RABBI AKIVA AND THE CROWNS: A PARABLE OF CONSTITUTIONAL FIDELITY[†]

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INTRODUCTION

The central theme of Jonathan Gienapp's *Against Constitutional Originalism*[1] is that the originalism of the modern conservative movement fails to reckon with the differences between the Founders' world and the world of contemporary Americans.[2] The Founders' ideas about the nature of law, the nature of constitutions, the nature of rights, and the practice of judicial review were very different than those held by most originalists today.[3]

Conservative originalists generally assume that they can understand Founding-era arguments in much the same way that they understand arguments made by lawyers today. But this view is mistaken, Gienapp argues.[4] Founding-era writers thought in ways that are alien to our world, and they would have rejected our twenty-first-century, post-legal realist assumptions about law, about legal texts, and about constitutions.[5]

Today's originalists ignore these differences; they assume that the Founders thought as they do and that they can read Founding-era texts as if the texts were written by contemporary lawyers.[6] As a result, Gienapp argues, their arguments are deeply anachronistic.[7] Therefore, they lack the fidelity to the Constitution that originalists claim for them.[8]

Conservative originalists are not the only people who should pay attention to Gienapp's arguments. They potentially affect everyone who claims to engage in faithful interpretations of the U.S. Constitution. Part I of this essay describes Gienapp's historicist critique. Part II explains why this critique poses problems for originalists and non-originalists alike. Parts III and IV address Gienapp's historicist challenge through the discussion of a famous story in the Talmud, the story of Rabbi Akiva and the crowns. This story explains how the rabbis who compiled the Talmud in the sixth century C.E. dealt with the problem of faithful interpretation of religious texts that had been written hundreds of years previously in a language that few people still spoke. The rabbis of the Talmud argued that faithful interpretation of the law must recognize the distance between past and present, and accept the need for creative adaptation in the face of transformations, upheavals, and ruptures. Using another famous story, the Oven of Akhnai, Part V explains that the rabbis of the Talmud understood that, separated from the law's origins by many centuries, it was their duty to

[1] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

[2] *See generally id.*

[3] *See infra* Part I.

[4] *See infra* Part I.

[5] *See* GIENAPP, *supra* note 1, at 81.

[6] *See id.*

[7] *See id.* at 13.

[8] *See id.*

expound the law in the present, and that to be faithful to the law, they had to be creative. A brief conclusion follows.

I. GIENAPP'S CRITIQUE OF CONSERVATIVE ORIGINALISM

Gienapp's critique makes five major claims.

First, Gienapp argues, although "[t]he Founding generation committed their constitutions to writing . . . they did not assume that writing constitutional principles down automatically erected sharp textual boundaries around those constitutions."[9] Rather, "constitutions consisted of both textual provisions and the preexisting principles of fundamental law."[10] Although contemporary conservatives identify the Constitution with its text and the Constitution's meaning with the meaning of the text, the Founding generation did not think this way.[11] The Constitution was not a text. It was far more than a text, and to interpret the Constitution properly one had to move beyond the text to understand the larger principles of law in which the text was situated.[12]

Second, "steeped as they were in social contract theory, Founding-era American constitutionalists believed that the federal Constitution's content could not be divorced from the kind of union the Constitution represented."[13] In order to interpret the Constitution, one had to understand what it was a Constitution of, and what kind of social compact it sought to implement. "[T]he national government's powers, as specified by the Constitution's text, depended upon whether the instrument spoke for a nation, a union of autonomous states, or something in between."[14] Hence, "[t]he meaning of the written Constitution . . . rested on an underlying socio-historical account of union and sovereignty that could never be wholly derived from the text itself."[15]

Third, because the Constitution existed beyond the text as well as within it, "constitutional principles were at once fixed and evolving."[16] Hence:

> [E]ven if the Constitution was law of some kind, the Founding generation did not immediately assume that it was alike in kind to other forms of law and thus susceptible to conventional legal interpretation. . . . At first and for years to come, many believed that the Constitution was a people's document, not a lawyer's document."[17]

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[9] *Id.* at 12.

[10] *Id.*

[11] *See id.* at 9.

[12] *See id.* at 12.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

Fourth, a written constitution established a frame of government.[18] But behind the frame of government was an enduring fundamental law.[19] "The concept of preexisting fundamental law was foundational to Founding-era constitutionalism,"[20] and "underscored why written constitutions could never be reduced to the contents of their text."[21] Only some features of basic law were "created through the constitution's enactment. Other fundamental law existed before the drafting of the constitution and was simply left in place, incorporated by implication."[22] The Founders believed in natural law, but they were not simply natural lawyers.[23] Rather, their concept of fundamental law was an amalgam of positive law, custom, common law, and natural law, drawing on assumptions about human nature and human society.[24] All of these sources were integrated: "The Founding generation . . . did not draw categorical distinctions between sources of law—natural law, customary law, enacted law. Nor did they assume that positive law could be neatly separated from non-positive law. Rather, they assumed that different sources and kinds of law naturally harmonized."[25] In contrast to today's conservative originalists, who sometimes look askance at international law as a violation of American sovereignty, the Founding generation assumed that fundamental law included the law of nations.[26]

Fifth, the Founders' conception of rights was pre-legal realist.[27] Constitutions declared preexisting rights that were part of fundamental law.[28] The First Congress that adopted the Bill of Rights "enumerated rights neither to establish their legality nor to fix their legal content by specifying how the rights would operate in particular instances."[29] The constitutional "text did little substantive work, neither creating constitutional rights nor determining their content. Instead, it underscored the pre-textual basis of most rights while leaving it to future decision-makers to more concretely determine their scope and effect."[30] Rights existed and were fundamental regardless of whether they were enumerated. "Clinging to long-standing assumptions about fundamental

[18] *Id.* at 72.

[19] *Id.* at 73 (explaining that constitutions were fundamental law "that stood above" ordinary lawmaking).

[20] *Id.* at 76.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 78.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 79, 101-03.

[27] *See id.* at 5.

[28] *See id.* at 99.

[29] *Id.*

[30] *Id.*

rights, law, and writtenness, [the Founding generation] did not think that written constitutions drew a sharp boundary between the text and what was outside of it. That was not how constitutionalism or fundamental law worked."[31]

Sixth, the Founders did not share today's conception of strong judicial review or assume that it was the job of judges to define the content and scope of constitutional rights and structures.[32] Courts were supposed to enforce the customary features of fundamental law and to read and interpret legislation in light of the fundamental law and preexisting fundamental rights.[33] These might or might not have been mentioned in the Constitutional text, and they included custom, natural law, and the law of nations.[34] But legislatures, not courts, were the primary guardians of rights. Rights—including natural rights—were subject to legislative regulation for the common good, and legislatures were presumed to act against the background of these understandings.[35] The early "debate over judicial review hinged on institutional enforcement rather than constitutional content—*who* could enforce general fundamental law, not whether it was part of the United States' fundamental law."[36]

In short, Gienapp argues that when originalists today argue for strong judicial review to strike down state and federal laws, they are being anachronistic. When they identify the Constitution with its text and the meaning of the Constitution with the original meaning of its text, they are being anachronistic. When they assume that the proper way to interpret the Constitution is to use "original legal methods" that they unthinkingly associate with the modern techniques and arguments of twenty-first-century lawyers, they are being anachronistic. And when they assume that the way twenty-first-century lawyers trained in professional schools read eighteenth-century legal materials is the same way that late-eighteenth-century citizens read and understood them, they are being anachronistic.

II. THE PROBLEM OF MODERNITY

Gienapp's book is an argument that we live in constitutional modernity.[37] Because conservative originalists do not reckon with the differences between

[31] *Id.* at 100 (describing views of Oliver Ellsworth and James Wilson with respect to ex post facto laws).

