constitution will provide a much more thorough conception of fidelity. In adjudicating a constitutional claim, the judge’s job is to read the Constitution to figure out what it means with respect to whatever question has been posed. A theory of interpretive fidelity must provide a way to hold the judge accountable—to make sure that the judge is not merely reading the Constitution to reflect her own naked preferences, thereby deciding the case politically. Thus, the appeal of history is that it constrains how the judge can read the

24. That is, to read something as a *text*, as opposed to an artifact, document, paper, or something else, makes a difference for purposes of intellectual history, and it is in this sense that I deploy the word. Often, legal theorists use the words “text” or “textual” to refer to constitutional arguments that appeal to grammar or what is frequently called plain meaning. Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195–97 (1987) (categorizing “arguments from text” in the typology of constitutional arguments). Thus, Akhil Amar unselfconsciously equates interpreting the Constitution as a text with interpreting it as a document. See Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). My analysis will require the reader to differentiate between the meanings of these words.

25. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (Amy Gutmann, ed., 1997).

26. Several thinkers have tried to do just this. See Friedman & Smith, *supra* note 16; Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995). I want to acknowledge this work here, but I would prefer to discuss it below.

27. See DOMINICK LACAPRA, *Rethinking Intellectual History and Reading Texts*, in *RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE* 23 (1983).

Constitution. The judge's task is therefore analogous to that of the intellectual historian, according to the theory I am advocating.²⁸ Theorizing fidelity in constitutional interpretation, like theorizing how to go about doing intellectual history, requires providing an account of how the judge (or historian) can read the Constitution (or text that is the object of study) in a way that accounts for and engages with the past without being excessively reductive of the text's meaning. LaCapra provides just such a theory for intellectual historians. By analogy, applying his insights should provide just such a theory for judges.²⁹ LaCapra, of course, is not concerned with the institutional considerations that prompt the judicial turn to history, but that does not make his ideas any less applicable. I have no desire to take issue with the originalist premise that constitutional adjudication must "fit" the Constitution's history.³⁰ Instead, I want to examine what we mean by *fit* and *history*. Such a critical examination, the directions of which are spurred by LaCapra's arguments about reading texts in a way that is historically responsible, suggests that the best conception of fidelity is one located in the reading itself.

B. *Two Aspects of Texts*

All texts possess both documentary and worklike aspects. LaCapra explains the distinction as follows: "The documentary situates the text in terms of factual or literal dimensions involving reference to empirical re-

28. It is not necessarily analogous according to any or every theory of intellectual history. If intellectual history is a story about actors inventing ideas, there's no productive analogy to the fidelitist judge. I think these particular ideas (aspects of texts, and texts and contexts) help suggest how judges should go about their business.

29. My claim is that the application of this theory works, in that it tells us how to read the Constitution in a way that is consistent both with history and with the text as a text (and not a mere document). If my claim persuades the reader, I do not think any additional authority for the theory is required. Others might disagree. Charles Collier, for example, has argued that theories of historiography cannot fruitfully be applied to adjudication at all, and his objection turns on authority. His first premise is that judges gain their authority institutionally, by appointment and as final arbiters. Humanistic theory, in contrast, earns authority intellectually, by surviving scholarly scrutiny. He concludes that "these simple institutional facts make inherently implausible any attempts to attribute grand, philosophical doctrines to the judiciary." Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 221 (1991). I suppose I am casting "[j]udges as hermeneuticians," *id.* at 264, an approach that I take Professor Collier to criticize. But I confess that I do not understand exactly what the critique *is*, except to suggest that it is unrealistic to assert that a judge would or should decide a case or change her approach because of reasoned argument about an interpretive strategy. I think such a suggestion derails the theoretical quest for fidelity before it can begin, and I do not, therefore, wish to engage it here. My aim is to detail how judges should go about reading the Constitution, but my twin goal (and one which, accepting *arguendo* Professor Collier's argument about authority, might yet be possible independent of how judges in fact do their jobs) is to provide criteria according to which one can evaluate whether a judge has engaged in the practice of interpretive fidelity.

30. Thus, I am not engaging in the debate laid out in Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999) (suggesting that theories of constitutional interpretation should be judged against values like the preservation of political democracy and morally acceptable rights). My paper proceeds on the assumption that fidelity *is* the value we are seeking to promote.

ality and conveying information about it. The 'worklike' supplements empirical reality by adding to and subtracting from it."³¹ If the documentary aspects of a text refer to the world of the text's production, its worklike aspects go beyond that world. A text might, for example, document the existence of a city at a particular time. But simultaneously it might make a claim on how we think about the city. It might do so by exhibiting an internal logic, or by participating in specific ways in literary traditions about talking of cities, or by the *way* it refers to the city's existence. How the documentary and worklike aspects of a text interact is my focus here, and I will return to it momentarily. But through this interaction, the worklike deconstructs and reconstructs what the documentary notes. Or, as LaCapra concludes, "[O]ne might say that while the documentary marks a difference, the worklike makes a difference—one that engages the reader in recreative dialogue with the text and the problems it raises."³²

Let me illustrate in familiar terms. When lawyers and law students study a judicial opinion, they typically emphasize the worklike aspects of the text. We are not particularly interested in what the opinion documents in the world—either at the time of the opinion's production or any other. We are interested instead in how the text changes those worlds. In other words, no one much cares about the facts of the case in and of themselves. They are only relevant because of what the decision says should happen to them.

For example, in announcing the judgment of the Court in *Miller v. Albright*,³³ Justice Stevens tells the reader something about how people usually establish the biological relationship between a mother and child: "The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates."³⁴ So the opinion documents a verifiable reality, that hospital records and birth certificates are the papers typically used to establish maternity in the late twentieth century. This is a reference to the empirical world, but it is not something that a lawyer is likely to focus on when reading *Miller*. Instead, she will focus on what the text *does* with the reference. How does the opinion take facts about the world and use them? In other words, what are the worklike aspects of the text? And how should those aspects deconstruct and reconstruct the facts of another world—that of a professor's hypothetical or the next case at bar? None of the circuit court of appeals cases that discuss *Miller* even mentions hospital records or birth certificates.³⁵ Their focus is on equal protection.

As the foregoing suggests, however, judicial opinions might also be read for their documentary aspects. Morton Horwitz does this repeatedly in *The Constitution of Change*.³⁶ First, to trace the idea of living constitutionalism, he turns to the United States Reports: "One way to capture the

31. LACAPRA, *supra* note 27, at 30.

32. *Id.*

33. 523 U.S. 420 (1998).

34. *Id.* at 436.

35. See, e.g., *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999); *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999); *Terrell v. INS*, 157 F.3d 806 (10th Cir. 1998).

36. Horwitz, *supra* note 16.

historical weakness of the competing idea of a 'living' or changing constitution is simply to count the citations to its most prestigious early statement."³⁷ And indeed, Chief Justice Marshall's dictum that the Constitution was "to be adapted to the various crises of human affairs"³⁸ was cited by the Supreme Court only once in the nineteenth century and six times by 1945. Later, Horwitz returns to the Supreme Court's opinions to extract references to democracy. Plotting these references on bar graphs, he concludes that incantation of democracy as a "timeless truth" is a relatively recent judicial practice.³⁹ In both examples, Horwitz focuses on those aspects of judicial opinions that document facts about the world, not the worklike aspects that lawyers and law students usually study.

More paradigmatically, literary theory is strongly concerned with the worklike aspects of the texts it considers. So a critic reading, say, *A la recherche du temps perdu*⁴⁰ will emphasize the work's thematics and thematization, the spectacle of its language, or the ways in which it sets up positions or performs emotions.⁴¹ The very fact that we call texts like Proust's "works" instead of "documents" alludes to this interpretive focus.

Before the 1980s,⁴² historiography was dominated by a documentary approach. Historians considered documents—wills, codes, registers, censuses. To the extent that they considered more complex or literary texts, historians did so reductively. In the hands of the unself-conscious historian, the "work" was reduced to "synoptic content analysis in the more narrative method and the form of an unproblematic identification of objects or entities of historical interest in the history of ideas."⁴³ LaCapra was critical of this practice, arguing that flat, reductive historical work constitutes bad history.

37. *Id.* at 41.

38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

39. Horwitz, *supra* note 16, at 58.

40. MARCEL PROUST, *A LA RECHERCHE DU TEMPS PERDU* (Gallimard 1987) (1914–27).

41. See, e.g., EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 213–51 (1990). In some ways, Sedgwick is a poor example, since she is interested throughout her book in a sort of loose historicization of homosexuality as a modern cultural node. But her analysis is literary and remains predominantly concerned with the worklike aspects of the texts she considers. For a more documentary study, published in the same year, of related subject matter, compare DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* (1990).

42. As a convenient chronological marker, we may note not only the date of LaCapra's essay but also the statement of Morton Horwitz in the preface to *The Transformation of American Law, 1870–1960*, published in 1992. Commenting on why the approach in that book differed from the one he took in *The Transformation of American Law, 1780–1860*, which was published in 1977, Horwitz noted,

Not only has the separation between fact and value as the basis for value-free social science or history been drawn into question, but self-consciousness of the contingency of categories, theories, and frames of reference has been accelerating as the message of the sociology of knowledge has been absorbed into interpretative and deconstructive intellectual movements.

MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* viii (1992). Much of this should be apparent in our current project.

43. LACAPRA, *supra* note 27, at 33.

His argument is simple and persuasive. First, as the above examples have I hope suggested, the documentary and the worklike are *aspects* of texts. “Works” are historically situated and reference the world in which they are situated. Their more documentary aspects are submerged when they are read formalistically or in isolation. “Documents,” too, are situated, and play a role in the world, but their more worklike aspects are ignored when the text is read merely as a reservoir of unproblematic facts relating to the time of its production. So one’s interpretive approach goes a long way toward developing the documentary or worklike aspects of any particular text. If one concentrates only on a text’s documentary aspects and ignores its worklike aspects, or vice versa, one fails to engage the full meaning of the text. This reasoning applies to the interpretation of all texts, but LaCapra argued that his critique of a documentary approach to historiography was particularly applicable to intellectual history:

If the dominance of this approach is open to question in other areas of historiography, it is perhaps even more questionable in intellectual history, given the texts it addresses. For certain texts themselves explore the interaction of various uses of language such as the documentary and worklike and they do so in ways that raise the issue of the various possibilities in language use attendant upon this interaction.⁴⁴

These conclusions apply with equal force to the history of the Constitution. Reading any text in a purely documentary manner would be reductive, but such a strategy would be particularly harmful in the case of the Constitution. The text speaks almost exclusively of the effects that the text itself is to have in the world.⁴⁵ For example, when Article One, Section Two first announced, “The House of Representatives shall be composed of members chosen every second Year by the People of the several States,” the House of Representatives did not yet exist. The text documents the existence of several states, but the operation of a federal House of Representatives is created by the work of the text, deconstructing and reconstructing the political relationships of the several states. The worklike possibilities of constitutional text are even more embedded in its amendments, since the very idea of an amendment involves change, alteration, modification, or improvement. Certainly, some worklike aspects of several constitutional provisions appear themselves to be rather documentary. The Importation Clause is one such example—it merely documents a particular resolution.⁴⁶ But, first, how documentary any clause is depends in part on the approaches taken to interpret it. Second, how such clauses function in the text in fact may not be as obvious as a first glance suggests. By referencing its own work and juxtaposing more determinate

44. *Id.* at 32 (internal reference omitted).

45. See William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 13, 18 (Sanford Levinson & Steven Mailloux eds., 1988) (“Interpretation must account for the transformative purpose of the text.”).

46. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .” U.S. CONST. art. I, § 9, cl. 1.

with more general provisions, the Constitution puts at issue the relationships between its documentary and worklike aspects, and it is therefore precisely the type of text that, if historicized in a purely documentary way, would be excessively reduced.

How, then, does an originalist approach the history of constitutional text? Consider a model of originalist analysis, Michael McConnell's *Originalism and the Desegregation Decisions*.⁴⁷ This Article seeks to rehabilitate the constitutional basis for *Brown v. Board of Education*⁴⁸ by examining the history of the Fourteenth Amendment. Noting that there is little direct discussion of segregation in public schools in the legislative history of the Amendment, McConnell examines several other sources. First, he tries to demonstrate that debates over the Civil Rights Act of 1866, public argument about segregated schools in the 1860s, and very early judicial opinions on the lawfulness of segregated schools do not conclusively answer the question. Next, he turns to congressional debates from 1868 to 1875 over legislation designed to enforce the Amendment's guarantees, since here there was much discussion of school segregation and the constitutional bases for bills to prohibit it. Counting the votes on these bills, he argues, "Although the case for *Brown* would be stronger if school desegregation legislation had actually passed, it is extremely significant that half or more of the Congress voted repeatedly to abolish segregated schools under authority of the Fourteenth Amendment."⁴⁹ Finally, McConnell examines three Supreme Court decisions interpreting the Fourteenth Amendment's relationship to segregation: *Railroad Company v. Brown*,⁵⁰ *Plessy v. Ferguson*,⁵¹ and *Brown v. Board of Education*.⁵² The two *Browns* were right, he concludes, and *Plessy* was wrong.

There is much to commend in McConnell's article. Although one might disagree with the conclusions he draws from his data,⁵³ the collection of that data is meticulous and exhaustive. Further, McConnell has been careful to examine the reliability and validity of the sources from which he has drawn.⁵⁴ In short, this is originalist inquiry properly accomplished.

But the article fails as history because it employs an unselfconscious documentary approach. According to this approach, very careful tracking of what certain people thought the Fourteenth Amendment meant with

47. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

48. 347 U.S. 483 (1954).

49. McConnell, *supra* note 47, at 986.

50. 84 U.S. (17 Wall.) 445 (1873).

51. 163 U.S. 537 (1896).

52. 347 U.S. 483 (1954).

53. See, e.g., Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223 (1996) (arguing that McConnell's article is flawed in its doctrinal analysis and conclusions on the relevance of the temporal relation of the data to original understandings).

54. See McConnell, *supra* note 47, at 1105–17 (addressing "the three most troubling potential pitfalls in the analysis"—changes in popular opinion, conflict between congressional and popular understandings, and the difficulty of distinguishing interpretation of the amendment from policymaking—and asking "how probable it is that they affect the ultimate conclusion").

respect to school segregation is what it meant, and what it means. The text of the Fourteenth Amendment is, on this view, a document. It documents the legal world of its passage. This much is indisputable, of course. But the approach neglects the worklike aspects of the text, and so it tells us very little about how the documented world actually operates in the text. This is reductive history.

It is also unsurprising. McConnell's article perfectly achieves its own goal. The project is based on three assumptions. First, "the courts must interpret the Amendment in light of its most probable understood meaning at the time it was enacted."⁵⁵ Second, "the opinions of the congressmen [are] evidence of the opinions of informed people of the day."⁵⁶ Third, these opinions indicate "the meaning that people at that time attached to the words of the Fourteenth Amendment."⁵⁷ The second assumption, in my view, is not problematic. But the first and third ones are more troubling. Arguing that the opinions of congressmen indicate the meaning that people attached to the words of the text is right to an extent, and we should afford latitude to the scholar who has done the best work possible with the available data. But the assumption exposes how originalism asks the wrong question, or at least an incomplete one. Even if the opinions of congressmen do indicate the meaning that people at the time attached to the words of the Amendment, so what? The Amendment is a text, and a complex one at that. It does not merely document what people thought at the time, so an interpretation that treats the text in such a purely documentary way loses much of the meaning therein. Indeed, McConnell's formulation of this assumption hints at the problem. Certain opinions indicate "the meaning that people at the time attached to the words," but they do not necessarily, or at least not completely, indicate the meaning of the words themselves in the text. As I will argue shortly, a historical reading of the text should therefore pose as a problem, instead of eliding as a solution, the relationship between the meaning people attached to the text and the text itself. Finally, McConnell's first assumption is problematic for similar reasons. Why must a court interpret the Amendment according to its understood meaning at the time it was enacted? If this means employing the methodology described above, the court would be doing something other than interpreting the Amendment according to its historical meaning.

This critique is external to McConnell's project. The article achieves its own goal, and its problem, as history, lies in the assumptions of its methodology. As Friedman and Smith have noted, originalists' methodology "has more to do with their theoretical understanding of what the Constitution is, and of the proper role of judges in interpreting that Constitution, than with their understanding of history."⁵⁸

Failing as history means failing as interpretive fidelity as well. For a decision to be one of fidelity, history must justify it.⁵⁹ But if we are em-

55. *Id.* at 1093.

56. *Id.*

57. *Id.*

58. Friedman & Smith, *supra* note 16, at 49.

59. It is largely for this reason that judges deploy "history" all the time. As the rationale for a holding: "History dictates our decision in this case." In dissent: "The majority

ploying a faulty notion of history, then any justification produced in reference thereto is also faulty. Thus, the conclusion remains: originalism is not fidelity.

Reorienting the historiography of constitutional interpretation to a history of constitutional text may permit a method better equipped to accomplish adjudication that is recognizable as fidelity. On this view, what originalist analysis assumed becomes a problem for investigation. Dialogue with the past supplements its reconstruction. And the problem of meaning, which grapples with the interaction of the documentary and worklike aspects of constitutional text, lies in the nature of the relationships between the text and its various contexts.⁶⁰ The task for the fidelitist adjudicator is to determine how the text has been related to its contexts in the past, and with what possibilities for the future.

Lawrence Lessig has been the legal scholar most emphatic about the importance of context to interpretive fidelity, so let me distinguish the program I am advocating from his. Lessig's argument, broadly, is that the Constitution was written within a particular context, so if the text does not change, but the context does, then to preserve the same meaning in a changed context will require a different reading.⁶¹ As a general matter, this seems to be an improvement of the originalist approach. But there are two problems. First, at a basic level, this theory sometimes shares the assumptions of the approach it criticizes. For an investigation into context might also treat the Constitution in an excessively documentary, and thus reduced, way. Treating text and context as separate entities and neatly identifying each precludes one from investigating how the text works and has worked with and on its contexts.⁶² Second, reference to context treats as a solution what ought to be investigated as a problem. Cultural critic Barbara Kirshenblatt-Gimblett explains, "The notion of in context . . .

ignores history." Implicitly: "It is too late in the day to assert . . ." But unless we get "history" right, none of the foregoing have any fidelitist bite. One could get it wrong in two ways. First, one could err as to particular historical facts—failing to account for certain documents, for example. Second, one could err as to what constitutes history; here is where the distinction between history and historicism comes into play. My concern is with the second type of error. See *infra* note 82 and accompanying text.

60. I am again following LaCapra:

A different understanding of intellectual history as a history of texts may permit a more cogent formulation of problems broached by established approaches and a more mutually informative interchange with the type of social history that relates discourse and institutions. On this understanding, what was taken as an assumption or elided in the perspectives I have mentioned becomes a problem for inquiry. One such problem at the very crossroads of the documentary and dialogical is the precise nature of the relation between texts and their various pertinent contexts.

LACAPRA, *supra* note 27, at 35.

61. See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lessig, *supra* note 26.

62. This failure to appreciate the interaction of text and context leads to a second problem, an overvaluing of what is contestable at a given moment. See *infra* note 84 and accompanying text.

poses the interpretive problem of theoretical frame of reference."⁶³ One never has access to *the* context. There will always be multiple, interacting contexts, whose relations to one another and to the text might well be problematic. And LaCapra notes that "what may be most insistent in a modern text is the way it challenges one or more of its contexts."⁶⁴ Which contexts are relevant and how their relationships should be resolved in a particular case are more properly regarded as subjects for argument.

C. Three Contexts

1. Authorial Intent

At least three general contexts should be investigated for their relations to any constitutional text. The first is the relation of the text to its authors' intent. By intent, I do not mean the unexpressed, subjective desires of the legislators who authored a text, nor of those who ratified it. That is a straw man in the discussion of fidelity to a public text, and everyone agrees that recourse to subjective intent is invalid. But we retain the idea that what an author meant to say and what a text means are very closely related. That is the impulse behind looking to statements or writings of the Framers as evidence of public understanding, or meaning, of the Constitution. But the relationship of statements of intentions to the text at issue are usually assumed to be unproblematic, when in fact the question of how they relate to each other must be wrestled with. Larry Kramer has recently written an article rather successfully making both points.⁶⁵ His subject is *The Federalist No. 10* by James Madison, and he begins by noting that lawyers routinely reference this document as a source of meaning for the Constitution: "We talk about 'Madisonian democracy' and give 'Madisonian readings' to so many constitutional practices in large part because we imagine the Constitution to be built on Madisonian foundations—meaning, specifically, Madison's uniquely original ideas about the role of an extended republic in controlling faction."⁶⁶ But what these standard invocations treat as a solution, Kramer investigates as a problem. Why did Madison compose *The Federalist No. 10*? How did other Framers receive it? How did it relate to the Constitution it has been taken to explain?⁶⁷ The depth of Kramer's investigation is perhaps too great to expect if it is just one component of a theory of interpretation, but it indicates the direction we ought to take.

63. BARBARA KIRSHENBLATT-GIMBLETT, *DESTINATION CULTURE: TOURISM, MUSEUMS, AND HERITAGE* 21 (1998).

64. LACAPRA, *supra* note 27, at 35.

65. See Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

66. *Id.* at 615.

67. Kramer concludes that Madison's insights about government and factions were largely ignored or misunderstood by the other Founders. See *id.* at 670. He wisely ducks the opportunity to explain the legal significance of his work. It "will vary from scholar to scholar, depending on the role that *The Federalist No. 10* plays in his or her thinking about either the Constitution specifically or the Founding generally," he correctly notes. *Id.* at 678.

2. Society

A second relevant context is the relation of the text to society. Posing this relation as a problem involves two parts, the first dealing with the genesis of the text and the second dealing with its impact. As to genesis, certainly each constitutional provision was produced in a particular place and at a particular time. So there will likely be ways that the text reflects those circumstances. Every text is a sign of the times to some degree.⁶⁸ It might exhibit certain discursive practices in a straightforward way. But to limit the meaning of a provision “through careful analysis of what was thinkable—and expressible—at the time a text was produced,”⁶⁹ as originalism requires,⁷⁰ is to forget again that our concern is a text, and there may be ways that a text does “engage in processes that, whether consciously or not, render [the discursive practices of an age] problematic, at times with critical implications.”⁷¹

Justice Scalia has grasped this possibility in the statutory context. Conceding that Congress could not have been concerned with male-on-male sexual harassment when it enacted Title VII, he rebutted the inference that Title VII must therefore not cover such harassment by stating that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁷² Despite similar rhetoric, this rebuttal is not the same as the straw man that legislators’ subjective desires do not govern. For if when Congress enacted Title VII no one even contemplated male-on-male sexual harassment (or, to put the situation more provocatively, the actions now thought to constitute male-on-male sexual harassment were not considered harassment at all, but normal homosocial activity), then the meaning located by Justice Scalia in Title VII is something other than the documentary understanding of text-in-society required by originalism. Of course, Justice Scalia’s opinion does no more than recognize the possibility that a text might accidentally subvert its times. The next step would be to examine whether and how a particular text does.

