Deferentialism, Living Originalism, and the Constitution
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Today I will contrast my improvement on Originalism, which I call “Deferentialism,” with Jack Balkin’s Living Originalism. 1 Deferentialism articulates correctness criteria for the interpretation of legal texts by legally authorized judicial actors. The theory rests on three claims.

(i) The legal content of a statute or a provision of a written constitution cannot be identified with either the semantic content of the text or the legal or political rationale for its passage; it can be identified with what was asserted or stipulated by lawmakers or ratifiers in passing or approving it. This is what a reasonable person who understood the linguistic meanings of the words in the text, the publicly available facts, the recent history of the lawmaking context, and the background of existing law into which the new law is expected to fit would take to have been asserted or stipulated in adopting the text.

(ii) In applying the law to the facts of a case, the legal duty of a judge is to reach the verdict determined by the asserted or stipulated content, unless (a) that content is vague and, as a result, it doesn’t determine a definite verdict, or (b) the content, surrounding law, and the facts determine inconsistent verdicts, or (c) the contents and facts are inconsistent with the rationale of the law, which is the chief purpose that proponents of the law advanced to justify it.

(iii) In cases of type (iia-c), the judicial authority must make new law by articulating a minimum change in existing law that maximizes the fulfillment of the original rationale for the law.

Elsewhere I have argued that Deferentialism is normatively superior to, and descriptively more accurate than, its competitors. 2 The descriptive claim is based on the separation of powers, which is rooted in American tradition, embedded in federal and state constitutions, and widely accepted today. The normative claim is that more expansive conceptions of the judiciary put too much legislative authority beyond the reach of democratically elected representatives, and, in so doing, put the integrity and competence required for faithful judging at risk by investing too much authority to change the law in those whose task is to impartially decided what its content is.


2 “Deferentialism: A Post-Originalist Theory of Legal Interpretation.”
Deferentialism is a narrowly circumscribed theory of criteria governing statutory and constitutional interpretation by American judges. Because the same principles govern both, the differences between the two types of interpretation are due to differences between constitutions and statutes. Although some constitutional provisions are precise and determinate, others are sweeping generalizations couched in vague and abstract language. As a result, their application to new cases in unforeseen circumstances is often less than fully determinate, with judges called upon to modify their contents based on their similarly sweeping rationales. By providing criteria for making such changes, Deferentialism delimits one form of legitimate constitutional change outside the amendment process. But it is not a theory of all such change. The practices of key governmental actors – to initiate military action, to pass national civil rights legislation, to provide sweeping new systems of services, to make recess appointments to fill vacancies that didn’t occur during a recess, to make unilateral changes in legislation without congressional approval, and the like – may, if unchecked, adjust constitutional boundaries. Such practices don’t fall within the scope of Deferentialism, except to the extent that courts may, and sometimes must, recognize the new constitutional content they generate.

The deferentialist conception of judicial modification of constitutional content is the natural consequence of four basic truths. (i) The Constitution contains sweeping principles the contents of which encompass both a determinate core and an indeterminate periphery. (ii) To apply this content to new circumstances requires periodic adjustments of content. (iii) Making these adjustments requires the combination of expert knowledge and authority possessed only by the Supreme Court. (iv) Because the Court does not have the constitutional authority to act as an independent political body, the adjustments it makes must be aimed at preserving the core assertive contents of
constitutional provisions to the maximum extent possible, while authorizing only those changes that
further the fulfillment of the original rationales of constitutional provisions.\(^3\)

Deferentialism’s single-minded focus on the role of the judiciary contrasts with Balkin’s
living originalist theory, which provides no explicit criteria reserved for the judiciary in guiding its
application of the Constitution to difficult cases. Instead, his general remarks are aimed equally at
all political actors, including ordinary citizens, who seek to further the founding project launched by
both the Declaration of Independence and the Constitution.\(^4\) Despite this difference in scope and
intent, the two theories both insist on what they call \textit{fidelity to the Constitution}. Deferentialism
requires fidelity to asserted or stipulated contents and their original rationales. Living Originalism
requires fidelity to “original meanings” of those provisions, which, Balkin insists, neither determine
nor are determined by, the way the original framers expected them to apply to particular cases.