[32] *See id.* at 105-07.

[33] *Id.*

[34] *See id.* at 86-89.

[35] *See id.* at 90.

[36] *Id.* at 108 (describing debate between Justices Chase and Iredell in *Calder v. Bull*).

[37] *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 10 (2024) ("Both originalism and living constitutionalism arose in response to constitutional modernity—the felt sense that the

our world and the understanding and outlook of the Founders, conservative originalists systematically misunderstand the Founders. Therefore, their arguments for originalism as the exclusive path to constitutional fidelity lack merit. Their practices are modernist practices that fail to recognize their own modernism.

Modernity is the recognition that we are distanced from the past.[38] This recognition produces a kind of anxiety and unease: a sense that our normative judgments lack a firm foundation, a concern that our practices have no grounding, and the fear, as Marx and Engels put it, that "[a]ll that is solid melts into air."[39]

This modernist anxiety produces two familiar reactions, which are mirror images of each other.[40] The first accepts that the past is the past and argues that we must figure out what to do on our own, freed from the musty relics of the past, which are full of injustice and mindless tradition. The idea of a "living Constitution"—a mode of constitutional reasoning that frees itself from the dead hand of the past and adjusts to changing times—is an example of this response to modernity.[41]

The other response to modernist anxiety is fundamentalism—that is, a return to fundamentals.[42] We must regain the past by hewing to its concrete manifestations and rituals as we understand them in the present.[43] We must cling to tradition—often an invented tradition—to ground our practices and give our normative judgments a sure and solid footing.[44] Modern conservative originalism is an example of this second tendency.[45] Originalism promises to give us something to hold onto as we interpret the Constitution, something firm, fixed, and dependable to which we can turn whenever we are in doubt.

Both living constitutionalism and conservative originalism are modernist features of American legal thought and legal culture. They emerged in the twentieth century as it became clear that Americans lived in a world quite

world of the framers had long since passed away, and that the problem for the present was how to be faithful to an ancient constitution in very different circumstances.").

[38] *See id.* at 68.

[39] Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, *in* THE MARX-ENGELS READER 469, 476 (Robert C. Tucker ed., 2d ed. 1978); *see also* BALKIN, *supra* note 37, at 68 ("By a crisis of modernity, I mean the recognition that one is losing—or has already lost—crucial connections to the stabilizing and legitimating authority of the past and the institutions and traditions of the past.").

[40] *See* BALKIN, *supra* note 37, at 69.

[41] *Id.* at 69-70.

[42] *Id.* at 69-70, 87.

[43] *Id.*

[44] *Id.* at 69.

[45] *Id.* at 70.

distant from the Founders.[46] Living constitutionalism and originalism stem from the same source, and they respond in different ways to the same problem: how to adapt an ancient constitution to a constantly changing world.[47]

By the end of the book, Gienapp leaves us with a puzzle. He argues that the way originalists think about the Constitution is thoroughly anachronistic, resting on views about the text, about judicial review, and about the nature of law that members of the Founding generation simply did not hold.[48] But his arguments do more than deflate the claims of originalists. They apply to lawyers who are not originalists as well.

Most contemporary lawyers in the United States are children of legal realism.[49] They do not believe in a general law that transcends positive state and federal law, and they regard the common law as essentially positive law made by judges. For them, there is no going back to a pre-realist consciousness in which judges merely discover a preexisting law rather than produce and construct the law through adjudication.

Thus, it is not only originalist understandings of the Constitution, judicial review, and the nature of law that are anachronistic. The same charge could be leveled at the understandings of modern American lawyers generally. All of us live in constitutional modernity. All of us lack an organic connection to the consciousness that produced the 1787 Constitution. None of us can help being modern in our understandings of law.

To be sure, there is no reason to think that the positivist and realist legal consciousness that developed in the twentieth century and currently dominates American law schools will prove permanent, any more than the consciousness that preceded it. Indeed, some contemporary lawyers are now seeking to jettison legal realist assumptions about law and begin reasoning in terms of the "general law."[50] But this is not a true return to a premodern consciousness, which is impossible at any rate. Rather, it is yet another way of attempting to regain the past by creating a new modernist version of premodern practices. If these approaches are successful, they will generate a modernist successor to legal realism, not pre-realism. Lawyers will find new ways to argue about the

[46] *See id.* at 69-70, 87-88.

[47] *Id.* at 10, 67, 70.

[48] *See* GIENAPP, *supra* note 1, at 106-11.

[49] *See, e.g.*, Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)) ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.").

[50] *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1193, 1215 (2024) (arguing that Reconstruction framers presupposed that the Fourteenth Amendment incorporated general law); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 527 (2019) (criticizing positivist assumptions of the post-*Erie* legal world).

"general law" or natural law while still retaining the modern administrative and regulatory state, digital technologies, and our contemporary ways of life.

Remarking on the historically-informed performance movement in classical music, Sanford Levinson and I once wrote that "[t]he idea that if we wish to recapture the 'authentic' experience of Bach or Beethoven all that is necessary is to [play an original instrument performance in] . . . our car stereo as we speed down interstate 35 seems increasingly preposterous the more that one thinks about it."[51] Trying to play a Bach cantata exactly the way audiences heard it in a poorly heated and dimly lit Leipzig church in the eighteenth century is a modernist obsession that responds to a modernist aesthetic. In the same way, the current interest in pre-legal realist thought is an attempt to regain a world long gone in quite different circumstances. If this attempt succeeds, it is because it is well adapted to the present, not because it accurately captures the past.

If the constitutional understandings of the past are so different from our own, how is it possible to be faithful to the Constitution today? After all, the interpretive practices of living constitutionalists are no more tethered to the past than those of their originalist colleagues.[52] Assuming that Gienapp is correct that originalist practice is hopelessly anachronistic, what justifies our current methods of interpretation, whether originalist or non-originalist, and what ensures their fidelity to the Constitution?

One possible response to this predicament is to deny that what we call "constitutional interpretation" is aimed at being faithful to the Constitution. Instead, one might break with the past, disown the goal of fidelity, and simply ask what, all things being equal, would be best to do, or what would make the constitutional system most attractive.[53] But if one disclaims any interest in being faithful to the Constitution, it is hard to say that one is still interpreting it. In interpretation, fidelity is the name of the game.[54]

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[51] Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1622 (1991).

[52] *See* BALKIN, *supra* note 37, at 69.

[53] *Cf.* CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8 (2023) ("Judges (and others) should choose the theory that would make the American constitutional order better rather than worse."). Sunstein is careful to note, however, that this does not mean giving up on fidelity to the Constitution, much less abandoning the text, because "generally everyone agrees that the text of the Constitution is binding." *Id.* at 22.

[54] *Compare* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 103 (2011) ("It is not really possible to be against fidelity if one is seriously interested in interpreting the U.S. Constitution. Fidelity is the whole point of the enterprise."), *with* SUNSTEIN, *supra* note 53, at 74.

> I agree that judges should be faithful to the text itself, even if the text were not as good as it is (and it is very good indeed). If judges were not faithful to the text, it is fair to say that they would not be engaged in interpretation at all.

To be sure, the centrality of fidelity to interpretation does not mean that there is only one way to interpret, or that there is only one way for interpreters to be faithful.[55] In particular, it does not mean that constitutional interpretation cannot involve implementation and construction, or that interpretation cannot involve creativity on the part of the interpreter. Indeed, most constitutional interpretation is construction that implements and realizes the Constitution in practice, and the task of construction is inevitably creative.[56]

Some lawyers may protest that they do not construct constitutional meaning through implementation and doctrinal exegesis, and that they are never creative but simply follow the rules laid down. But few people in the early twenty-first century are fooled by such protestations. To interpret the U.S. Constitution and apply it to a contested legal question almost always involves some degree of construction, and constitutional construction is a creative endeavor—sometimes very creative indeed. Even so, fidelity to what we are interpreting is a precondition to legal interpretation, no matter how much we construct legal doctrine and how much creativity we bring to the enterprise. If we dispense with the goal of fidelity, we are doing something else, which may be justified and legitimated on other grounds, but not on the ground that we are interpreting.

