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## FIT, JUSTIFICATION, AND FIDELITY IN CONSTITUTIONAL INTERPRETATION

JAMES E. FLEMING\*

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

– Oliver Wendell Holmes, Jr.<sup>1</sup>

### INTRODUCTION

With this event – a Symposium on Abner Greene’s *Against Obligation*<sup>2</sup> and Michael Seidman’s *On Constitutional Disobedience*<sup>3</sup> – we continue our *Boston University Law Review* series of symposia on significant recent books in law. The distinctive format is to pick two books that join issue on an important topic, to invite the author of each book to write an essay on the other book, and to invite several Boston University School of Law faculty members to write an essay on one or both books.

What are the justifications for pairing Greene’s and Seidman’s books in this series? I shall suggest three. First, as their titles indicate, the books argue respectively against constitutional obligation and for constitutional

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\* Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. I prepared this Essay for the Symposium on Abner Greene’s *Against Obligation* and Michael Seidman’s *On Constitutional Disobedience*, held November 8, 2012, at Boston University School of Law. Thanks to Courtney Gesualdi for helpful comments.

<sup>1</sup> OLIVER WENDELL HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920).

<sup>2</sup> ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

<sup>3</sup> LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

disobedience: they provocatively and creatively buck the tendencies of constitutional theorists to profess fidelity with the past in constitutional interpretation. Second, for this reason, these books are a worthy sequel to last year's symposium on Jack Balkin's *Living Originalism* and David Strauss's *The Living Constitution*.<sup>4</sup> Both books reject originalist understandings of obligation to follow original meaning in interpreting the Constitution, even of the sort associated with Balkin's abstract living originalism (which aspires to fidelity to the abstract commitments of, rather than the concrete expectations of, the founding generation).<sup>5</sup> And indeed both reject interpretive obligation to follow precedent, even of the type illustrated by Strauss's flexible living constitutionalism.<sup>6</sup> Greene and Seidman provide powerful arguments against views that original meaning and precedent are dispositive of constitutional meaning and decision. Each argues that we the people today should decide questions of constitutional meaning, commitment, and justice for ourselves, by our own best lights.

Third, while Greene's and Seidman's books share these similarities, they have illuminating differences. The most striking difference relates to their attitudes toward the dualist structure of our constitutional system: the two tracks of (1) the fundamental law of the Constitution and (2) the ordinary law of legislation. I do not interpret Greene as wishing to do away with the fundamental law or to "level" it to ordinary law, whereas I do interpret Seidman as aiming to do so. Rather, Greene aims to preserve the dualist structure and to elaborate the meaning of the fundamental law by giving primacy to normative argument over any obligation to follow the past.<sup>7</sup> By contrast, Seidman wants to "level" the fundamental law of the Constitution and just have discourse about what ordinary laws we ought to adopt.<sup>8</sup> He advocates that we should simply make all-things-considered judgments about the best thing to do.<sup>9</sup> As he titled an op-ed piece in the *New York Times*: "Let's [g]ive up on the Constitution."<sup>10</sup>

In this Essay I focus on Greene's arguments against interpretive obligation to the past, in particular, his argument that even constitutional theorists like Ronald Dworkin and I give too much deference or weight to "fit" and precedent, and not enough primacy to "justification" and justice, in our approaches to constitutional interpretation.<sup>11</sup> I should begin by observing that

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<sup>4</sup> *Originalism and Living Constitutionalism: A Symposium on Jack Balkin's Living Originalism and David Strauss's The Living Constitution*, 92 B.U. L. REV. 1127 (2012).

<sup>5</sup> JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>6</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>7</sup> See GREENE, *supra* note 2, at 201-04.

<sup>8</sup> See SEIDMAN, *supra* note 3, at 9.

<sup>9</sup> See *id.* at 26, 115, 129.