This terminological difference between the two theories signals no practical difference when
constitutional provisions are highly determinate, which Balkin calls “rules.” Examples are “there

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\(^3\) What happens when the assertive content is (relatively) clear, but the rationale is attenuated or nonexistent? The
Second Amendment is such a case. \textit{A well, regulated militia, being necessary to the security of a free state, the right of
the people to keep and bear arms, shall not be infringed.} Its content is given by the main clause, its rationale by the
dependent clause. The content stipulates that the federal government can’t impose a ban on guns and similar weapons.
But it remains vague and subject to future precisification what counts as “arms” and what “infringing” on the right to
bear them amounts to. The stated rationale provides guidance. Militias in 1791 were typically voluntary organizations of
citizens armed to protect themselves, to keep order, to be available for military duty in emergencies when called up by
the state, and even to guard against a tyrannical federal government. An argument can be made that this means that
weapons reasonably serving those or similar functions today can be born by citizens, subject to regulation, while other
weapons, like guided missiles and atomic bombs, have no constitutional protection. Although this is reasonable, it could
be countered that since there are no longer militias in the original sense, and hence no rationale for the asserted content
to fulfill, that content can be disregarded as fulfilling no constitutional purpose. Since this too is not unreasonable, the
issue is a gray area for Deferentialism. For my own part, I am inclined to think that the continued value of armed
citizens capable of protecting themselves and others is a surviving remnant of the stated rationale, which, together with
the priority of stated content over rationale, preserves the Second Amendment guarantee. (See also Balkin’s discussion
on pp. 206-07 of the place of the Second Amendment in the application of constitutional guarantees to the states, and
the changed view of its rationale in the minds of the framers and ratifiers of the Fourteenth Amendment in 1868.)

\(^4\) See chapters 4 and 5 of \textit{Living Originalism}, including the reference to the Declaration of Independence on pp. 76, 84.
Whereas Deferentialism seeks to specify the nature and limits of the legal authority and obligations of the judiciary in
applying constitutional law, Living Originalism sees what it calls “interpreting the Constitution” as a historical process
of individual, group, and national self-definition that requires a normative attitude of “attachment” to the Constitution
and “faith in the constitutional project, which is also faith in its redemption through history.” (p.74)
are two houses of Congress,” “each state has two senators,” and “if no candidate receives a majority of the Electoral College, the President is determined by a vote in the House of Representatives, where each state gets a single vote; in similar circumstances the Vice President is determined by the Senate.” When applied to these provisions, Balkin’s original meaning and my asserted or stipulated content yield equivalent results. This is significant. Balkin realizes that some “constitutional rules” may be neither normatively optimal nor even consistent with the overall democratic spirit of the Constitution – e.g., the rules that each state, no matter what size, is to be represented by two senators, that each has a single vote in the House to determine the President in case of an Electoral College tie, and that the Senate selects the Vice President in such cases. It’s not hard to imagine arguments for changing these rules based on fairness, equality, or the need to bring our governing principles up to date. Yet, Balkin maintains, they can’t be changed by judicial interpretation, no matter how desirable that might be. Why not?

His answer is that the Constitution is the law, which, like other law, including later constitutional constructions that grow up in the space created by the constitutional framework, remain in force until repealed. I agree. How, in a nation of laws not subject to explicit time limits, could it be otherwise? What about provisions Balkin calls “standards and principles”? Though subject to more indeterminacy than “rules,” surely they too have core determinate contents. Don’t those also deserve fidelity? I think so, and, to a degree, he does too, but it is unclear to what extent he takes “principles and standards” to have determinate content, or what fidelity to it amounts to.

Addressing this point, he says:

“Sometimes it is difficult to produce a rule to cover a wide variety of future situations, and so a standard or principle must do. Thus, choosing a standard or principle normally means that adopters are delegating the task of application to later generations...If adopters cannot use hardwired rules but do not want to delegate so much to future generations they can choose

5 Living Originalism, p. 55.
historical principles or historical standards...For example, adopters can choose language like “Congress shall make no law abridging the freedom of speech as understood at the time of the adoption of this Constitution”...To be faithful to such a norm, later generations must ask how such a principle would apply according to the understandings of the previous time. Generally speaking...the U.S. Constitution does not use this type of language. And this fact is quite important to constitutional construction today.”6