This brings us to the question of a text’s impact. If texts may correctly be characterized as having both documentary and worklike aspects, and if they therefore might simultaneously embed and challenge the practices of a time, then any idea of a single impact of constitutional text on society is too simplistic. Because constitutional texts have repeatedly been interpreted to have, and have had, real impacts in the world, the idea of im-

68. This insight is the contribution of Quentin Skinner. See, e.g., QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978).

69. James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 *HARV. L. REV.* 1332, 1335 (1993).

70. Cf. Scalia, *supra* note 12, at 856–57 (“it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day”); William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065, 1104 (1997) (“Scalia’s last sentence could easily have come from an essay by Skinner”).

71. LACAPRA, *supra* note 27, at 42.

72. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

fact must consider the uses to which the text has been put over time. The Constitution reaches us overlaid with past interpretations that the historian-interpreter must excavate. In an excellent article that shares much in common with this analysis, Barry Friedman and Scott B. Smith have concluded that we have a “sedimentary” constitution: “Because fidelity is owed to the Constitution rather than to the Framers, faithful constitutional interpretation requires that we take all of our constitutional history into account, rather than defining the Constitution only with reference to the Founding.”⁷³ We constantly reinterpret what came before us. This theory of history sounds quite similar to the specific point I am making here—that any notion of the impact of constitutional text on society should consider the uses to which the text has been put over time.

Friedman and Smith are persuasive until they become prescriptive. There is a minor and a major problem with the strategy they advocate as an application of their (correct) sedimentary view of history. The minor problem respects their view of the Founding. For Friedman and Smith, it remains important, but the “impetus should be to locate the most general of constitutive ideas, not to embark on an acontextual hunt for an answer to a particular problem.”⁷⁴ This turn to a high level of generality at the Founding is troubling both because it does not necessarily follow from the sedimentary metaphor and because it neglects the writtenness of the Constitution.⁷⁵ This second problem bleeds into the major difficulty. Friedman and Smith argue that we should look to history to determine our own deeply held commitments and use these as our constitutional constraints. But deeply held commitments are not the Constitution. The Constitution is a text that we must interpret, layered over as it may be. And we are inevitably stuck with our own perspective, located in a particular place and time. But unless we interpret the Constitution as a text, our reference to it becomes merely formal, and we instead track something else—deeply held commitments—through time.⁷⁶ This strategy abandons the attempt to understand what is involved in the impact of constitutional text.

73. Friedman & Smith, *supra* note 16, at 34.

74. *Id.* at 61-62.

75. Certain parts of the Constitution are more specific than others. To insist on “the most general of constitutive ideas” neglects this dimension of the text. The difficulty is analogous to the one encountered by process theorists when confronted with strikingly substantive clauses. Compare JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for a process-based understanding of the Constitution), with Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1065 (1980) (“One difficulty that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution’s most crucial commitments”).

76. Consider: “Whether there is a basis for finding a right to choose abortion in the Constitution should depend upon whether laws banning abortion are consistent with what history reveals to be the deeply held commitments of the people today.” Friedman & Smith, *supra* note 16, at 71-72. The Constitution itself drops out of Friedman and Smith’s view. If this were a faithful strategy, we would need no constitution at all.

3. Other Texts

A third relevant context is the relation of the text at issue to others with which it might be associated. We do not permit litigants to appeal to the Constitution as an undifferentiated whole. Constitutional claims must appeal to particular clauses. So in any constitutional case, there are at least two relations in this context. The first is the relation of the disputed clause to the Constitution as a whole. Akhil Amar has investigated this approach to constitutional meaning pretty thoroughly and calls it intratextualism.⁷⁷ Introducing the approach as a variant of both textual and historical arguments,⁷⁸ he explains that it encompasses three types of claims. First, the Constitution as a whole may serve as a dictionary in which to look up the meaning of a word in a single clause. Second, reading a set of words from one clause alongside other similar sets from other clauses might illuminate larger patterns at work in the whole Constitution. Third, how parallel commands in different clauses have been construed should be a guide to construction of any single command. Amar rightly views as a strength of intratextualism its “[e]mphasis on the Constitution’s writtenness—its general textuality and its specific textual provisions,”⁷⁹ but I think he is off the mark in asserting that a “judge reading the Constitution *as law* will look for . . . consistency rather than inconsistency.”⁸⁰ The internal logic of law requires like cases to be treated alike, but that does not mean that one must force the Constitution as a text to be continuous, clause to clause.⁸¹ I do not mean that a judge should seek discontinuity from clause to clause. Either would be an attempt to impose a unity on the text that may or may not be present. Here again I think that what Amar has taken as a solution ought to be reformulated as a prob-

77. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

78. . . . which I am trying to reorient as one and the same.

79. Amar, *supra* note 77, at 796.

80. *Id.* at 794. A sustained, recent critique of intratextualism also objects, but from quite a different perspective, to such a search for coherence. See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000). Vermeule and Young assert that intratextualism fails to account for both substantive and normative, or interpretive, incoherence in the Constitution and that, as a practical matter, intratextualism seems likely to yield poor results when practiced by judges. That we make one common objection to intratextualism seems almost coincidental, since, compared to this project, very different commitments motivate Vermeule and Young. Indeed, I think they miss the point in important ways. Their strongly political science approach does not really need to take aim at “coherence” because they seem uninterested in treating the Constitution or its clauses as texts, in the manner I have been discussing. Thus, for example, they point out that in seeking to understand one clause by reference to another, one must first ascertain the meaning of the referent clause. See *id.* at 738–39. But this objection is not nearly as important as they think because it ignores the reality that meaning is made in the relations themselves. Every clause may be taken as its own text for study, but the relevance of one clause to another comes from how closely the interpreter relates their meanings as they stand. Similarly, their arguments that conventionalism will not justify intratextualism and that “Amarian intratextualism would promote . . . infidelity to the original understanding,” *id.* at 762, are not truly responsive to the method. Intratextualism at least treats the Constitution as a historically developing text. Conventionalism and originalism are political science theories that do not.

81. Interpreting the Constitution is a task different from common lawmaking. See generally SCALIA, *supra* note 25.

lem. How does the part relate to the whole? We should be alert to differing forms of repetition within the Constitution. Simple unity, either as continuity or discontinuity, may be insufficient to describe what is actually going on.

The second relation in this context is that of the Constitution as one text to other texts—the Federalist Papers come to mind—with which it might be grouped. Now the overlapping nature of my contexts should be apparent, since this problem revisits the contexts of intention and society from a different perspective. Here the problem is what to make of language shared by the Constitution and other relevant texts, but again I would argue that one should hesitate to unify the Constitution and other texts—either in terms of continuity or discontinuity—but should instead be sensitive to the ways in which the Constitution might incorporate other texts while simultaneously subverting them.

Undoubtedly other contexts will also be relevant to any dispute about the right reading of constitutional text. Which other contexts is properly a matter for argument in each case.

As the foregoing illustrations indicate, lawyers of all interpretive persuasions already engage in many of the inquiries I have outlined. Pragmatically, this suggests that the program I am advocating is not implausible. Theoretically, this raises the question whether my argument offers something new or merely treats current approaches reductively. I do not think the latter is the case. When I argue that the relation between text and intent, for example, is problematic, I do not mean that it's hard to figure out what people intended. That is a standard antioriginalist move—forget about fidelity to historical meaning because it's impossible—and originalists generally concede the difficulty of their task as they see it. Instead, I mean that how the relation has been configured over time is *itself* a problem for inquiry. We err in thinking that there is an answer—subject to evidentiary problems—to the question of what authors intended. Again, this is an argument that takes issue with the premises of originalism, not its practice.

D. Dialogic Fidelity

I have argued that, if fidelity to the Constitution entails respecting its meaning as bounded by history, then a purely descriptive reconstruction of the past, the method of originalism, is incompatible with fidelity. Fidelity instead requires the interpreter of the Constitution to take a dialogic approach to the past, one that is sensitive to how constitutional text has interacted with its various contexts over time. Obviously, reconstruction of the past will be important in this endeavor, and documentation is crucial for any claims that call themselves historical.⁸² But the originalist

82. Others have criticized constitutional thinkers for claiming a purely descriptive reconstruction of the past but failing to actually consider all of the documentary record. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (criticizing Richard Epstein, Cass Sunstein, and Bruce Ackerman for this failing). My critique goes beyond these concerns, which is why I examined the work of Michael McConnell, above, which is largely blameless in this regard.

aspiration to a purely documentary account of constitutional history distorts the idea of fidelity. First, the idea of a purely descriptive reconstruction of the past is itself a fiction, since facts are only relevant in relation to a question posed.⁸³ Second, as I have tried to demonstrate, an originalist approach to history depends on generally unexamined assumptions about the relation of a text to its contexts. Third, as a corollary, it results in an excessively reductive understanding of the Constitution by ignoring its worklike aspects. As a consequence, such an approach leads the originalist to assert that anything that is not purely descriptive is the subjective bias of the interpreter. But that is a false conclusion, following on faulty premises.

A documentary approach leads to a historicist view of history that identifies as the object of study changing particulars (facts), as opposed to unchanging universals (constitutional principles). History, however, involves the study of change within a discourse, of discontinuity within continuity, of repetition with variation. A weak reading of Lawrence Lessig's notion of contestability accords with my view.⁸⁴ What works about

83. It is perhaps worth pointing out that here I am disagreeing with H. Jefferson Powell, who cautioned originalists, "History answers—and declines to answer—its own issues, rather than the concerns of the interpreter." H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987). Powell's thoughtful article addresses originalists on their own terms; that is, conceding that the originalist understanding of history is correct, what internal limitations apply to originalist inquiry? I have instead argued for a different conception of history in constitutional analysis, which I think renders most of Powell's rules inapposite. Cf. *id.* at 698-99 ("[T]he belief that history deals with objective 'facts' is itself a hotly disputed issue among contemporary historians In this essay I have assumed the intellectual validity of the objective-truth model of history").

84. Lessig argues:

Behind this rhetoric is a view held in common both by those who advance "updating" arguments of this sort, and by those who reject them. The view goes something like this: if it were really "just a value" that was at stake, then democratic action would have to change it. The idea is that values are for democrats; facts are for courts. So about the Fourteenth Amendment—if it is a change in values that justifies the changed reading of the Fourteenth Amendment, then, the view is, we need to find democratic ratification for this change in constitutional values. But if it is a fact, then judges may correct a mistake.

There's a confusion in this common view that goes to the core of constitutional thought. It is a conflation of "fact" with the idea of the uncontestable, and of "value" with the idea of "up for grabs." "Facts," this view implies, "are the sorts of things we all must acknowledge; if the Constitution was wrong about a fact, then judges can change it to fix that mistake." "But values," it continues, "are the sorts of things that are chosen. They are up for grabs. So if the Constitution was wrong about a value, we must amend it to change it."

This view is mistaken, though there is something real here that it is trying to track. Facts are not all uncontested, and neither are all values contested. There are facts that are up for grabs, as well as values that are, as it were, off the table. Thus, rather than a rhetoric that tracks ontological categories, like fact and value, and that allows changes in constitutional law when we can identify a view grounded on facts, we should follow a rhetoric that tracks "up for grab-ness," or "off the table-ness," and recognize changes based on them. There *are* changes that a court must recognize, fidelity notwithstanding; these changes are changes in this category of the uncontestable.

Lessig's notion is the recognition that any interpretation of the Constitution has its own historicity.