<sup>10</sup> Louis Michael Seidman, Op-Ed., *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

<sup>11</sup> GREENE, *supra* note 2, at 169-71, 192-97, 201-04 (criticizing RONALD DWORKIN,

both Greene and I are, broadly speaking, Dworkinians, or moral readers. By that I mean that we conceive the Constitution in significant part as a scheme of abstract moral commitments, not a code of concrete historical rules. And we conceive interpretation of the Constitution as requiring judgments about what interpretation best “fits” and “justifies” the constitutional document, order, and practice. Interpretation is not a matter of discovering and enforcing historically determined answers provided by the framers and ratifiers (whether original intentions, understandings, or public meanings).

Hence, it is no surprise that I largely agree with Greene’s account of the place of fit and justification in constitutional interpretation. And so, in what follows, it may seem like we are having a heated agreement. Even where we disagree, it may seem that we are having a family quarrel. But I do think the engagement is worthwhile, for it provides an occasion for me to clarify and sharpen my own arguments about fit, justification, and fidelity in constitutional interpretation. This Essay is part of my book in progress entitled *Fidelity to Our Imperfect Constitution*.<sup>12</sup> This book will criticize all forms of originalism and it will further develop my arguments in previous books for a “philosophic approach” to constitutional interpretation<sup>13</sup> and for a “Constitution-perfecting theory” that would interpret the Constitution so as to make it the best it can be.<sup>14</sup>

#### I. AGAINST INTERPRETIVE OBLIGATION TO FOLLOW THE PAST

Again, Greene argues against interpretative obligation to the past, whether to concrete original meaning or precedents (as he puts it, whether to “higher” or “prior” authorities).<sup>15</sup> He makes cogent arguments against originalism as conventionally understood. His arguments zero in on originalists’ assumptions or claims that we are obligated to follow the original understanding or original meaning, concretely conceived as the original expected applications of the framers and ratifiers. His arguments also target originalists’ aims or claims to avoid making moral and philosophic choices in constitutional interpretation. Such choices, he rightly argues, are inevitable and indeed desirable. In a nutshell, he shows that originalists unsuccessfully attempt to stress fit to the exclusion of justification.<sup>16</sup>

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LAW’S EMPIRE (1986); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (2006); Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2926-48 (2007).

<sup>12</sup> JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION (forthcoming) (on file with author).

<sup>13</sup> SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 82-84, 97-98, 155-70 (2007).

<sup>14</sup> FLEMING, *supra* note 11, at 16, 211, 225, 227.

<sup>15</sup> GREENE, *supra* note 2, at 161-63.

<sup>16</sup> *Id.* at 161, 165-66, 172-81.

At the same time, Greene criticizes moral readers like Dworkin and me for conceiving constitutional interpretation as being too constrained by fit – in particular, by interpretive obligation to follow precedents.<sup>17</sup> It seems that, to Greene, Dworkin and I do not fully acknowledge the primacy of justification over fit. I should say emphatically that I welcome this criticism! Moral readers like Dworkin and me are usually criticized for giving too little room for fit, and too much primacy to justification.<sup>18</sup> Since we are being criticized from both sides, I guess we must be doing something right!

To elaborate, I shall sketch the predicament of moral readers like Dworkin and me. In general, no one doubts our commitment to the normative dimension of justification in constitutional interpretation. After all, we argue that constitutional interpretation is a matter of making moral and philosophical judgments about the meanings and implications of our constitutional commitments. The challenge we face is to show that we are not just elaborating our own liberal commitments for a perfect liberal Constitution.<sup>19</sup> We make three basic responses to these “perfect Constitution” challenges. First, we argue that it is in the nature of constitutional interpretation to strive to interpret the Constitution so as to make it the best it can be.<sup>20</sup> Second, we show that we do not believe that the Constitution, even when construed in its best light, is perfect. For example, Dworkin concedes that the Constitution does not protect welfare rights (rights which his ideal liberal Constitution would protect).<sup>21</sup> And I have acknowledged all manner of constitutional evil, misfortune, stupidity, and tragedy in our constitutional practice.<sup>22</sup> Third, we argue that our liberal constitutional theories fit the constitutional document and scheme. They have a firm footing in our extant constitutional practice and they are not just normative theories that would justify a perfect liberal Constitution.<sup>23</sup>

Enter my first book, *Securing Constitutional Democracy*, which Greene criticizes for giving primacy to fit over justification.<sup>24</sup> Officially, Dworkin’s moral reading aspires to construct a theory that best fits and justifies our constitutional document, order, and practice.<sup>25</sup> Yet many critics believe that

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<sup>17</sup> *Id.* at 169-70, 192-97, 201-04 (criticizing DWORKIN, *supra* note 11; FLEMING, *supra* note 11).