Balkin’s message is that because the Constitution doesn’t use historical principles or standards, it delegates the determination of the legal contents of its principles and standards to later generations. To whom does it delegate?7 To presidents, congresses, Supreme Court majorities, citizens, or all of them? Although his answer is “all of them,” surely, whatever is delegated to others, the Court is the central locus of authority to create law by applying constitutional principles and standards. Thus, we need to know what it is expected to apply and what it has been granted the authority to do. For Balkin the Court applies linguistic meanings of constitutional principles and standards. When such meaning hasn’t changed over time, the Court may apply what he calls their, rather than the framers’ understanding, of that meaning. It will, he says, “inevitably interpret according to contemporary “meaning” in the sense of contemporary applications...As a result, vague and abstract clauses will likely reflect contemporary understandings rather than original understandings...[This] is consistent with the preservation of the original semantic meaning of enacted laws over time.”8

What are these things called different understandings of the same meaning?

One might imagine that different understandings are what is asserted or stipulated by different uses of the same constitutional text. This would have two virtues. First, the asserted content of a use of a constitutional clause is what those who use it are committed to, and what they intend to guide the actions of others – which is what we are after when the Constitution is used to

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6 Ibid., p. 40. My emphasis on all italicized expressions except ‘historical’.
7 Balkin’s understanding of the open-endedness of constitutional interpretation, construed as involving the delegation of broad authority to future generations is essentially connected to his picture, sketched in note 4 above, of constitutional interpretation as process of national self-definition requiring faith in future generations.
8 Ibid. pp. 43-44. My emphasis on ‘understandings’. 
stipulate what is permissible. Second, identifying interpretive understandings with asserted content fits our theoretical understanding of the relationship between meaning and assertion. It is now a commonplace in the study of language that the linguistic meaning of a sentence cannot, in general, be identified with what is asserted by literal uses of it. The asserted content of a use of a sentence is the joint product of its linguistic meaning plus special circumstances of the context of use, including the shared presuppositions of the participants. This joint product is what one’s linguistic performance commits one to and what knowledgeable hearers reasonably take one to be committed to. It is also what different parties jointly commit themselves to when they agree on a plan, sign a contract, or ratify a constitution. In the constitutional case, it is the law to which we must be faithful. But now there is a problem, for if the framers’ understanding of the text is the assertively stipulated law to which we must be faithful, then Balkin is wrong in insisting that it is not the framers’ understanding, but the original linguistic meaning, to which we must be faithful.

The problem is unavoidable as long as we recognize, (i) that what we must be faithful to is the law, (ii) that the asserted content of a provision is the law because it is what the framers and ratifiers committed themselves to, and (iii) that this content can’t, in general, be the meaning of the text used to assert it, because the latter was only one of two main factors determining the content. Short of disputing this third, linguistic, point, the only way out for Balkin is to maintain that although the asserted content is what framers and ratifiers agreed to, not it, but the original meaning of their words, is the law to which we must be faithful. According to this position, the linguistic meaning of a provision is what must be preserved, even if the content of the agreement resulting

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from its original use is dramatically at odds with the content it is used by political actors today to assert or stipulate. Against this, I maintain that what we, as a people, care about are the contents of our agreements – the promises made and guarantees issued – rather than the preservation of the linguistic modalities used to make or issue them.

The chief problem with *Living Originalism* is that it lacks the analytic middle ground provided by *asserted or stipulated content*, which stands between the unspecific linguistic meanings of abstract clauses and the over-specific mass of policy hopes and expectations of political actors who use them. Realizing that expected applications are too specific to be touchstones of our fidelity, Balkin equivocates. Sometimes his talk of original meaning tracks what is really asserted content; at other times it picks out genuine, under-specified, linguistic meaning that only partially determines such content. Instances of the former, which include several insightful analyses of key constitutional issues, give the impression that *Living Originalism* is a version of Originalism.\(^\text{10}\) Instances of the latter give the impression that it is also a version of *Living Constitutionalism*. Though this impression is understandable, it’s not accurate. No univocal theory is a version of both.

In what follows I compare Deferentialism and *Living Originalism* on a few well-known constitutional issues. I begin with the passage in which Balkin suggests there is a lesson in the fact that the framers didn’t use time-specific language like, “Congress shall make no law abridging the freedom of speech as understood at the time of the adoption of this Constitution.” The lesson, he seems to suggest, is that they intended to *delegate* to future generations the authority protect the speech and communication they would call free speech. This sounds as if what is delegated is the authority to protect all and only the speech and communication that *future generations think should*

\(^{10}\) See the discussions of the compact clause, the commerce clause, and the privileges or immunities clause. The discussion of the *necessary and proper* clause also belongs here, though what is really going on may be a revision of asserted content to bring it in line with its rationale in the manner of the Deferentialist principle (iic) above.
be free. This won’t do, if, as I assume, the content to which we must be faithful includes, even if it isn’t exhausted by, the specific freedoms presupposed by the framers and ratifiers.

