

## EXPERIMENTS OF LIVING CONSTITUTIONALISM

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### ABSTRACT

*Experiments of Living Constitutionalism urges that the Constitution should be interpreted so as to allow both individuals and groups to experiment with different ways of living, whether we are speaking of religious practices, family arrangements, political associations, civic associations, child-rearing, schooling, romance, or work. Experiments of Living Constitutionalism prizes diversity and plurality; it gives pride of place to freedom of speech, freedom of association, and free exercise of religion; it cherishes federalism; it opposes authoritarianism in all its forms. While Experiments of Living Constitutionalism has considerable appeal, my purpose in naming it is not to defend it, but to contrast it to Common Good Constitutionalism, with the aim of specifying the criteria on which one might embrace or defend any approach to constitutional law. My central conclusion is that we cannot know whether to accept or reject Experiments of Living Constitutionalism, Common Good Constitutionalism, Common Law Constitutionalism, democracy-reinforcing approaches, moral readings, originalism, or any other proposed approach without a concrete sense of what it entails—of what kind of constitutional order it would likely bring about or produce. No approach to constitutional interpretation can be evaluated without asking how it fits with the evaluator’s “fixed points,” which operate at multiple levels of generality. The search for reflective equilibrium is essential in deciding whether to accept a theory of constitutional interpretation.*

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## I. A PROPOSAL

Here is a proposal, for your consideration: Experiments of Living Constitutionalism. The central idea, emphatically liberal<sup>1</sup> in character, is that the Constitution should be interpreted to allow both individuals and groups to experiment with different ways of living, whether we are speaking of religious practices, child-rearing, family arrangements, romance, schooling, or work. Experiments of Living Constitutionalism prizes diversity and plurality; it opposes (what it sees as) authoritarianism in all its forms.

The operative phrase comes from John Stuart Mill, who said this in *On Liberty*:

That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognising all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.<sup>2</sup>

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1. I am speaking of course of the liberal political tradition, not of any "left-right" political divisions; Experiments in Living Constitutionalism cuts across such divisions.

2. See JOHN STUART MILL, ON LIBERTY 859. See also Elizabeth Anderson, *John Stuart Mill and Experiments in Living*, 102 ETHICS 4 (1991). Anderson's essay is deeply illuminating, but it does not explore Mill's relationship with Harriet Taylor, which was, in

Experiments of Living Constitutionalism insists on the importance of allowing and encouraging “varieties of character” and on the value of “different modes of life.” It does so in part because it values the dignity of every individual, who should be entitled to find his or her own way. It does so in part because it sees experiments of living as essential to social as well as individual progress. For those who embrace Experiments of Living Constitutionalism, experiments of living also contribute to the common good. If each of us is able to see what each of us has tried, we will have more options to consider; all of us will be able to learn from each of us. Failed experiments of living may be nothing to celebrate, but they contribute to both individual and social progress.

As its name (accidentally!) suggests, Experiments of Living Constitutionalism is a form of living constitutionalism. Its advocates firmly reject originalism. They do not believe that the Constitution should be understood in accordance with its original public meaning. But they claim that their preferred approach has deep roots in Anglo-American traditions, and that it can be understood in a way that is faithful to the text of the Constitution.

Those who favor Experiments of Living Constitutionalism prize freedom of speech. They embrace Justice Robert Jackson’s words: “Compulsory unification of opinion achieves only the unanimity of the graveyard.”<sup>3</sup> They agree with this suggestion: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>4</sup> To be sure, they do not believe that the first amendment is “an absolute.” They would allow restrictions on bribery, perjury, and fraud, and they would permit restrictions on free speech when there is a clear and present

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my view, central to his argument in *ON LIBERTY*. See Cass R. Sunstein, *John and Harriet: Still Mysterious*, N.Y. REV OF BOOKS (Apr. 2, 2015), <https://www.nybooks.com/articles/2015/04/02/john-stuart-mill-harriet-taylor-hayek/> [<https://perma.cc/K33K-3E53>].

3. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

4. *Id.*

danger. But they are broadly comfortable with current First Amendment doctrine, and they would resist efforts to authorize any kind of censorship.

In the same vein, those who favor Experiments of Living Constitutionalism prize freedom of religion. They would allow a plurality of faiths to flourish. They would stand in the way of federal or state efforts to impose secular values, even widely held ones, on people whose religious traditions are inconsistent with those values. For related reasons, Experiments in Living Constitutionalists have no problem with home schooling and the idea of a constitutional right, held by parents, to make choices with respect to their children's education.<sup>5</sup> Experiments of Living Constitutionalists are enthusiastic about freedom of association, whether we are speaking of civic associations, political associations, or associations of some other kind. Those who favor Experiments of Living Constitutionalism would also be strongly inclined to protect contemporary rights of privacy, including the right to use contraceptives, the right to live with members of one's family,<sup>6</sup> the right to engage in consensual sodomy,<sup>7</sup> and the right to same-sex marriage. Experiments of Living Constitutionalism takes the right to choose abortion seriously, but greatly struggles with that issue. Those who embrace it might not commit themselves to a right to choose, because of the importance and the value of protecting human life.

Experiments of Living Constitutionalism is a great friend to federalism, seeing the diversity of the states as an engine for the creation of experiments of living. Those who embrace it much like the idea of "laboratories of democracy"; they will strongly resist efforts to override values and approaches that are prized by citizens of (for

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5. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce v. Society of Sisters*, 268 US 510, 535 (1925).

6. *Moore v. City of East Cleveland*, 431 U.S. 494, 503–06 (1977).

7. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

example) California, Mississippi, or Wyoming.<sup>8</sup> They will not favor preemption of state law. At the same time, they will be open-minded on separation of powers questions; the commitment to Experiments of Living Constitutionalism does not entail a particular approach to grants of discretion to administrative agencies, or to the idea of a unitary president. But that commitment does entail approaching those issues with Mill's cautionary note in mind: "Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress."<sup>9</sup>

At this point, you might have numerous questions. What is the pedigree of the Experiments of Living Constitution? Where does it come from? Does the U.S. Constitution enact Mr. John Stuart Mill's *On Liberty*? Those who embrace the Experiments of Living Constitution think that they can answer these questions. They believe that their defining ideals are rooted in the distinctive form of liberal republicanism that defined and launched the U.S. Constitution,<sup>10</sup> and that Mill was essentially summarizing principles, rooted in the liberal tradition and also congenial to republicanism, that predated and informed the American founding. They insist that the Fourteenth and Fifteenth Amendments are animated by a commitment to freedom that fits comfortably with the Experiments of Living

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8. Suppose, for example, that one of those states takes a distinctive approach to environmental protection or to motor vehicle safety. General propositions do not decide concrete cases (as someone once said), but Experiments of Living Constitutionalists would be strongly inclined to allow such an approach, unless it is plainly inconsistent with federal law.

9. MILL, *supra* note 2 at 859.

10. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). There is a nice question, by the way, about the relationship between Common Good Constitutionalism and the Republican Revival of the 1980s and 1990s. The traditional of civic republicanism owes a great deal to, and to some extent is, the foundation for longstanding understandings of the common good.

Constitution.<sup>11</sup> In their view, the idea of experiments of living has a long tradition behind it; Montesquieu and Locke defended versions of that idea, as did Madison, Hamilton, and Jefferson.<sup>12</sup> Mill was hardly writing on a clean slate; the idea of experiments of living is anything but a bolt from the blue.