Far from being a constraint in addition to fidelity, as he assumes, this recognition is a valuable part of faithful interpretation. Since the historical meaning of a text arises from both what the text documents about and what it changes in various, pertinent contexts, previous expositions of the meaning of the text—and thus, its relationship to different contexts—become themselves a relevant context, and one that seems particularly likely to interact with other contexts. It is for this reason, though he approaches the problem differently, that Akhil Amar recognizes that even “erroneous precedents [cannot] always be tossed aside.”⁸⁵ In instances where Americans have sought to amend or not amend the Constitution, or where we have developed an economic or political system, in reliance on how the Supreme Court has interpreted a particular constitutional provision, Amar argues that judges may not toss aside the old interpretations: “erroneous precedents may stand if they have in effect been ratified not merely by the Court, but also by the People.”⁸⁶ This is another way of saying that previous interpretations of constitutional text may themselves change the meaning of the text.⁸⁷ In the desire to give an unchanging account of changing particulars, the originalist seeks to transcend, by ignoring, her own historicity. In this way a historicist approach is also ahistorical.

Rejecting a documentary approach to constitutional history does not require endorsing its opposite, the presentist idea of a living Constitution. That error has been made too often. Imposing our present concerns on a text without regard to documentation or to past interpretation does not even make a claim to be historical, and we can easily dismiss it in our

Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1845 (1997). A strong reading of Lessig's argument suggests that extra-judicial norms determine how judges decide cases; it eliminates judges' agency. On this view, it would be quite plausible to argue that judges of the *Plessy* era were merely guided by an incontestable scientific discourse of their time. For an example of this argument, see Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624. We err in theorizing away the agency of historical actors. Such an understanding of how the world works accords neither with our own, everyday experience, nor with thoughtful historiography. As David Nirenberg has argued in another context, “[A]ny inherited discourse . . . acquired force only when people chose to find it meaningful and useful, and was itself reshaped by those choices. Briefly, discourse and agency gain meaning only in relation to each other.” DAVID NIRENBERG, *COMMUNITIES OF VIOLENCE: PERSECUTION OF MINORITIES IN THE MIDDLE AGES* 6 (1996).

85. Amar, *supra* note 24, at 85.

86. *Id.*

87. I am describing what one commentator has termed a multitextual approach: “the authority employing the multitextual approach assesses that text itself from her own vantage point while also consulting the pre-modern authorities who have interpreted that text.” Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 154 (2000). This commentator identifies an additional benefit to a multitextual approach when he argues that “the approach minimizes the doctrinal instability that might result from constant historical reinterpretation without compromising the originalist's commitment to genuine historical inquiry.” *Id.* at 125.

quest for fidelity. Contrary to the way the debate has been structured, these two rejections do not leave us stranded.

Faithful interpretation should be dialogic with respect to the past. When we study the history of a clause of the Constitution, we must be open to the possibility that the text will change our minds.⁸⁸ Dialogue requires that we be willing to listen to history. The historian must ask questions of the past, but a fact might be pertinent to a faithful inquiry because it challenges the question or suggests that we are asking the wrong one.⁸⁹ Both originalism and living constitutionalism deny the possibility of dialogue.⁹⁰

Fidelity should be understood as a manner of inquiry, then, a way of inquiring what the Constitution means. It cannot lie in a body of knowledge about the Founding; it does not, therefore, inhere in substantive results. If one knows only the holding of a case, one cannot answer whether it is a decision of fidelity or infidelity. One must instead know something about how the judges went about their task. Did they inquire into the relations of text and contexts? Were they sensitive to both the documentary and worklike aspects of the text in these? Originalism and living constitutionalism are not historical precisely because they do not treat the Constitution as a text. The former requires full unity of past facts and the Constitution's meaning. The latter is premised on something like full disunity. As I have shown, however, full unity and disunity are ideal limits that do not accurately reflect how the Constitution works. Instead, they are limits that are more or less approximated. And the task of the adjudicator is to examine how these limits have been related in the Constitution and its contexts in the past and how they should be related in the future.⁹¹

88. I very much hope, therefore, that James Fleming is wrong when he writes, "The attempt to persuade Scalia that fidelity to the Constitution leads to any liberal or progressive conclusions is a fool's errand." James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1346 (1997). If he is right, of course, we can just give up, at least on Justice Scalia. Since, in any case, we can never prove a future negative like the one he claims, I would prefer to proceed under more charitable assumptions.

89. This is an argument addressed to adjudicators, not litigants. The advocate might prefer to ignore what the historical Constitution tells her is wrong with her claim. I believe Cass Sunstein proposes something like this view—the useable past. See Cass R. Sunstein, *The Idea of a Useable Past*, 95 *COLUM. L. REV.* 601 (1995). On the other hand, a litigant's argument might well be stronger if she acknowledges what history says in response to the questions she poses and engages these responses as problems.

90. This also suggests that we should be suspicious of reductive interpretations.

91. Compare Philip Bobbitt's insightful conclusion, albeit arrived at from a different angle:

Legal truths do exist within a convention. But the conventions themselves are only possible because of the relationship between the constitutional object—the document, its history, the decisions construing it—and the larger culture with whom the various constitutional functions serve to assure a fluid, two-way effect on the ongoing process of constitutional meaning. We have, therefore, a participatory Constitution.

PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 234–35 (1982). I would of course quibble with Bobbitt's use of the word "history": Bobbitt is describing the doing of constitutional history.

David Strauss's observation also bears noting:

This idea of fidelity is not unfamiliar to the Supreme Court. I have already discussed *Atwater v. City of Lago Vista*.⁹² In addition, both the majority and the dissent in *Seminole Tribe v. Florida*⁹³ deploy language and sometimes reasoning that might properly be termed historical. Justice Souter's dissent is a particularly good example. Attempting to ascertain the meaning of the Eleventh Amendment for federal jurisdiction, Justice Souter canvassed colonial English ideas about sovereign immunity, then argued that the text of the Amendment might be read to transform those ideas, in addition to documenting them. He continued by tracking the relation of the Eleventh Amendment to diversity language in Article III and tried to get at authorial intent by considering congressional failure to act on certain contemporaneous proposals. Finally, Justice Souter attempted to excavate meaning from previous interpretations. He showed how certain early opinions related text and contexts in ways that would support an understanding of the Eleventh Amendment allowing federal jurisdiction, and he argued that a third opinion, upon which the majority based its decision, should be rejected, explaining it on extra-textual grounds.

But if historical inquiry is familiar in certain constitutional contexts, scrutiny for sex discrimination is not one of them. Indeed, the Court's recent announcement in *United States v. Virginia*⁹⁴ that sex-discriminatory state action must be justified by an "exceedingly persuasive justifica-

[T]he constitution, in practice, includes not just the text of the document, but also the settled understandings that have developed alongside the text. The people rule not through discrete, climactic, political acts like formal constitutional amendments, but in a different way—often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more.

Strauss, *supra* note 13, at 1505. What I have tried to show is that in interpreting the Constitution, there can be no neat separation of text and context. Therefore, when Professor Strauss enumerates various means by which the people rule, I think he is listing a number of pertinent contexts, in relation to which the Constitution gains meaning over time. From the perspective that I am suggesting, then, his observation—with which I agree—does not lead to the conclusion that any argument that "the Nineteenth Amendment read in conjunction with the Fourteenth Amendment would support a principle forbidding gender discrimination that would otherwise be harder to justify" is tenuous. *Id.* at 1504. As I demonstrate in Part III, the opposite conclusion is better.

Finally, I should think my claim would satisfy at least Justice Scalia. *Cf.* SCALIA, *supra* note 25, at 46–47:

The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is . . . essentially lawyers' work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of "evolving standards of decency that mark the progress of a maturing society"—well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it.

92. 532 U.S. 318 (2001).

93. 517 U.S. 44 (1996).

94. 518 U.S. 515 (1996).

tion⁹⁵ provoked a bitter dissent from Justice Scalia, who essentially accused the majority of abandoning intermediate for strict scrutiny on the sly.⁹⁶ He contended in addition that the decision ignored history,⁹⁷ and here he was clearly right. Modern Supreme Court jurisprudence has never sought to ascertain the historical meaning of the Fourteenth Amendment for sex discrimination. Justice Scalia argued that a historical approach would yield a quite different conclusion, but he did not seriously attempt to conduct the inquiry.⁹⁸ That is a task that I will take up here.

III. APPLICATION

The Fourteenth Amendment was ratified in 1868. Its first section provides that all persons born in the United States are citizens, and it prohibits states from abridging citizens' privileges or immunities and from denying persons equal protection of the law or due process. Its second section provides that representation in the House of Representatives is to be determined by state population, but it also penalizes with reduced representation any state that denies its male citizens the right to vote. I have set out the precise language in the margin.⁹⁹ Taking the first section as our text, what is its historical meaning for sex discrimination?

95. *Id.* at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

96. *See id.* at 571 (Scalia, J., dissenting).

97. *See id.* at 566.

98. I do not understand Justice Scalia to assert that if a practice like single-sex education existed at the time an amendment was passed and continued to exist thereafter, that proves that the amendment has no application to the practice. Such an approach would fail Justice Scalia's own standards. *See* Scalia, *supra* note 12, at 857. Without even considering its merits under the concept of historical meaning that I have discussed, the practices approach is logically impossible. *See* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L. REV. 569 (1998). Rather, I understand the practices approach to be something of a quick estimate of originalism when time constraints make full inquiry impossible.

99. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

A. *Authorial Intent: The Framers*

Let us begin with the relation of the text to its authors. Institutionally, the Thirty-Ninth Congress authored the Fourteenth Amendment. In fact, those members of Congress who served on the Joint Committee on Reconstruction wrote the language of the Amendment. What did they think the Amendment meant for sex discrimination? They did not discuss the subject much in 1866, but, as Ward Farnsworth has shown in great detail,¹⁰⁰ they did not seem to have meant to subject sex discrimination to heightened scrutiny.

In the House of Representatives on February 27, 1866, Robert Hale, Thaddeus Stevens, and John Bingham debated whether the Amendment would proscribe state action that differentiated the property rights of married women, unmarried women, and men. Hale was dissatisfied with the text of Section One because it suggested to him that such state action would indeed be proscribed, which was apparently a ridiculous proposition. He argued,

Take the case of the rights of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or lesser extent still exist . . . I apprehend there is not to-day a State in the Union where there is not a distinction between the rights of married women, as to property, and the rights of *femmes sole* and men.¹⁰¹

Stevens replied that Hale was focusing on the wrong kind of distinction, one untouched by the Amendment: "When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."¹⁰²

This exchange, standing alone, is only indirectly relevant. Stevens was a member of the committee that drafted the Amendment, and it seems at least clear that he did not think it affected the property rights of married women. But while Hale's argument was premised on the apparent inequality between married women on the one hand, and men and unmarried women on the other, in Stevens's reply the sex discrimination drops out, and he addresses only differences based on marital status. Of course, in those states where marital status made a difference for one's property rights, it did so only for women. No state treated unmarried men's property rights differently than married men's.¹⁰³ One might nevertheless ar-

100. See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. REV. 1229 (2000).

101. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).

102. *Id.*

103. On property rights, sex, and marriage in nineteenth-century American law, see generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359

gue that Stevens's comment does not address sex discriminatory state action at all. But if we wish to conclude from such an argument that the authors of the Amendment could have meant for it to proscribe such differential treatment by the state, John Bingham's entry into the Hale/Stevens debate would stand firmly in the way.

Bingham, also a member of the drafting committee and reputedly the principal architect of the Amendment's first section,¹⁰⁴ calmed Hale by explaining that state property laws that discriminated only against married women were untouched by the Amendment. Hale "need not be alarmed at the condition of married women," Bingham said. "Those rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact."¹⁰⁵ But property rights were not among them. Existing state law determined those instead. As an example, Bingham considered real property: "As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States."¹⁰⁶ So if state law did not permit married women to hold property in their own name, that was part of the definition of property, and the Amendment did not redefine the concept. Only after someone had acquired property under state law did the Equal Protection Clause mandate that they "be equally protected in the enjoyment of it."¹⁰⁷ Bingham's explanation, contrasting rights enjoyed by all women with rights of property, suggests that regardless of marital status, if a state prohibited all women from owning property, that was permissible under the Fourteenth Amendment.