<sup>18</sup> *E.g.*, Anthony J. Sebok, *The Insatiable Constitution*, 70 S. CAL. L. REV. 417, 419-20 (1997).

<sup>19</sup> *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 364 (1981).

<sup>20</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 38 (1996); DWORKIN, *supra* note 11, at 255.

<sup>21</sup> DWORKIN, *supra* note 20, at 36.

<sup>22</sup> FLEMING, *supra* note 11, at 220-21.

<sup>23</sup> *Id.* at 63, 70, 80-81, 92-98.

<sup>24</sup> GREENE, *supra* note 2, at 169-71, 192-97, 201-04; Greene, *supra* note 11, at 2926-48.

<sup>25</sup> *See* DWORKIN, *supra* note 11, at 239.

Dworkin (to use Greene's terms) has given "primacy to justification"<sup>26</sup> and not enough "room for fit."<sup>27</sup> They claim that he has elaborated a perfect liberal constitution but has not done the concrete groundwork necessary to show that his interpretations of the Constitution adequately fit our practice, including original meaning and precedents.<sup>28</sup> In response, I basically say, "Do as Dworkin says, not as he does."<sup>29</sup> That is, even if Dworkin himself may not always satisfactorily do the fit work that his own theory calls for, I do take fit seriously in my book. I seek to remedy the deficiency of Dworkin's work by making the fit case for a liberal theory of "securing constitutional democracy" that protects not only basic procedural liberties associated with deliberative democracy, like the right to vote, but also basic substantive liberties associated with what I called deliberative autonomy, like the right to marry. Instead of simply making a normative argument that justice requires protecting a right to individual autonomy, I undertake an archeological excavation of the legal materials of our constitutional practice and culture, specifically the line of substantive due process cases protecting certain basic liberties associated with privacy or autonomy.<sup>30</sup> I ask: what constitutional theory would best fit and justify these cases? I argue that my "constitutional constructivism" better fits and justifies these cases than do competing theories of originalism (Justice Scalia's view) or perfecting the processes of representative democracy or deliberative democracy (Ely's and Sunstein's views).<sup>31</sup> Yet my taking this "fit" tack – doing as Dworkin says, not as he does – is evidently what has prompted Greene's criticism that I give too much deference to fit and precedent and fail to give "primacy [to] justification."<sup>32</sup>

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

Second, I argue that interpreters who aspire to fidelity in constitutional interpretation have a responsibility to construct an account that not only justifies but also fits our constitutional document, order, and practice. But the aspiration to fidelity itself does not entail an interpretive obligation to follow

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<sup>26</sup> GREENE, *supra* note 2, at 12, 201.

<sup>27</sup> *Id.* at 204; Greene, *supra* note 11, at 2947.

<sup>28</sup> Greene, *supra* note 11, at 2938.

<sup>29</sup> James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1349 (1997).

<sup>30</sup> FLEMING, *supra* note 11, at 92-98.

<sup>31</sup> *Id.* at 97-98 (criticizing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)).

<sup>32</sup> GREENE, *supra* note 2, at 12.

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the past. In short, taking fidelity seriously  $\neq$  interpretive obligation to the past. In this section I will comment in more detail on fidelity without obligation and without originalism, sketching the account of fidelity in pursuit of our aspirations that I am developing in my book in progress, *Fidelity to Our Imperfect Constitution*.