Skeptics might ask how Experiments of Living Constitutionalism relates to our existing Constitution, and whether it promises, or threatens, to produce radical reforms. Would there be a right to polygamous marriages? To incestuous marriages? To pornography? To these questions, defenders of Experiments of Living Constitutionalism have two things to say. First, they are respectful of precedent. Followers of Ronald Dworkin,<sup>13</sup> they believe that judges must fit as well as justify existing rulings. In that light, they would be reluctant in the extreme to say that the Constitution protects a right to polygamous marriages, incestuous marriages, or pornography. Indeed, they believe that Experiments of Living Constitutionalism is, to a significant degree, reflected in existing constitutional law. Second, defenders of Experiments of Living Constitutionalism would give respectful attention to democratic processes; they would be willing to consider Thayerism.<sup>14</sup>

Experiments of Living Constitutionalists will have to make some hard choices there, but if Congress or a state legislature has made a decision, supporters of Experiments of Living Constitutionalism might well be reluctant to reject it. In other words, Experiment of Living Constitutionalism could take on board a degree of Thayerism, or could reject it; that is a separate debate. We could imagine both Thayerians, broadly committed to Experiments of Living Constitutionalism but also deferential to democratic processes, and

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11. Consider Lincoln's statement: "No man is good enough to govern another man, without that other's consent. I say this is the leading principle—the sheet anchor of American republicanism." Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854).

12. I am not offering citations here, for reasons that will appear shortly; see *infra* note 15.

13. See Ronald Dworkin, *Law's Empire* (1986).

14. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

non-Thayerians, broadly enthusiastic about the same idea, and not so deferential to democratic processes; there could be interesting arguments between them.

## II. EXPERIMENTS IN LIVING CONSTITUTIONALISM AS A THOUGHT EXPERIMENT

My goal here is not to defend Experiments of Living Constitutionalism (though I do find it interesting). I mostly mean to use it as a thought experiment<sup>15</sup> in connection with current debates about constitutional interpretation and Common Good Constitutionalism.<sup>16</sup> Suppose, as is plausible, that Experiments of Living Constitutionalism and Common Good Constitutionalism overlap in important respects. For example, both of them reject originalism, and they will converge on some important matters.<sup>17</sup> Suppose too that the two diverge on some important matters, as is quite likely. As Vermeule puts it, “[T]he libertarian assumptions central to free speech law and free speech ideology—that government is forbidden to judge the quality and moral worth of public speech . . . will fall under the ax.”<sup>18</sup> Experiments of Living Constitutionalism may or may not embrace “libertarian assumptions,” but it will not be inclined to allow government “to judge the quality and moral worth of public speech.” Those who embrace Experiments of Living Constitutionalism are committed to Mill’s general proposition,

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15. Hence a paucity of citations in the preceding section! If my goal were to offer a full-throated defense of Experiments of Living Constitutionalism, many more details would of course be required. (I do like it more than I expected when I started.)

16. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

17. See *infra* (discussing the shared antipathy for both *United States v. Alvarez* and *Ashcroft v. Free Speech Coalition*). It is important to note that those who adopt a general approach to interpretation can disagree about applications. Originalists can disagree, for example, about affirmative action programs; moral readers can disagree about abortion. Those who embrace Experiments of Living Constitutionalism might disagree about any number of free speech cases. I believe that something similar can be said about Common Good Constitutionalism; it offers a general orientation but allows reasonable disagreement about particular cases.

18. VERMEULE, *supra* note 16, at 42 (2021).

which Common Good Constitutionalists would appear to reject: “It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.”<sup>19</sup>

To be sure, general propositions do not decide concrete cases, and those who embrace Experiments of Living Constitutionalism need not be inclined to strike down minimum wage laws, maximum hour laws, compulsory seatbelt laws, and occupational safety laws, even if those laws cannot be justified on “harm to others” grounds.<sup>20</sup> But to say the least, Common Good Constitutionalism does not ally itself with John Stuart Mill, and, as Vermeule makes clear, it is not inclined to favor the robust understanding of free speech that lies at the heart of Experiments of Living Constitutionalism. To say the least, Common Good Constitutionalism does not give pride of place to experiments of living; its foundation lies in the idea of the common good, which may or may not accommodate, permit, or forbid experiments of living. Some such experiments might be inconsistent with the common good, properly understood.