The problem that Gienapp poses thus transcends his critique of conservative originalism. What *is* faithful interpretation in constitutional modernity? What does it mean to be faithful to an enterprise created long ago by people with very different assumptions and understandings about constitutions, rights, law, and the world? One might have thought that the question is how to be faithful to a *document* written long ago, but that formulation is already misleading, because, as Gienapp explains, the Founding generation did not identify the whole of the Constitution with a document, and they did not understand the interpretation of the Constitution to be merely a matter of textual exegesis.[57] Today, people may assume that the proper object of interpretation is the text of the Constitution. But for the Founding generation, Gienapp reminds us, the object of interpretation was the Constitution, which was more than its text.[58] It was embedded in the general law, a diffuse interweaving of custom, common law, and natural law. But this consideration only makes the problem worse. If interpretation presupposes a desire to be faithful to the object of interpretation, what are we to do if the very object of interpretation is significantly different for us than it was for the Founding generation?

SUNSTEIN, *supra* note 53, at 74. Note Sunstein's equation of the object of constitutional fidelity with the text, which is the very assumption that Gienapp is putting into question.

[55] *Cf.* SUNSTEIN, *supra* note 53, at 128 ("There is nothing that interpretation just is.").

[56] *See* BALKIN, *supra* note 37, at 111, 141-42, 169-70, 234.

[57] *See* GIENAPP, *supra* note 1, at 10-12, 65.

[58] *See id.* at 57, 61-64, 86.

The two responses to modernity—returning to fundamentals or breaking with the past—have reciprocal problems. The fundamentalist can never fully regain the past. The fundamentalist's practice is always based on a selective reading of the past, a simulacrum of the past, or a theatrical imitation of the past, one that is always doomed to anachronism. In the words of the composer Aaron Copland, it "is the difference between watching a great man walk down the street and watching a great actor act the part of a great man walking down the street."[59] The present is embedded in everything we do. We perform the past in contemporary terms and with a contemporary aesthetic even as we purport to return to a purer, more authentic consciousness.

The problem for the cultural modernist who wants to break decisively from the past is the mirror image of the fundamentalist's problem. If the fundamentalist can never fully regain the past, the modernist can never fully escape it. A constitutional interpreter who simply did not care about the text or about attempting fidelity to the Constitution would cut away the supports of legitimacy that support the endeavor of constitutionalism. That is because the rule of law itself depends on a partial anachronism—that we attempt to apply the same law over time.[60]

III. MOSES IN RABBI AKIVA'S SCHOOLROOM

The problem of how to be both faithful and modern, to be distanced from the past and yet in appropriate communion with it, is not a new problem. It is very old, as old as modernist consciousness itself. This consciousness long predates what we call "modern" times. What we call "modern" is merely one instance of a phenomenon that has occurred in many times and places before: when people realize that their world has become separated from their past, and experience the sense of disturbance, uncertainty, and anxiety that comes with that realization.

A celebrated story in the Babylonian Talmud concerns this modernist predicament, although the events it describes date to the First Century C.E.[61] It is the story of Rabbi Akiva and the crowns, which appears in the Gemara of the tractate Menachot.[62]

The Talmud is a compilation of the oral traditions of Judaism, the so-called Oral Law that accompanies the Written Law of the Torah, the first five books of the Hebrew Bible.[63] The Talmud is composed of an earlier core called the

[59] AARON COPLAND, OUR NEW MUSIC 31 (1941) (comparing Beethoven's compositions with Mahler's).

[60] BALKIN, *supra* note 37, at 110-11, 138-39.

[61] *See* BARRY W. HOLTZ, RABBI AKIVA: SAGE OF THE TALMUD 4 (2017).

[62] Babylonian Talmud, Menachot 29b. All translations of the Talmud in this Essay are taken from the William Davidson digital edition of the Koren Noé Talmud, available at SEFARIA, http://www.sefaria.org (last visited Aug. 29, 2024).

[63] *See* HOLTZ, *supra* note 61, at 4.

Mishnah, compiled around 200 C.E., and a larger surrounding commentary called the Gemara, compiled around 500 C.E.[64] The tractate Menachot deals with the laws of ritual sacrifices made in the Second Temple in Jerusalem (destroyed in 70 C.E.).[65] In particular, it concerns the meal offerings of food made from grains and oils.[66] Parts of these offerings were burnt on the altar, while the rest were consumed by the priests in the Temple.[67]

Menachot is a fitting place for the discussion of modernity, change, and a past that cannot be recovered. The Mishnah was compiled a hundred years after the destruction of the Second Temple.[68] In the meantime, Judaism had been transformed from a religion organized around temple service to a religion organized around prayer, daily ritual, and the study and transmission of religious law.[69]

Following the destruction of the Second Temple by the Romans, the Jews in Palestine had lived through a series of persecutions that led, some sixty years later, to a failed revolt led by Bar Kokhba.[70] The Romans put down this final revolt mercilessly, killing off a large percentage of the Jewish population and driving most of the remainder into exile.[71]

The transformation of the social conditions in which Judaism was practiced led its religious leaders to attempt to write down the oral traditions of Judaism and the existing understandings of the written law, the Torah, before they were completely forgotten or destroyed.[72] By the time the Gemara was compiled, the Temple had been gone for hundreds of years, and Judaism had become a very different religion, organized around study, prayer, and rituals that were not part of the Temple service.[73] Although the language of the Torah was Biblical Hebrew, most Jews spoke Aramaic, Greek, or other languages in the countries

[64] *See id.*

[65] *See id.* at 114-15, 147; Babylonian Talmud, Menachot 2b-6b.

[66] *See* Babylonian Talmud, Menachot 6a.

[67] *Id.*

[68] *See* HOLTZ, *supra* note 61, at 4.

[69] *See id.* at 146-47; Alieza Salzberg, *Judaism After the Temple*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/judaism-after-the-temple/ [https://perma.cc/MJ2D-T67F] (last visited Aug. 29, 2024) ("The story of the founding of Yavneh represents the birth of rabbinic Judaism, a way of life focused on Torah and Jewish law, rather than Temple worship or political sovereignty.").

[70] *See* HOLTZ, *supra* note 61, at 4, 148-50.

[71] *See id.* at 26, 146.

[72] *See id.* at 4.

[73] MARTIN GOODMAN, A HISTORY OF JUDAISM 245-48 (2018) (explaining how Rabbinic Judaism dealt with the loss of the Temple through developing a liturgy and rituals that recalled the Temple and hoped for its rebuilding while placing the synagogue, various rituals, and holiday celebrations at the center of religious life).

where Jews had settled.[74] Many of the Rabbis who compiled the Babylonian Talmud had never been to Palestine or seen where the Temple once stood. And yet they still continued to preserve and debate the proper way of performing sacrifices in a Temple that was long gone.[75] The memory of Temple service had been transformed into one part of a larger discourse of law, whose development had become central to the faith.