Here is a portion of the First Amendment.

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…*

What is a law respecting the establishment of religion, and what is it to abridge the freedom of speech or the press? There is, I think, no case for identifying what was stipulated in ratifying the amendment with its linguistic meaning.\(^{11}\) The First Amendment doesn’t tell us that Congress shall make no law of any kind applying to a religious institution and no law restricting any form of speech. The key words are ‘establishment’ and ‘abridging’. Citizens of the newly independent states knew what an established, or official state religion was. Indeed, several states had versions of one.\(^{12}\) Hence the core asserted content of the establishment clause was (i) that the federal government must not interfere with the established religions in any of the states, and (ii) that it must set up an official national religion, or endow any sect with any of the essential trappings of one. This is what cannot be transgressed without constitutional amendment no matter what “new understandings” may arise from whatever religious revivals may lie in our future. There is nothing in the establishment clause that dictates complete neutrality toward religion vs. nonreligion, or even among all religions (provided all are free to practice).\(^{13}\) If some wish to guarantee such neutrality, they should amend the Constitution, because neither the asserted content of the Amendment nor its rationale requires it.

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\(^{11}\) Balkin’s discussion on pp. 204-05 of the “nonliteral” uses of ‘Congress’, ‘speech’, and ‘press’ in the amendment doesn’t, I believe, track non-literal *meanings*. Instead, words are used their with ordinary meanings in a special context in which what is asserted goes beyond what the sentences in which they appear literally mean. The point is similar to cases in literary criticism in which some interpreters wrongly identify metaphorical uses of words in sentences to express contents different from their literal meanings with the possession by words and sentences of nonliteral metaphorical *meanings*.

\(^{12}\) These varied in their exclusivity from “the Christian faith” (Delaware and Maryland) and “the Protestant faith” (New Hampshire, New Jersey, and South Carolina) to the Congregationalist Church (Connecticut and Massachusetts).

\(^{13}\) The matter has been muddied by the weight some interpreters give to James Madison’s support in Virginia’s General Assembly from 1779 to 1786 of Thomas Jefferson’s Bill for Establishing Religious Freedom, which went beyond eschewing a state church to enjoin a more robust separation of church and state. Madison’s role in proposing and securing the adoption of the First Amendment indicated that he hoped it to be interpreted in this way. But the asserted
As for freedom of speech and press, you can’t abridge something that isn’t already a reality. To abridge *War and Peace* is to truncate the original. To abridge the freedom of *speech* and of *the press* was, in 1791, not simply to truncate the existing freedom to verbally say things, but to truncate the freedom to speak, write, communicate, publish and disseminate information and opinion long recognized in England and America. It is not just that the ratifiers of the Constitution *expected* the federal government not to abridge those freedoms *for the foreseeable future*; abridging those freedoms is what they *stipulated* in ratifying the Constitution that the government had no authority *ever* to do. Of course, speech and communication today include forms that didn’t exist in 1791. There are also new ways of regulating communication. The questions for current constitutional interpretation are (i) which of these new forms of communication belong to the category protected by the original asserted content of the First Amendment and which new forms of regulation fall under the category originally proscribed, and (ii) which decisions about those new forms that *don’t* fall under categories included in the original assertive content the First Amendment would best fulfill its original rationale -- which was to ensure a representative government wouldn’t restrict important political, cultural, educational, commercial, moral, religious, and artistic communication. Since there are degrees of indeterminacy in here, the Court has considerable authority to update and modify the content of First Amendment guarantees in the manner specified by Deferentialism. But not anything goes.

The Due Process Clause of the Fifth Amendment is another illustration of how original assertive content, and its rationale, limits the discretion of later Supreme Courts.