How shall we choose between Experiments of Living Constitutionalism and Common Good Constitutionalism? Should we reject both in favor of originalism, democracy-reinforcing judicial review,<sup>21</sup> or some other approach? Any answer to that question would have to offer criteria of selection, which are urgently needed. I suggest that the only possible answer is another question: *What would make our constitutional order better rather than worse?* That is an admittedly daunting question, but there is no alternative to asking

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19. MILL, *supra* note 2 at 859.

20. Mill of course would restrict interferences with liberty to cases involving “harm to others.” *Id.* He also offered qualification to that restriction, which I cannot explore here. Those of us who are at least interested in Experiments of Living Constitutionalism need not (and in my view should not) adopt the harm-to-others restrictions for purposes of constitutional law. For relevant discussion, see SARAH CONLY, *AGAINST AUTONOMY* (2013).

21. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1983).



it.<sup>22</sup> The Constitution does not contain the instructions for its own interpretation.

Some originalists seem to think that their preferred approach follows from the very idea of interpretation,<sup>23</sup> but it really does not;<sup>24</sup> many different approaches, including Experiments of Living Constitutionalism and Common Good Constitutionalism, can fall within the domain of interpretation, so long as they operate by reference to and within the space of the Constitution itself. In their best moments, the most careful originalists argue that their preferred approach would, in fact, make our constitutional order better, because it would appropriately discipline judges, promote democratic ideals, and safeguard both institutions and rights.<sup>25</sup> Bracket the question whether that argument is convincing; it has the advantage of defining the terrain on which a theory of interpretation must be defended.

### III. REFLECTIVE EQUILIBRIUM AND CONSTITUTIONAL LAW

To be more specific: In order to choose a theory of constitutional interpretation, judges (and others) must seek “reflective equilibrium,” in which their judgments, at multiple levels of generality, are brought into alignment with one another.<sup>26</sup> In *A Theory of Justice*,

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22. This is the basic theme of Cass R. Sunstein, *How to Interpret the Constitution* (2023).

23. See Walter Benn Michaels, *A Defense of Old Originalism*, 31 *W. NEW ENGLAND L. REV.* 21, 21 (2009). For an analogous argument, see STEVEN SMITH, *LAW’S QUANDARY* (2007); for an analogous argument with a focus on meaning rather than intentions, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO L. J.* 1823 (1997).

24. See Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 *CONST. COMMENTARY* 193 (2015).

25. This is my preferred reading of Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CINN. L. REV.* 849 (1989).

26. My colleague Richard Fallon has explored the idea of reflective equilibrium, and its relationship to constitutional law, to superb effect in RICHARD FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018). The idea of reflective equilibrium is also used to good effect in Lawrence Solum, *Themes From Fallon on Constitutional Theory*, 18 *GEO. J. OF L. & PUB. POL’Y* 287 (2020); Mitchell N. Berman, *Reflective Equilibrium and*

John Rawls elaborates the basic idea for purposes of moral and political philosophy.<sup>27</sup> He begins with this suggestion: “There are some questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust.”<sup>28</sup> On some issues, we are confident that we “have reached what we believe is an impartial judgment,”<sup>29</sup> and the resulting convictions are “provisional fixed points which we presume any conception of justice must fit.”<sup>30</sup> At the same time, there are some questions on which we lack clear answers, and our aim might be to “remove our doubts.”<sup>31</sup> We might want our “principles to accommodate our firmest convictions and to provide guidance where guidance is needed.”<sup>32</sup>

As Rawls understands the matter, fixed points are only provisionally fixed; we might hold some judgment (say, the death penalty is morally unacceptable) with a great deal of confidence, and we might be exceedingly reluctant to give it up. But we should be willing to consider the possibility that we are wrong. In recent decades, many people opposed same-sex marriage quite firmly, but their judgment shifted, in part because their opposition did not fit well with what else they thought, and with the general principles that they hold.