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

## II. TAKING FIT SERIOUSLY $\neq$ INTERPRETIVE OBLIGATION TO FOLLOW THE PAST

Does my commitment to taking fit as well as justification seriously entail a commitment to interpretive obligation to follow the past, whether concrete original meaning or precedent? In making the “fit” case for my theory, I present precedents in the line of substantive due process decisions as bones or shards of a constitutional culture, as provisional fixed points that a constitutional constructivist archaeologist, or interpreter, has a responsibility to fit and justify.<sup>33</sup> I argue that a constructivist interpreter would not be free to cast out the substantive shards and bones in the way that an originalist or process-perfector would.<sup>34</sup> This is not to say that judges, much less citizens, have an obligation to follow the past. Rather, it is to say that our pictures of our constitutional practice will be more recognizable – and be better accounts – if we can work up an account that fits and justifies the durable lines of doctrine.

I do not offer a theory of precedent or stare decisis as such, nor do I justify following precedent for any of the reasons people commonly offer to justify this practice – reasons that Greene considers and rejects as inadequate.<sup>35</sup> As a matter of fact, I do not believe that anyone has a strong sense of obligation to follow precedent as such in constitutional interpretation.

Fidelity to our imperfect Constitution, I would argue – and thanks to Greene I now see this more clearly – entails rejecting any obligation to follow original meaning or precedent. As I have argued elsewhere, if our Constitution were conceived merely as consisting of original expected applications or precedents, it would not deserve our fidelity.<sup>36</sup> The Constitution, to be worthy of our fidelity, must reflect our aspirations to realize the ends proclaimed in the Preamble. For the Constitution to do that, we must reject any idea of an obligation to follow original expected applications or precedents as such. Fidelity to our imperfect Constitution entails fidelity in pursuit of our constitutional aspirations and ends.

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<sup>33</sup> FLEMING, *supra* note 11, at 93.

<sup>34</sup> *Id.* at 94.

<sup>35</sup> GREENE, *supra* note 2, at 190-99.

<sup>36</sup> FLEMING, *supra* note 11, at 226-27.

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

Furthermore, if one conceives constitutional interpretation and justification as constructivist, as I do, one sees our principles as manifested in and growing out of our constitutional commitments and practice, not abstract ideas of what justice requires.<sup>37</sup> Within constructivism, one sees the dimension of fit as bound up with the dimension of justification: we are trying to work up the best justification for the extant materials of the constitutional practice.

In response to Greene's argument that Dworkin and I give too much deference or weight to precedent, I should clarify my views about the place of precedent in constitutional interpretation. I would say that, if one thinks of precedents as good-faith efforts to work out the best understanding of our constitutional commitments, one should give them some weight and approach them with some humility. I hasten to add that, to accept this approach, one need not and should not go whole hog to Burkeanism. Greene aptly criticizes Burkean justifications for following precedent as such.<sup>38</sup> One need not give precedents presumptive weight or "deference," to use Greene's formulations.<sup>39</sup>

Ironically, moral readers and common law constitutionalists may give more weight to precedent than do originalists. For one thing, originalists officially give greater weight to concrete original meaning and are dubious about precedents they see as inconsistent with concrete original meaning.<sup>40</sup> Indeed, some originalists, like Gary Lawson, reject precedent altogether.<sup>41</sup> Others, like Justice Scalia, make a "pragmatic exception" to originalism to accommodate precedent.<sup>42</sup> By contrast, moral readers and living constitutionalists (more precisely, common law constitutionalists) conceive the Constitution as a frame of government and scheme of abstract powers and rights, the meaning of which

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<sup>37</sup> *Id.* at 6, 62, 66, 92-94.

<sup>38</sup> GREENE, *supra* note 2, at 194-95.

<sup>39</sup> *Id.* at 192-93, 197-98.

<sup>40</sup> BALKIN, *supra* note 5, at 14.

<sup>41</sup> Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994).

<sup>42</sup> Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 140 (Amy Gutmann ed., 1997).