There are three main characters in the story of Rabbi Akiva and the crowns: Moses, God, and Rabbi Akiva.[76] Moses represents the Written Law of Judaism that appears in the Torah, which, according to tradition, God dictated to Moses when Moses was on Mount Sinai.[77] Rabbi Akiva represents the Oral Law, the set of customary practices that were conveyed from generation to generation and developed over time; they were eventually compiled, organized, and rationalized in the Mishnah and the Gemara.[78]

Rabbi Akiva, whose name was Akiva ben Josef, was born around 50 C.E., some twenty years before the destruction of the Temple.[79] He died in 135 C.E., in the wake of the failure of the Bar Kokhba revolt, a revolt that he is thought to have supported because he hoped that Bar Kokhba would be the promised Messiah who would liberate the Jews from Rome.[80]

According to tradition, Rabbi Akiva was an illiterate shepherd.[81] At the urging of his wife Rachel, he turned to the study of Jewish Law at the age of forty—late in life for most people in that world.[82] He quickly became an acknowledged master of Jewish law, and mentored countless students and disciples.[83] Later commentators argued that he was the single most important figure in converting the customary traditions of the Oral Law into a rationalized legal form that appears in the Mishnah.[84] By tradition, Rabbi Akiva is also the originator of a revolution in legal hermeneutics.[85] He pioneered techniques for deriving the Oral Law from the text of the Hebrew

[74] *Id.* at 21 (noting that by the First Century C.E. Aramaic and Greek had become the dominant languages in the Fertile Crescent and the Near East, respectively).

[75] *Id.* at 244-45 (noting the Mishnah's detailed coverage of Temple rituals and practices).

[76] Babylonian Talmud, Menachot 29b.

[77] HOLTZ, *supra* note 61, at 27.

[78] *Id.* at 4.

[79] *Id.* at 14-15.

[80] *Id.* at 14, 150-51.

[81] *Id.* at 60.

[82] *Id.* at 84.

[83] *See id.* at 83-84. The Talmud reports that he had 24,000 disciples. *Id.* at 154; Babylonian Talmud, Yevamot 62b; Babylonian Talmud, Nedarim 50a. This exaggeration testified to his influence.

[84] *See* HOLTZ, *supra* note 61, at 189-91; Babylonian Talmud, Sanhedrin 86a (explaining that Akiva's students were the basis of various parts of legal commentary).

[85] HOLTZ, *supra* note 61, at 180.

Bible, and especially the first five books that constitute the Torah.[86] The Gemara that tells the story of the crowns was compiled some four centuries after Rabbi Akiva's death, so he was already a figure of legend.[87]

As the story is told in Menachot, Moses is on Mount Sinai waiting to receive the Torah so that he can give it to the Hebrews.[88] The text of the Torah—by tradition dictated by God and written by Moses himself—is essentially complete.[89] Yet God is still putting on the finishing touches, adding decorations to some of the Hebrew letters in the Torah scroll.[90] These figures are called "crowns" because they are placed on top of the letters.[91]

Seeing God busying himself with these decorations, Moses is puzzled.[92] "Master of the Universe," he says, "who is preventing You from giving the Torah without these additions?"[93] Why is God, an all-powerful being, wasting his time putting decorations on the letters? God replies that after many generations, there will be a man, Akiva ben Josef, and he will derive heaps and heaps of laws from these crowns.[94] The crowns are a symbol of Akiva's daring hermeneutical techniques. In fact, as Barry Holtz explains, "[T]here is no text in the rabbinic corpus in which Akiva (or anyone else) uses the crowns on the letters to interpret 'heaps and heaps' of anything. It is a literary flourish, a hyperbole aimed at making the larger point about Akiva's status."[95]

Moses is amazed by God's description of Akiva. He asks: Can you show him to me? God says: Turn around.[96] Moses does so, and he is hurled a

[86] *See id.* at 181-82 ("[Akiva's] mode of interpretation set the tone for the approach to reading Jewish texts that influenced all of later Jewish religious history. His view was wide-ranging and expansive. It was sometimes outlandish . . . but filled with imagination."); Louis Ginzberg, *Akiba Ben Joseph*, JEWISHENCYCLOPEDIA.COM, https://jewishencyclopedia.com/articles/1033-akiba-ben-joseph [https://perma.cc/2LCK-CX8M] (last visited Aug. 29, 2024) ("Akiba made the accumulated treasure of the oral law—which until his time was only a subject of knowledge, and not a science—an inexhaustible mine from which, by the means he provided, new treasures might be continually extracted.").

[87] Babylonian Talmud, Menachot 29b.

[88] *Id.*

[89] *See* Babylonian Talmud, Bava Batra 14b-15a (explaining that Moses wrote the entire Torah except for the last eight verses (*Deuteronomy* 34:5-12), written by Moses's successor Joshua, which describe Moses's death).

[90] *See* HOLTZ, *supra* note 61, at 185.

[91] *See id.*

[92] *See id.*

[93] Babylonian Talmud, Menachot 29b.

[94] *Id.* ("There is a man who is destined to be born after several generations, and Akiva ben Yosef is his name; he is destined to derive from each and every thorn of these crowns mounds upon mounds of *halakhot*.").

[95] HOLTZ, *supra* note 61, at 187.

[96] Babylonian Talmud, Menachot 29b.

thousand years into the future.[97] He finds himself in Rabbi Akiva's schoolroom, where Akiva is teaching the Torah to his pupils.[98] Moses sits in the back of the classroom with the less able students and begins to listen.[99] Moses hears Rabbi Akiva expound on the Torah—the very same Torah that Moses had just written down—and he can't understand a word of what Akiva is saying.[100] His heart sinks.[101]

Then a student raises his hand.[102] Rabbi, he asks, what is the basis of the ruling you've just taught us?[103] Akiva replies that it is a law given to Moses on Mount Sinai.[104] The Talmud tells us that Moses was comforted.[105]

Why was Moses comforted? I will return to that important question in a moment. But this is not the end of the story. As sometimes happens in the Talmud, the tale takes a surprising, and even tragic, turn. Having seen Akiva's mastery of the law, Moses says to God, "Master of the Universe, You have a man as great as this and yet You still choose to give the Torah through me. Why?"[106] (A traditional attribute of Moses is his humility.)[107] "Be silent," God

[97] *See* HOLTZ, *supra* note 61, at 185-86.

[98] *Id.*

[99] Babylonian Talmud, Menachot 29b.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* A "law given to Moses at Sinai" (*Halakha le-moshe mi-sinai*) has become a term of art. It refers to a law that is not derived from the text of Scripture and therefore must have been orally transmitted through the generations. THE OXFORD DICTIONARY OF THE JEWISH RELIGION 317 (Adele Berlin ed., 2d ed. 2011); *see, e.g.*, Babylonian Talmud, Megillah 19b. David Weiss Halivni argues that the term began to be used more frequently by the Amoraim (who produced the Gemara in which this story appears) in order to affirm the equal divinity and authority of the oral tradition. DAVID WEISS HALIVNI, REVELATION RESTORED: DIVINE WRIT AND CRITICAL RESPONSES 56-57 (1997). Given the opening of the story in Menachot 29b, one might have expected that Rabbi Akiva would answer the student by saying that the ruling in question was derived from the crowns of the letters in the Torah. He could have claimed, in other words, that the ruling was implicit in the text. But he does not say this. Instead, he says that it was a law given to Moses at Sinai. That is, it was part of the oral tradition that was given to Moses along with the written law. *See* Mishnah, Berakhot 5a (stating "all aspects of Torah were given to Moses from Sinai"). The fact that Moses does not even recognize this ruling—and that he was comforted by Akiva's answer—makes the story all the more remarkable.

[105] Babylonian Talmud, Menachot 29b ("When Moses heard this, his mind was put at ease . . . .").

[106] *Id.*

[107] *See Numbers* 12:3 (New Revised Standard Version) ("Now the man Moses was very humble, more so than anyone else on the face of the earth.").

replies. "[T]his intention arose before Me."[108] (That is, "this is how I conceive of it." God, who exists out of time, explains his actions in terms of his thoughts.)