As Rawls understands the matter, “we work from both ends,”<sup>33</sup> involving both abstract principles and judgments about particular cases. If some general principles “match our considered convictions”<sup>34</sup> about those cases, there is no problem. In the case of discrepancies, we might “revise our existing judgments” about

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*Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, 2011 FACULTY SCHOLARSHIP AT PENN CAREY LAW 2349.

27. See John Rawls, *A Theory of Justice* 18 (1971).

28. *Id.* at 17–18.

29. *Id.* at 18.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

particular cases, “for even the judgments we take provisionally as fixed points are liable to revision.”<sup>35</sup> We go back and forth between principles and judgments. When we produce “principles which match our considered judgments duly pruned and adjusted,” we are in “reflective equilibrium,” defined as such because “our principles and judgments coincide,” because “we know to what principles our judgments conform and the premises of their derivation.”<sup>36</sup>

To be sure, the equilibrium might not be *stable*. It might be upset if, for example, reflection “lead[s] us to revise our judgments.”<sup>37</sup> It is important to emphasize that on Rawls’ account, a “conception of justice cannot be deduced from self-evident premises or conditions on principles”; it is a matter “of everything fitting together into one coherent view.”<sup>38</sup> And importantly, Rawls suggests that we consult “our considered convictions at all levels of generality; no one level, say that of abstract principle or that of particular judgments in particular cases, is viewed as foundational. They all may have an initial credibility.”<sup>39</sup>

Rawls’ motivation was “the hypothesis that the principles which would be chosen in the original position are identical with those that match our considered judgments and so these principles describe our sense of justice.”<sup>40</sup> But Rawls urges that this view is too simple, because our considered judgments might be wrong. They might be “subject to certain irregularities and distortions.”<sup>41</sup> For example, we might think that meat-eating is acceptable, or that meat-eating is not acceptable, and we cannot know whether we should continue to think that until we test the proposition against our other judgments. When we are given “an intuitively appealing account” of what justice requires, we may well revise our “judgments to

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 19.

39. John Rawls, *Political Liberalism* 8 n.8 (1993).

40. RAWLS, *supra* note 27, at 42.

41. *Id.*

conform to its principles even though the theory does not fit" our existing judgments exactly.<sup>42</sup>

Whether or not we agree with Rawls for purposes of moral and political philosophy, there is a close analogy in constitutional law. Theories of constitutional interpretation are standardly defended or rejected, embraced or discarded, by asking how well they fit with our considered judgments at multiple levels of generality. There is no alternative. We cannot know what approach would make our constitutional order better rather than worse without seeking reflective equilibrium. In the United States, most people would be reluctant to accept a theory of interpretation that leads to the conclusion that *Brown v. Bd. of Education*<sup>43</sup> was wrongly decided. If a proposed theory would allow racial segregation by state governments, the theory might well (in their view, and mine too) have to be rejected for that reason. At the very least, a theory of interpretation that would allow racial segregation must meet a heavy burden of justification. The reason, in short, is that a constitutional order that allowed racial segregation would be intolerably unjust, and we should not understand our constitutional order to authorize intolerable injustice unless we are required to do so. So long as a theory of interpretation is optional, we should not adopt one that allows intolerable injustice. What is taken as intolerably unjust by some is not so taken by others, which helps explain why different people have different fixed points.

Suppose that a theory would mean that *District of Columbia v. Heller*,<sup>44</sup> protecting the individual right to possess guns,<sup>45</sup> was incorrectly decided. Some people would conclude that if so, the theory is questionable. Many people would think that if a theory suggests that *Brandenburg v. Ohio*,<sup>46</sup> broadly protecting political speech

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42. *Id.*

43. 347 U.S. 483 (1954).