“No person shall… be deprived of life, liberty or property without due process of law”

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content of the text is not determined by what some small number of its proposers and supporters intended. Rather, one must look to what both ratifiers reasonable and knowledgeable members of the general public understood the nation to be committed to by its adoption. The relationship between church and state established by passage of Jefferson’s bill in Virginia was not typical of other states, and the understanding of Jefferson and Madison about the proper relationship between the two was not the common one.
What is it to be deprived of something \textit{without due process of law}? The ordinary linguistic meaning of the phrase is, roughly, \textit{without the process of law to which one is due}. But if that were the content of the clause, it would have added nothing to whatever processes of law are guaranteed elsewhere in the Constitution. In fact, it added a guarantee that played an important role both in the run up to the American Revolution and in state governments after the Revolution. Elsewhere I have noted, following Chapman and McConnell, that the term “due process of law” appears in 1354 British statute law where it is used to denote the application of existing law by an judicial body -- which was prescribed by the Magna Carta as a condition limiting the King’s ability to deprive a subject of his rights.\textsuperscript{14} It occurs again with the same assertive content in the 1628 Petition of Right and in legal writings in Britain up through the American founding, when -- following the Boston Tea Party -- the so-called the “Intolerable Acts” imposed by Parliament in 1774 inflamed the colonies for, among other things, inflicting punishments \textit{without benefit of trial}. Following the Revolution, Alexander Hamilton used the term in remarks made to New York State’s General Assembly 1787 in arguing that \textit{ex post facto} laws against loyalists violated “due process of law” by depriving them of property without benefit of a judicial proceeding.

This was the presupposed background that generated the core assertive content of the Due Process Clause, which guarantees that no rights involving life, liberty, and property may be deprived without the protection of a judicial process. Among these rights are those explicitly mentioned in the Constitution, which can’t be abrogated by legislation, and those traditional rights (to work, travel, raise a family, etc.) that can be regulated by legislative acts that are genuinely nonjudicial in nature. As I have argued elsewhere, on this reading, the same deferentialist principle that invalidates the decision in \textit{Lochner v New York} invalidates the decision in \textit{Planned Parenthood}\textsuperscript{14}

of Southeastern Pennsylvania v Casey. In both cases, the Court impermissibly inserted their policy preferences into the assertive content of a clause restricted to safeguarding procedural rights.

How and why does such judicial overreach occur? It began innocently with Marbury v Madison, when the Court ruled that Congress improperly granted authority to the Court itself to issue writs beyond what is specified in the Constitution. The result of this ironic decision was that the Court, in deference to its own limited scope under Article III of the Constitution, resisted an essentially inconsequential congressional increase in its authority, thereby asserting an immensely greater authority to strike down acts of Congress nowhere explicitly asserted in the Constitution. Although this may sound suspect, it isn’t. The logic of constitutional limits and guarantees requires a body, which can only be the Supreme Court, to judge when they have been violated. The same constitutional logic also requires that in adjusting the Constitution to new circumstances, the Court must not make up new constitutional content on its own, but must, to the maximum degree possible, defer to the Constitution. In the case of the Due Process Clause this means that the Court must not replace its original asserted content with the Court’s own contemporary understanding of the process of law to which one is due. Adjustments of the original content to resolve vagueness and inconsistency are justified to the extent that they fulfill its original rationale. But our system of the separation of powers grants no authority to unelected, ostensibly non-political, justices to place their policy choices of beyond the reach of the normal operation of representative government.

My chief worry about Living Originalism is that it invites such judicial overreach. It’s not, I think, that Balkin is fond of judicially imposed policy. But that, I worry, is what he may be led to when principles and standards are involved. The problem is the false dichotomy drawn between

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15 “Deferentialism,” op. cit.
16 Since the clause is repeated in the Fourteenth Amendment, it applied to state action, which was at issue in these cases.
semantic meaning, which is often underspecified, and what he calls “expected applications,” which are highly specific. The problem is illustrated in his discussion of Justice Scalia.

“Justice Scalia agrees that we should interpret the Constitution according to the original meaning of the text, not what the original draftsmen intended…But he insists that [content]…must be…applied in the same way…[it] would have been…applied when…[it was] adopted. As he puts it, the principle enacted in the Eighth Amendment is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not…‘whatever may be considered cruel from one generation to the next, but what we consider cruel today [i.e. 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation...Scalia’s version of “original meaning” is not original meaning in my sense, but a more limited interpretive principle, ‘original expected application’. Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with an legal terms of art).”¹⁷

