

IS IT TIME TO REWRITE THE CONSTITUTION? FIDELITY TO OUR IMPERFECT CONSTITUTION

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INTRODUCTION

Is it time to rewrite the Constitution? We should break this question down into two parts: (1) is it time to rewrite the Constitution by adopting particular amendments?, and (2) is it time to throw out the Constitution and write a new one by holding a constitutional convention, as Sandy Levinson has urged?¹

A further question is to what extent does the Constitution, and our constitutional practice under it, already permit or require “rewriting” as we build out our framework of constitutional self-government over time? Despite claims by some originalists that the formal amending procedures of Article V are the exclusive legitimate means for changing the Constitution, living constitutionalists like David Strauss and Bruce Ackerman have gone so far as to argue that formal constitutional amendments are largely irrelevant to such change. Strauss argues that common law constitutional interpretation, not amendment through the formal procedures of Article V, has been our primary means for constitutional change.² Ackerman argues that the six-phase higher lawmaking procedures outside Article V that he elaborates have been the primary means whereby We the People have “hammered out” such changes.³ To the extent that living constitutionalists like Strauss and Ackerman are right, perhaps we do not need formally to rewrite the Constitution to realize constitutional change. Perhaps we already do well enough through “rewriting” it informally.

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1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

2. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

3. BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 43–47 (2014).

For that very reason, conservatives and libertarians like Richard Epstein have bemoaned that progressives already have “rewritten” the Constitution, expanding governmental powers and eviscerating economic liberties.⁴ Similarly, conservative originalists like Robert Bork and Antonin Scalia have complained that liberals already have “rewritten” the Constitution, reading “unenumerated” personal liberties into it.⁵ And libertarian originalists like Randy Barnett have called for “restoring the lost Constitution” by undoing the progressive and liberal “redactions.”⁶

This Essay is part of my book in progress, *Fidelity to Our Imperfect Constitution*,⁷ in which I reject all forms of originalism and recast the best forms of living constitutionalism. Instead, I defend what Ronald Dworkin has called a “moral reading” of the American Constitution⁸ and what Sotirios A. Barber and I have called a “philosophic approach” to constitutional interpretation.⁹ By “moral reading” and “philosophic approach,” I refer to conceptions of the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices, and of interpretation of those principles as requiring normative judgments about how they are best understood, not merely historical research to discover relatively specific original meanings. I argue that the moral reading, not any version of originalism or living constitutionalism, is the most faithful to the Constitution’s commitments.

In my book, *Securing Constitutional Democracy*, I characterize my approach as a “Constitution-perfecting theory” (my term) under which we should interpret the Constitution so as to make it the best it can be (Dworkin’s formulation).¹⁰ That is not to say that we should interpret it as a perfect Constitution. Rather, whatever imperfections our Constitution and our constitutional practice under it may have, we should

4. RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

5. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

6. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

7. JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (forthcoming 2015) (on file with author). © 2015 by Oxford University Press, Inc. By permission of Oxford University Press, USA. For information on Oxford University Press, see OXFORD U. PRESS, <http://global.oup.com/?cc=us> (last visited Apr. 8, 2015).

8. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2–3 (1996).

9. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS*, at xiii, 155 (2007).

10. JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

interpret it in its best light. Constitution-perfecting approaches like Dworkin's and mine, while not interpreting the Constitution to make it perfect, nonetheless mitigate some of its imperfections by aiming for what Levinson has called "happy endings."¹¹ Furthermore, we adopt and strive to maintain an attitude of fidelity to our imperfect Constitution.

Proponents of views like Dworkin's and mine may be less ready than some others to argue that we should rewrite the Constitution as a whole—to throw out the Constitution and adopt a new one. This notwithstanding the fact that we recognize many imperfections in our Constitution and constitutional practice. We also may be less likely than some others to argue for adopting a number of specific constitutional amendments.

But even under a Constitution-perfecting theory, and even with an attitude of fidelity to our imperfect Constitution, we might conclude that it is time to rewrite the Constitution in certain circumstances. And so, let us return to the opening question: Is it time to rewrite the Constitution? The answer depends upon our judgments concerning: (1) whether the Constitution has failed, (2) whether it has contributed to incorrigible breakdown or dysfunction, (3) whether it is irredeemably undemocratic or unjust, and (4) whether the prospects for reform and improvement through rewriting the Constitution are good. In my fuller paper, which will be a chapter in my book, I address such issues.