But Moses persists. "Master of the Universe, You have shown me [his] Torah, now show me his reward."[109] Once again, God tells him: Turn around.[110] Moses does so, and now he is sent a little further into the future. Rabbi Akiva had died a martyr's death; the Romans had flayed him alive for teaching the Torah.[111] Arriving in the future, Moses sees Rabbi Akiva's flesh being weighed and sold in a marketplace.[112] Moses is horrified and dumbfounded. He protests to God, "Master of the Universe, this is [the] Torah and this is its reward?"[113] "Be silent," God replies. "[T]his intention arose before Me."[114] There the story ends.

The tragic ending of the story of Rabbi Akiva and the crowns reminds the reader that Akiva was God's faithful servant, so faithful to God's law that he was willing to endure the most horrible torture. It also reminds us that God exists at all times and that we, as limited, historical beings, do not understand the larger meaning or purpose of events.

Moses does not understand why Akiva had to die a martyr's death. But Moses also does not recognize the law that he himself gave in the form that Akiva expounds it a thousand years later. If Moses, who actually wrote down the Torah, does not understand what Akiva is doing, how can it be a faithful interpretation of the law? All of which leads to a central question posed by the story: why was Moses comforted when Akiva told his students that a law that Moses himself did not recognize or understand was a law transmitted to Moses on Mount Sinai?

The compilers of the Gemara understood that they lived in a different world from either Moses or Akiva. They recognized that Judaism had changed in multiple ways. The religious rituals of a nomadic people in Canaan in the Second Millennium B.C. were not the same as First Temple Judaism; or the Judaism that emerged from the destruction of the First Temple and the Babylonian captivity; or the Judaism that developed in the Second Temple period; or the Rabbinical Judaism that emerged following the destruction of the Second Temple in 70 C.E. and the failure of the Bar Kokhba revolt; or the Diasporic Judaism in which the Gemara was compiled centuries later.[115] The

[108] Babylonian Talmud, Menachot 29b.

[109] *Id.*

[110] *Id.*

[111] *Id.*; *see also* Babylonian Talmud, Berakhot 61b (describing Akiva's death).

[112] Babylonian Talmud, Menachot 29b.

[113] *Id.*

[114] *Id.*

[115] *See generally* GOODMAN, *supra* note 73, at 245-48 (describing multiple transformations of Judaism throughout its history).

history of Judaism had not been a story of a continuous, unbroken tradition. It was a story of ruptures, revolutions, and catastrophes. The Mishnah was compiled from oral traditions because of a fear that with the destruction of the Second Temple and the Roman persecutions, the Jewish religion would be lost.[116] In the process of writing down the oral law, its nature was forever changed. And the *Amoraim* (expounders) who wrote the Gemara were even further distanced from the origins of Judaism than Akiva and his contemporaries.[117] The compilers of the Gemara were moderns in their time, and they knew it.

The story of Rabbi Akiva and the crowns serves to explain how interpretive fidelity is possible despite these ruptures, transformations, and catastrophes. The story seeks to explain how one can interpret the law faithfully despite the temporal and cultural distance between Moses and Akiva, and by extension, between Moses and the generation of Rabbis who compiled the Mishnah, between Moses and the still later generation of Rabbis who compiled the Gemara, and between Moses and Jews living today.

Moses was comforted, the Talmud seems to imply, because Akiva faithfully sought to continue a tradition of legal interpretations that he believed had begun with Moses. Akiva's martyrdom is evidence of his commitment to faithful interpretation through practices of legal argument, practices that did not exist in Moses's time and that Akiva himself had pioneered. Akiva symbolizes the creative and adaptable methods that the Rabbis developed over the centuries for understanding and applying an ancient text written in an archaic language that few people still spoke. Akiva also symbolizes the dialectical culture of Jewish law, which always included multiple opinions on multiple subjects, and which carried disagreements and differing perspectives forward from generation to generation.

The fact that Moses did not even understand what Akiva was saying shows us that there had been considerable change in the law over a thousand-year period. It also shows that Akiva's assumptions and understanding of how to interpret the law were very different from those of Moses. But the fact that interpretations of the law and methods for interpretation change over time—so that earlier interpreters would not even recognize them—does not mean that the later interpretations are not faithful. It means only that the project of interpretation, and the techniques and methods of interpretation, evolve like everything else in human thought and culture. Although the Torah is timeless, it constantly evolves. Although the law is unchanging, it gradually changes.

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[116] *See id.* at 244.

[117] *Id.* at 261 ("As [the story of Rabbi Akiva and the crowns] illustrates, rabbis in sixth-century Mesopotamia were well aware of the extent to which the Judaism they practised and taught had evolved from the scriptures they believed had been handed down from Moses . . . .")

IV. THE FOUNDERS IN RABBI AKIVA'S SCHOOLROOM

With this in mind, let us return to the problem that Gienapp poses for us. We cannot interpret the Constitution the same way that the Founding generation did because their world is not our world, and their understandings of law and of constitutions are not our understandings. We live in a post-legal realist world that they knew nothing about. From our standpoint, the Founders are like Moses sitting in Rabbi Akiva's schoolroom. Our current practices would be unintelligible to them.

Nevertheless, the story of Rabbi Akiva suggests that fidelity is not impossible. We can still use the past in different ways than the Founders would have understood in our efforts to produce faithful readings of the Constitution. Put another way, fidelity does not require that we interpret the law using exactly the same legal methods that the Founders employed nor does it require that we understand the Constitution or law in general in exactly the same way that the Founders understood them. Indeed, if we try to do this, we will likely fail, because we live in a different world. We must approach the task of fidelity differently.

Participation in a hermeneutical tradition that extends over many centuries requires a commitment to further the ends of the practice we are engaged in as we currently understand it, employing those tools of understanding and exegesis that we have. In participating in a long-lived hermeneutical tradition, we, who live in the present, should try to understand the values and commitments of the past and articulate them in terms of our own values, problems, and concerns. Thus, as Lawrence Lessig famously argued, interpretation of an ancient constitution requires a kind of translation from the past to the present.[118] We cannot begin to understand those values and commitments (as opposed to substituting our own) unless we recognize the past as potentially very different from the present.[119] Our goal is to seek a commonality in understanding, but in order to seek commonality, we must first recognize difference.[120] Thus, in the context of American constitutional law, we must understand how the Founders' conceptions of constitutions, text, and law differed from our modern-day conceptions. We cannot simply pretend that they were twenty-first-century lawyers.

Yet the converse is also true: in order to understand how the past is different, we must nevertheless assume a commonality between ourselves and those who lived in the past, so that their words and actions are intelligible to

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[118] Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1166, 1171 (1993). On Lessig's metaphor of translation, see Jack M. Balkin, *Translating the Constitution*, 118 MICH. L. REV. 977, 977 (2020) (reviewing LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019)).

[119] *See* BALKIN, *supra* note 37, at 139.

[120] *Id.*

us. Without that assumption of common humanity, translation from past to present would be impossible.

Now there may be many different ways to understand the past, because there are many different aspects of the past to foreground or emphasize, and many different ways to draw analogies from the past. That means that the translation from past to present is likely to be under-determinate. But the fact that different people will draw different meanings and lessons from the past does not mean that there are no meanings and lessons to draw. The past contains too much meaning and too many associations and analogies for the present, not too little meaning.

A. *Originals Versus Originalists*

The story of Rabbi Akiva and the crowns offers two additional lessons about modernist interpretation of the Constitution. The first lesson is that our methods of interpretation do not have to be the same as those of the Founding generation in order to interpret the Constitution faithfully today. The questions we ask and the kinds of things that we argue about are different. To be sure, some conservative originalists who want to claim the authority of the Founders may wish to argue that the Founders were originalists.[121] But this claim, too, is anachronistic.