Balkin criticizes Scalia for identifying original meaning, to which we must be faithful, with original expected applications, to which we need not be faithful. The criticism is correct to the extent that Scalia’s rejection of original intention fails to distinguish what J.L. Austin called perlocutionary intentions (encompassing consequences one expects to follow one’s speech act) from what he called illocutionary intentions (encompassing shared expectations one relies on to determine the content of one’s speech act).¹⁸ But Balkin’s position is the mirror image of Scalia’s, and so is subject to a similar critique. Balkin is right to the extent that he maintains that original expected applications encompassed by the framers’ perlocutionary intentions are not constitutive of constitutional content. But he, like Scalia, is wrong to the extent that he fails to distinguish those expectations from expected applications encompassed by the framers’ illocutionary intentions, which incorporate shared presuppositions of framers and ratifiers that contribute to asserted or stipulated content.

¹⁷ Living Originalism, p. 7. Italics are used to indicate Balkin’s quotation of Scalia’s words.

The constitutional significance of recognizing this distinction can be illustrated by a quick look at the Fourth and Eighth Amendments.

4th Amendment: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated…

8th Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The key words are ‘unreasonable’ in the Fourth Amendment, and ‘excessive’ and ‘cruel and unusual’ in the Eighth. What counts as unreasonable may vary from circumstance to circumstance, which may change over time. So, the scope and limits of constitutionally permitted searches and seizures may vary without expanding or contracting the originally asserted content. Thus, historical findings about the kinds of searches and seizures the founding generation found to be warranted are of limited importance in determining Fourth Amendment content. Such findings may help us fix the weight the founders placed on the security of persons relative to other public values. This, in turn, may contribute to setting a lower bound below which the value of personal security cannot be pushed by competing concerns. In this way, some of the founders expected applications of the Fourth Amendment may have an indirect and limited role in determining its content.

Analogous remarks apply to the Eighth Amendment prohibition of excessive bail, excessive fines, and cruel and unusual punishments. The asserted contents of the first two clauses prohibit bail and fines that are punitively out of proportion with the severity of the underlying charge or, in the case of bail, the amount needed to deter flight. The asserted content of the third clause forbids punishments that are cruel by virtue of being punitively out of proportion with the severity of the offense. The content of the amendment doesn’t provide detail concerning the scales by which offenses are ranked, which offenses are ranked where, or the scales and rankings of punishments. No doubt, historical research could provide information about which offenses were, in 1791, widely recognized to be more serious than others and which punishments and fines for them were judged to
be appropriately proportional, and so not excessive, cruel, or unusual. This creates a constitutional presumption that contemporary punishments and fines for offenses that are reasonably taken to be comparable in seriousness to similar offenses at the time of the founding – murder and petty theft, perhaps – must, in order to pass constitutional muster, not be substantially more punitive than those for similar offenses were then. To this limited extent Scalia is right in affirming, and Balkin is wrong in denying, that prevailing historical standards at the time of the founding play some constitutive role in determining the original Eighth Amendment content to which we owe fidelity.

This is so despite the fact that the comparisons needed to arrive at defensible results in real cases are not algorithmic. Changing social circumstances can render facially similar offenses more or less serious now than before, while different punishment regimes, plus increased knowledge of their deterrent effects and their long-term consequences for those subjected to them, can lead to current applications that justifiable differ from those expected by the founding generation. But, to the degree to which we recognize that the founders moral standards concerning punishment do play a constitutive role in ruling out some possible punishments as too punitive, we must also recognize the burden they place on those today whose moral standards classify certain punishments, e.g., capital punishment, as too extreme for any offense. The mere existence of these changed standards by many citizens may provide a reason not to impose such punishment. But it does not, on a proper theory of constitutional interpretation, give the Court grounds to find the continued employment of such punishment by some states to be unconstitutional.

These examples are intended to illustrate the deferentialist balance between fidelity to the Constitution and the authority of the Supreme Court to modify constitutional content when required by unanticipated circumstances. While Deferentialism recognizes this authority, it places restrictive limits on it – so restrictive that some important decisions in recent decades don’t pass muster (in the
form they were originally rendered). This might seem to cause a conceptual problem. Since Deferentialism views Supreme Court precedents on constitutional matters as generating real constitutional content, one might argue that we owe the same fealty to the new content that we once owed to the now superseded content. But how can that be? Surely, the original Constitution holds a privileged place in our jurisprudence, as the touchstone to which we must perennially return. By contrast, one might argue, it is a virtue of Living Originalism that it identifies the original meaning of constitutional text as that to which we always owe fealty, while demoting what it calls mere understandings, both original and those in Supreme Court precedents, to the status of temporary implementations that may be discarded when new circumstances prompt a change. Thus, it may seem that Living Originalism does, whereas Deferentialism does not, accord the original Constitution its proper pride of place.