I. STRATEGIES FOR RESPONDING TO IMPERFECTION

In confronting (real or arguable) constitutional failure, dysfunction, democratic deficits, and injustice, we need strategies for responding to imperfection (to recall the title of a book edited by Levinson).¹² These strategies may include convening a constitutional convention or adopting specific formal constitutional amendments through the procedures of Article V. But, I argue for less formal strategies: (1) developing informal constitutional amendments over time (e.g., through Strauss-style common law constitutional interpretation or Ackerman-style higher lawmaking outside the procedures of Article V); (2) interpreting the Constitution so as to make it the best it can be (Dworkin's moral reading) or to fulfill its promises (Balkin's living originalism); and (3) working around imperfections through what I have called "successful failures," whereby the features of a Constitution fail to work as contemplated or

11. See Colloquy, *Fidelity as Integrity*, 65 *FORDHAM L. REV.* 1357, 1358 (1997) (statement of Sanford Levinson).

12. *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

designed, but we comprehend that that failure turns out to be a good thing.

Under these strategies for responding to imperfection, we adopt and strive to maintain an attitude of fidelity to our imperfect Constitution. We conceive the Constitution as a framework of general powers and abstract rights, as an instrument for pursuing the ends proclaimed in the preamble and honoring the Constitution's commitments. (Here I deliberately echo and invoke the work of Barber.) We approach the Constitution as an "experiment" in constitutional self-government, a scheme to be built out over time, not a fully finished structure to begin with. We appreciate that the building is never complete—that the Constitution "will always be building," as Charles Black put it.¹³

As discussed above, Levinson's response to dysfunction and the democratic deficit (as he sees it) is to call for rewriting the Constitution through holding a constitutional convention.¹⁴ My response to such imperfections—beyond arguing for applying a Constitution-perfecting theory, with an attitude of fidelity to our imperfect Constitution—is to call for "rewriting" the constitutional culture, as it were. For a muscular argument along these lines, read Barber's important and provocative new book, *Constitutional Failure*.¹⁵ Barber goes so far as to argue that the Constitution has failed—or is in danger of failing—not because of the institutional failure that Levinson and others have lamented, but because of "attitudinal" failure.¹⁶ Barber forcefully argues that Madison's strategy of supplying the defects of better motives through checks and balances and relying upon private incentives—rather than through cultivating the virtues and attitudes in citizens that are necessary for successful constitutional self-government—has failed.¹⁷ I have addressed such matters in my book with Linda McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues*.¹⁸ There we argue for a "mild perfectionism," a formative project of inculcating civic virtues and cultivating the capacities required for constitutional self-government.¹⁹ Like Barber, I would argue that it is in virtues, attitudes, and capacities, not in the "hard-wired features" of the Constitution as such, where the greatest failures of our constitutional order lie. Barber cites our book as

13. Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 337, 343 (Randy E. Barnett ed., 1989).

14. See LEVINSON, *supra* note 1 and accompanying text.

15. SOTIROS A. BARBER, *CONSTITUTIONAL FAILURE* (2014).

16. *Id.* at 24.

17. *Id. passim*.

18. JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013).

19. *Id.*

among those sources offering some hope for American constitutionalism (despite what he sees all around as the evidence of constitutional failure).²⁰

Here I would make two further points. One, we may not be able to rewrite the Constitution successfully without “rewriting” the constitutional culture to begin with—otherwise, good proposals most likely would fail to be made or even if made, would fail to be adopted. Second, once we “rewrite” our constitutional culture—so as more effectively to inculcate the civic virtues and capacities necessary for successful constitutional self-government—we may not need to rewrite the Constitution, whether by specific amendments or a constitutional convention. Instead, applying a Constitution-perfecting theory, with an attitude of fidelity to our imperfect Constitution, we might be able to do well enough by interpreting the Constitution we have so as to make it the best it can be.

At the same time, if we take the view that “the preeminent constitutional virtue is not fidelity to a given constitution but the moral and intellectual capacity to make and reform constitutions”—as Barber, invoking Murphy, has argued in *Constitutional Failure*²¹—we might more readily conclude that we should rewrite the Constitution. Or at any rate that we should “rewrite” the constitutional culture in order to cultivate liberal virtues (as Stephen Macedo has argued)²² and foster the capacities for constitutional self-government (as McClain and I have argued).²³ These virtues and capacities may be necessary to “supply the defect of better motives”—contrary to Madison’s strategy of checks and balances and private incentives—if we are to attain or maintain a Constitution that would be worthy of our fidelity.

20. BARBER, *supra* note 15, at 142 & n.51 (citing FLEMING & MCCLAIN, *supra* note 18, at 4–11, 54–68, 87–91, 113–21).

21. *Id.* at 111 & n.1 (citing WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 15–16 (2007)).

22. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990);

23. *See* FLEMING & MCCLAIN, *supra* note 18.