We make arguments from text and structure, and so did the Founders. But they made these arguments in the context of very different understandings about legal texts, law, and constitutionalism.[122] So even though they made arguments that we would recognize as being based on text and structure, it does not follow that they were originalists in our modern sense. Originalism is a practice that emerges in a post-legal realist world.[123]

The central division in interpretive debates today is between originalism and living constitutionalism.[124] Originalism defines itself in contrast to living constitutionalism, and vice versa.[125] These two positions are products of constitutional modernity; they are contrasting ways to apply the Constitution in modern times. But this opposition is not relevant to Founding-era disputes because the Founders were not trying to apply a centuries-old constitution in

[121] *See, e.g.*, John O. McGinnis, *Were the Founders Themselves Originalists?*, 46 HARV. J.L. & PUB. POL'Y 1, 1 (2023); Federalist Society, *Panel 1: Were the Founders Themselves Originalists?*, YOUTUBE (Mar. 4, 2022), https://www.youtube.com/watch?v=rfIiZJl60v4 [https://perma.cc/BAX2-PNZ6].

[122] GIENAPP, *supra* note 1, at 12.

[123] *See* BALKIN, *supra* note 37, at 10 ("[T]he rise of originalism as a general or comprehensive theory of constitutional interpretation is the product of the twentieth century.").

[124] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019).

[125] *Id.*

markedly changed circumstances. Their concerns were different. They disagreed about whether to construe the Constitution strictly or loosely, and the basis of that dispute was an eighteenth- (and early nineteenth-) century dispute about the nature of the social compact.[126] Moreover, there was no common set of interpretive rules; instead, the Founders continually debated what the rules should be.[127] If we want to understand the Founders' interpretive methods, we have to put aside our own preconceptions about interpretation. In particular, we should not assume that they shared a common interpretive methodology that we can and should apply today if they themselves disagreed about their methods.[128]

Today, when we read Founding-era disputes, we tend to look past what the participants were actually disagreeing about. Instead, we recognize familiar kinds of arguments from text, history, and structure. But we cannot infer from this that the Founders were originalists, *as opposed to living constitutionalists*. This is a non sequitur. The Founders were not choosing between these alternatives; they were fighting about something completely different, based on pre-legal realist conceptions of law that most lawyers today—whether originalist or living constitutionalist—do not share. To ask whether the Founders were originalists as opposed to living constitutionalists is an anachronistic question, as nonsensical as asking whether the Founders preferred Apple or Android cellphones.

To be sure, when we look into the past, we see the Founding generation using common-law methods of interpretation; we see the people of that generation arguing from familiar categories of text, purpose, structure, and precedent.[129] Their interpretive arguments seem familiar to us and similar to our own ways of arguing. But this does not mean that the Founders were originalists as opposed to living constitutionalists. After all, today's living constitutionalists use the very same set of modalities of argument that originalists do. Everyone in our present-day culture makes arguments from text, history, structure, purpose, tradition, precedent, and so on. If the issue is whether people in the past used the same modalities of argument as people do today, we could just as easily conclude that the Founders were living constitutionalists.

The Founders lived in a common-law culture and they drew on existing common law methods. But they used these methods to argue about what really divided them, which was the nature of the Federal Constitution and the contrasting philosophies of strict versus broad construction.[130] Today, both originalists and living constitutionalists also draw from a shared set of

[126] *See* GIENAPP, *supra* note 1, at 164-65.

[127] *See id.* at 165-66.

[128] *Id.* at 165.

[129] *Id.* at 70.

[130] *Id.* at 170-71.

modalities of legal argument, which have their origins in the common law. But as was the case with the Founding generation, their real dispute lies elsewhere. Originalists and living constitutionalists use a common set of modalities to argue about how best to adapt the Constitution in today's world. We should not confuse common modalities with shared interpretive theories. That is as true of the Founders' world as our own.

Perhaps equally important, the philosophy of original*ism* is an "ism"—it seeks to mimic or follow an original model centuries later under changed circumstances.[131] But the Founders were not trying to follow an original model. They *were* the model. They were the *originals*, not originalists.

We understand the Constitution differently than the Founding generation did. But this does not mean that we cannot have faithful interpretations of the Constitution today. It does not mean that we should not make arguments about the text or about constitutional structure. It does not mean that we should not make arguments about the Founders' purposes and goals. It means only that we make those arguments using our contemporary legal methods. These techniques are the descendants of common-law methods employed at the Founding, but they do not have to be exactly the same methods as those used by the people who wrote and ratified the Constitution. And we do not have to share exactly the same set of assumptions as the Founders had about law, the social compact, and constitutions.

In the Talmudic story, God says that Akiva will derive heaps and heaps of laws from the figures on the letters.[132] That is not how Moses understood or interpreted the Torah. Akiva's derivation of the law is not the law's original meaning to Moses. We know this because Moses does not even understand what Akiva is teaching.[133] And Akiva's methods of legal interpretation are not the original legal methods. They are methods that emerged a thousand years later, after the destruction of two Temples, the Babylonian exile, the Roman persecutions, and the scattering of the Jews into a diaspora. Since we can't trace these methods of interpretation back to Moses, does that mean that Rabbi Akiva's methods are illegitimate? No, says the Talmud; they are Akiva's attempt to discern the purposes and commitments of the law and apply them in Akiva's own time.

B. *Fidelity Requires Creativity*

The story's second lesson about interpretation in modernity is that it is necessarily creative. Perhaps all interpretation is a bit creative, but this is especially so when we have become separated from the past. The lesson of the story is that fidelity and creativity in interpretation are not opposed. They go together; they are two sides of the same coin. One cannot be faithful to the past

[131] *See id.* at 175.

[132] Babylonian Talmud, Menachot 29b.

[133] *Id.*

without creativity, because we must translate the concerns of the past into the present. We must bring them into a world which they could know nothing about and for which they were not prepared.

One way of reading the story denies that Akiva is being creative at all. All of the laws Akiva derives are already latent in the text of the Torah, having been put there by God. The crowns on the letters serve as a sort of hidden code known only to cognoscenti. This code allows Akiva and those who follow him to understand God's intentions with respect to the content of the law. Thus, Akiva knows something that Moses does not. He can interpret the crowns, although Moses cannot.

But this is not the lesson of the story. Akiva uses the crowns to derive the laws, but he is not simply reading the laws off of the crowns. The crowns do not have a secret content that simply *means* the laws that Akiva derives.

The reason why this cannot be the lesson of the story is that the Talmudic sages often disagreed about the law, a fact that has generated its own very interesting literature in Jewish thought.[134] Some of the rabbis criticized Akiva for his hermeneutical practices, which they regarded as excessive.[135] There was a disagreement over practices of interpretation rather than a secret code known by all and understood by all.[136] Akiva was being creative in "deriv[ing] . . . mounds upon mounds"[137] of new laws from the text, and that is why other rabbis sometimes criticized him.[138]

V. THE LAW IS NOT IN HEAVEN

Moreover, the point of one of the most famous of all Talmudic stories is that the rabbis understood that they were making law to implement the Torah and not merely discovering and pronouncing God's specific meanings or intentions. The rabbis understood that they were doing far more than passively channeling divine revelation. They were being creative in order to be faithful.

[134] *See* Gideon Sapir, *Living Originalism—The Jewish Version*, 7 JERUSALEM REV. LEGAL STUD. 49, 51-56 (2013).

[135] *See* HOLTZ, *supra* note 61, at 182-84 (describing differences between the opposing interpretative schools associated with Rabbi Akiva and Rabbi Yishmael); ABRAHAM JOSHUA HESCHEL, HEAVENLY TORAH: AS REFRACTED THROUGH THE GENERATIONS 32-42 (Gordon Tucker & Leonard Levin eds., 2005).

[136] HOLTZ, *supra* note 61, at 183-84; HESCHEL, *supra* note 135, at 32-42.

