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Fidelity and Constitutional Aspirations

Cover Page Footnote

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FIDELITY AND CONSTITUTIONAL ASPIRATIONS

*Sotirios A. Barber**

IN his contribution to this Symposium Professor Balkin cautions writers who emphasize constitutional aspirations not to ignore the historical deals and the positive constitutional doctrines that protected and still protect some large injustices in America.¹ This is good advice. Because one aspires to become what one is not, aspirations have a mixed structure. They can't help giving some expression to one's worse self along with one's better self. As an aspirational expression, the Constitution speaks for a culture whose aspirations presuppose its imperfections, and the Constitution may well be imperfect by its own standards. It can be expected to give legal form some of the very vices whose causes it would cure or whose effects it would control.

As inseparable as the noble and the base aspects of our constitutional politics may be, constitutional interpretation should take its guidance from "the better angels of our nature." Constitutional interpretation seeks to make sense of a text, and making sense of a prescriptive political text requires relating it to some plausible and attractive version of the common good. You might say that interpreting the Constitution is a way of trying to make it, and therefore the nation, look good. And the ends of interpretation should shift its focus away from sources like legislative histories and the notes of constitutional conventions and toward preambulatory statements and public-spirited theories of the Constitution like those in *The Federalist* and Lincoln's First Inaugural.

With these observations I would restate and to some extent amend parts of Professor Balkin's argument:

The ends of constitutional interpretation require that we view the constitutional text as adumbrating an ideal way of life that defines the nation's aspirations. Lincoln took such an approach when he argued that the Constitution put slavery "in the course of ultimate extinction" and that its original compromises with slavery were the temporary expedients of an imperfect situation. Fidelity to an aspirational constitution requires that we confront and overcome the imperfections in ourselves that the Constitution presupposes, including even provisions of the constitutional document that might obstruct progress toward constitutional ends. Thus, to secure union, Lincoln found ways partly to defeat constitutional barriers to the national government's aboli-

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1. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703 (1997).

tion of slavery. When all's said and done, we will find that we all take some variation of Lincoln's approach to constitutional interpretation.

Consider what's going on when we pretend to view the Constitution as indifferent to good and evil results—as the edict of some historical sovereign or as a set of processes (institutional or natural) for achieving and maintaining any number of states of affairs, including some that are unjust or evil. Outsiders of various sorts—scientific observers, for example, some legal “dualists,” or political opponents of the Constitution—may describe the Constitution this way, but these outsiders can't be true to themselves while interpreting the Constitution for civic purposes. Proceduralists, originalists, and other insiders who would interpret the Constitution for the constitutionally faithful have no option beyond some variation on Lincoln's approach. Proceduralists thus assume that on the whole, or on balance, and despite initial appearances, it really is good to admit opportunities for injustice on some retail or nonsystemic levels for the sake of some larger ultimate good, like liberal (read “bourgeois”) democracy. And originalists typically argue that nonoriginalism risks social turmoil and elitist tyranny that they assume to be worse than the racism, sexism, and economic injustice that many nonoriginalists would ameliorate.

Try to avoid thinking aspirationally or in terms of praiseworthy results and you'll either find yourself repairing to a metaethics that excuses you from assessing political phenomena in moral terms, or you'll find yourself saying one thing and believing another about what is just and good. The metaethical move lands you outside the practice of constitutional interpretation with nothing relevant to say to those who think and act inside the practice. And pretending that the unjust is just brings what Professor Balkin calls cognitive dissonance and probably an eventual loss of self respect. An aspirationalist understanding of the Constitution is thus the only one from which one can hope to justify fidelity to the Constitution.

But an aspirational understanding, properly understood, can't guarantee fidelity to the Constitution. Far from it. Our best understanding of the Constitution can still be no more than the prescriptive counterpart of a mere conception of the good or just society, the end in whose light the document makes sense. Don't forget that the constitutional document refers to itself in instrumental terms and dedicates itself to ends like *justice* and the *general welfare*, not to anyone's conception thereof. As humanly contrived means to presumably real ends in an unpredictable world, the Constitution is not merely open to the possibility of failure; it will fail eventually, and everyone knows it will fail eventually. Fidelity to the Constitution should therefore be provisional and contingent on our ability continually to reaffirm it for what it expressly says it is: an instrument of justice and the general welfare. In a sense, we can't be faithful to the Constitution; we can at best only strive to be faithful to the Constitution. Fidelity to this Con-

stitution means working for the philosophic knowledge, scientific knowledge, legal and political reform, and concrete social conditions needed to vindicate the Constitution's claim to be an instrument of justice and the general welfare. Fidelity turns out to be a very tall order indeed, too tall for hopes of ultimate success, too tall for anything short of epic tragedy.

What constitutes constitutional failure is a complex and neglected question of constitutional theory whose answer depends in part on a successful theory of constitutional ends. At a time when realism and constructivism in ethics have neutralized skepticism and subjectivism, I see no compelling reason to conclude that the needed theories are impossible. Nor is it clear that ideological divisions foreclose a convergence of scholarly opinion on significant aspects of such theories. We can't know the outcome of our efforts before we make them, especially since convergence on some issues may be more than merely possible. One such issue is whether the Constitution is a mere "charter of negative liberties." The negative-liberties doctrine should be easy to refute among those willing to debate, and when it is refuted observers on all sides should be willing to consider whether millions of impoverished children, a permanent underclass, and perhaps a permanently depressed and immobile working class indicate the failure of the Constitution as an instrument of justice and the general welfare.

Described formally, constitutional failure (of one kind) is the inadequacy of constitutional means to constitutional ends. Lincoln seemed to feel, for instance, that because he couldn't act successfully to preserve the Union by honoring the most plausible reading of the power to suspend habeas corpus, the Constitution obligated him to distort the provision. Lincoln thus acted as if fidelity to the Constitution demanded violation of the Constitution in order to achieve or preserve the conditions of constitutional authority and coherence. Because such a judgment may in appropriate circumstances hold for any and even all operative constitutional provisions, perhaps an important form of fidelity should be described less in terms of institutional responsibilities than in terms of practical virtues not fully reducible to legal form. If so, constitutional theory should reconsider Madison's proposal for achieving constitutional ends chiefly through a system of countervailing private incentives. Public-spiritedness, practical wisdom, political trust, and their social, economic, and political infrastructures seem also to be needed.

In the end constitutional fidelity may require the cultivation of certain human types. As a step toward discovering what types, we might consider whose fidelity we ourselves would value. We would want most the fidelity of persons who are fully capable of criticizing us and moving on to something better. We would need the fidelity of such people to assure us that we deserve anyone's fidelity. We can't be confident the Constitution deserves our fidelity unless we believe that

we can do better than the Constitution if we have to—unless we believe that the nation can still produce critics, movements, and resulting constitutional reforms on the order of those associated with Lincoln if not Madison.

If we still have the capacities in us, we have a good Constitution, one that deserves our fidelity. We will know eventually.