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must be elaborated over time. They deny that the framers and ratifiers resolved our problems for us. Accordingly, they may give greater weight to interpreters' good-faith efforts to work out the frame or scheme over time. I say "ironically" because living constitutionalists always emphasize flexibility and change, and argue against being tied down by the past. Yet they may be more tied down by precedent than originalists are. This is so in part because they conceive of precedents as part of the constitutional practice that we are trying to carry on in a principled, coherent way.

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

Furthermore, as Sotirios Barber and I have argued, we cannot make recourse to precedent to avoid making moral and philosophic choices in constitutional interpretation.<sup>43</sup> Instead, we use precedent and argument concerning its implications as a site on which to do battle over and choose among competing views. Thus, precedent is a site or battleground for making moral and philosophic choices. The precedents themselves do not settle the questions and make the choices for us.

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

### III. TAKING FIDELITY SERIOUSLY $\neq$ INTERPRETIVE OBLIGATION TO THE PAST

In articles that are part of my book in progress, *Fidelity to Our Imperfect Constitution*, I argue that, if we aspire to fidelity to the Constitution, a moral reading is superior to originalism (at least all varieties of originalism besides

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<sup>43</sup> BARBER & FLEMING, *supra* note 13, at 135-40, 190.



Balkin's abstract living originalism, which I interpret as a moral reading).<sup>44</sup> The aspiration to fidelity

raises two fundamental questions: *Fidelity to what?* and *What is fidelity?* The short answer to the first – fidelity to the Constitution – poses a further question: *What* is the Constitution? For example, does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules? . . . The short answer to the second – being faithful to the Constitution in interpreting it – leads to another question: *How* should the Constitution be interpreted? Does faithfulness to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts or prohibit it and instead require historical research to discover relatively specific original understanding or meaning? And does the quest for fidelity in interpreting the Constitution exhort us to make it the best it can be or forbid us to do so in favor of enforcing an imperfect Constitution?<sup>45</sup>

Let's begin with the question, *Fidelity to what?* My answer is fidelity to our abstract constitutional aspirations, including ends, principles, and basic liberties. Fidelity to our aspirations does not entail obligation to follow the past in the sense of either concrete original meaning or precedents. That would enshrine an imperfect Constitution that falls short of our aspirations and does not deserve our fidelity. We should treat precedents as evidence, factors, or resources, but not as obligations. They are to be taken into account, but followed only to the extent that they accord with our best understanding of our aspirations.

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

Moreover – to return to the question, *Fidelity to what?* – we should aspire to fidelity to our scheme as an ongoing frame of government pursuing the ends of the Preamble, not as a set of concrete original meanings or a string of

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<sup>44</sup> James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1798-99 (2013); James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1175-77 (2012); James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 675-79.

<sup>45</sup> Fleming, *supra* note 29, at 1335.

precedents. Again, I do not say that we have an obligation to follow the concrete past, though I do say that we aspire to fidelity to the Constitution. How can we honor fidelity while rejecting obligation to the concrete past?

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

*Fidelity? Yes. Commitment? Yes. Obligation or obedience in an authoritarian sense to original expected applications or precedents? No.* Fidelity is not obedience to decisions already made for us in the past by people who are long dead and who were ignorant of the challenges and problems of our age. Fidelity, rather, is an attitude of commitment to making the scheme work and to further developing it, building it out over time, as Balkin puts it,<sup>46</sup> in ways to better realize its ends and our aspirations. Or, as Dworkin and I put it, to making the Constitution the best it can be.<sup>47</sup>

#### IV. FIT AND JUSTIFICATION IN CONSTITUTIONAL INTERPRETATION

Finally, I shall assess Greene's formulations about the "primacy of justification" and "room for fit." Greene argues against interpretive obligation to follow the past, but he allows "room for fit."<sup>48</sup> He acknowledges that in particular cases there can be good reasons for following past decisions. As Balkin puts it, evidence of concrete original meanings and precedents serve as a resource, not a constraint, in constitutional interpretation.<sup>49</sup> Similarly, Greene says that they serve as a factor, not an obligation.<sup>50</sup>