[137] Babylonian Talmud, Menachot 29b.

[138] HOLTZ, *supra* note 61, at 184 (describing the story of Rabbi Akiva and the crowns as "[t]he single most dramatic example of the rabbis' own understanding of Rabbi Akiva's interpretative radicalism"); HESCHEL, *supra* note 135, at 42-43 (describing criticisms of Akiva by other Talmudic sages).

This is the lesson of the story of the Oven of Akhnai in the Gemara of the tractate Bava Metzia, which concerns the law of personal property.[139]

The two main characters of the story are Rabbi Eliezer ben Hyrcanus, sometimes called Rabbi Eliezer the Great, and Rabbi Joshua ben Hananiah.[140] Both were born in the first century C.E. and were active about a century before the completion of the Mishnah.[141] The story in the Gemara, written centuries after their deaths, treats them as legendary figures.[142]

Both Rabbi Eliezer and Rabbi Joshua were students of Rabbi Yochanan ben Zakkai, who was instrumental in preserving Jewish learning in the wake of the destruction of the Second Temple.[143] According to a famous story, when Jerusalem was under siege by the Romans, Yochanan ben Zakkai was smuggled out of the city in a coffin carried by his students, Rabbi Eliezer and Rabbi Joshua.[144] Rabbi Yochanan, who predicted that the Roman general Vespasian would soon become emperor, negotiated with Vespasian to allow him to create a school in the town of Yavneh that would preserve Jewish learning, thus laying the foundations for Rabbinic Judaism.[145] His pupils, Rabbi Eliezer and Rabbi Joshua, became two of the greatest sages of their time, intellectual rivals and close colleagues.[146] Both were teachers of Rabbi Akiva.[147] The two had complementary virtues. Rabbi Eliezer had a conservative temperament and a prodigious memory; he prided himself on

[139] Babylonian Talmud, Bava Metzia 59b. The story has attracted considerable interest among American legal scholars. *See, e.g.*, Caleb Stegall, *The Ethics of Decision-Making: Result Oriented Judging and the Oven of Akhnai*, KAN. L. REV. 593, 600-04 (2022); Judith Hahn, *'Not in Heaven'. What the Talmudic Tale on the Oven of Akhnai May Contribute to the Recent Debates on the Development of Catholic Canon Law*, 6 OXFORD J.L. & RELIGION 372, 373 (2017); Oren Gross, *Violating Divine Law: Emergency Measures in Jewish Law*, *in* EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE 52, 53 n.8 (Clement Fatovic & Benjamin A Kleinerman eds., 2013); Christine Hayes, *Rabbinic Contestations of Authority*, 28 CARDOZO L. REV. 123, 123-25 (2006); David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 CHI.-KENT L. REV. 1253, 1253 (2004). Daniel Greenwood has offered an especially detailed account of the story and its jurisprudential meaning. Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309.

[140] Babylonian Talmud, Bava Metzia 59b.

[141] Greenwood, *supra* note 139, at 312.

[142] *See id.*

[143] *Id.*

[144] Babylonian Talmud, Gittin 56a-b.

[145] *See id.* at 56b (recounting Yochanan's conversation with Vespasian).

[146] *See* HOLTZ, *supra* note 61, at 84-98; Greenwood, *supra* note 139, at 321-22.

[147] Greenwood, *supra* note 139, at 322.

never teaching anything that he had not learned from his teachers.[148] Rabbi Joshua, a political leader who negotiated with the Romans on behalf of the Jewish community, was widely regarded as the most brilliant mind of his generation.[149]

The story of the Oven of Akhnai takes its name from a dispute among the rabbis about the ritual purity of a hypothetical oven that contains layers of sand between its parts.[150] Rabbi Eliezer argued that the oven is ritually pure.[151] He argued for his views at length, but was unable to convince his colleagues.[152] To demonstrate that his view of the law was correct, he performed a series of miracles.[153] A carob tree was ripped from its roots and flew away.[154] The course of a river began to run backwards.[155] The walls of the house of study in which the rabbis debated began to fall in on them, and only the magical intervention of Rabbi Joshua prevented their complete collapse.[156] Rabbi Joshua scolded the walls, saying that when the rabbis are debating the law, it is none of their business to interfere.[157] After each marvel, the other rabbis rebuffed Rabbi Eliezer and argued that one cannot derive the law from miracles, but only from rational argument.[158]

Finally, a frustrated Rabbi Eliezer declared, "If the *halakha* [law] is in accordance with my opinion, Heaven will prove it."[159] Suddenly, "[a] Divine Voice emerged from Heaven and said: Why are you differing with Rabbi Eliezer, as the *halakha* is in accordance with his opinion in every place that he

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[148] *See* Mishnah, Pirkei Avot 2:8 ("Rabbi Eliezer ben Hyrcanus is a plastered cistern which loses not a drop . . . ."); Babylonian Talmud, Sukkah 27b-28a (explaining that Rabbi Eliezer never taught anything that he had not learned from his teachers).

[149] *See* Babylonian Talmud, Sotah 49b:16 ("From the time when Rabbi Yehoshua died, council and deliberate thought ceased, as he had the sharpest mind in Israel."); Mishnah, Chullin 59b-60a (recounting some of Rabbi Joshua's conversations with the Roman Emperor). For an admiring biographical portrait, see Joshua Podro, *A 1st-Century Jewish Sage: The Life and Teachings of Rabbi Joshua ben Hananiah*, COMMENTARY (July 1958), https://www.commentary.org/articles/joshua-podro/a-1st-century-jewish-sagethe-life-and-teachings-of-rabbi-joshua-ben-hananiah/ [https://perma.cc/NT8C-ZP96].

[150] Babylonian Talmud, Bava Metzia 59b. Different versions of the story also appear in: Jerusalem Talmud, Moed Katan 3; and Babylonian Talmud, Berakhot 19a.

[151] Babylonian Talmud, Bava Metzia 59b.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* ("The Gemara relates: The walls did not fall because of the deference due Rabbi Yehoshua [Joshua], but they did not straighten because of the deference due Rabbi Eliezer, and they still remain leaning.").

[158] *Id.*

[159] *Id.*

expresses an opinion?"[160] Rabbi Joshua (who had kept the walls from falling in) rose to his feet and responded on behalf of the other sages with a quote from the Torah: "It [The Law] is not in Heaven,"[161] but must be articulated and determined by human beings on earth.[162] As often happens in rabbinical literature, this scriptural proof is taken out of context. In Exodus when Moses says that the law is not in Heaven, he means that the law is not difficult to understand.[163]

Rabbi Yirmeya (Jeremiah) explained Rabbi Joshua's argument: "Since the Torah was already given at Mount Sinai, we do not regard a Divine Voice, as You already wrote at Mount Sinai, in the Torah: 'After a majority to incline.'"[164] That is, in disputes among the rabbis, the proper interpretation of the law must be decided by a vote of the majority, because the Torah says "after a majority to incline."[165] Once again, it is worth noting that this quotation is taken out of its original context. The actual text of Exodus says that one should not incline to the majority to commit injustice.[166]

The story of the Oven of Akhnai explains how the rabbis who wrote the Talmud justified their authority to expound the law in a time of uncertainty and exile from an older world that had passed away. Like the story of Rabbi Akiva, the story of the Oven of Akhnai reflects the modernist sensibility of the Gemara. In rejecting the authority of Rabbi Eliezer's miracles—and even a voice from Heaven—the story affirms that the age of direct revelation had ended. The legend of the Oven of Akhnai recognizes the deep discontinuity in Jewish history that the rabbis faced. The Temple, which had been the center of Jewish worship for centuries, had been destroyed, and the Jews had been scattered.[167] The world of the past was gone. If Judaism was to survive, its future rested with Rabbinic Judaism, in which successive generations of people educated in the tradition attempted to derive the law from textual exegesis and

[160] *Id.* As Daniel Greenwood wryly remarks, this moment in the story is "the ultimate fantasy" of originalist theory. "[T]he Founding Father has told us what He meant." Greenwood, *supra* note 139, at 314. Moreover, "we know not only what He intended at the time of promulgation but what He intends now, on both the specific issue and on the general level. All the difficult interpretive issues have been resolved." *Id.*

[161] Babylonian Talmud, Bava Metzia 59b (quoting *Deuteronomy* 30:12).