Not so. A Court precedent doesn’t have the status of original constitutional content because its legitimacy is contingent on finding the application of that content in a case to require modifying it in accord with original rationale. When the Court later determines that an earlier precedent-setting decision must be overturned, it must be shown either that the earlier decision failed to respect antecedent constitutional content and rationale, or that new circumstances have arisen that make possible a resolution that better respects constitutional content and rationale. Since this chain of justification stretches back to the Constitution, Deferentialism properly accords it pride of place as the touchstone against which all judicial decisions are evaluated. It succeeds because it correctly recognizes inherent limits on the Court’s authority to engage in constitutional construction.

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19 Balkin makes a version of this point on pp. 50-58 in effectively criticizing David Strauss, who argues (in *The Living Constitution*, Oxford: Oxford University Press, 2010) that our real constitution is a common law constitution of judicial and non-judicial precedents, and that we owe no special fealty to our written Constitution. The argument is inverted against Originalism in chapter 7, where it hinges on originalists’ failure to recognize implicit constitutional changes sometimes ratified by the judiciary after being initiated by others. This argument does not apply to Deferentialism, which does recognize the legitimacy of constitutional change by means other than amendment or judicial decision.
My chief worry about Living Originalism is that it doesn’t consistently do so. This worry is qualified by the fact some of Balkin’s most edifying discussions end up close to what I take to be a proper deferentialist result. I will close by recounting two cases.

The first is his discussion of the compact clause of Article 1 section 10 of the Constitution, which is, as I read it, sensitive to original asserted content and rationale. The compact clause says “[n]o State shall, without the Consent of Congress…enter into any Agreement or Compact with another State.” Commenting on this, Balkin observes:

“The language seems to state a ban on all agreements between states without congressional consent. But such a rule…would be unwieldy, if not absurd; it would require Congress to pass on administrative or ministerial arrangements between states in which the federal government has no interest, and that pose no danger to the federal union…Accordingly, the Supreme Court has always treated the compact clause as stating a principle…[I]t…has held that the clause prevents combinations that increase the power of the states at the expense of the supremacy of the federal government…Justice Field and later interpreters…sought to understand the point of the text in order to understand what kind of constraint it creates. Treating the text as a hardwired rule was absurd; therefore they assumed that the text was ambiguous and required construction.”

Although the result is correct, the attempt to fit it into the Living Originalist framework is strained. The language of the clause is underspecified, not ambiguous. This is common when phrases some/any/no so-and-so are used, which often incorporate tacit restrictions on the subdomain of so-and-so’s quantified over. As in ordinary speech, the contribution to assertive content made here by the use of the phrase any agreement or compact with another state is determined by the point of its use in the text, which is to prohibit agreements that diminish federal supremacy. This isn’t constitutional construction, which modifies original asserted content in light of new facts. It is correct identification of what was asserted in a case in which asserted content is a function of more than linguistic meaning. The residual problem with Balkin’s otherwise insightful discussion of this

20 Living Originalism, 47-48, my emphasis.
clause is the mirror image of Scalia’s otherwise insightful dissent in *Smith v United States*, where, lacking the analytical notion of *asserted content*, he wrongly identified it with the ordinary linguistic meaning of the clause “uses a weapon” in a congressional statute.\(^\text{22}\) Here, lacking the same analytical notion, Balkin wrongly identifies original asserted content with a *later understanding of original linguistic meaning*. Fortunately, his final result is not affected.

Balkin also gets *Brown v Board of Education* substantially right, again for essentially deferentialist reasons. His discussion is important both for its critique of McConnell’s originalist defense of *Brown* and for Balkin’s identification of the *Privileges or Immunities Clause* as the driver of Fourteenth Amendment guarantees. Here is part of the Fourteenth Amendment.

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

McConnell’s originalist defense of *Brown* bases it on the equal protection clause, the congressional supporters of which, he argues, intended to outlaw racially segregated public schools.\(^\text{23}\) Balkin argues that this historical finding is not dispositive because McConnell conflates the framers’ intended application of the text with its original meaning.