I agree completely with Greene's conception of "room for fit."<sup>51</sup> Yet he says that people like Dworkin and me want to treat fit as more than a factor.<sup>52</sup> Greene conceives of a presumption of deference as lying on the terrain between fit being a factor and fit being an obligation, and situates Dworkin and me at that point. I think that Dworkin and I give similar room for fit, and we similarly treat fit as a factor though not an obligation. If I appear to treat fit as more than a factor, I suspect that it is simply because I have attempted to provide a corrective to Dworkin's work – to do as he says, not as he does. I suspect that most readers outside our family quarrel would argue that Dworkin

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<sup>46</sup> BALKIN, *supra* note 5, at 5.

<sup>47</sup> DWORKIN, *supra* note 11, at 255; FLEMING, *supra* note 11, at 16, 211, 225, 227.

<sup>48</sup> GREENE, *supra* note 2, at 201-06.

<sup>49</sup> BALKIN, *supra* note 5, at 256-59.

<sup>50</sup> GREENE, *supra* note 2, at 192, 197, 206.

<sup>51</sup> *Id.* at 204-06.

<sup>52</sup> *Id.* at 192-93, 196-97.

and I, like Greene, *do* give primacy to justification over fit (or indeed that we give too little room for fit).

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

What is more, I do not believe that Greene has made the case for the primacy of justification over fit. He has, admittedly, made the case for the unavoidability of justification as well as fit, and the inextricable connection between them. I would argue instead that fit and justification are co-original and of equal weight.<sup>53</sup> Both are inherently involved in constitutional interpretation. Both stem from the basic aim of developing the best interpretation.

In places, Dworkin almost seems to regret drawing the distinction between the two dimensions of fit and justification.<sup>54</sup> Doing so is important for analytical clarity, but it may lead people to see the two dimensions as more distinct than they are, as if they correspond to a two-step process. And it may lead them to view the two dimensions as sequential rather than as dimensions of a holistic judgment: as in, first we fit and then we justify.<sup>55</sup> And it may lead them to argue that one or the other is primary. For example, they might argue that fit is everything, to the exclusion of justification.<sup>56</sup> Or, even if fit is not everything, that fit has primacy over justification. Or, to the contrary, that justification has primacy over fit. This is what Greene argues.<sup>57</sup>

In *Securing Constitutional Democracy*, I spoke of the best interpretation as that which provides the best fit with and justification of the constitutional document, order, and practice.<sup>58</sup> Thus, I purposely avoided splitting up these two dimensions. Having said that, I should acknowledge that I do make a *fit* case for my theory of securing constitutional democracy. But I hasten to add that, at the same time, I make the case that my theory *justifies* our constitutional document, order, and practice.

In writing the book, *Constitutional Interpretation: The Basic Questions* with Sotirios Barber, I initially wanted to refer to the two dimensions of fit and justification, but Barber insisted that we avoid this distinction. For him,

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<sup>53</sup> Cf. FLEMING, *supra* note 11, at 78 (applying the idea “co-original and of equal weight” in an analogous context (quoting John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 163 (1995)).

<sup>54</sup> DWORKIN, *supra* note 11, at 65-66.

<sup>55</sup> E.g., Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 553-54 (2010).

<sup>56</sup> See, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997).

<sup>57</sup> GREENE, *supra* note 2, at 201-04.

<sup>58</sup> FLEMING, *supra* note 11, at 5, 63, 84, 92-93, 97-98.

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interpretation is just a matter of giving the best account of honoring constitutional commitments and furthering constitutional ends. I have come to see the wisdom of this view of fit and justification as inextricably bound together in the idea of giving the best account.