An exchange in the Senate in May of the same year is more directly on point. Senator Jacob M. Howard of Michigan, a member of the Joint Committee on Reconstruction, presented to the full Senate on May 23, the text of the proposed Amendment.¹⁰⁸ The first remarkable aspect of his presentation is that he articulated and elaborated on all of Section One without interruption for clarification or argument at all. When he reached Section Two, however, several senators sought to engage him on precisely how a state could condition the right of suffrage without being penalized in terms of representation. Thus, for example, Senator Daniel Clark wanted to know whether the Amendment would reduce the representation of a state that conditioned its franchise on an intelligence test. Following the language of the text, Howard replied that it certainly would.¹⁰⁹ After further prodding about what exactly constituted an "abridgement" of the right to vote, Howard quoted James Madison to illustrate the re-

(1983); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

104. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181 (1998).

105. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

106. *Id.*

107. *Id.*

108. See CONG. GLOBE, 39th Cong., 1st Sess. 2764 (1866).

109. See *id.* at 2767.

publican principle at stake in Section Two's penalty-for-abridgement provision. Faced with the alternatives of equal and universal citizen suffrage for each branch of government or confining the right to vote to part of the citizenry—property holders, in Madison's example—Howard quoted Madison to conclude that "it is better that those having the greater interest at stake, namely, that of property and persons both, should be deprived of half their share in the Government, than that those having the lesser interest, that of personal rights only, should be deprived of the whole."¹¹⁰ Then Howard queried his colleagues, perhaps rhetorically, "[H]ow can any man of true republican feeling, attached to the essential principles of our system of government, refuse the right of suffrage to the whole negro population as a class?"¹¹¹

Reverdy Johnson, the Democrat who had successfully litigated *Dred Scott* a decade earlier, immediately shot back, initiating, for us, a crucial exchange: "Females as well as males?" Howard answered, "Mr. Madison does not say anything about females." To which Johnson specified Madison's precise language: "'Persons.'" Howard could reply only that when Madison said *persons* he obviously meant *men*:

I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting or of an infant's voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.¹¹²

If we are interested in what the Fourteenth Amendment's authors thought it meant with respect to women, this exchange is illuminating. In its absence, one might have argued that, as a matter of general intent, the text's authors *did* mean for it to render sex based discrimination suspect. This would be a simple argument. First, they used the word "person" to identify the subjects of the text. Second, women are persons. Had they wished to exclude women, the argument would continue, the drafters could have written "men" instead of "persons," particularly since the second section of the Amendment does identify the relevant subjects by sex.¹¹³ But this exchange should rebut the argument from general intent.

110. *Id.* (quoting Madison).

111. *Id.*

112. *Id.*

113. Nina Morais has made a more thorough, general intent argument for the Fourteenth Amendment's coverage of sex discrimination. See Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988). In addition to the short proof I have offered here, Morais relies on three other observations. First, other comments in the *Congressional Globe* and *Record* indicate that several congressmen were not adverse to women's rights. Considering the civil rights/political rights dichotomy that existed at the time, she concludes that many congressmen might have supported women's rights, just not suffrage. Second, Morais contends that, given the political climate of the time, Congress must have foreseen that the suffragists would take their case to court if the Amendment was broadly worded. Third,

Here an objecting senator articulated precisely this gap between the words “males” and “persons.” And the proponent of the Amendment met the objection by stating that, in the text he was referencing, the category of persons did not include women. The application of natural law to politics was sufficient justification. And this rejoinder appears to have satisfied its audience. True, Howard was talking about Madison’s writings, not the text of the Amendment, but it seems highly implausible that the senators would have thought that persons included women in the text they were debating but not in the political theory deployed to support that text. On the contrary, in the course of debating a proposed text that used the word “person,” its authors reached the consensus that persons did not include women.

We should note at this point that we have already completed all the research necessary to achieve the originalist/antioriginalist impasse. The latter approach, though it shares the result of the argument from general intent, nevertheless uses different means. These would be something like the following. The Amendment speaks of persons, and at the present time, we think it incontestable that women are persons.¹¹⁴ Or, somewhat more philosophically, we could probably reach the conclusion that any coherent moral theory must include women as persons.¹¹⁵ Therefore, in either case, discrimination against women because they are women falls within the condemnation of the text. In response, the originalist would point to the evidence above and conclude that, as a historical matter, the Fourteenth Amendment simply did not include women within its purview.¹¹⁶ Our hypothetical antioriginalist has not even purported to make a historical claim, while his originalist counterpart claims that history is conclusive. The crucial point to recognize, however, is that analysis of the historical meaning of the Fourteenth Amendment is far from complete at this point.

B. *Text and Society: Separate Spheres*

Why would it have made sense to Congress that the category of persons did not include women? To understand this thinking we must in-

the association of the women’s movement with abolitionism suggests that any measures adopted to ameliorate the situation of black people were likely intertwined with thoughts of improving the situation of women.

114. Cf. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1809 (1997) (suggesting as one resolution for the conflict between modern notions of sex discrimination and those of the framers of the Fourteenth Amendment the idea that we can reject the application of their views to the Amendment because “on some occasions the reasoning of the Framers—viewed in modern perspective—will be so flawed or distasteful as to suggest that the Constitution means the opposite of what they assumed”).
115. Cf. *id.* at 1810 (“Similarly, modern views about the immorality of gender discrimination place the Framers of the Fourteenth Amendment in a particularly unheroic light.”).
116. Indeed, Ward Farnsworth has examined the evidence and so concluded. See Farnsworth, *supra* note 100, at 1290 (“This original understanding is hard to square with most judicial scrutiny under the Fourteenth Amendment of laws distinguishing between the sexes, not to mention the heightened scrutiny the Supreme Court currently gives to such laws.”).

investigate how the nineteenth-century American mind conceived of one's relation to the state. We will thereby see how the text of the Fourteenth Amendment incorporated the idea of women's exclusion from the category of political persons while simultaneously undermining it.

Early American political thought conceived of the family as the basic unit for social activities. Ellen DuBois has noted that in seventeenth-century New England, "all community functions—production, socialization, civil government, religious life—presumed the family as the basic unit of social organization The adult male's position as producer, as citizen, as member of the church, all flowed from his position as head of the family."¹¹⁷ But by the nineteenth century, a newer discourse had emerged alongside the earlier one: that of the individual. This second discourse, more familiar to modern ears, poses the political realm as a direct relation between the individual and the state. DuBois argues, "In the nineteenth century, we can distinguish two forms of social organization—one based on this new creature, the individual, the other based on the family. These overlapping but distinct structures became identified respectively as the public sphere and the private sphere."¹¹⁸

Only men emerged from their familial roles into the public sphere. As a matter of social organization, women remained within the family. We frequently misapprehend the operation of this ideology of separate spheres, asserting that it mandated subordinated social roles for women.¹¹⁹ While such an assertion is true in the sense that women did not in fact pursue professions, it is misleading in the sense that it posits women as individuals who were restricted in their range of professional opportunities. Women were not restricted as individuals; they were not individuals in any public sense at all. Thus, in 1835 Alexis de Tocqueville was able to write without irony that "universal suffrage has been adopted in all the states of the Union,"¹²⁰ even though women were barred from voting. He could extol the civilizing influence of, and productive energy unleashed by, political participation by all citizens, while observing that "even the women frequently attend public meetings and listen to political harangues as a recreation from their household labors."¹²¹ For de Tocqueville as for most political thinkers of his time, political activity was

117. Ellen DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, 3 FEMINIST STUD. 63, 64 (1975).

118. *Id.*

119. I think Deborah Rhode's historical account of women and the law has the flavor of this error. Cf. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 9, 10–11 (1989) (focusing on the "tensions between women's rights and social roles"). For another example of this tendency, consider Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 839 (1990) (discussing the concept of separate spheres in an 1872 Supreme Court concurrence and continuing with the assertion, "Not until the 1970's did the woman question begin to yield different answers about the appropriateness of the role of women assumed by law.").

120. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 199 (Phillips Bradley ed., Vintage Books 1990) (1835). Of course, de Tocqueville's statement also reflects an assumption that universal suffrage did not include black men. In the context of *Democracy in America*, however, this assumption is more explicit, and thus less ironic. See Randall Kennedy, *Tocqueville and Racial Conflict in America: A Comment*, 11 HARV. BLACKLETTER L.J. 145 (1994).

121. DE TOCQUEVILLE, *supra* note 120, at 250.

public, so in discussing it he omitted women, whose place was in the private sphere, as a matter of course.

Congressional debates in the winter of 1866 over suffrage in Washington, D.C. illustrate the prevalence of the ideology of separate spheres to those who wrote the Fourteenth Amendment. Senator Lot M. Morrill of Maine based his opposition to the extension to women of the right to vote on its disruption of public and family relations:

Now, sir, in practice its extension to women would contravene all our notions of the family; "put asunder" husband and wife, and subvert the fundamental principles of family government, in which the husband is, by all usage and law, human and divine, the representative head. Besides it ignores woman, womanhood, and all that is womanly; all those distinctions of sex whose objects are apparent in creation, essential in character, and vital to society, these all disappear in the manly and impressive demonstration of balloting at a popular election. Here maids, women, wives, men, and husbands promiscuously assemble to vindicate the rights of human nature.

Moreover, it associates the wife and mother with policies of the state, with public affairs, with making, interpreting, and executing the laws, with police and war, and necessarily disseverates her from purely domestic affairs, peculiar care for and duties of the family.¹²²

But not only would women's suffrage upset public and private relations, it was unnecessary, since men, as heads of their households, would represent their interests. Senator Benjamin Wade of Ohio agreed that "there is not the same pressing necessity for allowing females as there is for allowing the colored people to vote; because the ladies . . . are in high fellowship with those that do govern, who, to a great extent, act as their agents . . . promoting their interests in every vote they give."¹²³ Such thinking also manifested itself in arguments about Section Two of the Fourteenth Amendment. Answering the problem of why women who could not vote should be counted in the numbers for representation if black men, also excluded, should not, Senator John B. Henderson of Missouri explained that the ballot "is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother."¹²⁴

In these ways the Fourteenth Amendment was a sign of its times. Those who drafted it spoke of persons but did not think they were including women. Such an understanding was possible if one assumed the context of separate spheres. For all public activities, only men were persons. Women were persons within the home. For public purposes, men "represented" the women to whom they were related by birth or marriage, a vestigial concept from an earlier era in which one's relation to the state was defined solely by reference to one's family. This background

122. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).

123. *Id.* at 63 (1866).

124. CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866).

ideology was particularly plausible when buttressed by the notion that nature fitted women for domestic life and men for the public sphere.

At the same time, however, the text itself challenged both its framers' intentions and the societal norms that it supposedly incorporated. Speaking of "persons" as "citizens," the Amendment guaranteed them "equal protection" and guarded against the abridgement of their "privileges or immunities." Between the text and its contexts, then, significant gaps existed. An interpreter who pressed hard on the language might be able to jar the text loose from the context in which it was originally framed. In so doing, the text itself might change the context. That is, convincing an interpreter that women were persons in the Fourteenth Amendment might undermine one's confidence that its framers intended the opposite, that natural law dictated separate spheres for men and women, that separate spheres meant what was commonly assumed, or even that they existed at all.