44. 554 US 570 (2008).

45. *Id.* at 595.

46. 395 US 444 (1969).

through a version of the “clear and present danger” test,<sup>47</sup> was wrong, the theory is much less appealing. Other people will think that if a theory suggests that *Brandenburg v. Ohio* was right, or might be right,<sup>48</sup> we had better find another theory.

Fixed points might not be limited to *existing* rulings. People care about the constitutional future, not merely the constitutional present. Many people would reject a theory of interpretation that might make space for, or require, a (future) return to *Lochner v. New York*,<sup>49</sup> which struck down maximum hour laws,<sup>50</sup> or anything like it. People might reject a theory of interpretation that might, in the future, allow or require government to restrict political dissent. (Advocates of Experiments of Living Constitutionalism would certainly do that.) One might reject a theory of interpretation that puts the administrative state in (future) constitutional jeopardy, and that would (for example) cast constitutional doubt on the Clean Air Act or the Occupational Safety and Health Act.

More fundamentally, many people would reject a theory of interpretation that would rule out new and (to us) surprising developments that would expand prevailing conceptions of liberty and equality. They would insist on opening the ground for something like a *Brown v. Board of Education*,<sup>51</sup> or an *Obergefell*,<sup>52</sup> for new and future generations. They would also make a bet that a Supreme Court, operating under a theory that makes space for decisions like *Brown* or *Obergefell*, appropriately expanding equality and liberty, would produce a similar decision in 2030, or 2040, or 2090, also

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47. *Id.* at 448.

48. There is a lurking question about how much judicial discretion a theory authorizes. A pervasive concern about “moral readings,” see RONALD DWORKIN, *FREEDOM’S LAW* (1998), is that different judges will offer different moral readings. On one moral reading, for example, *Brandenburg* is right; on another, *Brandenburg* is wrong, and states can do as they like; on another, *Brandenburg* is wrong, and states may regulate dangerous speech.

49. 198 U.S. 45 (1905).

50. *Id.* at 53.

51. 347 U.S. 483 (1954).

52. *Obergefell v. Hodges*, 576 US 644 (2015).

appropriately expanding equality and liberty (not the worst bet, though also perhaps not the best).<sup>53</sup>

In short: Judges (and others) must consider the consequences of their choice for particular judgments that operate, for them, as provisional “fixed points,” understood as judgments that seem both clear and firm. If a theory of interpretation would allow the federal government to discriminate on the basis of race and sex, it is unlikely to be a good theory of interpretation; it is at least presumptively unacceptable for that reason.

I have used the term “provisional fixed points,” and in this respect I am following Rawls, who emphasizes their provisional character in moral and political philosophy. A judge might believe something with real conviction. Even so, a judge ought to be willing to listen to counterarguments; humility is a good thing. Few points are so fixed that nothing at all could dislodge them. Still, people have beliefs about constitutional meaning that would be exceptionally difficult to dislodge. They might have an assortment of such beliefs. What I am urging here is that that is entirely fine. Fixed points about particular cases are central to assessments of theories of constitutional interpretation.

It might be tempting to respond that the choice of a theory of interpretation cannot possibly depend on the results that it yields. One might think that that choice has to be made on the basis of some commitment that might seem higher or more fundamental. If we focus on results, and choose a theory of interpretation on the basis of results, perhaps we are biased, or unforgivably “result-oriented,” and engaged in some kind of special pleading.

The problem with that response is that it rests on an illusion of compulsion. Among the reasonable candidates, judges (and others) are not compelled to adopt a particular theory of interpretation; they must make a choice. One more time: To do that, judges (and

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53. Some people would of course believe that to be a terrible bet, on institutional grounds. They might believe that the democratic process would and should make any expansions. They might believe that judicial expansions, as the judges might see it, would likely be grave mistakes.

others) are required to think about what would make our constitutional order better rather than worse. To be sure, we should not consider, as fixed points, only results about particular cases (though they matter a great deal). We must also consider defining ideals (including self-government and the rule of law), and we must think about processes and institutions. There might be fixed points there as well.