At the same time, I should emphasize that there is analytical power and clarity in distinguishing fit and justification and acknowledge that I myself have distinguished the two in my own work.<sup>59</sup> As against those who argue that “fit is everything,” I have argued that fit alone is insufficient to resolve the clash between competing interpretations in hard cases. We have to resort to justification to do so. As stated above, my taking fit seriously shows that my moral readings have a firm footing in our constitutional practice. Furthermore, fit enables people to see their aspirations in the Constitution. Finally, fit enables us to criticize others’ views as revisionist, radical, or subversive. For example, I can criticize the Tea Party as revisionist, radical, and subversive because they cannot even fit much of our twenty-first century constitutional practice. To be sure, I can also criticize them on normative grounds of justification: they have a deficient, unjust normative theory, one moreover that falls short of or misses the mark on our aspirations in the Preamble to the Constitution.

These uses of fit show the analytical power, in certain contexts, of stressing fit. But that is not to say that, even here, fit is entirely distinct from justification. To recall Greene’s formulation, I would say that, in these ways, fit is a factor in constitutional interpretation.<sup>60</sup> In my book, I shall say more about how fit factors in constitutional interpretation – even perfectionist interpretation that aspires to interpret the Constitution so as to make it the best it can be and worthy of our fidelity.

I doubt that Greene would object to what I have said here about fit and justification. To recapitulate: if I seem to give primacy to fit over justification, it is because I strive to show that my theory – though a Constitution-perfecting theory – is a theory of *our* constitutional order, not one of a perfect liberal Constitution. Like Greene, I view fit with original meaning and precedent as a resource for deciding constitutional meaning, as a factor in making constitutional decisions, and as evidence of the content of our commitments and indeed of political justice. Even though interpreters do not have an obligation to follow the past, they may be more effective in persuading people that their interpretations are faithful to the Constitution’s aspirations if they can make an argument that their interpretation both fits with and justifies the constitutional document, underlying constitutional order, and evolved constitutional practice.

Finally, I would like to make an observation concerning Seidman’s evident view related to fit and justification. If Greene would give primacy to justification over fit, it seems that Seidman would throw out fit altogether and

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<sup>59</sup> *Id.*; Fleming, *supra* note 29, at 1348-52.

<sup>60</sup> GREENE, *supra* note 2, at 192, 197, 206.

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the Constitution along with it.<sup>61</sup> Evidently that would leave only normative argument about the best thing to do. It is not clear to me that normative arguments without regard to fit with the extant constitutional document, doctrine, and practice will be superior to our current forms of argument. Normative arguments tend to be more persuasive to people when they are cast in terms of realizing our commitments and aspirations than when they are cast simply as arguments for an ideal state of affairs. Similarly, I believe that, to a greater degree than is commonly appreciated, normative argument, at least in our political and constitutional culture, is more constructivist than utopian. It articulates the ideals implicit in our practices. Seidman might say this is a bad thing – that it shows the degree to which the Constitution has constricted our thinking about justice and other good things. But I believe that our thinking about justice is enriched through constructivism, as compared with what it would be like if we did away with the Constitution or simply asked ourselves what justice requires as a utopian matter.<sup>62</sup> Constitutional arguments that fit and justify our constitutional document and practice exert a greater claim on people than do utopian arguments, for the former are arguments about the best understanding of our practices, commitments, and aspirations.

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

In the passage quoted in the epigraph with which I began this Essay, Holmes famously wrote that “historic continuity with the past is not a duty, it is only a necessity.”<sup>63</sup> I suppose that Holmes meant that somehow there is no avoiding following the past. I do not endorse Holmes’s evidently deterministic view. I, like Greene, would agree with Holmes that following the past is not a duty. Unlike Holmes, however, I would say that it is a necessity in the weaker sense that, to be persuasive in our constitutional culture, one generally needs to argue that one’s interpretations fit with the past, show the past in its best light (as Dworkin and I put it), or redeem the promises of our abstract moral commitments and aspirations (as Balkin puts it).<sup>64</sup> This is not originalism. It is a moral reading that aspires to fidelity to our imperfect Constitution.

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<sup>61</sup> SEIDMAN, *supra* note 3, at 11-28.

<sup>62</sup> *See id.* at 139-43.

<sup>63</sup> HOLMES, *supra* note 1, at 139.

<sup>64</sup> BALKIN, *supra* note 5, at 74-81.