C. Reading the Amendment in the 1870s

Almost as soon as the Amendment was ratified, advocates for women's rights began to read it in just such a subversive way, and they pressed their reading on the text's authoritative interpreters: the courts. Suffragists argued that the new Amendment made women citizens, that voting was the highest privilege of citizenship, and that therefore states could not deny women the vote. Whether their argument was "right," is, I think, the wrong question to ask. Instead, we should pay attention to how their interpretive claims shaped the relation of the text of the Fourteenth Amendment to the contexts already discussed. In the early 1870s a number of suffragist claims worked their way through the federal courts.¹²⁵ Though the Supreme Court eventually resolved the issue against the suffragists in *Minor v. Happersett*,¹²⁶ I want to first examine how the Supreme Court of the District of Columbia¹²⁷ interpreted the Amendment when confronted with the suffragists' argument.

That case, *Spencer v. Board of Registration*,¹²⁸ is particularly instructive for those seeking to understand the historical meaning of the text because a transcript of the plaintiffs' oral argument has been preserved.¹²⁹ We can

125. See Morais, *supra* note 113, at 1168.

126. 88 U.S. (21 Wall.) 162 (1874).

127. This Supreme Court of the District of Columbia later became the United States Court of Appeals for the District of Columbia Circuit.

128. 8 D.C. (1 MacArth.) 169 (1873). The official reporter provides 1873 as the year of decision in this case, a date that I think is almost certainly wrong. A book containing the plaintiffs' oral argument and the court's decision was published in 1871. See *infra* note 129. Small inconsistencies like this one are an obvious hazard for anyone attempting to trace the historical meaning of a text, though I would venture to suppose that the problem is more dire for the strict originalist, who supposes that historical meaning is fixed at the moment of enactment in documentary fashion, than for the historian interested in understanding the evolutionary relation of a text to its contexts.

129. See SUFFRAGE CONFERRED BY THE FOURTEENTH AMENDMENT: WOMAN'S SUFFRAGE IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, IN GENERAL TERM, 1871—SARA J. SPENCER VS. THE BOARD OF REGISTRATION, AND SARAH E. WEBSTER VS. THE JUDGES OF ELECTION—ARGUMENT OF THE COUNSEL FOR THE PLAINTIFFS—WITH THE OPIN-

therefore examine the suffragists' arguments in detail, as well as the reactions of the judges who heard them. The appeal consolidated two cases. Sara Spencer had brought suit against the Board of Registration for refusing to register her to vote, and Sarah Webster's complaint was against the Superintendents of Election for refusing to receive her vote.

A. G. Riddle and Francis Miller argued their case. They leveled a number of arguments against the intent or understanding of the Amendment's drafters as controlling. First, Riddle noted that the Amendment was authored after the wrenching dislocation of the Civil War. This "great revolution" changed chattels to persons; against such a backdrop of transformation, it was appropriate to read the language of the Amendment as similarly transformative.¹³⁰ He therefore focused quickly on a worklike aspect of the language, what it does, with reference to women's exclusion from the public, political sphere. The purpose of Section One was to produce "a higher development from persons to citizens, from a natural person to an artificial political being And this is really the issue—does this language mean and do anything?"¹³¹ Second, although we have seen that Congress did contemplate and reject the idea that the Amendment applied to sex discrimination, Riddle argued that they had not specifically thought of women at all;¹³² they were "unaware of the mighty result" of their words.¹³³ Finally, Francis Miller stated that "we would all be willing to admit that Congress did not expect, by virtue of this Fourteenth Amendment, to give to women the right of suffrage. But, if that be the case, it is far from being the first time that men have 'buildded better than they knew.'"¹³⁴ Here already the meaning of the text had been separated from its framers' understanding, as Justice Humphreys noted in response to Miller that one "must presume that the legislative body means what the words import."¹³⁵

Perhaps surprisingly, neither Riddle nor Miller devoted a great deal of argument to whether women were persons under the Fourteenth Amendment. The background political discourse indicated they were not: women were certainly persons, but not political persons. Riddle argued the issue obliquely by insisting, as we have seen, that the Amendment transformed each "natural person" into an "artificial political being." This

IONS OF THE COURT (1871). Harvard University owes its copy to a donation by Senator Charles Sumner of Massachusetts on August 13, 1872.

130. *See id.* at 20.

131. *Id.*

132. "Now, I admit, as broadly and fully as words can express, that the framers, adopters, and promulgators of these amendments, man-like, went through it all and never thought of women. Never thought that they were in existence—were persons, or human, even." *Id.* at 34. This is, of course, a familiar rhetorical move in constitutional argument: the framers did not think about the precise issue at bar. The "historical" evidence is therefore inconclusive, and we must have recourse to the clear import of the Constitution's words. For the most famous example of this move, see *Brown v. Board of Education*, 347 U.S. 483, 489, 492 (1954) (calling the sources for the original understanding of segregation and the Fourteenth Amendment "inconclusive" and concluding that "we cannot turn the clock back to 1868 when the Amendment was adopted").

133. SUFFRAGE CONFERRED, *supra* note 129, at 34.

134. *Id.* at 63.

135. *Id.* at 64.

argument insisted that by virtue of the Amendment women were not only actual persons but also political ones as well, thereby acknowledging the distinction relied on in the Howard/Johnson exchange on the floor of the Senate but arguing that the text Howard and Johnson wrote eliminated it. The judges did not object. Nor did they object when Riddle confused the issue further by stating not only that Congress did not think of women when writing the Amendment, but further that it “[n]ever thought that they were in existence—were persons, or human, even.”¹³⁶ This statement undermined the distinction by emphasizing the everyday meaning of “persons”: If Congress did not think of women as (political) persons, they did not think of them as (human) persons at all. Miller pursued this latter tack, telling the court, “‘All persons’—we will not discuss the question whether women are persons,”¹³⁷ as if the answer was too obvious, though of course it was only obvious if “persons” was understood biologically, instead of through political discourse. The plaintiffs also exposed the ways that the law had conceived of families as the relevant units; laws that in practice disabled women certainly had no legal bearing on their rights as individuals. Thus, when Riddle argued that by common law women had always had the right to vote, Chief Justice Wylie interrupted him to ask whether coverture had incapacitated them from exercising the right. “No, your honor,” Riddle responded, “the right to vote attached to the freehold, and by the old law that by marriage vested in the husband.”¹³⁸

The only proof remaining for the plaintiffs was that citizenship necessarily entailed voting. Riddle deployed two different strategies here, both of which sought the meaning of Section One in relation to other texts. First, he sought to ascertain the meaning of “citizen” in the text of Section One by reference to other contemporary documents: dictionaries. He quoted Webster, among others, to support the proposition that voting defines citizenship.¹³⁹ Second, he argued that Section Two, which penalizes a state’s representation “when the right to vote . . . is denied to any of the male inhabitants of such State,”¹⁴⁰ necessarily assumes that “the right to vote” exists prior to its denial.¹⁴¹

But the Justices of the D.C. Supreme Court found this link problematic. First, they felt that voting could not be a privilege or immunity of the United States citizenship since no one would suppose that the Amend-

136. *Id.* at 34.

137. *Id.* at 44.

138. *Id.* at 12.

139. “Webster: ‘Citizen—a person . . . native or naturalized, who has the privilege of voting for public officers.’” *Id.* at 22–23. Trying to apprehend the meaning of a text through the relation of its words to contemporary dictionary definitions is an increasingly common tack for the Supreme Court, particularly for Justice Scalia. *Cf.*, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333–34 (2000) (quoting a 1950 edition of *Webster’s* to determine the “core meaning” of “abridge” in § 5 of the Voting Rights Act of 1965).

140. U.S. CONST. amend. XIV, § 2.

141. “It unequivocally recognizes that he has the right to vote. If *the right of the citizen to vote* is denied, *his right to vote* . . . I am to be told, am I, that this American Constitution, which thus solemnly recognizes this right to vote, also recognizes the right to deny this right?” SUFFRAGE CONFERRED, *supra* note 129, at 32.

ment granted to citizens of New Jersey the right to vote in Pennsylvania.¹⁴² Second, if women were entitled to full participation in the political system, that would be strongly inconsistent with the ideas of natural law that supported the background context of separate spheres. Thus, the court actually debated with counsel for both the plaintiffs and the defendants the relevance of Eve's role in the biblical narrative of the Fall.¹⁴³

The *Spencer* court ruled against the plaintiffs. Chief Justice David Cartter rested his opinion on the holding that voting was not necessarily an attribute of citizenship. Women could therefore become citizens without becoming voters. What the Fourteenth Amendment *did*, according to the court, was to "clothe[] them with the capacity to become voters."¹⁴⁴ It remained up to the legislature to make them so.

Without resting its interpretation on it, the court's explanation of the theoretical demerits of universal suffrage indicates the societal context in which they were operating. Commenting on urban centers that had extended the vote to virtually all men, the court observed that "[t]he result in these centers is political profligacy and violence verging upon anarchy."¹⁴⁵ It therefore deduced that "the right to vote ought not to be, and is not, an absolute right. The fact that the practical working of the assumed right would be destructive of civilization is decisive that the right does not exist."¹⁴⁶

142.

Justice WYLIE. You don't mean to say that a citizen of New Jersey could vote in Pennsylvania?

Mr. RIDDLE. No, sir; but he has the right of voting in Pennsylvania upon the same terms that her own citizens can—residence, &c.

CHIEF JUSTICE. He becomes a citizen of Pennsylvania.

Mr. RIDDLE. He can become such.

Justice WYLIE. Then he has not the same right.

Id. at 27.

143. The remarkable exchange ended with laughter, but as the eager assistance of defendants' counsel (Mr. Cook) demonstrates, this was a live question:

Justice WYLIE. I do not know if there is anything in it, but what do you make out of that declaration by the Almighty to Eve, as a punishment, that her desires should be to her husband, who should rule over her?

Mr. MILLER. Your Honor, I am discussing now merely a political, and not a theological question.

Mr. RIDDLE. I am not aware that that extended to all her children.

Mr. COOK. I have it here. Unto the woman he said: "I will greatly multiply thy sorrow, and through thy conception in sorrow shalt thou bring forth children, and thy desires shall be to thy husband, and he shall rule over thee."

THE CHIEF JUSTICE. Was not that dispensation legislated away with the new?

Mr. COOK. No, sir; intensified by the new.

Mr. RIDDLE. Your Honor will bear in mind it was restricted to one generation. I know of no rule of construction that imposes it upon her daughters.

Justice MACARTHUR. It was confined to that particular instance?

Mr. RIDDLE. Yes, your Honor, they disposed of the case before them.

Id. at 52.

144. 8 D.C. at 178.

145. *Id.* at 177.