[162] Babylonian Talmud, Bava Metzia 59b.

[163] *Deuteronomy* 30:11-12 (New Revised Standard Version) ("Surely, this commandment that I am commanding you today is not too hard for you, nor is it too far away. It is not in heaven, that you should say, 'Who will go up to heaven for us, and get it for us so that we may hear it and observe it?'").

[164] Babylonian Talmud, Bava Metzia 59b (quoting *Exodus* 23:2).

[165] *Id.*

[166] *Exodus* 23:2 (New Revised Standard Version) ("You shall not follow a majority in wrongdoing; when you bear witness in a lawsuit, you shall not side with the majority so as to pervert justice.").

[167] HOLTZ, *supra* note 61, at 25-26.

rational argument. The future would have to conserve what was valuable in the past and translate it into the present.

The Gemara then imagines God's reaction after the rabbis rejected Rabbi Eliezer's miracles and even the voice from Heaven:

> Rabbi Natan encountered Elijah the prophet and said to him: What did the Holy One, Blessed be He, do at that time . . . ? Elijah said to him: The Holy One, Blessed be He, smiled and said: My children have triumphed over Me; My children have triumphed over Me.[168]

This passage imagines one of the key redactors of the Mishnah[169] in conversation with one of Judaism's greatest prophets (as well as the harbinger of the Messiah).[170] The prophet Elijah reports that God indirectly approves of the Rabbis' creative lawmaking authority. Although God calls it a defeat, his smile conveys that he is pleased with his children's cleverness.

The tale then shifts to an extended parable which tells the tragic consequences that occurred after Rabbi Eliezer stubbornly refused to accept the ruling of the majority. The other rabbis overreached. They ostracized and exiled Rabbi Eliezer.[171] But, given his magical powers, they were afraid to tell him so.[172]

Finally, Rabbi Eliezer's beloved student, Rabbi Akiva, dressed in mourning garments, agreed to convey the bad news.[173] Rabbi Eliezer, in righteous anger, performed still more miracles, destroying much of the world's crops[174] and creating a storm at sea.[175] Eventually he prayed for the death of Rabban

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[168] Babylonian Talmud, Bava Metzia 59b.

[169] *See* Babylonian Talmud, Bava Metzia 86a (describing Rabbi Yehuda HaNasi and Rabbi Natan as "the end of the Mishna, i.e., the last of the *tanna'im*, the redactors of the Mishna").

[170] DANIEL C. MATT, BECOMING ELIJAH: PROPHET OF TRANSFORMATION 2 (2022) ("He helps the poor, rescues those in danger, defends Israel from its enemies, and will one day redeem the whole world by heralding the Messiah.").

[171] Babylonian Talmud, Bava Metzia 59b.

[172] *Id.*

[173] *Id.* ("Rabbi Akiva, his beloved disciple, said to them: I will go, lest an unseemly person go and inform him in a callous and offensive manner, and he would thereby destroy the entire world.").

[174] *Id.*

> The Gemara relates: His eyes shed tears, and as a result the entire world was afflicted: One-third of its olives were afflicted, and one-third of its wheat, and one-third of its barley. And some say that even dough kneaded in a woman's hands spoiled. The Sages taught: There was great anger on that day, as any place that Rabbi Eliezer fixed his gaze was burned. *Id.*

[175] *Id.* According to the story, the storm threatened a boat containing "Rabban Gamliel, the *Nasi* of the Sanhedrin at Yavne, the head of the Sages who were responsible for the decision to ostracize Rabbi Eliezer." *Id.* Rabban Gamliel recognized that the storm "is only for the sake of Rabbi Eliezer ben Hyrcanus, as God punishes those who mistreat others." *Id.*

Gamliel, the head of the Sanhedrin (rabbinic assembly) that had ostracized him, and the prayer was answered.[176] The story ends with the statement by Rabbi Eliezer's wife (and the sister of Rabban Gamliel), Imma Shalom ("Mother Peace"), that although all the gates of Heaven may be locked, they are still open to the prayers of those who have been mistreated.[177]

The second lesson of the story is as important as the first lesson that the law is no longer in Heaven. Indeed, the two lessons go together. Because the majority will decide what the law is, it is crucial to be civil in disagreement and kind to those in the minority. Those who lose in a dispute over the law must be treated with courtesy and respect even though their views do not win out. Human beings are fallible, and their judgments may be wrong or only partially correct. If the law is no longer in Heaven but is to be produced through the exercise of human reason, people must adhere to a morality of decency and mutual respect in argument.

CONCLUSION

Gienapp argues that once people recognize originalism as a modernist reconstruction of the past, and as a conservative form of living constitutionalism, it will lose its aura of legitimacy.[178] I am not so sure about that. After all, non-originalists continue to make arguments from original meaning and purpose even though they do not accept the ideological apparatus of conservative originalism. Arguments from text, history, and structure are no less anachronistic when non-originalists make them. Yet non-originalists treat these arguments as having persuasive value as part of a larger practice of faithful interpretation. And they are right to do so.

There is a second reason to doubt that Gienapp's critique will successfully undermine originalism's legitimacy. I have argued that "[c]onservative originalism has succeeded not because it is apolitical or methodologically coherent. It has succeeded because it constructs memory and gives voice."[179] It gives people "a way to connect their vision of the world to the authority of the Constitution, and to articulate their political objections in terms of fidelity to the Constitution."[180] Far from being fixed and constraining, conservative originalism has allowed movement conservatives to express their changing values and commitments through the language of constitutional law. And such a practice of argument is valuable not only to conservatives; it is valuable to everyone who wants to argue from the meaning of the past. If liberals and

So he "stood on his feet and said: Master of the Universe . . . [I acted only] for Your honor, so that disputes will not proliferate in Israel. In response, the sea calmed from its raging." *Id.*

[176] *Id.*

[177] *Id.*

[178] GIENAPP, *supra* note 1, at 214-15.

[179] BALKIN, *supra* note 37, at 174.

[180] *Id.*

living constitutionalists want to displace conservative uses of the Constitution "with a successful living constitutionalism of their own, they must find a way to articulate their vision of social life and connect that vision to the Constitution."[181] Their task must not be to disown the past, but to show how the best versions of the American constitutional tradition live in their commitments and values today.

For all these reasons, I suspect that taking aboard the lessons of Gienapp's book would not end the practice of making originalist arguments any more than the story of Rabbi Akiva and the crowns or the story of the Oven of Akhnai have undermined the work of Rabbinical Judaism. Quite the contrary: these stories, subversive though they may appear, are two of the most celebrated in the Talmud. They tell us that, distanced as we are from the origins of our traditions, and through centuries of change and upheaval, our work must continue, even and especially if we recognize its constructed character. That is how we perform the practice of fidelity.

The best approach to constitutional interpretation would be one that recognizes our distance from the Founding but remains committed to developing and redeeming the Constitution in our own time. Such an approach would maintain commonality with the past by acknowledging our difference from the past. It would recognize that the Constitution does not change without formal amendment and yet constantly changes. It would embrace both of the modernist strategies by which Americans adapt their ancient constitution to a constantly changing world. It would, in other words, be a living originalism.

[181] *Id.*