Note that there is a large and critical difference between fixed points and preferred results. You might want the Supreme Court to issue certain rulings, but if it does not, you will think it reasonable, and even if you think it unreasonable, you might not think that something horrible or horrific has happened. A theory of constitutional law might not yield *all* of one's preferred results (it had better not!), but it might also yield, or at least not foreclose, all, most, or many of one's fixed points. Note as well that I am suggesting that for judges (or others), thinking about theories of constitutional interpretation, the relevant fixed points really are, and must be, their own. And it is important to see that we are not speaking of a small number of fixed points or a handful of iconic cases; a theory of interpretation might be acceptable if it undoes just a few. The real problem comes if such a theory operates as a wrecking ball.

#### IV. THE MATTER AT HAND

We have seen that Common Good Constitutionalism rejects originalism.<sup>54</sup> Vermeule's own focus is mainly on defining ideals; he emphasizes "peace, justice, and abundance."<sup>55</sup> Speaking broadly, Vermeule states that "[t]he main aim of common good constitutionalism . . . is not the liberal goal of maximizing individual autonomy or minimizing the abuse of power—an incoherent goal in any event. . . . Instead it is to ensure that the ruler has both the authority and the duty to rule well."<sup>56</sup> *Experiments of Living*

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54. See VERMEULE, *supra* note 16, at 1.

55. *Id.* at 7.

56. *Id.* at 37.

Constitutionalists will not entirely welcome that formulation, though they will be keenly interested in understanding what it means for a ruler “to rule well.”<sup>57</sup>

Much of Vermeule’s discussion focuses on general considerations, but he does offer a number of details. For example, he is sharply critical of *United States v. Alvarez*,<sup>58</sup> giving constitutional protection to a candidate’s false claim about having won the Congressional Medal of Honor.<sup>59</sup> He is also sharply critical of *Ashcroft v. Free Speech Coalition*,<sup>60</sup> giving constitutional protection to sexually explicit images, sometimes called “virtual child pornography,” that appear to depict minors but are produced through computer-imaging technology.<sup>61</sup> Vermeule also thinks that in cases involving restrictions of freedom of speech, judges who embrace Common Good Constitutionalism “would defer to the legislative specification within broad boundaries of reasonableness,” in a way that is close to “(forgiving versions of) arbitrariness review under the Administrative Procedure Act.”<sup>62</sup> Vermeule is hospitable toward the administrative state, which, he says, “is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory.”<sup>63</sup> In Vermeule’s view, “[a]gencies are the living voice of our law.”<sup>64</sup>

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57. In various places, Vermeule is sharply critical of “liberalism,” though in *Common Good Constitutionalism*, he objects to “progressive constitutionalism.” Liberalism is of course a capacious tradition, and many critics, on both the left and the right (including those drawn to “postliberalism”), understand it in a way that would be unrecognizable to most liberals. I should add that Experiments of Living Constitutionalism is one form of liberalism, but it is only one form, and sensibly understood, it does not reject the claims of tradition (even if it is willing to scrutinize them), and it need not and should not turn Mill’s Harm Principle into a dogma, let alone a constitutional dogma. For a relevant discussion of norms, bearing on how to think about traditions, see EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1978).

58. *United States v. Alvarez*, 567 U.S. 709 (2012)

59. *Id.* at 730.

60. 535 U.S. 234 (2002).

61. VERMEULE, *supra* note 16, at 170–72.

62. *Id.* at 170.

63. *Id.* at 135.

64. *Id.* at 138.