146. *Id.*

In *Minor*, the Supreme Court insisted that the Fourteenth Amendment did even less than the *Spencer* court thought. This case wound its way to the high Court through the state courts of Missouri, where Virginia Minor sued after Registrar Happersett had refused to register her as a voter. The Supreme Court of Missouri sustained Happersett's demurrer¹⁴⁷ to the suit, and a unanimous Supreme Court affirmed in an opinion by newly appointed Chief Justice Morrison R. Waite. Much might be found wanting in Waite's narrowly historicist analysis, in which he repeatedly turned to the suffrage laws of the states as they existed at the formation of the Union to support the proposition that voting was not a privilege of citizenship. Waite utterly failed to reckon with the relation of the new Amendment to this particular context. In fact, his reductionist historicism stubbornly insisted that there was really nothing to consider, for the Amendment, in his view, performed close to no work at all: "The amendment . . . simply furnished an additional guaranty for the protection of such [rights] as he already had. No new voters were necessarily made by it."¹⁴⁸

In the course of this opinion, the *Minor* Court made a number of moves with regard to the relations of the text of the Fourteenth Amendment's first section to a number of contexts. First, the Court devoted fully the first third of its opinion to settling the proposition that women were persons, as well as citizens, within the meaning of Section One. We have already seen that this proposition was far from a foregone conclusion. The Framers probably intended otherwise, and they construed the same words in supporting works to that effect. In everyday language women were persons (and therefore citizens), but in a political discourse of separate spheres, emerging from a theory that one related to the state through one's family, women might well not be persons. The *Minor* opinion began by severing these contexts at the word "person": "There is no doubt that women may be citizens. They are persons."¹⁴⁹ Influencing the Court to adopt this view was probably its ultimate desire to conclude that, as regards women and voting, the Amendment did nothing. To strengthen that sense, the Court argued not only that women were persons and therefore citizens under the Fourteenth Amendment, but also that they had been citizens all along. It argued that women were persons when the states originally adopted the Constitution, and since the Preamble speaks for "the people of the United States,"¹⁵⁰ that must include women. It also looked to congressional acts allowing female aliens to become naturalized citizens; wouldn't this be inconsistent with native-born women being denied citizenship? Finally, it noted that citizenship is required to establish

147. The demurrer was the procedural ancestor of Rule 12(b)(6). This gives one pause in evaluating Nina Morais's claim that although late nineteenth-century courts invariably ruled against women on their Fourteenth Amendment claims, "they did not do so because the plaintiffs had failed to state a claim under the Fourteenth Amendment." Morais, *supra* note 113, at 1167. Procedurally, the *Spencer* and *Minor* Courts did just that. Their analysis was more involved than merely noting the sex of the plaintiffs, probably the best way to read Morais's assertion is as a recognition of the significance of involved analysis.

148. 88 U.S. at 171.

149. *Id.* at 165.

150. U.S. CONST. preamble.

the jurisdiction of federal courts, and since women had long sued in federal court, they must have been citizens.

The Court instead sustained the defendant's demurrer because it thought that the right of suffrage was not one of the necessary privileges of a citizen of the United States.¹⁵¹ Here the Court relied on a mixture of textual and historicist argument. Textually, it argued, first, that citizenship did not include voting by the terms of the unamended Constitution because Article One, Section Two prescribed that the electors in each state for the federal House of Representatives must have the qualifications for electors of the most numerous branch of the state legislature, thereby inferring that states held the power to define such qualifications. It bolstered this assertion by listing these qualifications for each state at the time the Constitution was adopted. Then it reversed Mr. Riddle's argument about the import of Section Two of the Fourteenth Amendment: "Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants?"¹⁵² Finally, it looked at the Fifteenth Amendment, which, it concluded, would have been unnecessary if the Fourteenth already prohibited a state discriminating among who had the right to vote.¹⁵³

Two years earlier the Court had resolved in similar fashion the claim that the Fourteenth Amendment prohibited a state from denying women admission to the bar solely because of their sex.¹⁵⁴ Justice Miller's brief opinion for the Court simply concluded that of the privileges and immunities of citizenship, "[T]he right to admission to practice in the courts of a State is not one of them."¹⁵⁵

It would be wrong to read cases like *Bradwell* and *Minor* merely as exercises in guessing precisely which privileges were bound up with citizenship for Fourteenth Amendment purposes. First, answering that question is not itself relevant to our purpose. Litigants challenge sex discrimination as a violation of equal protection, not an abridgement of privileges and immunities, and we are trying to ascertain whether heightened scrutiny should apply to such discriminatory state action. We are therefore interested not in whether lawyering is a privilege of citizenship, but rather in how past interpretations have shaped the meaning of the Fourteenth Amendment by relating its text to pertinent contexts—the intent of its drafters, other texts, and societal notions about separate spheres.

Second, reading each decision as an isolated inquiry into the privileges of citizenship misses the ways that the inquiry itself turned on women's relation to the political sphere and to the Fourteenth Amendment. Justice Bradley's better-known concurrence in *Bradwell* makes these

151. 88 U.S. at 170.

152. *Id.* at 174.

153. The Court concluded its opinion by brushing aside claims under the Republic Form of Government, Bill of Attainder, and Due Process Clauses. None received more than a page of attention. *See id.* at 175–77.

154. *See Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

155. *Id.* at 139.

connections more explicitly. For Bradley, the question of “the privileges and immunities of women as citizens to engage in any and every profession” was a question of “the fundamental privileges and immunities of the sex.”¹⁵⁶ Bradley explicitly tied the text of the Fourteenth Amendment to the background context of separate spheres in order to answer the question in the negative:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest[s] and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.¹⁵⁷

What is important to note here is that Bradley’s concurrence makes explicit that which is only implicit in the majority opinion in *Bradwell* and the opinion in *Minor*: separate spheres meant that whatever rights women claimed in the public, political sphere, these could not be privileges of citizenship.

The inquiry was virtually circular when a woman brought a claim because what the Amendment itself covered was defined heuristically by its relation to separate spheres. If separate spheres eliminated women from consideration of a right, that right was political and therefore untouched by the Fourteenth Amendment. If not, it was civil, and included.¹⁵⁸ And the preeminent marker of this distinction was voting, thus the insistence of the suffragists and thus the necessity for Matthew Carpenter, on behalf of Myra Bradwell, to begin his argument with the disclaimer, “The question does not involve the right of a female to vote.”¹⁵⁹ It certainly did! As Ellen DuBois has concluded, “The demand for suffrage drew together protest against all these abuses in a single demand for the right to shape the social order by way of the public sphere.”¹⁶⁰

The Fifteenth Amendment addressed itself directly to this distinction, denying states the ability to abridge the right to vote on account of race. As we have seen, judges understood the point well in the 1870s. The Amendment that dealt with political rights did not deal with sex. Laws that discriminated against women in the public, political sphere were untouched by the Fourteenth Amendment.

Of course, all government action is subject to challenge under that Amendment, but unless the challenged law is subject to unusual scrutiny, the state may continue its practice if it can articulate a legitimate governmental interest that is rationally furthered thereby. To say that in the late nineteenth century the Fourteenth Amendment did not touch state-

156. *Id.* at 140–41 (Bradley, J., concurring).

157. *Id.* at 141.

158. Akhil Amar has made this observation as well. See Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 469 (1995) (asserting that in the 1870s the category of unmarried white women was “a central intellectual category, defining in some ways, what the Fourteenth Amendment was all about”).

159. 83 U.S. at 133.

160. DuBois, *supra* note 117, at 66.

sponsored sex discrimination with respect to political rights (that is, in the public sphere) is to say that such discrimination need pass only rational basis scrutiny to survive.

D. Another Text: The Nineteenth Amendment

The history of the Fourteenth Amendment does not end in the nineteenth century, however. The notion of women as the touchstone for determining which rights the Fourteenth Amendment protects has largely disappeared, but this disappearance was not by happenstance. Following the litigation failure of *Minor*, suffragists focused on a federal constitutional amendment to secure the right of women to vote. I do not want to chronicle the history of the drive for a women suffrage amendment.¹⁶¹ Instead, let me point out that in the years just prior to congressional passage and state ratification of the Nineteenth Amendment, its opponents continued to make similar contextual assumptions and to draw on similar language to that which we have encountered in the courts.

In 1916 former and future congressman Henry St. George Tucker, then a law professor at Washington & Lee University,¹⁶² delivered the Storrs Lectures at Yale Law School, and he took the opportunity to oppose the proposed amendment on federalism grounds.¹⁶³ Since states decide who votes, he argued, mandates at the federal level would decrease individual liberty by reducing states' rights. What was at stake was the survival of local self-government; according to Tucker, these words

are the guaranty of the safety of the home, the recognition of the trusteeship of man as the defender of the home and the guardian of its sacred precincts. They single out the individual, arm him with the greatest political power that can possibly be given to an individual, and hold him responsible for its exercise in the development of home and neighborhood; and thus is demanded at his hands the exercise of the highest and most sacred duties that can ever be the portion of an American Citizen.¹⁶⁴

Tucker's view recapitulates nicely several of the ideas upon which the *Bradwell*, *Spencer*, and *Minor* Courts implicitly relied. First, Tucker posits the individual in a direct relation with the state. Local self-government arms him with political power, that is, political rights, against it. Second, the individual is male. As a matter of nineteenth-century political discourse, this was generally assumed. For Tucker, faced with the real possibility of women voting—the paradigmatic political right—it was explicit. Third, though the individual himself had rights against the state, he remained representative of a home, which included women internally but invisibly to the public. In fact, only by virtue of his protection of home

161. The canonical modern work on the subject remains ELEANOR FLEXNER & ELLEN FITZPATRICK, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (Harvard Univ. Press 1996) (1959).

162. See Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES, WITH SELECTED WRITINGS*, at xi (Liberty Fund 1999) (1803).

163. See HENRY ST. GEORGE TUCKER, *WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT* (2d prtg. 1928).

164. *Id.* at 106.

and neighborhood was a political individual entitled to exercise the highest duty of citizenship—voting.

Nor were these notions the province of a legal elite. In the first fifteen years of the twentieth century, they were widely dispersed throughout society. Suffragist pamphlets routinely argued that “the political unit is not the family, but the male individual,”¹⁶⁵ that women were not already represented by their male relatives,¹⁶⁶ that female suffrage would not cause divorce,¹⁶⁷ and that claiming that suffrage is not a natural right was an insufficient justification for women’s exclusion thereof.¹⁶⁸

It seems clear, then, that any historical understanding of the Fourteenth Amendment and sex discrimination must consider the relevance of the Nineteenth Amendment. But precisely how is the latter text relevant to the former? First, as an intratextual matter, the meaning of the Fourteenth Amendment as a text must include its relation to the Constitution as a whole. Second, this relation, between the texts of the Fourteenth and Nineteenth Amendments, speaks directly to the societal context of separate spheres and political rights with which we have been preoccupied.

The Nineteenth Amendment’s words are nearly identical to those of the Fifteenth. The newer amendment replaced “race, color, or previous condition of servitude” with “sex.” Each is the object of a preposition, detailing the proscribed basis for governmental discrimination in voting. Nothing in the intervening text suggests that the repetition is ironic. If we read the Fourteenth Amendment by the light of the Fifteenth, it makes sense that the Nineteenth should shed light on the Fourteenth in the same way. As we have seen, the point was crucial for the *Minor* Court: the Fourteenth Amendment alone could not mean equal rights for women, the Court reasoned, because the Fifteenth Amendment was necessary to give the political right of voting to blacks. The Nineteenth Amendment disrupted such a proof.

Second, the Nineteenth Amendment speaks to voting, the paradigmatic political right. Late nineteenth-century interpretations of the Fourteenth Amendment had narrowed any gap between women and persons, but the background context of separate spheres was manifest in notions about the sorts of rights protected by the Amendment. Women were not cognizable in the public sphere; therefore, the Amendment did not reach their political rights. Debates in Congress about Madisonian political theory, oral argument on Adam and Eve, and concurrences discoursing on the domestic sphere make explicit the calculus upon which determinations of the reach of the Amendment turned. The Nineteenth Amendment repudiated such thought in strong terms. If voting was the highest duty of citizenship and the paradigmatic political right, and if it could not be denied on account of sex, it makes no sense to assume that sex is the relevant dividing line for political rights. Given these crucial developments between the Fourteenth Amendment’s text and its contexts wrought by

165. Alice Stone Blackwell, *Objections Answered*, WOMAN SUFFRAGE: ARGUMENTS AND RESULTS (Nat’l Am. Woman Suffrage Assoc., New York, N.Y.), 1911, at 23.

166. *See id.* at 2.

167. *See id.* at 20–21.

168. *See id.* at 29.

the Nineteenth Amendment, one might wonder why the Supreme Court failed to take notice. In fact, it did.