“McConnell showed that in the years following the ratification of the Fourteenth Amendment, many…congressmen and senators who proposed…[it] argued for desegregation of schools in proposed federal legislation…They supported this legislation on constitutional grounds, because they believed that segregated public schools violated the Fourteenth Amendment…My point…is that…[McConnell’s] research…is…unnecessary if the question is whether *Brown* is consistent with original meaning…[He] thought that the best evidence of original meaning was evidence of original expected application…[He] did not use evidence of original expected application by the *general public* and the *ratifiers* of the amendment – whom …[he] conceded probably strongly supported school segregation. Instead, he used evidence of original expected application by the

\(^{22}\) See Soames *supra* note 1 at 598-600.

framers. McConnell made his case for original meaning by making a case based on the original intentions of the framers.”

Apart from conflating original assertive content with original meaning, Balkin’s critique of McConnell is correct. Assertion is not a solitary, but a social, act that involves coordinating the intentions and expectations of asserters and addressees. Because of this, the assertive contents of linguistic performances are not found solely in minds of the performers. What is asserted by a use of a text is what the performance commits the performers to, which is what knowledgeable addressees who understand the linguistic meaning of the text and are familiar with the contextual background reasonably take them to be committed to. Since neither the general public nor ratifiers could be expected to take the Fourteenth Amendment to commit the country to banning racially segregated public schools, McConnell’s finding that key congressional supporters intended it to do so does not show that its ratification established the unconstitutionality of school segregation.

Nevertheless Brown is Deferentially justified. Its chief justification, lies, as Balkin contends, in the privileges or immunities clause which asserts that all citizens of the United States have rights deriving from their national citizenship that no state (after the Civil War) can infringe. Although Balkin calls this the original meaning of the clause, it is, I think, better characterized as original asserted content. What were national rights involving public education in 1868? Since public education in America, including the territories as well as the states, was uneven, and not universally available, it is not obvious precisely what they were. Whether or not operating different and unequal in an area offering public schools was unconstitutional may have been arguable even then, even if the outcome is not obvious. But whatever may be said of 1868, by 1954 changes in the general conditions of life and the role of government in the lives of citizens had removed any remaining

24 *Living Originalism*, p. 105. See also pp. 226-27.

25 See *Living Originalism* pp. 192-93.
doubt. The ubiquity and importance of systems of public education made it highly plausible that citizens did have a right to attend them. Since the so-called “separate but equal” systems to which African-Americans were in some places confined were inherently unequal to majority systems, many descendants of those the plight of whom it was the rationale of the Fourteenth Amendment to address were unconstitutionally denied the rights of citizens. Thus, the result reached in *Brown* was Deferentially correct.

So, although Deferentialism and Living Originalism arise from different conceptions of constitutional interpretation and employ different analytic tools, they can be used to reach similar results in some important cases. Nevertheless, I remain skeptical about how far this convergence can be pushed. Whereas Balkin sees and celebrates the delegation of judicial authority to alter the basic tenets of our constitutional system, I seek to minimize that delegation by restricting needed alternations to those that are maximally deferential to original asserted content and rationale. If determinate constitutional rules are sacrosanct, then, as I see it, the rationales for, and determinate parts of, the asserted contents of all constitutional provisions are similarly sacrosanct. That, in a nutshell, is Deferentialism. It is also, I fear, what Living Originalism denies.

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26 The same can be said about the perspectives of Deferentialism and Living Originalism on a number of the issues involving the commerce clause and its expansive application in the last 75 years beyond narrow matters of trade, or even strictly economic matters, illuminatingly discussed in chapter 9 of *Living Originalism*. As before, the suggested convergence comes with the caveat it is the original asserted or stipulated content of the commerce clause that best plays the role of Balkin’s original meaning. The necessary and proper clause, discussed on pp. 177-79, requires a related caveat. Although the clause empowers Congress to do what it reasonably judges to be proper for the purpose of implementing the specifically granted powers, more of less as Chief Justice Marshall thought, this interpretation is by no stretch of the imagination the original meaning of the words “The Congress shall have Power…to make all Laws which shall be necessary and proper for carrying into execution…” It is not even obvious that the correct interpretation was asserted by the original use of the constitutional text, as opposed to being a revision of an unduly weak original assertion needed to achieve the clear rationale of the clause, which was to ensure that Congress could adopt reasonable means, consistent with other constitutional provisions, to achieve the ends it had been given the power to pursue.