Vermeule is especially critical of *Obergefell*, stating that it “is what progressive constitutionalism looks like when it has become detached from the objective legal and moral order that underpins classical legal theory and the common good.”<sup>65</sup> Marriage, he writes, “is a natural and moral and legal reality simultaneously, a form itself constituted by the natural law in general terms as the permanent union of man and woman . . . .”<sup>66</sup> In these circumstances, a “civil specification that distorts the essence of the natural institution would be unreasonable and arbitrary, from the standpoint of common good constitutionalism.”<sup>67</sup> *Obergefell* “warped the core nature of the institution by forcibly removing one of its built-in structural features.”<sup>68</sup>

For the record, I agree with Vermeule on the administrative state<sup>69</sup> and on both *Alvarez* and *Ashcroft*, but I do not agree with him on freedom of speech in general or on *Obergefell*.<sup>70</sup> (Those who embrace Experiments of Living Constitutionalism would likely concur with me.) With respect to freedom of speech, recall Mill’s words: “unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good.”<sup>71</sup> This is a point about human fallibility, even in democratic arenas. But defending a robust system of freedom of speech is not my goal here. The real point has to do with the criteria for choosing a theory of interpretation. For those drawn to Common Good Constitutionalism, the question is what kind of constitutional order it would produce. What would it do with, or to,

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65. *Id.* at 131.

66. *Id.* at 131–32.

67. *Id.* at 132.

68. *Id.*

69. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN* (2021).

70. For many reasons, *Obergefell* is a complicated decision, and one could reject it for any number of reasons (for example, they might be Thayerian, Burkean, or originalist). When I say that I do not agree with Vermeule, I mean that I do not agree with his claims about the nature of marriage. (I know that he has reasons for his view.) I am keenly aware that a defense of my view, and a rejection of his, would require some details, which would take me well beyond the present topic.

71. MILL, *supra* note 2 at 859.

self-government? What would it do to, or with, existing free speech doctrine? How would it handle the privacy cases, past and future? To know whether to accept or reject any proposed approach, we need to have a kind of map of the system of constitutional law to which it would lead. It would be too much to expect a full specification of results; but it would not be too much to ask for a general understanding of what it would entail (more or less).

In my view, Thayerism, writ large, must be rejected because it would lead to a constitutional order that is far inferior to our own.<sup>72</sup> Something similar can be said, I think, for originalism.<sup>73</sup> I greatly admire Vermeule, and I have learned a great deal from him, but I am not sure about Common Good Constitutionalism.<sup>74</sup> I favor experiments of living.<sup>75</sup>

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72. The reason is that it would require elimination of numerous current constitutional rights, including the right to be free from racial segregation, *see* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and racial discrimination, *see* *Loving v. Virginia*, 388 U.S. 1, 12 (1967), at the hands of the states, and certainly the right to be free from racial discrimination from the federal government, *see* *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). *See* Cass R. Sunstein, *Thayerism* (Sep. 10, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4215816](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816).

73. This is a complicated matter, because originalism can be understood in many different ways, and its implications for specific cases are hardly uncontested. *See* CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* (2023); for a valuable discussion, *see* RANDY BARNETT AND EVAN BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* (2021). In my view, the original public meaning, properly understood, would lead to too many unacceptable results, and for reasons stated in text, that unhappy fact is highly relevant to the decision whether to embrace originalism. *See* Cass R. Sunstein, *Is Living Constitutionalism Dead? The Enigma of Bolling v. Sharpe* (Harvard Public Law Working Paper No. 22-30, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4192758](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192758).

74. The reason is that it might produce a system of constitutional law that would, in crucial respects, be inferior to the one we have, or to an imaginable alternative. I am thinking in particular of what Vermeule says about freedom of speech, though I do not know if his view should be seen as a necessary part of Common Good Constitutionalism, or simply as one possible specification. My main submission here is that any theory of interpretation, including Common Good Constitutionalism, stands or falls on the system of constitutional law that it would support or bring about.

75. I say that I favor experiments of living, because I am certain that I do; I do not say that I favor Experiments of Living Constitutionalism, because I am not certain that I do.