In 1923 the Court addressed several of these issues squarely in *Adkins v. Children's Hospital*.¹⁶⁹ In some ways *Adkins* was a typical case. A progressive legislature passed a statute creating a labor board empowered to set a minimum wage in the jurisdiction, and this drew predictable constitutional critique as an interference with the rights of employers and employees to contract on whatever terms they wished: the now-discredited doctrine of liberty of contract. Here, Congress had legislated for the District of Columbia. The conservative federal judiciary had been invalidating such progressive legislation at least since *Lochner v. New York*¹⁷⁰ in 1905. But Congress sought to avoid the fate of New York's statute setting the maximum hours for bakers by giving the labor board jurisdiction to set minimum wage only for women and children.

This was an entirely plausible strategy, as the Supreme Court in 1908 had allowed stand an Oregon statute that limited the number of hours women could work in laundries.¹⁷¹ In sustaining the Oregon statute, the Court had opined that a maximum hour law for men would have been unconstitutional,¹⁷² but after reading the brief of Louis Brandeis, it was convinced that legislation to protect women was permissible. Reading Justice Brewer's opinion for the Court, it is difficult to ascertain precisely why this was so. Sometimes he wrote of physical differences between men and women,¹⁷³ but he also relied on unabashedly social relations.¹⁷⁴ This rather confused vision probably followed from Brandeis's brief, which threw *everything* at the Court to a degree insufficiently appreciated by most accounts.¹⁷⁵ It was also a sign of its times, reflecting the erosion of

169. 261 U.S. 525 (1923).

170. 198 U.S. 45 (1905).

171. See *Muller v. Oregon*, 208 U.S. 412 (1908).

172. See *id.* at 422.

173. "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing." *Id.*

174. "Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present." *Id.* at 421.

175. Conventional legal historiography places the Brandeis brief on a lofty perch. For the first time, the Court was persuaded by two pages of legal argument and a hundred of social science data. Cf., e.g., HORWITZ, *supra* note 42, at 209 ("It was precisely at this time that an alliance between the social sciences and the movement for legal reform was being forged"). But while the brief is not very legal, it is hardly as scientific as the foregoing assessment suggests. The first three authorities cited in Part Second are medical professionals, and the testimony of doctors and professors is frequent throughout. The meticulous organization of the brief also suggests a scientific compartmentalization. Not all of the brief's science, however, was good science. Lamarckian evolution is present in the testimony that the state ought not enfeeble its citizens through long hours of work because "like begets like." Nor was it entirely scientific. Quite a few arguments turn explicitly on the woman's role as homemaker, apart from her physical constitution. Further, everybody now seems to agree that the only truth at stake concerned women's bodies. Cf., e.g., Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 157 n.41 (1996). Yet most of the scientific arguments presented in

the unacknowledged consensus in legal discourse on the normativity of separate spheres. In this regard, toward the very end of his opinion, Justice Brewer recognized the potential relevance of suffrage as an indicator of political rights, but he refused to rest the holding on this point. Instead he mused cryptically, "We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive."¹⁷⁶ One supposes that twenty years earlier he would not have had to disclaim women's political inequality at all.

In his brief for the minimum wage board in *Adkins*, Felix Frankfurter spent a great deal of time arguing against the validity of liberty of contract generally, but this case concerned a law applicable only to women, which seemed safe constitutional ground after *Muller*. Yet Frankfurter sought to address the argument that if Congress was permitted to pass a minimum wage law for women, no constitutional principle could restrain it from doing the same thing for men. "This argument," Frankfurter noted, "is founded upon the Nineteenth Amendment. But the political equality of woman is an irrelevant factor. The argument was long ago anticipated and answered, in classic language, by this Court. Men and women remain men and women forever."¹⁷⁷

The Court, however, disagreed. The majority opinion of Justice Sutherland, who before joining the Court had advised Alice Paul on early drafts of an equal rights amendment,¹⁷⁸ reiterated the unconstitutionality of minimum wage laws for men. Then it reasoned that the Nineteenth Amendment had confirmed political equality for women; therefore, no basis justified treating the law differently because it applied only to them. As it makes the point well, the opinion is worth quoting at length:

But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case . . . has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation,

the Brandeis brief were applicable to both men and women. The section on the economic aspect of short hours, for example, deals only with women specifically in E. A–D apply generally. See Brief for the Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908).

176. *Muller*, 208 U.S. at 423.

177. *Adkins*, 261 U.S. at 534 (citing *Muller* for this proposition).

178. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 212 (1991).

cations to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.¹⁷⁹

The dissents of Chief Justice Taft and Justice Holmes questioned the validity of *Lochner*; neither seriously challenged the Court's reasoning with respect to sex discrimination.¹⁸⁰

I do not want to suggest that *Adkins* definitively narrowed the relation between the Fourteenth Amendment and the Nineteenth, nor that it dug a great gulf between the notion of separate spheres and the protection of the Fourteenth as applied to sex discrimination. *Adkins*, after all, did not even concern the Fourteenth Amendment. Since Congress was the legislature in question, the Court based its decision on the Fifth Amendment's Due Process Clause. Second, *Adkins* had a relatively short life in American law. Less than fifteen years later it was reversed.¹⁸¹ Third, the *Adkins* Court decided that if a law applied to everyone deserved (and failed) strict scrutiny, the same law applied only to women deserved the same. This is not the same question as whether a law that discriminates on the basis of sex deserves strict scrutiny for that reason alone.

Yet *Adkins* indicates that a historically minded court could conclude just that. The reasoning by which Justice Sutherland related the Nineteenth Amendment to the Fifth makes equal sense in relation to the Fourteenth. *Muller*, of course, was a Fourteenth Amendment case. And *Adkins* owes its downfall to the collapse of the substantive doctrine underlying it, liberty of contract; its reasoning about the relevance of sex has never been repudiated. Finally, reading the Fourteenth and Nineteenth Amendments parallel to the Fourteenth and Fifteenth, and recognizing in the Nineteenth the rejection of the societal notion of separate spheres, one would reasonably conclude that the Fourteenth Amendment, despite the intentions of its framers, confers no constitutional legitimacy on governmental distinctions based on sex. To so conclude is to arrive at strict scrutiny for sex discrimination.

In an incisive article Reva Siegel details much of this reasoning.¹⁸² She argues that a court could understand the Nineteenth Amendment as "de-

179. *Adkins*, 261 U.S. at 553.

180. Chief Justice Taft did wonder "whether the Court thinks the authority of *Muller v. Oregon* is shaken by . . . the Nineteenth Amendment." *Adkins*, 261 U.S. at 567 (Taft, C.J., dissenting). Justice Holmes stated clearly that since there should be no doctrine of liberty of contract, there was no need to reach the relevance of the Nineteenth Amendment. *See id.* at 570 (Holmes, J., dissenting).

181. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

182. *See* Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* (Austin Sarat & Thomas R. Kearns eds., 1999) at 131. Very recently, Professor Siegel has published an article that expands on this work and focuses on appropriate doctrinal reconstruction in light thereof. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947 (2002). Time and the editing process constrain me from substantively addressing this second article. Its central relevance for purposes of this Article, however, is the same as that of the one herein discussed.

cisively repudiating the republican conception of the state as an aggregation of male-headed households and recognizing that women were entitled to participate directly in democratic self-governance, as equal citizens under law."¹⁸³ If a court gave effect to these "normative commitments" of the Nineteenth Amendment, "equal protection jurisprudence would [be] grounded in a sociohistorical understanding."¹⁸⁴

Professor Siegel wants to show us that society's view of sex discrimination and the way the Court reasons about it mutually reinforce one another. In both, sex discrimination is rather personal and based primarily on slowly evolving social customs, unlike race discrimination, which is the product of a history of legal oppression, struggle, and repudiation. Siegel demonstrates that we could tell an equally valid and structurally similar story about sex discrimination. She is not explicitly concerned with fidelity, and it is not even clear that she would consider her argument for strict scrutiny one of fidelity.

I believe that it clearly is. In one sense, we might read her article as questioning a purely documentary interpretation of the Nineteenth Amendment. This questioning makes presumptively good sense on its own terms, but considering the Nineteenth Amendment in relation to the Fourteenth and its contexts, the latter should certainly be read to do more than just grant women the vote. From the standpoint of fidelity to historical meaning, a judge would be completely justified in understanding the Nineteenth Amendment as a strongly relevant gloss on the text and contexts of equal protection.

It should not be surprising that Professor Siegel's argument accords with the views I have expressed here. Though her aim was to match rhetorically the discourse of sex discrimination with that of race discrimination, she thereby produced a "sociohistorical" understanding of the Nineteenth Amendment's relation to equal protection. This paper has similarly been concerned with reading the Fourteenth Amendment in a historically responsible way. I have argued that fidelity involves the right reading of history. One pertinent context of any text is other texts with which it might be compared. Another is society. These contexts are often overlapping, and, as Professor Siegel shows, they intersect at the significance of the Nineteenth for the Fourteenth Amendment.

E. Theory and Application: Reprise

Where and how has our theory of fidelity gotten us in response to the query of appropriate scrutiny for sex discriminatory state action? How Stevens, Bingham, and Howard understood the operation of the Amendment was conditioned on the background assumption of separate spheres. Certainly, that assumption was never constitutionalized in the sense of being proposed and ratified as an amendment. Originalism would give it that force, and I do not think the originalist position would be wrong as a factual matter. That is, to the extent we can reconstruct how the framers understood the Fourteenth Amendment, the originalist reading is not unfaithful to those facts. It is, however, unfaithful to the

183. Siegel, *Collective Memory and the Nineteenth Amendment*, *supra* note 182, at 167.

184. *Id.* at 167-68.

historical meaning of the text because it ignores how the Amendment provided opportunities to change the ideology of separate spheres. To understand how the text in fact worked with and against the contexts that shape its meaning historically, we must engage in something like the above analysis. Then we can understand why the Nineteenth Amendment is significant for the Fourteenth's meaning. If we want to say that history justifies the level of scrutiny applied to laws that discriminate on the basis of sex, we need to have the right idea of history.

I hardly need to point out how different this analysis is from not only originalism but also current Supreme Court jurisprudence on sex discrimination. As Siegel points out,¹⁸⁵ that is a jurisprudence justified almost entirely by reference to formal, philosophical analysis, considering factors like the immutability of sex and its relation to one's ability to perform in society. It is not historical and cannot, therefore, make a justifiable claim to interpretive fidelity.¹⁸⁶

IV. CONCLUSION

Originalism is not constitutional history. But instead of turning to moral philosophy or formal analysis, the fidelitist interpreter ought to elaborate what historical meaning *is*. I have argued that it is attentive to both the documentary and worklike aspects of texts and seeks to determine how the text and its relevant contexts have been related in the past and with which possibilities for the future. Fidelity in interpretation, on this view, inheres not necessarily in the substantive result but rather in the process. Engaging in such a process to determine the meaning of the Fourteenth Amendment for sex discriminatory state action, I have examined the notions of the Amendment's framers, the text's relation to societal norms, and the relation of other constitutional text to both the Fourteenth Amendment and society. I have sought along the way to account for previous interpretations of these relations.

My conclusion in this application illustrates a more general lesson. Originalism suggests rational basis review, if any review at all, of sex discriminatory state action. A much better reading of the text and its contexts, however, indicates that strict scrutiny is the appropriate standard. But to reach strict scrutiny we need not judge old gender notions against current preferences and reject them, thereby abandoning fidelity, as some would have us do. Quite the contrary: The history of the Fourteenth Amendment, as a text, yields our result.

185. *See id.* at 166–77.

186. It cannot make a justifiable claim. The decision might be right, in the sense that an inquiry into the historical meaning of the Fourteenth Amendment might yield the same result. But without conducting that inquiry, we cannot know whether the decision is right, in a fidelitist sense.